Scottish Law Commission

RESEARCH PAPER

on

ACTIONS of EJECTION

and REMOVING

by

Mr A G M Duncan

January 1984

(This Paper is referred to in S.L.C. C.M. No. 59)

FOREWORD

This Research Paper is published by the Scottish Law Commission in connection with Consultative Memorandum No.59 on "Recovery of Possession of Heritable Property". The Paper was prepared by Mr A G M Duncan, formerly Senior Lecturer in Scots Law at the University of Edinburgh, at the Commission's request and as a basis for detailed examination of the widely recognised need for reform of the procedural law relating to actions of ejection and removing. The views expressed in this Paper are entirely those of the author, and it follows that they do not necessarily coincide with those of the Commission. It is hoped, however, that this Paper will form a useful source of information for those who wish to consider and to comment in detail on the questions discussed in the Memorandum. We might add that the range of topics discussed in the Memorandum is somewhat narrower than in this Paper.

Mr Duncan has stated the law as at 31 January 1983. Since then, Schedule 1 to the Sheriff Courts (Scotland) Act 1907, which contains rules for the conduct of ordinary causes in the sheriff court, has been amended.* There follows, therefore, a table comparing the original rules, and the forms referred to therein, with those in the current Schedule, in so far as relevant to this Paper:

	Original	Current*
Rule	24	25
	85	90
	110	103
	111	104
	112	105
	113	106
	114	107
	121	-
Form	H	L
	I	M
	J	N

*See Act of Sederunt (Ordinary Cause Rules, Sheriff Court) 1983 (S.I. 1983/747) and Act of Sederunt (Ordinary Cause Rules Amendment) 1983 (S.I. 1983/1546).

ACTIONS OF EJECTION AND REMOVING

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CHAPTER 1 INTRODUCTION

1.1 Among the first tasks entrusted to the Law Reform Committee for Scotland appointed in 1954 was the consideration, with a view to amendment, of the procedural law relating to removings and ejections.[1] The Committee interpreted this remit as excluding matters of substantive law affecting the rights and obligations of landlords and tenants respectively but as embracing all forms of process whereby owners of heritable property sought to recover possession from occupiers. They considered it inadvisable, however, to attempt to deal with matters falling within the scope of the Agricultural Holdings Acts in view of the special provisions of these Acts.

1.2 The first, and it would appear the most important proposal resulting from the Committee's deliberations, was the recommendation that one form of action should be provided for all cases where recovery of possession of heritable property from an occupier was sought. This proposal was endorsed by the Grant Committee on Sheriff Court Procedure[2] and accordingly received effect in the Sheriff Courts (Scotland) Act 1971, applying the new summary cause procedure introduced by that Act to the generality of actions for recovering possession of heritable property. This has had the effect of resolving the dilemma of the intending pursuer who had to make a choice, which was sometimes a difficult one, between proceedings for removing and

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[1] The Committee's Report is published as Cmnd. 114 (1957).
[2] The Committee's Report is published as Cmnd. 3248 (1967).

proceedings for ejection. As the 1971 Act abolished small debt procedure in the sheriff courts, certain proposals of the Committee for a division of the jurisdiction in actions for recovery of possession as between small debt and ordinary courts have been superseded. The Law Reform Committee's Report, however, contained other important recommendations which have remained unimplemented despite the passing of a quarter of a century since they were published. They dealt in some detail with such matters as the period, form and content of notices terminating tenancies, the right or title of parties to give notice and take recovery proceedings, the effect of decrees in such proceedings and the requirement of caution for violent profits as a condition of defending such proceedings.

1.3 The examination of these matters and certain related topics in the light of the Law Reform Committee's proposals, taking account of subsequent statutory changes and other developments, forms the main content of this study, which, differing in this respect from the Committee's Report, includes consideration of agricultural tenancies and their specialities as arising within the topics examined. In addition, some attempt has been made to assess the merits of the new summary cause as the normal form of process for recovery of possession of heritable property but here any conclusions and proposals must necessarily be of a tentative nature as the procedure has been in use for a comparatively short period and very few decisions on its working are reported or otherwise available for reference. The study has been directed primarily to matters arising in relation to the termination of tenancies, as

proceedings for recovery of possession of heritable property occur most frequently where a relationship of landlord and tenant exists, or is claimed to exist. However, other cases are considered as appropriate.

CHAPTER 2 TACIT RELOCATION

2.1 The concept of tacit relocation, being central to the issue of tenancy termination, is the first topic examined in detail. The following questions seem to call for consideration[1] and, in some cases at least, may have to be taken into account in the formulation of proposals for amending legislation:-

(a) To what tenancies does tacit relocation not apply? Are the exceptions to its application confined to those clearly vouched by authority, such as seasonal lets or liferent tenancies, or are there other exceptions such as short furnished lets of dwellinghouses? (See paras. 2.6-2.14).

(b) In a case where tacit relocation operates by legal implication, is it possible and/or should it be possible, by the terms of the tenancy, to contract out of tacit relocation, thus constituting a tenancy similar to what is known in England as a fixed term tenancy terminating by the effluxion of time per se? (See paras. 2.15-2.21).

(c) When the subjects of a tenancy are joint or common property, can one of the owners give a notice of termination effective to exclude tacit relocation? (See para. 2.25).

(d) Where the subjects of a tenancy are in divided ownership it appears all proprietors must consent to or concur in any notice terminating the let wholly or partially, but should provisions for this contingency similar to those

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[1] Certain of these questions are discussed in an article entitled "Tacit Relocation in Leases - Some Problems and Doubts" 1978 S.L.T. (News) 157.

operative in England be made? (See paras. 2.26-2.27).
(e) Apart from cases covered by the Rent Acts, what is the position of sub-tenants under a legitimate sub-let when the main tenancy is terminated and the landlord is seeking vacant possession of the subjects sub-let? It seems clear that the sub-tenant cannot be ejected as a squatter, but what are his rights as regards tenure and notice of termination, and how is notice to be given by a landlord unaware of the identity of the sub-tenants? (See paras. 2.29-2.30).
(f) Where a notice to quit is withdrawn or cancelled, or is rendered ineffective because of failure to obtain some authorisation necessary for its operation, is the continued possession by the tenant thereafter attributable to continuation of the previously existing tenancy, or does it constitute a new tenancy? (See para. 2.31).

2.2 To these questions arising out of the detailed examination of certain aspects of tacit relocation may be added a question of more general import, i.e. whether the notice effective to prevent the operation of tacit relocation requires to have, or should be required to have, the same degree of formality as a notice forming the basis of proceedings for recovery of possession. It appears that the requirements for the termination of a tenancy, with resultant cancellation of the respective obligations of landlord and tenant, do not always coincide with the prerequisites of an action for recovery of possession.[1] Problems to which such differences can give rise are

[1] See Paton and Cameron, Landlord and Tenant, p.225.

discussed in the dissenting opinion of Lord Birnam in Rae v. Davidson.[1] Such differences as there may be in this matter do not affect the period of notice but can create difficulties in matters such as the appropriate form and content of a notice to quit. It would seem to be desirable that statutory or other rules concerning the termination of a tenancy at the instance of one or other party should apply alike for all purposes and irrespective of the means by which parties may subsequently seek to enforce their rights.

Effect, scope and significance

2.3 One of the essentials of the contract of lease is that its endurance should be defined although in some cases, at least, the absence of express provision on this point can be made good by the implication of a let for a year. As a general rule contracts having a specified period of endurance terminate on the expiry of that period without notice of termination requiring to be given.[2] The main common law exception to this rule is the application in contracts of lease, partnership, and service of the principle of tacit relocation.[3]

2.4 Tacit relocation has been described as an implied agreement inherent in the bargain between the parties that whatever may be the stipulated period of endurance that period may be extended by tacit agreement of the parties.[4]

[1] 1954 S.C. 361 at p.379.

[2] Gloag, Contract, 2nd edn., p.731; Paton and Cameron p.221.

[3] Gloag op. cit. pp.731/2.

[4] Douglas v. Cassillis and Culzean Estates 1944 S.C. 355 per L.J.-C. Cooper at p.361.

As applied to leases this results that unless and until notice conforming to the requirements applicable in the particular case has been given by one party to the other, or arrangements for continuation of the tenancy under a new contract or agreement have been made, the existing tenancy contract continues on a year to year basis, if it was originally for a year or more, and on the existing periodic basis where it was for less than a year. The rules under which tacit relocation operates and affects not only the original parties to the contract but also their respective successors, singular or universal, as dealt with in the standard texts, are for the most part settled beyond dispute. The question, on which opinions may have varied in the past, whether tacit relocation results in the extension of an existing tenancy (the term "renewal" appears in Bell's Principles[1]) or the creation of a new tenancy (as perhaps indicated in Erskine[2]) seems to be resolved in favour of the former view in certain dicta of Lord Justice Clerk Cooper in one of the leading cases.[3] He refers to the ruling of Lord President Clyde in the case of Cowe v. Millar[4] that the original contract of tenancy remained and was not displaced when tacit relocation operated. Cowe's case concerned outgoing claims but the ruling is important in relation to notices

[1] Bell's Principles, para. 1265.

[2] Erskine, Institute II, VI, 35.

[3] Douglas v. Cassillis and Culzean Estates 1944 S.C. 355 per L.J-C. Cooper at 361. See also Smith v. Grayton Estates Ltd. 1960 S.C. 349 per Lord President Clyde at p.354 where tacit relocation is described as "the prolongation each year of the tenancy for a further one year".

[4] 21 December 1921, unreported.

to quit (e.g. under the Agricultural Holdings (Scotland) Act 1949 requiring notice of not less than one year and not more than two years) which it enables to be given before the end of the stipulated period of a lease or again before the end of a period of extension by tacit relocation, in the one case to take effect at the end of the first extension and in the other at the end of a subsequent extension. If tacit relocation were to be regarded as creating a new lease or tenancy contract, difficulties could arise in complying with the rule that notice terminating a tenancy must be given within the tenancy's currency.[1]

2.5 As the operation of tacit relocation is crucial in determining the steps which an owner of heritable property must take to recover possession on the termination of a tenancy it is necessary to consider (a) the cases or circumstances in which tacit relocation does not operate and (b) the effectiveness or otherwise of provisions in the contract excluding or purporting to exclude the operation of tacit relocation. In these matters there have to be considered not only the authorities affecting the common law rules but also the relevant features of legislation concerning various forms of tenancy.

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[1] It appears that before statutory provisions changed the position, a lease of a farm, arable or pastoral, for a single year or less was unaffected by tacit relocation because it was impossible to give the requisite notice within the period of let. See McNair v. Lord Blantyre's Tutors (1833) 11S. 935 and Dunlop v. Meiklem (1876) 4R. 11; cf. Blair v. Ferguson (1840) 2D. 546.

Exceptions and special cases

2.6 Seasonal lets. The exceptions most clearly established appear to be seasonal lets of subjects such as fishings, shootings and grass parks where the intermittent or temporary nature of the tenancy can be said to be inconsistent with the application of tacit relocation.[1] Thus ejection, as contrasted with removing preceded by notice, has been regarded as the appropriate form of action for a landlord seeking recovery of possession on the termination of such a tenancy.[2] In the case of grass parks the scope of the exception is limited by the terms of the Agricultural Holdings (Scotland) Act 1949 (Section 2(1) proviso) requiring the exclusion of normal rights of cultivation as well as a restriction of the duration to some period less than a year.[3]

2.7 Furnished houses. Along with these cases of seasonal lets certain writers mention as excepted from the operation of tacit relocation the case of houses let furnished, at

[1] Rankine, Leases (3rd edn.), p.599; Macharg (1805) Mor. Removing Appendix 4. It appears that the exception of grazings may depend on the subjects being in fact offered for letting by the proprietor each year on the open market - see Taylor v. Norie-Miller (1902) 18 Sh. Ct. Rep. 104.

[2] Secretary of State for Air v. Davidson (1950) 66 Sh.Ct. Rep. 59.

[3] See Roberts v. Simpson (1954) 70 Sh.Ct.Rep. 153 and Mackenzie v. Laird 1959 S.C. 266. Apparently the exception may apply without restriction as to time where the grazing of animals is only a subsidiary or ancillary use of lands of which the principal use is non-agricultural; see Provost, Etc. of North Berwick v. Wilson (1907) 33 Sh.Ct.Rep. 243.

least if let for less than a year.[1] If, as suggested by one writer,[2] the basis of all exceptions to the application of tacit relocation is universal understanding, then it seems at least arguable that furnished lets of houses should no longer be regarded as an exception. While at one time such lets may have been used only as short term or temporary arrangements it has become common for furnished tenancies, although initially granted for shorter periods, to continue for periods of a year or more.[3] In practice it seems to be assumed that tacit relocation operates, and that notice of termination must be given, however short the period prescribed in the document constituting the let.[4]

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[1] Gloag op. cit. pp. 732/3; Paton & Cameron, p. 223.

[2] Gloag loc. cit.

[3] With the introduction of statutory rent control and security of tenure there developed an increasing tendency for the furnished let to be used in circumstances in which a house would otherwise have been let unfurnished, furnished tenants having originally no statutory security of tenure and until recently only limited protection under the Rent Acts.

[4] If it were accepted that tacit relocation does not apply to furnished lets, and that they accordingly terminate without notice, such lets while they remained under Part VII of the Rent (Scotland) Act 1971 would not have qualified for the limited security of tenure obtainable from Rent Tribunals whose jurisdiction in this matter arose only on the issue of a notice to quit. In England this appears to have been accepted as being the position of furnished tenancies on a fixed term basis under the corresponding statutory provisions (see Megarry, The Rent Acts (10th edn.), pp. 526/7 referring to Langford Property Co. v. Goodman (1964) 163 Estates Gazette 324(Q.B.)). See also Schnabel v. Allard [1967] 1 Q.B. 627 per Denning M.R. at p.632. In Scotland it was at least arguable that notice was required in terms of the provisions of the Sheriff Courts (Scotland) Act 1907 (see ss. 37 and 38). But in both countries the security of tenure of furnished tenants has now been put beyond question by the Rent Act 1974 bringing them into the category of regulated tenancies.

2.8 Mixed contracts of location and hiring. In the same context as furnished lets of houses reference is made to the case of lodgings, and again to arrangements now less common than formerly whereby shops were let with equipment, or factories or collieries with machinery, all being cases of mixed contracts of location and hiring, as contrasted with the simple contract of location, resulting from the normal lease.[1] It could be said that the composite nature of such contracts takes them out of the limited category of contracts to which tacit relocation applies, but it seems more logical to regard the main subject matter of the contract, namely the heritable property, as determing the nature of the contract and the incidents which flow from it Such an approach, making tacit relocation applicable in the normal way, is in no way inconsistent with the rule clearly established on authority, whereby tacit relocation has no application to service occupancies. There, the occupier's right terminates ipso facto with his employment, there

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[1] Rankine op. cit. pp. 287-290. Neither Rankine nor Hunter in his work on Landlord and Tenant give any indication that furnished lets or similar arrangements form exceptions to the tacit relocation principle. But see Wallace, Sheriff Court Practice, p.511 dealing with lets for less than a year as affected by summary removings under s.38 of the Sheriff Courts (Scotland) Act 1907.

[2] Rankine op. cit. p.288 where the author referring to furnished lets of houses states: "The ordinary rules of removing and ejection apply to the subjects, since it is regarded as a unum quid." In Robertson v. M'Intosh (1920) 36 Sh.Ct.Rep. 227, 1922 S.L.T. (Sh.Ct.) 7 this passage is referred to by the sheriff substitute deciding that notice was necessary to terminate a furnished let.

being no tenancy in the proper sense of the term, but merely a right of occupancy as an incident of the main contract, the contract of service.[1]

2.9 Liferent tenancies. An exception to the tacit relocation principle clearly established on authority, but rarely encountered in modern practice, is the liferent tenancy, i.e. the lease granted for the duration of the tenant's life. Under such a contract no interest passes to any representative or successor on the death of the tenant,[2] and an action of ejection at the instance of the landlord is competent without prior notice or warning against anyone found in possession after the tenant's death.[3] It has been

[1] Paton and Cameron op. cit. p.223; Gloag op. cit. p.733; Sinclair v. Tod 1907 S.C. 1038; Cairns v. Innes 1942 S.C. 164.

[2] The position in this respect as established under the common law is confirmed in terms of the Succession (Scotland) Act 1964, ss. 16(1) and 36(2).

[3] Rankine op. cit. at pp. 593/4; Tennent v. Tennent (1760) Mor. 13845; Gordon v. Michie's Reps. (1794) Mor. 13851; Stewart v. Grimmond's Reps. (1796) Mor. 13853; see also Hunter, Landlord and Tenant (4th edn.), Vol. II, p.81 distinguishing the liferent tenancy in this respect from the lease for the landlord's lifetime to which lease tacit relocation applies in the usual way (Johnston's Trs. (1803) Mor. 15207). The cases of leases for the duration of the lessee's tenure of a certain office terminating automatically on his ceasing to hold that office mentioned in the same context as liferent leases (see Hunter loc. cit., cf. Paton & Cameron op.cit. p.172) are rare in modern practice and may be regarded as superseded by service occupancies as now used in practice.

suggested that liferent leases can be used as a means of securing that the subjects revert to the landlord on the tenant's death without any representative or successor having a right, but that this result will not be reached in the cases of crofts and agricultural holdings.[1] A restriction of duration to the tenant's lifetime would clearly be inconsistent with the perpetual nature of crofting or land-holding tenure, but in the case of an agricultural holding the position seems more doubtful. In the Agricultural Holdings Acts the definition of a lease is "a letting of land for a term of years or for lives or for lives and years or from year to year."[2] On that wording it is questionable whether a lease for a single life, i.e. that of an individual tenant, although undoubtedly valid at common law, would constitute a tenancy of an agricultural holding. Again while tacit relocation is mandatory in tenancies of agricultural holdings[3] it is difficult to see how the contractual relationship, as extended by the operation of tacit relocation, can be sustained in relation to the tenant's interest since on the termination of such a lease by reason of a tenant's death no interest passes to an executor or other successor.[4]

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[1] Paton & Cameron op. cit. pp. 172 and 176.

[2] Agricultural Holdings (Scotland) Act 1949, s.93(1).

[3] Ibid. s.3.

[4] See the observations of Lord Guest in Inland Revenue v. Graham's Trs. 1971 S.C. (H.L.) 1 at pp. 24, 25.

2.10 Judicial leases. Judicial leases granted under the authority of the court by which a proprietor's estate has been sequestrated, now unknown in practice,[1] were an exception to the application of tacit relocation, as the court never warns a tenant and caution as essential for such a lease lapses with the expiration of the fixed period.[2] An extension of a shop tenancy under the relative statutory provisions is not a judicial lease and accordingly a further extension can result from tacit relocation.[3]

2.11 Implied yearly lets. A question on which there appears to be a scarcity of authority is whether tacit relocation operates in the normal way in the case of a tenancy having no express or specified endurance, but existing on the implication of a yearly let. In a recent case the sheriff, in allowing a proof before answer, indicated that in his view tacit relocation would operate in the normal way in that situation.[4]

2.12 Statutory provisions. Of the various statutory provisions regulating different categories of tenancy, those affecting crofts and small holdings create a perpetual tenure which supersedes any application of tacit relocation. Tacit relocation however would seem to apply in the

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[1] Rankine op. cit. p.599.

[2] Erskine, Institute II, VI, 36.

[3] White v. Paton (1953) 69 Sh.Ct.Rep. 176, not following Hill v. McCaskill's Trs. (1951) 67 Sh.Ct.Rep. 128.

[4] Cinema Bingo Club v. Ward 1976 S.L.T. (Sh.Ct.) 90.

case of the statutory small tenancy, soon to be extinct, which gives the tenant no absolute security of tenure but only the right of renewal at the discretion of the Land Court when the landlord seeks to terminate the tenancy.[1] Again tacit relocation would seem to apply to cottars at least in so far as their rights can be regarded as constituting tenancies.[2]

2.13 The statutory provisions affecting allotments and allotment gardens respectively, while containing certain requirements as regards notice to be given to tenants on termination, contain nothing excluding the normal application of tacit relocation.[3] In relation to agricultural holdings generally the Act makes tacit relocation operative irrespective of the terms of the lease or other contract.[4] In the case of shops the Act providing for the extension of tenancies, in making the application for extension follow upon a notice to quit issued by the landlord, assumes the operation of tacit relocation.[5]

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[1] Small Landholders (Scotland) Act 1911, s.32.

[2] See Crofters (Scotland) Act 1955, s.28 where ss. (4) in defining "cottar" distinguishes between the rent-free occupier and the tenant from year to year.

[3] See the Allotments (Scotland) Act 1892 s.4(1) re. allotments and the Allotments (Scotland) Act 1932 s.11A re. allotment gardens: see also Law Crescent Allotment Association v. Green (1933) 49 Sh.Ct.Rep. 319.

[4] Agricultural Holdings (Scotland) Act 1949, s.3.

[5] Tenancy of Shops (Scotland) Act 1949, s.1(1) and (4).

2.14 In tenancies of dwellinghouses coming under the Rent Acts tacit relocation will apply in the usual way to the protected contractual tenancy; but where a tenancy has been terminated and replaced by a statutory tenancy the position is different. While the tenant remains bound to give due notice of his intention to terminate the tenancy,[1] the landlord is entitled to seek an order for possession on any of the grounds prescribed by the Acts without having given any form of notice to quit.[2] The statutory provision prescribing a minimum period of notice for the termination of a residential tenancy,[3] applying where a notice to quit is requisite, does not affect the landlord's right to seek possession under a statutory tenancy without having given notice. Consistently with this, the regulations requiring that a notice to quit as given to a tenant of a dwelling-house be amplified to refer to certain rights the tenant

[1] Rent (Scotland) Act 1971, s.12(3) and (4).

[2] Ibid. s.12(5); see Woodfall, Landlord and Tenant (27th edn.), para. 2274 dealing with the identical provision, s.12(5) of the Rent Act 1968; cf. Megarry, The Rent Acts (10th edn.), p.226 where the comment is made that as his conduct bears on the question of reasonableness it would be prudent for the landlord to warn the tenant that he intends to sue for possession. It would appear that absence of warning could also affect the pursuer's claim for expenses. In Current Law Statutes 1968, s.12(5) of the Rent Act 1968 is described in annotation as reproducing a proviso to s.15(1) of the Rent and Mortgage Restriction Act 1920, and as being pointless "because it is an established principle that once the contractual term has been determined a notice to quit does not have to be given by the landlord before claiming possession". Confirmation of this view is to be found in the decision of the English court in Morrison v. Jacobs [1945] K.B. 577.

[3] Rent (Scotland) Act 1971, s.131 as amended by Housing Act 1974, s.123.

has or may have, refer to protected tenancies but not to statutory tenancies in terms of the Rent Acts.[1] On the other hand, while the provisions of the Sheriff Courts (Scotland) Act 1971 prescribing a single form of process for recovery of possession of heritable property have now superseded the question, it may be noted that the Court of Session took the view that removing and not ejection was the appropriate process to dispossess a statutory tenant,[2]

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[1] Notices to Quit (Prescribed Information)(Protected Tenancies and Part VII Contracts) (Scotland) Regulations 1980.

[2] Mackay v. Menzies 1973 S.C. 691, vide Lord Mackay at pp. 694/5. The question affecting the form of appeal to the Court of Session at issue in this and other cases appears no longer to arise, since an Act of Sederunt of 12 June 1938 rendered decrees of removing of tenants appealable in the same way as decrees of ejection, and made suspension of decrees of removing incompetent (see now Rules of the Court of Session 1965 No.267). In the case of Kemp v. Ballachulish Estate Company 1933 S.C. 478 the action, although referred to as a summary ejection, appears to have been dealt with as a removing process (see Lord Hunter at p.490). It may be that confusion has arisen either, as suggested by Lord Mackay in Mackay v. Menzies supra at p.693, from the introduction in the Sheriff Court (Scotland) Acts 1907 and 1913 of the application for a "warrant for summary ejection" to be used in circumstances where the removing process in the older and longer form was previously appropriate, or again, from the use of the term "order for ejection" in s.4(1) of the Rent and Mortgage Interest Restrictions Act 1923, now replaced by the more neutral wording "order for possession" (see e.g. Rent (Scotland) Act 1971, s.10(1)). Whatever form the action takes there will normally have to be averments establishing the termination by due notice or otherwise of the contractual tenancy from which the statutory tenancy arose (see e.g. Aitken v. Shaw cited below). The practical effect of s.12(5) of the Rent (Scotland) Act 1971 is simply that no new notice has to be given by the landlord to terminate the tenancy which has followed upon the termination of the contractual tenancy (see Paton and Cameron op. cit. p.516), although for reasons already indicated (para. 2.14) some form of warning to the tenant will normally be advisable.

although ejections appear to have been used in some sheriff court cases.[1]

Contracting out

2.15 On the question of whether or not there can be an effective contracting out of tacit relocation by provisions in a lease, the existence in English law of the fixed term tenancy which terminates automatically by the effluxion of time is of interest and of possible significance.[2] When a house coming under the Rent Acts is held on a regulated tenancy on a fixed term basis a statutory tenancy will replace the contractual tenancy automatically on the expiry of the fixed term without any notice or other procedure. Until furnished tenancies received the full protection of the Acts by becoming regulated tenancies a furnished let on a fixed term basis left the tenant with no protection whatsoever, the jurisdiction of the Rent Tribunals being dependent on the application of a notice to quit.[3] It follows that in England such tenancies as remained within the jurisdiction

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[1] E.g. Aitken v. Shaw 1933 S.L.T. (Sh.Ct.) 21; Grimond v. Duncan 1949 S.C. 195. It is not absolutely clear from the reports in these cases whether the actions were summary ejections at common law, or applications under s.37 of the Sheriff Courts (Scotland) Act 1907. In the latter event, notice as prescribed would be required, and in Aitken's case the report discloses that notice had been given.

[2] Evans, The Law of Landlord and Tenant (1974), pp. 26/27.

[3] See Megarry op. cit. as referred to in para. 2.7 above.

of the Rent Tribunals[1] after the 1974 legislation were, if constituted on a fixed term basis, wholly unprotected by the Rent Acts.[2]

2.16 Does the operation in Scotland of tacit relocation, which appears to have no real counterpart in English law, result that in Scotland a fixed term tenancy or its equivalent cannot be effectively created? In principle there seems no reason why this should be so. If tacit relocation is in effect the result of an implied term in the tenancy contract[3] it would appear that the parties should be free to elide or negative this implication.[4] It appears to be accepted that the effect of tacit relocation may be conventionally varied or modified e.g. by a provision for a monthly or weekly extension where tacit relocation would have operated for a longer period.[5] In

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[1] Under the Tenants' Rights, Etc. (Scotland) Act 1980, ss. 52 and 55, Rent Tribunals disappear. Their security of tenure jurisdiction passed in the case of existing contracts under Part VII of the Rent (Scotland) Act 1971 to the Rent Assessment Committees, and in the case of future contracts to the sheriff, whose powers are not dependent on a notice to quit having been given.

[2] Evans op. cit. pp. 189/190.

[3] See the case of Douglas referred to in para. 2.3 above.

[4] In Smith v. Grayton Estates Ltd. 1960 S.C. 349 it was said that tacit relocation was "the prolongation each year of the tenancy for a further one year if the actings of the parties to the lease show that they are consenting to this prolongation" (per Lord President Clyde at p.354). It is difficult to see why this consent should not be excluded by the terms of the lease itself.

[5] See Encyclopaedia of Scottish Legal Styles, Vol. 6, p.107, No. 131 (missive of let of furnished house perhaps, however, drafted on the assumption that tacit relocation is inapplicable).

other matters affecting the terms of the tenancy contract, for example rights of resumption[1] and conventional irritancies,[2] freedom of contract has been successfully claimed. It is, however, established that the provision for long adopted in Scottish leases whereby a tenant is obliged to remove without warning or process of law does not elide tacit relocation and make notice unnecessary.[3] At one time such a provision was of significance in simplifying or abbreviating the procedure for having a tenant removed, but from a very early stage it seems to have been accepted, perhaps as a concession to tenants, that such a provision in their leases should not deprive them of the normal right to notice or warning from their landlords when their tenancy was to be terminated.[4] An exception has been made and notice is unnecessary where the lease containing such a provision is dated within a year of the removal,[5] but the exception represented by an old Act of Sederunt[6] still nominally in force under which an action of removing raised 40 days before a term of Whitsunday can proceed without prior notice or warning to the tenant does not depend on

[1] See Edinburgh Corporation v. Gray 1948 S.C. 538 per L.P. Cooper at p.545.

[2] M'Douall's Trs. v. McLeod 1949 S.C. 593: see Lord Jamieson at pp. 616/7; Dorchester Studios (Glasgow) Ltd. v. Stone 1975 S.C. (H.L.) 56.

[3] Rankine op. cit. p.556; Paton & Cameron op. cit. p.223.

[4] Rankine loc. cit.

[5] Paxton v. Slack (1803) Hume 568; Brown v. Peacock (1822) 1S. 359.

[6] Act of Sederunt 14 December 1756.

such a provision in the lease. Again, the more recent statutory provision for a letter of removal by the tenant making notice to him unnecessary involves a document separate from the lease.[1]

2.17 There is some support for the view that section 34 of the Sheriff Courts (Scotland) Act 1907 prescribing a requirement of written notice to exclude tacit relocation supersedes any conventional provision in this matter, thus making contracting out of tacit relocation by any form of dispensation with notice incompetent.[2] Apart, however, from the fact that section 34 deals only with the case of land exceeding two acres let under a probative lease, the proviso to the section preserving the competency of "proceedings under any lease in common form" could be said to negative the suggested construction.[3] Again in relation to various matters arising under the 1907 Act it has been held that its provisions apply only in the particular form of sheriff court procedure for which it provides, and should not be read as changing in

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[1] The provisions of s.35 of the Sheriff Courts (Scotland) Act 1907 as originating in the Sheriff Courts Act of 1853; see Cesari v. Anderson (1922) 38 Sh.Ct. rep. 137 and the discussion under "Letters of Removal" infra paras. 3.33-3.34.

[2] Dobie Sheriff Court Practice at p.410 founding on Duguid v. Muirhead 1926 S.C. 1078 per Lord Constable at pp. 1082/3.

[3] Cowdray v. Ferries 1918 S.C. 210, per Lord Johnston at p.219.

any way the substantive law of landlord and tenant.[1] In the current legislation for agricultural holdings it has been considered necessary or at least desirable to resolve such doubts as may have existed by making the requirement for notice and the application of tacit relocation operative irrespective of any provisions in the tenancy contract.[2]

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[1] See Craighall Cast Stone Co. v. Wood Bros. 1931 S.C. 66; Gillies v. Fairlie (1920) 36 Sh.Ct.Rep. 6; and Lord Advocate v. Dykes (1921) 37 Sh.Ct.Rep. 133, being cases in which a more restricted view of the scope and effect of the 1907 Act appear to have been taken: on the other hand a view consistent with that of Lord Constable (supra) was adopted in Templeton v. Graham (1919) 35 Sh. Ct. Rep. 249 and in Robertson v. M'Intosh 1922 S.L.T. (Sh.Ct.) 7 in which the provisions in question were described as intended to alter the common law and not merely to introduce alternative procedures. In Milne v. Earl of Seafield 1981 S.L.T. (Sh.Ct.) 37, the sheriff principal accepted the view that the 1907 Act did not alter the substantive law.

[2] Agricultural Holdings (Scotland) Act 1949, ss. 2 and 3; cf. Agricultural Holdings Act 1948, ss. 2 and 3, in effect making tacit relocation apply to fixed term tenancies in England to give the tenant security of tenure. Prior to the 1948/49 legislation the position in Scotland was perhaps not absolutely clear. See Duguid v. Muirhead 1926 S.C. 1078 where Lord Constable (see his comments at p.1084) held that the parties could not contract out of the requirements for notice prescribed by the Act of 1923. See also Reid, The Agricultural Holdings (Scotland) Act 1923, p.105 discussing this point and having a possible bearing on the general issue, and the recent House of Lords decision in Johnson v. Moreton [1980] A.C. 37.

2.18 On the other hand, in section 38 of the Sheriff Courts (Scotland) Act 1907 dealing with summary removings from subjects let for less than a year, the words "in the absence of express stipulation" as applied to the periods of notice prescribed are construed by some writers as resulting that in cases covered by the section there can be contracting out of the right to notice and consequently of the operation of tacit relocation.[1] It might however be suggested that the words in question envisage some different and perhaps longer periods of notice being conventionally adopted.

2.19 Statutory provisions apart, it is clear that nothing less than express provision would be sufficient to rebut the presumption represented by tacit relocation. The strength of that presumption is shown by the limited effect given to a clause requiring a tenant to remove without warning and again by the application of tacit relocation to leases granted for the lifetime of the landlord although such leases cannot be terminated on their contractual expiry as due notice can only be given after the landlord's death has occurred.[2] Tacit relocation has also been held to operate in cases of tenancies due to expire on the occurrence of some future event.[3]

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[1] Gloag and Henderson, Introduction to the Law of Scotland (8th edn.), p.456; cf. Wallace, Sheriff Court Practice (1911), p.511.

[2] Johnston's Trs. (1803) Mor. 15207.

[3] Birrell v. Provost, Etc. of Kirkcaldy (1912) 28 Sh.Ct. Rep. 155 where tacit relocation was referred to as being of universal application subject only to the exception of judicial leases (para. 2.11 above).

2.20 Whether tacit relocation should be regarded as operating in relation to a tenancy contract expressed to subsist for a definite period and for no longer is a matter on which there appears to be no conclusive authority in Scotland. Conveyancing practice here not having adopted the fixed term tenancy contract, no examples are to be found in the style books. If such a contract were to be regarded as effective as the law at present stands, or again if a change in the law to secure its effectiveness were contemplated, the resultant situation in relation to the various cases of security of tenure would have to be considered. There would be no change in the position under the Agricultural Holdings Acts, tacit relocation remaining mandatory irrespective of the terms of the tenancy contract. Again, regulated tenancies under the Rent Acts would not be affected, except in so far as the transition from protected contractual tenancy to statutory tenancy would take place, as it does in England with fixed term contracts, by the effluxion of time and without any notice of termination.[1] Likewise the rights of tenants now entering into contracts coming under Part VII of the Rent (Scotland) Act 1971 would not be prejudiced. The jurisdiction conferred on the sheriff in such cases to postpone the date of possession in proceedings for recovery of possession is not dependent, as was the jurisdiction of the Rent Tribunals on that matter, on the issue of a notice to quit.[2]

[1] Evans op. cit. p.189.

[2] See Rent (Scotland) Act 1971, s.95B as introduced by Tenants' Rights, Etc. (Scotland) Act 1980, s.55: cf. the corresponding English provision, s.106A of the Rent Act 1977 introduced by s.69(2) of the Housing Act 1980.

2.21 The adoption of the fixed term tenancy would, however, be significant in relation to tenancies of shops where the statutory powers of the sheriff become operative only where a tenancy is being terminated by notice to quit.[1] In England the Landlord and Tenant Act of 1954 providing a measure of security of tenure for business tenancies generally has some rather complicated provisions concerning fixed term tenancies.[2] In Scotland, however, the matter might be covered in respect of shops by a simple statutory amendment giving the tenant the right to apply to the sheriff not only on receipt of a notice to quit from his landlord but alternatively up to a certain time before the end of a tenancy due to expire by effluxion of time.

Notice of termination

2.22 In modern practice, notice of termination takes the place of and largely supersedes the older methods of warning for terminating a tenancy such as the raising of an action at a certain point of time.[3] Notice may be given by landlord to tenant, or vice versa, but certain questions can arise when changes in either interest take place during

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[1] Tenancy of Shops (Scotland) Act 1949, s.1.

[2] Landlord and Tenant Act 1954, Part II. The same matter has now had to be dealt with in relation to secure domestic tenancies in the public sector where s.29 of the Housing Act 1980 provides for a periodic tenancy arising on the termination of a fixed term tenancy.

[3] But certain older procedures, not having been abolished or rendered incompetent, may still be invoked. See for example Green v. Young (1919) 35 Sh.Ct.Rep. 201 and Kerr v. Young (1920) 36 Sh.Ct.Rep. 184, both being cases in which the calling of the landlord's action 40 days before the term at which the tenancy terminated was held to make any other form of notice to the tenant unnecessary.

a tenancy, or again, where there is more than one party involved either as landlord or tenant.

2.23 Prima facie a notice given to a tenant should be given by the parties who will have the title to sue in proceedings for that tenant's removal, but there are circumstances in which a party entitled to give a notice which will prevent tacit relocation operating is not in a position, or not by himself in a position, to take proceedings for the tenant's removal. Whether the question be one of the right to give notice, or one of title to sue in the proceedings for a tenant's removal,[1] a tenant cannot impugn the right or title of the party by whom his lease has been granted.[2]

2.24 Notice by landlord's successor. Problems can, however arise when during the currency of a tenancy changes affecting the interest of the landlord occur. A landlord does not require to be infeft in the property to give a valid notice to quit[3] but a purchaser under missives, as contrasted with the holder of an unrecorded disposition or other incomplete title, cannot give such a notice.[4] If a change of ownership takes place after notice has been given there must be an express assignation of the notice before

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[1] The matter of title to sue is examined in detail in Chapter 4 below.

[2] See Rankine, p.513; Paton & Cameron, pp. 252/3.

[3] Walker v. Hendry 1925 S.C. 855. At present decree for recovery of possession will not be granted to an uninfeft pursuer. See Chapter 4 below for changes proposed in this respect.

[4] James Grant & Co. Ltd. v. Moran 1948 S.L.T. (Sh.Ct.) 8; cf. Grandison v. Mackay 1919 1 S.L.T. 95, per Lord Sands at p.97.

it can be founded on by the new owner in removing proceedings.[1]

2.25 Joint or common property. Again division or plurality of interests either on the tenant's side or on the landlord's side can create difficulties. It is now settled that one of several joint tenants can effectively give notice excluding tacit relocation and terminating the tenancy.[2] It has been suggested that the ratio of that decision, that is to say that notice from any of the parties concerned breaks the silence involved in tacit relocation, must apply to entitle any joint owner to give notice to quit,[3] but it is questionable if that is a legitimate inference from the decision. The point is not covered by direct authority,[4] and such obiter dicta as there are bearing on it are inconsistent. On the one hand, there is the argument that tacit relocation cannot operate when any interested party has intimated unwillingness to the

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[1] Grant v. Bannerman (1920) 36 Sh.Ct.Rep. 59 where it was held that although the seller's notice may have elided tacit relocation assignation of that notice was necessary for it to be founded on in the removing action at the instance of the purchaser; cf. Brown v. Collier 1954 S.L.T. (Sh.Ct.) 98: see also Black v. Paterson 1968 S.L.T. (Sh.Ct.) 64 where the sheriff discussed certain of these issues in distinguishing notices to arbitrate on rent under s.7 of the Agricultural Holdings (Scotland) Act 1949 from notices to quit forming the basis of proceedings for removing.

[2] Smith v. Grayton Estates 1960 S.C. 349.

[3] Paton and Cameron op. cit. pp. 225/6.

[4] Gloag, Contract (2nd edn.), written before Smith's case, treats the point as unsettled, but in the light of his comment on the case of Gates v. Blair infra (see note p.534) might have agreed with the view of Paton and Cameron.

extension of the tenancy contract.[1] On the other hand, it is said that the termination of the tenancy, being an act of management of the joint or common property, requires the concurrence or consent of all proprietors.[2] As it is clear that all proprietors must be party to any proceedings for the tenant's removal,[3] it would appear that the right of one co-proprietor to give notice, if it exists, is of limited practical value. Whatever may be the position at the normal or final expiry of a lease, it seems clear that when the rights conferred by a break clause in a lease are being exercised all joint tenants or joint landlords, as the case may be, must be parties to the giving of notice. The exercise of an option is regarded as a positive act distinguishable from the withdrawal or withholding of consent which is sufficient to exclude tacit relocation.

2.26 Notice by part owner. Again the question of the rights of landlords to give notice to quit can arise where changes in ownership of the land during the tenancy result in different parts of the let subjects coming into separate ownership, perhaps by

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[1] Walker v. Hendry supra, per L.J-C. Alness at p. 875.

[2] Ibid, per Lord Constable at p.861 and Lord Anderson at p.882. See also Lord Skerrington in Graham v. Stirling 1922 S.C. 90, at pp. 107/8. In that case as in Walker's case the question of notice by a joint owner, although arising, did not require decision.

[3] Rankine: op. cit., pp.516/517, Land Ownership (4th edn.), pp. 587/588; Hunter, Vol. II, pp. 12/13.

reason of a sale or again as a result of a succession on the death of the original landlord. It has been decided that apart from express provision in the lease or the application of some statutory provision[1] a tenant cannot have his tenancy terminated even when it is running on tacit relocation quoad part only of the subjects let to him.[2] It might, however, be argued that when ownership has been divided the manifestation on the part of any of the various owners of unwillingness to allow the continuation of the tenancy should be sufficient to exclude tacit relocation. To this there is the objection that if a part-owner be allowed to act on his own, so to speak, these actions must either lead to the tenancy as a whole being terminated, contrary perhaps to the wishes of the other owners, or to the tenant without his concurrence having the tenancy contract altered during its currency. Accordingly, it appears to be the position that when division of a property subject to a tenancy takes place by sale or otherwise, the part-owners can terminate the

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[1] For example, s.32 of the Agricultural Holdings (Scotland) Act 1949.

[2] Gates v. Blair 1923 S.C. 430; this decision is criticised in Paton and Cameron op. cit. at pp. 223 and 225 and again in Gloag op. cit. p.734 (note) in respect that it ignores the principle that tacit relocation involves tacit consent by both parties; the case of Lord Advocate v. Drysdale (1874) 1R. (H.L.) 27 referred to in Paton and Cameron at p.223 (note 22) seems to have been a special one involving a let of heterogeneous subjects with termination in respect of each requiring different steps; see the comments of Lord Neaves in the Court of Session Report ((1872) 10M. 499 at p.509).

tenancy wholly, or if permissible partly, only by acting in collaboration. It is at least doubtful if any of them acting without the other's concurrence can give a notice which will exclude tacit relocation or form the basis of a removing action.[1]

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[1] S.32 of the Agricultural Holdings (Scotland) Act 1949 entitles a landlord in certain circumstances if the tenancy is running on a year to year basis to give a notice affecting part only of the holding, while s.33 enables the tenant receiving such a notice to treat it as terminating the tenancy entirely. In the case of Secretary of State for Scotland v. Prentice 1963 S.L.T. (Sh.Ct.) 48 it was held that, when there has been a division of the property let, one part owner acting alone cannot effectively give notice to quit in terms of s.32 for his part of the property. This decision however turned on the relevant terms of the Act, including the definition of landlord in s.93(1) and the requirements as to the form of notice to quit set out in various provisions of the Act, particularly s.24. The sheriff indicated that the part-owner's contention that his notice was sufficient to exclude tacit relocation might have been valid at common law. The Scottish Land Court had to deal with somewhat similar situations in the cases of Stewart v. Moir 1965 S.L.T. (Land Ct.) 11 and Gordon v. Rankin 1972 S.L.T. (Land Ct.) 7, being cases in which their consent in terms of s.25 of the 1949 Act was sought to the operation of notices to quit given to tenants by part owners. In both cases the applications were unsuccessful because they involved the applicants applying for consent in respect, inter alia, of land which they did not own. In Stewart's case, the Land Court reserved their opinion on the soundness of the decision in Prentice's case, from which they were able to distinguish Stewart's case, in respect that the notice given to the tenant did not comply with s.32, the only statutory provision under which an agricultural tenancy can be partially terminated otherwise than by contractual resumption.

2.27 In England an attempt has been made to resolve the problems arising in circumstances of this kind by a statutory provision entitling a part owner to give notice to quit in respect of his own property, subject to the right of the tenant receiving such a notice to call for the termination of the tenancy as a whole.[1]

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[1] Law of Property Act 1925, s.140(1) and (2). As shown by the decision in Jelley v. Buckman [1973] 3 All E.R. 853 the severance of the reversion does not result in the creation of separate tenancies which could deprive the tenant quoad part of the subjects of some statutory security of tenure affecting the subjects as a whole. These provisions differ in important respects from the provisions of s.32 of the Agricultural Holdings (Scotland) Act 1949, of which the English counterpart is s.8 of the Agricultural Holdings (Notices to Quit) Act 1977. The 1925 provisions apply to tenancies generally, and can be invoked when and only when there has been a division in ownership of the let property during the tenancy; they are not, like the 1949 provisions, available to a single landlord as a means of recovering possession of part only of the subjects let; but where division has taken place they entitle the part owner to act on his own initiative giving notice to quit affecting his part of the property, the tenant however being entitled to have the notice made applicable to the whole of the let property (cf. s.33 of the 1949 Act). In Scotland, the only way in which a part-owner of let property could recover possession of his part of the property acting on his own initiative would appear to be by virtue of a resumption clause in the lease. Resumption clauses are commonly found in agricultural leases, and are exempted from the whole code of rules affecting notices to quit (see Agricultural Holdings (Scotland) Act 1949, s.24(6)). In the case of Secretary of State for Scotland v. Campbell 1959 S.L.C.R. 49 it was held that the part-owner could by himself exercise a right of resumption conferred by the lease, this right being a part of the contractual arrangements with the tenant which was unaffected by transactions between the original landlord and other parties. However if Secretary of State for Scotland v. Prentice (sup. cit.) is correctly decided, Campbell's case is of very doubtful validity.

2.28 Joint tenants. In practice where the interest of either landlord or tenant is shared in any way termination of the tenancy will normally involve the cessation of all interests and any notice of termination should be given to all parties sharing an interest. It appears, however, that in a jointly held tenancy it may be competent for the landlord to terminate the interest of one or more of the joint tenants by notice to, and if necessary proceedings against, them alone leaving the tenancy in being quoad any other joint holder.[1] In cases where a landlord has invoked an irritancy or similar ground to terminate the interest of certain joint tenants it has been held that any remaining joint tenant is entitled but not bound to continue the tenancy.[2] Even so it may be said to be inevitable that any joint tenants whose interest the landlord is not entitled to terminate should be required to undertake the obligation of the tenancy alone as a condition of retaining their interest. The situation is one which will not often arise in practice but it might perhaps be met by a statutory provision which, unless the lease provided otherwise, would prevent the landlord terminating the interests of one or more but not of all joint tenants except with the consent of any joint tenant whose interest was not being terminated.

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[1] Macdonald v. Sinclair (1843) 5D. 1253; Rankine op.cit. pp. 520/1; Paton & Cameron op. cit., p.259.

[2] Young v. Gerard (1843) 6D. 347; Buttercase & Geddie's Tr. v. Geddie (1897) 24R. 1128.

2.29 Sub-tenants. A problem as to the position and rights of sub-tenants may arise when the tenant has legitimately sub-let the subjects of a lease, wholly or partially, or the landlord has consented to a sub-letting prohibited by legal implication or by the terms of the lease.[1] It has been held that a sub-tenant remaining in possession after the principal tenancy has ended, as a result of a notice to quit served by the landlord on the principal tenant only, cannot be summarily ejected at the instance of the landlord.[2] It is suggested that a landlord terminating a tenancy where there are sub-tenants should include these sub-tenants in giving his notice to quit.[3] The position of a

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[1] When sub-letting is excluded by the lease or by implication and has not been authorised by the landlord, the sub-tenant is a possessor without right or title against whom proceedings can be taken without notice; see Paton and Cameron op. cit. pp. 224 and 257; Rankine op.cit. pp.520 to 521. See further Chapter 5 below.

[2] Robb v. Brearton (1895) 22R. 885.

[3] See Paton and Cameron op. cit. pp. 169 and 224. So long as the principal lease subsists there is no privity of contract between landlord and sub-tenant. Thus if it is desired to terminate the main tenancy and the sub-tenancy simultaneously it may be better that the notice to the sub-tenant should come from the tenant, if co-operating, and if necessary be assigned to the landlord for the purpose of removing proceedings against the sub-tenant. See in this connection the Agricultural Holdings (Scotland) Act 1949, s.27(5) which contemplates the notice to quit to the sub-tenant coming from the principal tenant when the landlord is terminating the main tenancy. In Robb v. Brearton supra however the opinions of the judges appear to indicate that a notice could competently be given by the landlord to the sub-tenant despite the absence of a contractual relationship.

sub-tenant who has not received notice to quit and remains in possession after the termination of the principal tenancy is anomalous.[1] It is arguable that the principal tenancy from which his tenancy is derived no longer existing, he cannot be regarded as holding on tacit relocation but if, as has been decided,[2] his tenure is not precarious, what is its basis, to what date does it run, and on what period of notice can it be terminated? In actions of removing, the standard practice has been for the crave or conclusion to include dispossession of any sub-tenants of the defending tenant.[3] It would appear that where there are known to be sub-tenants against whom it may be necessary to operate the decree they should be called as defenders,[4] in which case the relevancy of the case against them would seem to depend on their having received due notice of termination of their tenancies.[5]

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[1] Rankine op. cit. p.600. In Robb v. Brearton supra the judges specifically reserved their opinion on the sub-tenant's position.

[2] Robb v. Brearton supra.

[3] Encyclopaedia of Scottish Legal Styles, Vol. 8, pp. 7 and 9; Dobie, Sheriff Court Styles, pp. 414 and 417.

[4] Rankine op. cit. p.521.

[5] See Johnston Brothers v. Feggans (1931) 47 Sh.Ct.Rep.200 applying the ruling in Robb v. Brearton supra to the case of a partial sub-let, and indicating that the landlord must give due notice to the sub-tenant prior to proceeding de novo against him following the termination of the main tenancy. The case of Robb v. Menzies (1859) 21D. 277 which Rankine (op. cit. p.198) cites with Robb v. Brearton as authority for the landlord's right to remove sub-tenants provided due warning is given to them, discloses the difficulties which may arise in giving notice because of the identity of the sub-tenants being unknown to the landlord.

In the case of domestic tenancies coming under the Rent Acts the position of the sub-tenant remaining after the termination of the principal tenancy is made clear by a provision that he becomes tenant of the landlord or proprietor on the terms on which he held from the principal tenant.[1] Again the statutory provisions now in force for interposed leases result that the termination of the interposed tenancy during the subsistence of the original or main tenancy which has become a sub-tenancy, re-establishes the landlord and tenant relationship between the proprietor and the occupier under the original tenancy.[2] With agricultural holdings, on the other hand, it seems to be assumed that a sub-tenancy must terminate with a principal tenancy from which it is derived as the security of tenure conferred by the Acts, although applying in questions between tenant and sub-tenant, is not available to the sub-tenant when the principal tenancy is terminated by the landlord.[3] It would appear, however, that a landlord seeking to remove a sub-tenant from an agricultural holding would have the difficulties already mentioned if notice had not been given to the sub-tenant, and the sub-tenant called as a defender in any proceedings.[4]

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[1] Rent (Scotland) Act 1971, s.17.

[2] Land Tenure Reform (Scotland) Act 1974, s.17(2), which appears to contemplate termination of the interposed lease occurring with the original lease still having some time to run, whereas in the case of a sub-lease granted by the lessee the duration should not exceed that of the principal lease.

[3] See Agricultural Holdings (Scotland) Act 1949, s.27(5).

[4] See Chapter 5 below.

2.30 There appears to be no Scottish authority bearing on the situation arising where, with a sub-tenancy subsisting, notice of termination of the principal tenancy has been given or that tenancy has been renounced by the principal tenant. In England, this situation has been treated as exceptional, the sub-tenant retaining in a question with the landlord or proprietor the rights which he derived from the principal tenant until his sub-tenancy is terminated in the appropriate way.[1]

Notice withdrawn, cancelled or ineffective

2.31 Certain problems can arise where for some reason a notice to quit given by either party is not acted upon or enforced. There is English authority to the effect that notice given by either party terminating the tenancy contract cannot be cancelled or withdrawn without the consent of the other party.[2] Seemingly this ruling applies

[1] See Brown v. Wilson unreported, but commented on in [1949] 208 L.T. 144 in which case reference was made to the opinions of the judges in Meller v. Watkins (1874) L.R. 9 Q.B. 400.

[2] Tayleur v. Wildin (1868) L.R. 3 Ex.303. Cases in which it may be desired to withdraw a notice given inadvisedly seem most likely to arise with tenants (e.g. Gilmour v. Cook infra) but landlords may sometimes wish to withdraw a notice e.g. in an agricultural tenancy where the notice does not comply with the requirements of s.11 of the Agriculture (Miscellaneous Provisions) Act 1968 for exemption from liability for compensation to the tenant under s.9 of that Act. The matter is discussed from a Scottish viewpoint in an article entitled "Revoking a Notice to Quit" 1979 S.L.T. (News) 265.

independently of any actings or circumstances giving rise to a plea of personal bar.[1] The position is different from that arising when a tenant incurs a forfeiture of his lease, which the landlord may waive or depart from if he chooses.[2] There appears to be no direct authority in Scotland,[3] but in one case it was held,[4] following certain

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[1] The provisions of the Rent Acts (for Scotland see the Rent (Scotland) Act 1971 s.10(1) and Sched. 3, Part 1, case 4) might seem inconsistent with this proposition in requiring, as a condition of a court order for possession following upon a tenant's notice to quit, actings by the landlord on the basis of the notice, prejudicial to him if possession is not given: in a protected tenancy, however, the effect of notice from either party is not *per se* to entitle the landlord to possession but, where the tenant remains in possession, to convert the protected contractual tenancy to a statutory tenancy as from the effective date of the notice (see s.3 of the Act and *Barton* v. *Fincham* [1921] 2 K.B. 291).

[2] See *Clarke* v. *Grant* [1950] 1 K.B. 104.

[3] In *Gilmour* v. *Cook* 1975 S.L.T. (Land Ct.) 10 where a farm tenant sought unsuccessfully to repudiate as defective his own notice to quit, the fact that the notice had been expressly accepted by the landlord presumably eliminated any question of withdrawal. But s.31 of the Agricultural Holdings (Scotland) Act 1949 (cf. Agricultural Holdings (Notices to Quit) Act 1977, s.7 as operative in England) providing for cancellation of a landlord's notice to quit on a sale of the tenanted subjects during the currency of the notice has provisions (ss. (2) and (3)) preserving the tenant's right to have the notice remain in force should he so desire.

[4] *Morrison-Low* v. *Howison* 1961 S.L.T. (Sh.Ct.) 53.

English decisions,[1] that more than one notice from the same party may, where the notices are not inconsistent, be current at the same time, since a notice is not cancelled by the issue during its currency of another notice. If, after the expiry of a notice to quit, a tenant continues in possession without objection or positive action from the landlord, tacit relocation will be regarded as reviving and bringing about a continuation of the tenancy.[2] Where, however, a notice is cancelled of consent or withdrawn, such communings between the parties as will have taken place may be regarded as constituting a new lease by informal agreement, rather than as bringing about an extension of the existing tenancy as would result from tacit relocation.[3] A question of the application of tacit

[1] Cowan v. Wrayford [1953] 1 W.L.R. 1340 at p.1344; French v. Elliot [1960] 1 W.L.R. 40; Lowenthal v. Vanhoute [1947] 1 K.B. 342 at p.345: See also Thompson v. McCullough [1947] 1 K.B. 447.

[2] Erskine, Institute II, VI, 35; Gloag, Contract (2nd edn.), p.735; Paton and Cameron op. cit. p.227: referring to Milner's Curator Bonis v. Mason 1965 S.L.T. (Sh.Ct.) 56 where acceptance of rent after the expiry of the notice was a significant factor. Prolonged delay by a landlord in enforcing a decree of removing may have the same result: see Taylor v. Earl of Moray (1892) 19R. 399 where a delay of a few weeks was held not to have this effect.

[3] Cf. the decisions in the English cases of Lower v. Sorrell [1963] 1 Q.B. 959 and Freeman v. Evans [1922] 1 Ch.36 where that result was reached and the Irish decision in Inchiquin v. Lyons (1887) 20 L.R. Ir. 474 to the opposite effect not followed. As brought out in the opinions of the judges in Lower's case the practical significance of this ruling is that where a new tenancy is created as from the expiry of the notice to quit, notice terminating that new tenancy could not be given before its commencement i.e. before the end of the original tenancy. The position would be different in Scotland if tacit relocation could be regarded as operating.

relocation might be said to arise when, under the relative statutory provisions,[1] a landlord of an agricultural holding, having served notice to quit and received counter notice from the tenant, is unsuccessful in obtaining the Scottish Land Court's consent to operate the notice to quit. In such a case, can the tenant's continuance in possession be attributed to the extension of the lease by tacit relocation, such extension being clearly contrary to the will of the landlord who is powerless to prevent it?[2] It would appear however that this question is resolved by the relative statutory provisions which, by making the operation of the notice to quit conditional on the Court's consent,[3] result that failing such consent the notice must be regarded as not having been given, leaving tacit relocation to operate as provided for in the Act.[4]

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[1] Agricultural Holdings (Scotland) Act 1949, ss. 25 and 26.

[2] The decision in MacArthur v. MacMaster (1894) 2 S.L.T. 137 concerning a somewhat similar situation arising under crofting legislation might be founded on in support of a negative answer.

[3] Agricultural Holdings (Scotland) Act 1949, ss. 25 and 26.

[4] Ibid, s.3. Tacit relocation will clearly set in if the tenancy continues beyond the year commencing from the effective date of the notice to quit; if tacit relocation is not to be regarded as operative during that year it becomes difficult to define the legal basis of the tenancy: if it is a new tenancy and not a continuation of the original one it could not be terminated by any notice given before its commencing date.

CHAPTER 3 NOTICES TO QUIT

3.1 The rules of law affecting notices terminating tenancies may be said to fall into three categories, namely:-

(i) Common law rules and statutory provisions applying by implication in the absence of conventional provisions;[1]

(ii) Statutory provisions operating irrespective of any conventional provision;[2] and

(iii) Statutory provisions requiring to be observed where some particular form of process or procedure for recovery of possession is being adopted.[3]

Those rules and the questions to which they give rise are examined under the following heads:-

(1) The period or duration of the notice in relation to its effective date (paras. 3.2-3.20);

(2) The nature or form of the notice and the manner of giving it (paras. 3.21-3.24);

(3) The substantive content of the notice (paras. 3.25-3.31);

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[1] Such common law rules as affect the matter are in this position. Instances of statutory provisions applying "in the absence of express stipulation" are ss. 4 and 5 of the Removal Terms (Scotland) Act 1886 and s. 38 of the Sheriff Courts (Scotland) Act 1907.

[2] S.24(1) of the Agricultural Holdings (Scotland) Act 1949 and s.131 of the Rent (Scotland) Act 1971 are examples.

[3] On one view at least this is the effect in general of the provisions of the Sheriff Courts (Scotland) Act 1907 concerning removings.

(4) Other questions and problems affecting the matter of notice, namely:-

(a) Specialities as regards notices by tenants (para. 3.32);

(b) Letters of removal (paras. 3.33-3.34);

(c) Notices in respect of resumption (paras. 3.35-3.38);

(d) The effect of notices as admissions of right or title (paras. 3.40-3.41);

(e) Notices to or by successors of landlords or tenants (paras. 3.42-3.49);

(f) Notices terminating "mixed" tenancies (paras. 3.50-3.51).

Period or duration of notice

3.2 General. In the Second Report of the Law Reform Committee for Scotland[1] reference is made to the many different periods of notice prescribed in various statutory provisions, with the length of notice in a particular case depending partly on the period of let and partly on the nature of the subjects. In the opinion of the Committee, the number and variety of the existing periods made for unnecessary complexity. At common law it had for long been established that reasonable notice must be given by the party who was seeking to end the tenancy by preventing the operation of tacit relocation.[2] Forty days seems to have

[1] Cmnd. 114 (1957), para. 13.

[2] Chirnside v. Park (1843) 5D. 86f: Morrison v. Abernethy School Board (1876) 3R. 945.

been accepted as a basic minimum period,[1] and that period was adopted in the earliest statutory provisions[2] affecting the removal of tenants. Originally, because most tenancies ran from the Whitsunday term, 40 days notice had to be given before that term, even where the tenancy ran to some other date, but this rule was modified by statute allowing the period to be related to the termination date applicable in the particular case.[3] It has been, however, and apparently continues to be the position that where there is neither statutory provision applying nor conventional provision made the period of 40 days will apply. The Law Reform Committee appear to have taken the view that 40 days remained an appropriate basic period under modern conditions; they recommended that it should apply to any let of a year or more but that in other cases 14 days, or the period of let if shorter, should be sufficient.[4] Agricultural lets were, however, excluded

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[1] Rankine, p.556 founding on Stair, Institutions, II, 9, 38.

[2] Act of 1555 c.39 "Anent the Warning of Tenants"; Act of Sederunt 14 Dec. 1756 "Anent Removings", subsequently embodied in Codifying Act of Sederunt xv 1913.

[3] Sheriff Courts (Scotland) Act 1853, ss. 30 and 31. While s.37 of the 1907 Act mentions the 40 days period only in connection with the Whitsunday and Martinmas terms, the view has been expressed (Rankine op. cit. p.573) that the 40 days period applies to all cases, but that under existing law the days must be counted from 15th May and 11th November respectively in terminations at the Whitsunday and Martinmas terms.

[4] Cmnd. 114 (1957), para. 13.

from the Committee's remit.[1] For these it has always been accepted that the period of 40 days is too short and statutory provisions have prescribed a period of not less than one year and not more than two years applying irrespective of any provision in the tenancy contract.[2] The same minimum and maximum periods are prescribed by the Sheriff Courts (Scotland) Act 1907[3] for lets of lands exceeding two acres for not less than three years. Apart from these cases the only upper limit on the period of notice is represented by the basic requirement that notice must be given within the currency of the tenancy it purports to terminate.[4] In practice there may be some justification for limiting the period during which tenancies such as those of farms can be subject to notice of

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[1] Ibid., preamble.

[2] The current provision is s.24(1) of the Agricultural Holdings (Scotland) Act 1949. Cf. Agricultural Holdings (Notices to Quit) Act 1977, s.1(1) as operative in England.

[3] See s. 34 and First Schedule, Rule 110(a).

[4] See Lower v. Sorrell [1963] 1 Q.B. 959: in theory parties must be landlord and tenant respectively before a valid notice can be given (see Donovan L.J. at p.975): in practice permitting a notice to be given before the commencement of the tenancy would be destructive of any statutory security of tenure (see Ormerod L.J. at p.968) although this difficulty might be overcome if there were a requirement that a binding tenancy contract be concluded before notice was given (cf. Agricultural Holdings (Scotland) Act 1949, s.5(3)).

termination[1] and there appears to have been no call for a change in this respect. It is rare for a notice to be invalidated on this ground but in at least one case the objection was judicially sustained.[2] With periods permitted for the initiation of action by a tenant invoking his statutory right of security of tenure running as they do from the receipt of the notice[3] it might be thought undesirable to have notices to quit issued more than two years before their effective dates as the Land Court's decision in such matters should be made in the light of circumstances prevailing or expected to prevail reasonably near to that date. This difficulty might perhaps be overcome, however, by allowing the tenant to take action up to a certain time before the operative date of the notice to quit and/or prescribing a date in relation to that operative date after which the Land Court would be empowered to hear the case. The absence of a maximum period of notice does not appear to have given rise to difficulties under the Tenancy of Shops (Scotland) Act 1949 where a tenant invoking the statutory provisions must act within 21 days of service of a notice to quit.[4] This, however, may be accounted for by the fact that the period of let and notice usually applying in such cases is much shorter than in farming or other rural tenancies.

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[1] See Hume, Lectures, Vol. IV, p.103.

[2] Cowdray v. Ferries 1918 S.C. 210, the point being decided by Lord Anderson in the Outer House, but not canvassed in the subsequent appeal.

[3] Agricultural Holdings (Scotland) Act 1949, s.25(1).

[4] Tenancy of Shops (Scotland) Act 1949, s.1(1).

3.3 Also outwith the application of the 40 days rule are the special categories of tenancy represented by crofts and small holdings. In these cases of quasi-perpetual tenure, termination, apart from default on the part of the tenant, has to be effected by renunciation by the tenant notified in writing to the landlord at least a year before the Whitsunday or Martinmas term at which it is to take effect.[1]

3.4 Dwellinghouses. If the proposals of the Law Reform Committee were to be adopted for tenancies other than agricultural lets, variation or exception would be necessary in the case of lets of dwellinghouses whether or not affected by the Rent Acts. The Rent Act 1957 introduced a rule whereby in a let of any dwellinghouse at least four weeks' notice of termination of the tenancy must be given. The rule, which applies irrespective of anything in the tenancy contract, is now contained in section 131 of the Rent (Scotland) Act 1971.[2] Regulations affecting the content of the notice apply only to certain tenancies affected by the Rent Acts,[3] but the application of the minimum period of notice is not

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[1] For small holdings, see Crofters Holdings (Scotland) Act 1886, s.7 as amended by Small Landholders (Scotland) Act 1911, s.18; for crofts, see Crofters (Scotland) Act 1955 s.7.

[2] As amended by the Housing Act 1974, s.123(1) requiring the notice to be in writing.

[3] Notices to Quit (Prescribed Information) (Protected Tenancies and Part VII Contracts) (Scotland) Regulations 1980.

thus restricted.[1] If it be accepted that tacit relocation applies to lets of dwellinghouses generally, irrespective of stipulated duration,[2] the effect of section 131 is that such lets cannot initially be limited to periods of four weeks or less, at least four weeks notice of termination having to be given within the currency of the let[3] irrespective of any statutory[4] or conventional provision for shorter notice.[5] It should be noted, however, that the section does not make the period of notice which it prescribes sufficient in any case where that would not otherwise be so.[6]

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[1] Cf. s.5 of the Protection from Eviction Act 1977 operative in England affecting all domestic lets: but see also Rent (Scotland) Act 1971, Sched. 18, Part II amending s.5 of the Removal Terms (Scotland) Act 1886, and s. 38 of the Sheriff Courts (Scotland) Act 1907. In these amendments the minimum period is stated as 28 days and not four weeks, presumably to correspond with the period of 40 days referred to in the respective Acts. As, however, the application of the sections amended is not restricted to dwellinghouses, the amendment results, per incuriam perhaps, that the minimum period of notice is being applied to a wider category of urban subjects.

[2] See para. 2.8 above.

[3] See para. 2.2 above.

[4] E.g. Sheriff Courts (Scotland) Act 1907, s.38 as originally applying where the period of let was less than 12 weeks: but see s.38A added by the Housing Act 1974, Sched. 13, para. 1 making the minimum period of four weeks mandatory for domestic lets.

[5] But a let for a short period such as a week would still have the advantage that it could be terminated at the end of any weekly period by giving four weeks' notice.

[6] E.g. under the Sheriff Courts (Scotland) Act 1907, s.37 in the case of houses let for more than a year, or again under s.38 in the case of lets of less than a year but more than four months (see also Rule 110(c) in the First Schedule to the Act).

3.5 Removal Terms (Scotland) Act 1886. Apart from the specialties affecting agricultural tenancies and domestic tenancies the statutory provisions concerning the period of notice are to be found in the Removal Terms (Scotland) Act 1886[1] and the Sheriff Courts (Scotland) Act 1907.[2] The principal purpose of the 1886 Act was to clarify a doubt about the actual date of removal from urban subjects where a tenancy commenced and ended at one or other of the terms of Whitsunday or Martinmas. The Act purports to deal with "houses" but this term is widely defined,[3] and covers not only dwellinghouses separately let as such, but also shops or other buildings and their appurtenances, and dwellinghouses or buildings let along with land for agricultural or other purposes. Section 4 provides that when a lease prescribes Whitsunday or Martinmas for the end of the tenancy and the tenant's removal, then in the absence of contrary stipulation, the 28th day of the month shall be implied in each case, but notice of termination must be given 40 days before 15th May for a Whitsunday termination, and 40 days before 11th November for a Martinmas termination.[4] It is suggested that under modern conditions there is no justification for computing a period of notice otherwise than by

[1] Ss. 4 and 5.

[2] Ss. 34 to 38 and Rule 110, First Schedule; the House Letting and Rating (Scotland) Act 1911 which also affected this matter is repealed in terms of the Local Government (Scotland) Act 1973, Sched. 29.

[3] S.3.

[4] See Fraser v. Maule (1904) 6 F. 819 as to meaning of Whitsunday under the 1886 Act the term being regarded as fixed by statute at 15 May.

reference to the effective date of that notice.[1] Section 5 of the Act applying to lets not exceeding four months of houses other than dwellinghouses or buildings let along with land for agricultural purposes, requires that in the absence of express stipulation, notice be given as many days before the ish as equals one third of the period of let.[2]

3.6 Sheriff Courts (Scotland) Act 1907. The main source of statutory provisions affecting the period of notice for termination of tenancies is the Sheriff Courts (Scotland) Act 1907. There has been considerable, although not universal, support for a view that

[1] The intention of the Agricultural Holdings (Scotland) Act 1949 (s. 93(1)) in defining for the future Whitsunday and Martinmas as 28 May and 28 November respectively would seem to have been to eliminate this differentiation for agricultural tenancies, but in one case there are indications that this result may not have been achieved in relation to notices to quit (see Stirrat v. Whyte 1968 S.L.T. 157, Sheriff Principal Kidd at p. 160). In a more recent case, however, the Land Court applied the statutory definition of Whitsunday in upholding the validity of a notice to quit, rejecting the argument that the references in s.24 of the Act to certain provisions of the Sheriff Courts (Scotland) Act 1907 made the interpretation of "Whitsunday" as 15th May which applies under the 1907 Act operative under the 1949 Act (Austin v. Gibson 1979 S.L.T. (Land Ct.) 12). See also the case of Evans v. Cameron (Elgin Sheriff Court 6 March 1981) where the sheriff applied s.93(1) in the same way to determine when rent became due. The Law Reform Committee (see Cmnd. 114 (1957), para. 15) seem to have envisaged that the distinction between the two dates involved in the Whitsunday and Martinmas terms would be maintained in tenancies with which they were concerned.

[2] See footnote to para. 3.4 above referring to the amendment of this provision.

this being an Act dealing primarily with courts and their procedure, the rules which it prescribes in relation to such matters as notices to quit apply only where a form of process for which it makes provision is being adopted, and that its provisions should not be regarded as altering the substantive law on matters such as the period and form of notice for termination of tenancies.[1]

3.7 In relation to the period of notice the Act covers four separate cases:-

(1) Lands exceeding two acres in extend held under a lease extending for three years or more: an interval of not less than one year and not more than two years is to elapse between the date of the notice and the term of removal (see Rule 110(a));

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[1]The application of this restricted interpretation is exemplified in Craighall Cast Stone Co. v. Wood Bros. 1931 S.C. 66 and again in the sheriff court in cases such as Gillies v. Fairlie (1920) 36 Sh.Ct. Rep. 6 and Lord Advocate v. Dykes (1921) 37 Sh.Ct.Rep. 133; but a different view was taken by Lord Constable in Duguid v. Muirhead 1926 S.C. 1078 at pp. 1082/3 and again in the sheriff court in cases such as Templeton v. Graham (1919) 35 Sh.Ct. Rep. 249, Robertson v. McIntosh 1922 S.L.T. (Sh.Ct.) 7 and Montgomerie v. Wilson 1924 S.L.T. (Sh.Ct.) 48; but in the latest reported decision bearing on this issue, namely Milne v. Earl of Seafield 1981 S.L.T. (Sh.Ct.) 37 the rulings in Gillies and Craighall Cast Stone Co. are followed.

(2) Lands exceeding two acres in extent held on a tenancy of less than three years or on tacit relocation: an interval of six months must elapse between the date of the notice and the term of removal (Rule 110(b));

(3) Heritable subjects other than land exceeding two acres in extent let for a year or more: at least 40 days must elapse between the date of the notice and the term of removal (Rule 110(c));

(4) Any heritable subjects let for less than a year: if the period of let is not over four months, notice must be given as many days before the ish as equals one third of that period:[1] where it exceeds four months, notice must be given at least 40 days before the ish: these periods apply in the absence of express stipulation (section 38).[2]

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[1] See para. 3.4 above as to the application of a minimum period of 28 days.

[2] A question arises whether the words "in the absence of express stipulation" as used here result that a tenancy may be terminated and proceedings under the section taken on shorter notice than prescribed or without any notice. The view that notice may be contractually dispensed with is taken by Wallace, Sheriff Court Practice (1900) p.511 and again in Gloag & Henderson's Introduction to the Law of Scotland (8th edn.), pp. 456 and 485. This of course involves that tacit relocation can be conventionally excluded in cases to which s.38 applies. Other writers (e.g. Dobie, Sheriff Court Practice, p.405; Lewis, Sheriff Court Practice (8th edn.), p.273 and Paton & Cameron op. cit., pp. 270/271) seem to assume that notice of some duration must be given and under the House Letting and Rating Act 1911, which, while in force, superseded the provisions of s.38 in the cases to which it applied, notice was always required. The amendment to s.38 made by the Rent (Scotland) Act 1971 (see above) while making 28 days the minimum period of notice does not necessarily imply that notice must be given.

3.8 It should be noted that the provisions of Rule 110, as above mentioned, are not restricted in their application to any particular form of process, but apply to any ordinary action of removing in the sheriff court. On the other hand, section 38 of the Act deals only with the case of a summary application to the sheriff for the tenant's removing.

3.9 While it appears that the 1907 Act attempted to provide a comprehensive code for the termination of tenancies its classification of the various cases wholly or partly by the nature of the subjects is unsatisfactory in practical effect. The Law Reform Committee recommend "that the nature of the subjects be ignored as a factor which ought to be reflected in the period of notice, especially since this factor is generally reflected in the period of let."[1]

Factors affecting reform

3.10 Assuming that proposals are to be adopted which will supersede generally the existing statutory provisions[2] and any relevant rules of the common law affecting the period of notice and that these new rules would follow, so far as possible, the recommendations of the Law Reform Committee, a number of points seem to call for particular consideration.

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[1] Cmnd. 114 (1957), para. 13.

[2] For example, under the Sheriff Courts (Scotland) Act 1907 or the Removal Terms (Scotland) Act 1886.

3.11 Agricultural tenancies. It is assumed that in the case of agricultural tenancies, with which the Law Reform Committee were not concerned, the existing rules will continue.[1] Again it will probably be convenient that these rules should, at least so far as the period of notice is concerned, continue to be contained in a statute dealing with the substantive law of such tenancies.[2]

3.12 Functional considerations. There would appear to be two essential functions of rules determing the period of notice for termination of tenancies. Firstly, they must prescribe irreducible minima in cases such as agricultural or domestic tenancies where, on grounds of public policy or for other reasons, the law so requires. Secondly, the rules should prescribe a period of notice which, in the absence of conventional provisions and subject always to irreducible minima where applicable,[3]

[1] The Agricultural Holdings (Scotland) Act 1949, s.2(1) provides for short lets of agricultural land not taking effect as year to year tenancies being constituted with the consent of the Secretary of State. Such lets are not affected by the provisions of s.24(1) of the Act, but are covered by the rules affecting tenancies of less than one year (Sheriff Courts (Scotland) Act 1907, s.38).

[2] In England the matter of notices to quit in agricultural holdings involving as it does many specialties concerning security of tenure is now dealt with in a separate Act, the Agricultural Holdings (Notices to Quit) Act 1977.

[3] As is in effect now done in the Removal Terms (Scotland) Act 1886, s.5, and in the Sheriff Courts (Scotland) Act 1907, s.38, in each case as amended.

will apply and be sufficient for the termination of the tenancy. The proposal of the Law Reform Committee[1] is that certain periods should apply "only in the absence of any express provision in the lease for a longer period of notice." Presumably they intended that the same periods would form irreducible minima. It might, however, be said that in some cases at least a distinction should be drawn between the two cases, with periods somewhat longer than the irreducible minima constituting the legal implication. That appears to be the present position as regards dwelling-houses except in the case of very short lets, 40 days being the legal implication and four weeks or 28 days the irreducible minimum statutorily prescribed. On the other hand if a period acceptable for both purposes can be found the adoption of the same period for both purposes has the advantage of simplicity.

3.13 The matter of length of notice raises some difficult questions. The 40 days period is of long standing in Scotland as a basic rule in urban tenancies, but is there any reason why it should be adhered to under present day conditions, particularly when four weeks or 28 days is being prescribed throughout the United Kingdom as the minimum for lets of dwellinghouses? If the irreducible minimum period is as a general rule to coincide with the legally implied period there may be said to be a case for adopting the four weeks period for both purposes. The Law Reform Committee, reporting as they did in December 1956, may not have had before them the proposal as to the minimum period of notice in tenancies of dwellinghouses to which

[1] Cmnd. 114 (1957), para. 14.

effect was given in section 16 of the Rent Act 1957. Having that in view the Committee, in making their proposals, might have suggested the adoption of 28 days in place of 40 days. Standing the statutory provision of a minimum period of four weeks affecting all lets of dwelling-houses, it would be impossible to adopt the Law Reform Committee's proposals for the period of notice to apply to the termination of lets for less than a year, (i.e. 14 days or the period of let if less), and the making of the necessary exception would involve a differentiation by nature of subjects contrary to the Committee's general recommendation.[1] Differentiation may, however, be inevitable here if it be accepted that, while on grounds of public policy it is undesirable that lets of dwellinghouses should be terminable on notice of less than four weeks, it should be possible, dwellinghouses apart, to constitute a let of urban subjects effectively limited to some very short period without resort to a fixed term tenancy, which is of doubtful validity and not generally accepted in Scotland.[2]

3.14 There remains the important question whether four weeks or even 40 days is an adequate period of notice to be applied in the case of a tenancy of a year or more. The provisions of the Sheriff Courts (Scotland) Act 1907 prescribing longer periods of notice as a prerequisite of proceedings for recovery of possession are not in terms

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[1] Ibid, para. 13.

[2] See para. 2.17 above.

confined to agricultural lets.[1] Again in 1950 the Guthrie Committee in the Final Report of their Inquiry into the Tenure of Shops and Business Premises[2] recommended as an amendment of the law affecting the tenancies of all types of business premises a period of notice of 90 days for tenancies of a year or more, with 40 days applying in tenancies of less than a year but more than four months, and one third of the period of let in shorter tenancies. They recommended the 90 days period in the light of what they found to be the general practice in relation to the provision for, and the timing of, notices to tenants of premises such as shops. In England, the implication in periodic tenancies of any substantial duration is for a more ample period of notice.[3] To some extent the problem might be resolved by distinguishing in the case of tenancies of a year or more between the irreducible minimum on the one hand, and the legal implication on the other, using in the former case the basic period whether it is to be four weeks or 40 days, and in the latter some longer period.[4] Perhaps, however, this departure from the simpler course of adopting the same period for both purposes, apparently favoured by the Law Reform Committee, would not be justified in practice. Lets of substantial duration

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[1] S.36 and Rule 110(a) and (b).

[2] Cmnd. 7903 (1950), para. 48.

[3] See Evans, Landlord and Tenant, pp. 103/104 and Hill and Redman, Landlord and Tenant (11th edn.), p.489.

[4] The six month period is applied in certain cases by the Sheriff Courts (Scotland) Act 1907, s.36, and Rule 110(b), and appears again in the Succession (Scotland) Act 1964 s.16(4) which, however, is concerned only with the special case of the premature termination of a tenancy following on the tenant's death.

require writing for their constitution, and will normally be covered by formal leases containing express provisions for termination.

3.15 Protected tenancies. In tenancies of dwelling-houses protected by the Rent Acts, the importance of the duration of notice, so far as the tenant is concerned, is reduced by the fact of the tenant's security of tenure involving that he will not normally be obliged to obtemper punctually a notice to quit received from his landlord. If, as a result of statutory changes, the tenant's security of tenure was in some way to be reduced or perhaps even eliminated in the case of future lets, such change might reasonably be accompanied by some substantial extension of the minimum period of notice on which the landlord would be entitled to recover possession. Of interest and possible significance in this context are the provisions of the Tenants' Rights, Etc. (Scotland) Act 1980[1] for short tenancies of from one to five years in duration. Under these tenancies, subject to compliance with the statutory conditions, the landlord is entitled to recover possession on termination of the tenancy at the expiry of its prescribed duration.[2] For this purpose, in addition to giving the appropriate notice to quit timeously, the landlord has to serve on the tenant either before, or not later than three months after, the termination of the tenancy notice of his intention to seek an order for possession from the court.[3]

[1] Ss. 33-36.

[2] S.35(1).

[3] S.36(2).

The application for such an order is to be made not less than three months and not more than six months after service of the notice.[1] Thus a landlord desirous of ensuring recovery of possession on the expiry of the lease will require to give notice of his intended application at least three months before the date of expiry. Failure by the landlord to take the necessary steps within the time limits prescribed results in the continuance of the tenancy on a yearly basis, subject to the same conditions for termination with recovery of possession at any yearly term.[2] The landlord's rights against authorised assignees, sub-tenants or successors of the original tenant[3] are the same as against the original tenant, they being entitled to retain possession only till the expiry of the tenancy.[4] Special provision is made for premature termination of the tenancy (subject only to liability for outstanding rents and damage or dilapidations)[5] by the tenant giving the landlord one month's notice in a let of two years or less, and three months notice in any other case.[6]

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[1] S.36(2).

[2] S.36(4).

[3] S.35(3).

[4] S.35(5).

[5] S.35(4).

[6] S.35(2).

3.16 Special categories. Accepting that special periods of notice are to be prescribed for domestic tenancies[1] and agricultural tenancies respectively, the question arises whether there are any other identifiable categories or types of tenancy for which such provision would be appropriate. The Guthrie Committee, as has been seen, made certain proposals to cover shops and business premises, representing a category which could presumably be satisfactorily defined, but it appears that no proposals of this kind have been made in relation to any other class or classes of tenancy. The criteria of area or extent adopted in the Sheriff Courts (Scotland) Act 1907 cannot be regarded as a satisfactory solution under modern conditions. Again, however, the categories of tenancy for which special provisions might seem appropriate, including as they do such diverse examples as sporting leases, mineral leases and leases of ferry rights, are so numerous and varied as to make grouping or classification impracticable in legislation of general application. It would therefore appear that unless the proposal of the Guthrie Committee is adopted for shops and business premises, domestic tenancies and agricultural tenancies must remain the only cases with special provisions regarding the period of notice. For the rest it must be accepted that the matter of notice will normally be

[1] In dealing with secure domestic tenancies in the public sector the Tenants' Rights, Etc. (Scotland) Act 1980 adopts the period of four weeks for termination of the tenancy by notice given by the tenant (see s.12(1)(f)), and again for notice by the landlord preparatory to proceedings for possession (see s.14(3)).

regulated by conventional provisions representing the customary and approved practice in the particular field.

3.17 Application. Any statutory provision for an irreducible minimum period of notice of termination of a tenancy should be so worded as to apply whether termination is taking place at the expiry of the lease or at some earlier date, e.g. under a break clause, or any similar provision whereby one party or either party can terminate the tenancy prematurely without founding on some default of the other party.[1]

3.18 Computation of period. It has been suggested above that there is now no reason why the period of a notice to quit or notice of termination of tenancy, should be computed otherwise than by reference to its effective date.[2] In the computation of the period, however, there arises the question whether the day the notice is given and/or the day it takes effect, are to be counted in determining if the appropriate period has been observed. Direct Scottish authority on this matter appears to be

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[1] A break provision in favour of either or both parties is to be distinguished from a right of resumption in the landlord as referred to later (see paras. 3.35-3.38 below). The distinction is brought out clearly by Lord Blackburn in Alston's Trs. v. Muir (1919) 2 S.L.T. 8 at p.9. In England the necessity for due notice at a break has been confirmed by the House of Lords (see Edell v. Dulieu [1924] A.C. 38) and presumably this ruling would be followed in Scotland. The case of Strachan v. Hunter 1916 S.C. 901 shows that clear and explicit notice is necessary where advantage is to be taken of a break.

[2] See para. 3.5.

lacking,[1] but in the latest English decision the statutory requirement of not less than four weeks notice was held to be satisfied by a notice served on Friday March 4, and expiring on Friday April 1.[2] The Court there rejected the concept of clear days as used in some other branches of law, and said that in landlord and tenant cases, in giving notice of termination, only one and not both of the days of giving and taking effect of the notice respectively should be excluded. This ruling was applied to a statutory provision identical with section 131 of the Rent (Scotland) Act 1971.[3] It would seem that the same construction should be put on section 24 of the Agricultural Holdings (Scotland) Act 1949, on section 5 of the Removal Terms (Scotland) Act 1886, and on sections 34, 36, 37 and 38 of the Sheriff Courts (Scotland) Act 1907, all referring as they do to notice being given a certain time before its effective date. By contrast, however, Rule 110 of the First Schedule to the 1907 Act, in dealing with actions of removing

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[1] In Dunlop v. Meiklem (1876) 4R. 11 the Court found it unnecessary to decide whether a notice given on 2nd October for 11th November gave 40 days warning as then required.

[2] Schnabel v. Allard [1967] 1 Q.B. 627. This case is cited on the interpretation of s. 16 of the Rent Act 1957 (now s. 131 of the Rent (Scotland) Act 1971) in Paton and Cameron op. cit. pp. 265 and 273 (addendum).

[3] See para. 3.5 above.

generally, requires that at least a certain time shall elapse between the date of the notice and the term of removal, a requirement which might be construed as requiring a period of clear days. A definite and uniform view on this matter should be reflected in any future legislation, and it is suggested that a wording consistent with the English Court's decision, and accordingly in line with that of the Rent Acts and the Agricultural Holdings Acts, should be adopted generally.[1]

3.19 A question may be said to arise as to whether periods of notice should be expressed in days or in some other form e.g. weeks or months. The lack of consistency in this matter gives rise to minor distinctions and differences which can be difficult to justify.[2] While long periods of

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[1] Schnabel supra represents English practice in treating the tenancy as terminable at midnight, making the notice valid if given to take effect on the last day or the succeeding day. In Scotland, the punctum temporis for removing by a tenant appears to be noon on the last day of the tenancy, with an extension of one day when the tenancy concludes on a Sunday (see for example Removal Terms (Scotland) Act 1886, s.4). A notice to quit giving the tenant longer time in which to remove than that to which he is legally entitled may not be invalid on that ground, at least when the question arises out of the different dates involved in the terms of Whitsunday or Martinmas; see Campbell's Trs. v. O'Neill 1911 S.C. 188, followed in Callander v. Weatherston 1970 S.L.T. (Land Ct.) 13; cf. Austin v. Gibson 1979 S.L.T. (Land Ct.) 12; but a notice specifying 15 May where 28 May should have applied was held invalid: see James Grant & Co.Ltd v. Moran 1948 S.L.T. (Sh.Ct.) 8.

[2] E.g. While a domestic tenancy can be terminated on 28 days notice under s.131 of the Rent (Scotland) Act 1971, the premature termination by the tenant of a "short tenancy" under s.35(2) of the Tenants' Rights, Etc. (Scotland) Act 1980 requires one months notice where the period of the tenancy is two years or less, and three months notice in other cases.

notice are suitably stated in years it is suggested that shorter periods, unless they cover a unit or units of calendar months,[1] should be stated in days rather than in weeks. It would be helpful if the same basis of terminology could be adopted as regards notices which may have to be given in response to or following upon notices to quit.[2]

3.20 The Law Reform Committee[3] referred to the difficulty sometimes experienced in actions of removing of determining the true ish of the lease, being the date against which notice to quit must be given. This problem usually results from a lack of information, documentary or otherwise, about the commencement of the tenancy and/or its duration.[4] The Committee suggest that all annual lets including those running on tacit relocation, should be

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[1] When the corresponding date principle, as exemplified in the recent case of Dodds v. Walker [1981] 2 All E.R. 609, will apply.

[2] E.g. Counter notice under s.25(1) of the Agricultural Holdings (Scotland) Act 1949 at present required to be given "not later than one month from the giving of the notice to quit."

[3] Cmnd. 114 (1957), para. 15.

[4] There is a presumption of yearly duration affecting tenancies of unspecified length: see Gibson v. Adams (1875) 3R. 144 and Gray v. Edinburgh University 1962 S.C. 157. Again there is, at least in agricultural tenancies where the date of entry is unspecified, a presumption that entry takes place at the next term after the execution of the lease: Christie v. Fife Coal Co. (1899) 2F. 192.

rebuttably presumed to terminate on 15 May.[1] This seems an acceptable proposal but it is made expressly without prejudice to the provisions of the Removal Terms (Scotland) Act 1886. Presumably what is in view here is the distinction reflected in that Act between the removal terms at Whitsunday or Martinmas respectively and the dates against which notices require to be given, a distinction which it has already been suggested, should be eliminated when new legislation is passed.[2]

Form of notice

3.21 The Law Reform Committee, after stating that at common law an informal notice which may be oral suffices to terminate a tenancy, recommend that the requisite notice should be in writing and that a single form of notice should be provided.[3] The latter part of that proposition is dealt with below under the head of "content of notice". As indicated in the Committee's Report the validity of verbal notices extends only to urban tenancies[4] and since the Committee reported it has ceased

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[1] No mention is made of the position in shorter lets but presumably the recommendation is proceeding on the implication of a yearly let operative in cases where the period is undefined: Rankine op. cit. p.115.

[2] See para. 3.5 above.

[3] Cmnd. 114 (1957), para. 12.

[4] In agricultural tenancies, with which the Committee were not dealing, writing is an essential requirement of notice. See Agricultural Holdings (Scotland) Act 1949, s.24(1); Crofters Holdings (Scotland) Act 1886 as amended by Small Landholders (Scotland) Act 1911, s.8; Crofters (Scotland) Act 1955, s.7.

to apply in tenancies of dwellinghouses.[1] Even within the residual category of urban tenancies it would appear that any justification there may be for the continued acceptance of verbal notices can apply only to tenancies of not more than a year being tenancies which may be constituted without writing. In England, the validity of verbal notices has been confined to such tenancies,[2] but it is not possible to say that such has been the sole basis of acceptance of a verbal notice in Scotland. In the past there seems to have been an assumption, or at least an opinion, that less formality should be required in the matter of notice when dealing with urban tenancies than when dealing with rural tenancies.[3] Yet even within the category of urban tenancies it seems to have been unsettled whether the acceptability of verbal notice applies generally or is confined to verbal leases, or

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[1] Rent Act 1957, s.16, as re-enacted in Rent (Scotland) Act 1971, s.131, as amended by Housing Act 1974, s.123(1); see also Sheriff Courts (Scotland) Act 1907, s.38(A), as introduced by Housing Act 1974, Sched. 13, para. 1.

[2] Hill and Redman op. cit. p.497 and authorities there referred to.

[3] For a criticism of this view see the dissenting opinion of Lord Birnam in Rae & Cooper v. Davidson 1954 S.C. 361 at p.378.

again to yearly tenancies.[1] In the circumstances it seems clear that the Committee's proposal to make written notice, which is already essential in dwellinghouse tenancies and in agricultural tenancies, a universal

[1] See Paton and Cameron op. cit. pp.224 and 272; Rankine op.cit. p.597; Hume, Lectures, IV, 110. The position is exemplified in a number of cases including Robb v. Menzies (1859) 21D. 277, per Lord Curriehill at p.281; Tait v. Sligo (1766) Mor. 13864; Hood v. N.B.R. (1895) 3 S.L.T. 196; Morris v. Allan (1839) 1D. 667; Gillies v. Fairlie (1920) 36 Sh.Ct.Rep. 6; Grant v. Bannerman (1920) 36 Sh.Ct.Rep. 59; and Craighall Cast Stone Co. v. Wood Bros. 1932 S.C. 66. These are all cases of termination by the landlord affecting either verbal or yearly lets. In relation to the competency of removal proceedings the last two decisions mentioned are in conflict with decisions in the sheriff court cases of Templeton v. Graham (1919) 35 Sh.Ct.Rep. 249 and Robertson v. McIntosh (1920) 36 Sh.Ct.Rep. 227 in both of which was held that formal notice as prescribed in the 1907 Act was necessary to render competent any form of action of removing in the sheriff court. See also Taylor v. Brown (1914) 30 Sh.Ct.Rep. 215. These decisions may, however, be regarded as overruled by the Court of Session decision in Craighall Cast Stone Co., supra, and in Paterson v. Robertson 1944 J.C. 166 (a case of a prosecution under the Trespass (Scotland) Act 1865) Lord Moncrieff took the view that verbal notice by the lessor was sufficient to terminate a furnished let of less than one year. In Gilchrist v. Westren (1890) 17R. 363 a tenancy of over seven years constituted by written lease was held to be terminated by the verbal notice of the tenant. A similar ruling had been given in the earlier case of Jack v. Earl of Kelly (1795) Mor. 13866 where, however, the report does not disclose the duration of the tenancy or indicate if there was a written lease. The question of a distinction between landlord and tenant in the matter of notice of termination is discussed later (paras. 3.32 et. seq.) and it is suggested that such distinctions as exist in this matter should be elimianted, a view which derives support from the opinion of Lord Birnam referred to above.

requirement is justified and that it should be provided that the termination of any tenancy will require a notice in appropriate form signed by or on behalf of the party giving it duly transmitted to the other party.[1] In accordance with the existing and apparently satisfactory rule a notice neither holograph nor attested[2] but signed by the party or his duly authorised agent should be sufficient.

3.22 There are judicial dicta in a fairly recent case[3] indicating that as the law stands it is not essential that all the necessary elements of a notice to quit should be contained in one document, two or more documents internally linked or complementary in their terms coming into the recipient's hands at the same time, for example by post in the same envelope, being permitted to be read together to constitute a valid notice. In practice it seems very

[1] This would have the effect of rendering any other form of notification e.g. chalking of doors (see Paton and Cameron op. cit. p.263) ineffective to terminate a tenancy. It would also result that a landlord could no longer proceed under s.2 of the Act of Sederunt 1756 (see Codifying Act of Sederunt xv 1913) making competent without prior notice to the tenant an action of removing called in court 40 days before a term of Whitsunday or Martinmas; (see para. 2.17 above and para. 3.39 below).

[2] As in Sheriff Courts (Scotland) Act 1907, Sched. 1, Rule 113; in Cullen v. Niekirk (1952) 68 Sh.Ct.Rep. 220 a notice in Form J (Rule 112) signed by a firm of law agents on their client's behalf was held valid, notices authenticated thus having been accepted without objection in earlier cases such as Walker v. Hendry 1925 S.C. 855.

[3] Barns Graham v. Lamont 1971 S.L.T. 341, per Lord Cameron at p.348, following Turton v. Turnbull [1934] 2 K.B. 197.

unlikely that a notice to quit involving nothing beyond the basic essentials for termination of the tenancy would not be wholly comprised in a single document. On the other hand, having regard to the possible difficulties emerging as exemplified in certain reported cases,[1] there might be said to be justification for a statutory provision making clear that, when by statute or otherwise, data such as reasons for the notice being given have for any purpose to be included in a notice to quit, such data, to be effective for their purpose, must form part of the content of that notice and cannot validly be incorporated in any other document.

Service of notice

3.23 The Report of the Law Reform Committee does not deal with the manner of giving or transmitting a notice. No problem should arise in these matters when transmission by registered post (now recorded delivery) or again service

[1] In Both Barns Graham and Turton, supra, the actual point for decision was whether the reasons for giving the notice, being a matter which in the circumstances affected compensation rights and which the relative statutory provision directed should be stated in the notice to quit, could effectively be contained in a separate document such as a letter accompanying the notice. The affirmative decision in Turton's case related to statutory provisions now superseded and while followed in Barns Graham has not found favour with authors and commentators on the subject. (See Muir Watt, Agricultural Holdings Acts (12th edn.), p.278 and Scammell and Densham, The Law of Agricultural Holdings (6th edn.), p.98; cf. the articles "Reorganisation Compensation and Notices to Quit" 1972 S.L.T. (News) 129 and "Reorganisation Payments Again" 1973 S.L.T. (News) 141, commenting on this and certain other aspects of the decision in Barns Graham. In Copeland v. McQuaker 1973 S.L.T. 186 it was not extended to apply to the circumstances there in question.

by messenger or officer is adopted. The Sheriff Courts (Scotland) Act 1907[1] authorises personal or postal service of any removal notice given under its provisions, and there are similar provisions operative quoad all urban tenancies in the Removal Terms (Scotland) Act 1886.[2] Again the 1907 Act[3] provides for the giving of notice being evidenced by a certificate of the officer, agent or other person giving it, or in the case of lands over two acres by acknowledgement of the recipient. As the statutory provisions stand it is perhaps not absolutely clear that they apply equally and as a whole to notices by tenants as well as to notices by landlords.[4] Any such doubt should be eliminated in terms of future legislation, and again, there seems no reason why the acknowledgement of the recipient should not be made competent evidence in all cases. The question, however, arises whether in the reframing of the law to adopt one form of notice and one form of removing process, as suggested by the Law Reform Committee[5], the use of one or other of these methods

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[1] Sched. 1, Rule 113, as amended by Recorded Delivery Service Act 1962.

[2] S.6.

[3] Sched. 1, Rule 114.

[4] See Reid, The Agricultural Holdings (Scotland) Act 1923, pp. 188/189. The Act dealt with in this work, like the Agricultural Holdings (Scotland) Act 1949 (see s.24) has provisions invoking those of the Sheriff Courts (Scotland) Act 1907 on the matter of notice.

[5] Cmnd. 114 (1957), paras. 8 and 12; for reasons indicated later it is considered that the recommendation as affecting notices should be applied to agricultural as well as to urban tenancies.

should be made mandatory, or whether it should be left open to a party to adopt some other method, for example delivery in person or by unregistered post, provided that he is in a position to prove receipt of the notice if such receipt is not admitted. Cases in which the use of methods of service other than those statutorily recognised have been successfully objected to appear to have been cases in which statutory provisions as affecting some particular form of process are involved.[1] Thus it has been held that one of the statutorily recognised methods of service must be adopted in the termination of any agricultural tenancy,[2] but in the current agricultural holdings legislation there is a provision which might be said to be inconsistent with that view in permitting "any notice or other document required or authorised by this Act to be given to or served on any person to be duly given or served if it is delivered to him or left at his proper address or sent to him by post in a registered letter."[3] This provision was not

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[1] Department of Agriculture v. Goodfellow 1931 S.C. 556; see also the sheriff court decisions in Watt v. Finlay (1921) 37 Sh.Ct.Rep. 34; Hay v. Anderson 1949 S.L.T. (Sh.Ct.) 20; Glass v. Klepczynski 1951 S.L.T. (Sh.Ct.) 55. These decisions appear to proceed on the view that formal written notice as statutorily prescribed was in the circumstances necessary. The question does not arise in a case where verbal notice is permissible but could arise in circumstances in which informal written notice was acceptable and was being founded on.

[2] Department of Agriculture v. Goodfellow, supra.

[3] Agricultural Holdings (Scotland) Act 1949, s.90(1): it might however be said that there must be registration (now recorded delivery) if the notice is to be given by post.

included in the Agricultural Holdings (Scotland) Act 1923[1] and so was not in force in Scotland when it was decided[2] that a notice to quit in respect of an agricultural holding served by unregistered post but admittedly received was invalid for the purpose of a removing action. In England the statutory provision corresponding to that above-quoted[3] has been construed as covering a notice to quit,[4] but it should not be too readily assumed that the same decision would be reached if the issue arose on the legislation now current in Scotland. It could be regarded as conflicting with other provisions in the Scottish Act[5] and it must also be kept in view that English legislation on agricultural holdings contains no directions as to service of notices to quit and that, in general, English law has allowed much greater latitude in this matter than is permissible in Scotland.[6]

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[1] While its counterpart in English legislation (Agricultural Holdings Act 1948, s.92(1)) is of much earlier origin, the first appearance of this provision in a Scottish Act appears to be s.83(1) of the Agriculture (Scotland) Act 1948.

[2] Department of Agriculture v. Goodfellow, supra.

[3] Agricultural Holdings Act 1948, s.92(1).

[4] Poyser and Mills' Arbitration [1964] 2 Q.B. 467 a case in which recorded delivery of a notice to quit was held effective although the Recorded Delivery Service Act of 1962 was not at the time in force.

[5] Agricultural Holdings (Scotland) Act 1949, s.24(4) referring to the Sheriff Courts (Scotland) Act 1907 and to the Removal Terms (Scotland) Act 1886.

[6] See Hill and Redman op. cit. p.501.

3.24 There remains, however, the question affecting tenancies generally, whether the notice for their termination and on which proceedings for recovery of possession will competently follow should be permitted to be given in any manner, provided receipt is admitted or can be proved by satisfactory evidence. Although in practice difficulties of proof[1] 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. The opposite view, which involves treating the giving of a notice like the service of process in court proceedings may, however, be justified theoretically at least on the basis of the historical background referred to in a number of the authorities,[2] the notice having as a result of statutory changes taken the place of the separate action of removing which had at one time to precede the action for recovery of possession.

Content of notice

3.25 When recommending that written notice to quit should be mandatory the Law Reform Committee proposed that a single form of notice should be provided.[3] Presumably they

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[1] See Newborough v. Jones [1975] Ch.90 concerning a notice to quit alleged to have been personally delivered conform to s.92(1) of the Agricultural Holdings Act 1948 (cf. Agricultural Holdings (Scotland) Act 1949, s.90(1)), and other examples referred to in Hill and Redman op. cit. pp. 504/5.

[2] E.g. Campbell's Trs. v. O'Neill 1911 S.C. 188 at p.193, followed in Watt v. Findlay (1921) 37 Sh.Ct.Rep. 34 but not in Robertson v. Wilson 1922 S.L.T. (Sh.Ct.) 21.

[3] Cmnd. 114 (1957), para. 12.

envisaged the prescription by statute of a form of notice applicable in all cases except perhaps that of agricultural tenancies. The position in Scotland has been that while certain forms of notice have been provided by statute, adherence to these forms is obligatory only where the statutory provisions make it so,[1] as for example where any of the special forms of process of removing provided by the Sheriff Courts (Scotland) Act 1907 are to be used, and again in all cases involving agricultural holdings where the relative statutory provisions have been construed as invoking the provisions of that Act on a mandatory basis.[2] In England, no form of notice has been statutorily prescribed, the essential elements of a valid notice being apparently well established on common law and statutory authority.[3] If there is to be a change in the basic position here it might be thought sufficient for legislation to define or specify the essential elements of a valid notice, without prescribing the actual form or terms of that notice. These will in any event require adaptation to differing circumstances. Such a course might have the merit of avoiding questions such as those which have arisen as to the validity of a notice which does not completely adhere to the statutory form, and disputes as to whether a notice complies with provisions requiring it to be "as nearly as may be" in a prescribed

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[1]Paton and Cameron op. cit. pp. 277/8.

[2]Rae & Cooper v. Davidson 1954 S.C. 361.

[3]Hill and Redman op. cit. p.497; Evans op. cit. p.195.

form.[1] The Law Reform Committee however appear to have contemplated the provision of a statutory form of notice and with this in view the existing forms must be examined.

3.26 Forms prescribed by statute. The Sheriff Courts (Scotland) Act 1907 in its First Schedule provides two forms of notice designated respectively H and J, basically for use by landlords but adaptable also for tenants' use[2]. Form H applies to procedure under sections 34, 35 and 36 of the Act (see Rule 11). It is to be suggested that the provisions of sections 34 and 35 which are rarely, if ever, used in present-day practice[3] should be repealed and not replaced, but here it is necessary to note their effect as bearing on the form of notice prescribed in the Schedule. Section 34 affects lands exceeding two acres let under a probative

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[1] Sheriff Courts (Scotland) Act 1907, First Schedule, Rules 111 and 112, and see Rae & Cooper v. Davidson, supra; Scott v. Livingstone 1919 S.C. 1. Cf. Barns Graham v. Lamont, supra, and Robertson v. Wilson 1922 S.L.T. (Sh.Ct.) 21.

[2] Form H is framed on the assumption that the notice is to be given by the landlord, but as s.36 specifically refers to notice given by either party it would appear that tenants are intended to use Form H with the necessary alterations. It should, however, be noted that Rule 112 in requiring Form J to be used in certain cases specifically states that Form J may be used mutatis mutandis for notices by the tenant. Rule 111, prescribing the use of Form H in certain cases, has no such provision.

[3] It appears that the neglect of the procedure prescribed by these sections may be attributed to the fact that they are too likely to involve the landlord or officer in an action for damages - see Reid, The Agricultural Holdings (Scotland) Act 1923, p.187.

lease for a specific period not being less than a year, and gives the lease, or an official extract thereof, the effect of an extract decree of removing on which, on the authority of the lessor, the tenant can be dispossessed by the sheriff officer subject to previous written notice of the requisite period having been given. Under section 35, if the tenant of lands exceeding two acres with or without written lease has on entering into the lease or subsequently granted a letter of removal, holograph or attested, (which letter according to Rule 111 may be in Form I as contained in the Schedule) this has the effect of an extract decree of removal in the same way and subject to the same notice as the lease under section 34.[1] Section 36 concerns a let of land exceeding two acres with no written lease and no letter of removal, and makes the let terminable on six months' written notice by one or other party, with the landlord entitled to apply for summary warrant of ejection should the tenant fail to remove.

3.27 Form H, as addressed to the tenant, requires him to remove from subjects specified at a specific term (or different terms for different parts of the subjects where appropriate) in terms of a lease as specified (this apparently envisaging the circumstances of section 34), or in terms of a letter of removal of a certain date (apparently applicable under section 35), or "otherwise as the case may be" (which may refer to section 36 where there is neither lease nor letter of removal).

[1] By a proviso to the section a letter of removal dated within a month of the date of removal makes notice unnecessary; see infra paras. 3.33 and 3.34 as to Letters of Removal.

3.28 In terms of Rule 112, Form J of the Schedule[1] applies where the provision invoked is section 37 of the Act, affecting heritable subjects other than land exceeding two acres let for a year or more, with written notice of the requisite period from either party entitling the landlord to apply for a warrant for summary ejection in common form against the tenant who does not remove. Form J is also commonly used in cases coming under section 38 of the Act for which no special form is provided.[2] Section 38 relates to subjects let for less than a year, and provides for a summary application for removing leading to a decree equivalent to a decree of removing and warrant of ejection subject to notice (not actually specified as written) being given over the appropriate period. Form J as addressed to the tenant, requires him to remove from the subjects specified at a specific term. It contains no reference to any lease or letter of removal.

3.29 General application. In the leading case[3] on the current provisions of the Agricultural Holdings Acts, the majority of the court, having held that the use of Form H by a landlord was mandatory

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[1] Rule 112 and Form J are discussed here on the basis that they are still in force, although it appears that per incuriam perhaps they have been cancelled or revoked, at least quoad lets of dwellinghouses by paragraph 1 of Sched. 13 to the Rent Act 1974 introducing an additional section, 38A, in the Sheriff Courts (Scotland) Act 1907.

[2] Paton and Cameron op. cit. p.275.

[3] Rae & Cooper v. Davidson, supra.

where the termination of an agricultural let was being enforced by an ordinary action of removing, decided that the omission of a reference to a lease was fatal to the landlord's case, as the notice omitting it was not "as nearly as may be" in the statutory form.[1] It was clear that no prejudice had been sustained by the tenant as a result of that omission, and it was with some reluctance that the court upheld this technical objection.[2] In practice the position would appear to be that with sections 34 and 35 of the 1907 Act rarely invoked and section 36 having very limited application, Form H is seldom used except for agricultural holdings. In other tenancies notices to quit will normally adopt or be based on Form J.[3] Comparison of the two forms reveals as the main difference the reference in Form H to the lease, the omission of this reference being fatal when there is a

[1] In a persuasive dissenting opinion Lord Birnam took the view that Form H was not mandatory except in the case of procedure under ss. 34, 35 or 36 of the Sheriff Courts (Scotland) Act 1907, but his Lordship appears to have been mistaken in construing s.36 as authorising the removal of a resisting tenant without any court process, the section providing for a summary warrant of ejection being granted on the landlord's application.

[2] See opinion of Lord Justice-Clerk Thomson at p.369.

[3] Strictly speaking Form J and not Form H would seem to be appropriate where an agricultural holding does not exceed two acres. That view is taken in Paton & Cameron op. cit. pp. 272/3 (cf. Reid, The Agriculture Holdings (Scotland) Act 1923, p.189) but in Connell's Agricultural Holdings (Scotland) Acts (6th. edn.), p.135 it appears to be assumed that Form H will apply in the case of any tenancy coming under these Acts.

lease and the Form is applicable. The justification for making a reference to the lease when applicable an essential of any form to be prescribed for general use seems questionable. Clearly reference to the lease or alternatively to a letter of removal[1] was appropriate under the special procedures of sections 34 and 35 of the Act, but under section 36, the other section to which Form H is applied by Rule 111, neither the lease nor the letter of removal will exist to be referred to.[2] Thus while there are in certain cases advantages in having the notice include a reference to the document containing the warrant for termination of the tenancy at the term stated,[3] it is doubtful if there is justification now for making this a requirement of a form which is to be of general application. It cannot be complied with, and indeed does not apply, unless there is a formal lease. Yet it results that where there is such a document the omission to refer to it can result in the notice to quit being held inoperative on purely technical grounds.[4] Again difficulties may arise in complying with the requirement where there has been more than one agreement relating to the tenancy which is being terminated.[5]

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[1] See infra paras. 3.33 and 3.34 as to Letters of Removal.

[2] The wording "or otherwise as the case may be" is possibly intended to cover this contingency but seems more readily applicable to the situation where some document, other than a formal lease or letter of removal, is to be founded on; see Watters v. Hunter 1927 S.C. 310, per Lords Sands at p.319.

[3] Watters v. Hunter, supra.

[4] Rae & Cooper v. Davidson, supra.

[5] Mackie v. Gardner 1973 S.L.T. (Land Ct.) 11.

Agricultural tenancies apart, Form J would seem to embody the essential elements of a notice to quit for general application, namely the name and address of the recipient, a description or specification of the subjects, and a specification of the date for removal.

3.30 The word "remove" is used in both statutory forms, and in some cases its inclusion has been regarded as particularly significant and indeed essential.[1] Obviously the notice must indicate a definite and unconditional intention to terminate the tenancy at a specific date or term,[2] but is it essential that the word "remove" or its equivalent should be used? It has been suggested earlier that one object of any legislative changes in this matter should be the elimination of any difference there may be between the requirements for termination of the tenancy by excluding tacit relocation, and the prerequisites of proceedings for recovery of possession. In these circumstances it may be for consideration whether the style of notice to be prescribed for general use should take the form of an intimation that the tenancy of the particular subjects will terminate at some particular date(s) or term(s).

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[1] Patten v. Morison (1919) 35 Sh.Ct.Rep. 252; Core v. v. Gray (1920) 36 Sh.Ct.Rep. 113; Richards v. Cameron (1946) 62 Sh.Ct.Rep. 106.

[2] Murray v. Grieve (1920) 36 Sh.Ct.Rep. 126.

3.31 Agricultural tenancies. In suggesting that a single form of notice for termination of tenancies be statutorily prescribed, the Law Reform Committee were not considering agricultural tenancies, these being outwith their remit. It would appear that on account of certain specialities frequently arising in practice it will be convenient, if not actually necessary, to have a separate form prescribed for agricultural tenancies. Such specialties include: (a) different dates of termination for different parts of the subjects[1] (a contingency meantime covered in Form H, but not in Form J), (b) exercise of the facilities under s.32 of the Agricultural Holdings (Scotland) Act 1949 for partial termination of a tenancy necessitating a particular or at least specific duration of the subjects affected by the notice, and (c) requirements involving the inclusion in many notices of data such as the statutory warrant or other reason for the notice being given. Form H can readily be, and in practice is, adapted to meet such of these requirements as apply,[2] and so would seem to be suitable as the basis of the form to be prescribed for use in agricultural tenancies as opposed to tenancies generally. There should, however, be two changes from the

[1] See Montgomerie v. Wilson 1924 S.L.T. (Sh.Ct.) 48; in Milne v. Earl of Seafield 1981 S.L.T. (Sh.Ct.) 37, where Montgomerie's case was distinguished and its decision doubted for application under current statutory provisions, it was held that a lease, although having provisions for earlier access to and earlier vacation of parts of a holding to provide certain facilities for incoming tenants, will have a single ish for which notice to quit should be given.

[2] See Connell, The Agricultural Holdings (Scotland) Acts (6th. edn.), pp. 227-229 and 232.

position at present existing in relation to its use in agricultural tenancies. Firstly, for the reasons already indicated, reference to the lease should no longer be an essential; and secondly, for the reasons stated below, its use should be mandatory by tenants as well as by landlords.

Notice by tenant

3.32 Thus far the requirements for termination of tenancies as affecting notice to quit have been discussed in the main from the point of view of a notice given by the landlord. So far as the period of notice is concerned, there appears to be no difference in the rules affecting the respective parties, notice, timeous in the particular circumstances by the statutory rule or otherwise, being necessary whichever party is taking the initiative in order to exclude tacit relocation and make possible proceedings for possession should these be required. In other matters affecting the notice to quit or notice of removal, we have the basic common law rule, affecting both parties alike, that the notice given must be definite and unconditional in its terms, enabling the recipient to know his position.[1] Such differentiation in this matter as there is between landlords and tenants arises from statutory provision, but here again not all statutory provisions treat landlords and tenants differently. The provisions of the Removal Terms (Scotland) Act 1886[2] concerning notice given by registered letter apply in both cases, but under the Sheriff

[1] Paton and Cameron op. cit. p.278.

[2] S.6.

Courts (Scotland) Act 1907, as has been seen, particular forms of notices have to be adopted only by the landlord, and again only where certain special forms of procedure are being used.[1] The tenant giving notice to elide tacit relocation may adopt a prescribed form, but is not bound to do so.[2] Under section 131 of the Rent (Scotland) Act 1971,[3] the requirement for written notice of a minimum period affects both parties,[4] but with agricultural holdings, while the requirement for written notice of a certain period[5] applies alike to landlord and tenant, the application of the rules of the 1886 Act and the 1907 Act as regards the content and manner of giving of notices[6] affects only the landlord. It is perhaps not absolutely clear whether the Law Reform Committee, in making their recommendations for a single form of notice,[7] had in view its application to notices given by tenants as well as those given by landlords, but it is suggested that in this matter there should be no distinction between the two parties. This proposal would be consistent with the suggestion that the termination of a tenancy by the exclusion of tacit relocation should in all

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[1] Ss. 34-37 and First Sched., Rules 111-113.

[2] Paton and Cameron op. cit. p.277; Ritchie v. Lyon (1940) 56 Sh.Ct.Rep. 39.

[3] As amended by the Housing Act 1974, s.123(1).

[4] But the further requirement that the notice contain certain additional information as prescribed in the Notices to Quit (Prescribed Information) (Protected Tenancies and Part VII Contracts) (Scotland) Regulations 1980 affecting tenancies in the categories specified necessarily applies only to notices by landlords.

[5] Agricultural Holdings (Scotland) Act 1949, s.24(1).

[6] Ibid, s.24(4)

[7] Cmnd. 114 (1957), para. 12.

cases result not merely in the termination of the rights and liabilities of the respective parties, but should also entitle the landlord to take proceedings for recovery of possession should the subjects not be vacated by the tenant at the termination date. As a tenant having his tenancy terminated is entitled to have from his landlord notice in clear and unconditional terms, the landlord, if termination is being initiated by the tenant, should likewise be entitled to specific and definite notice on which he can act without hesitation. The difference between the respective positions of landlord and tenant in this matter appears to have arisen mainly, if not entirely, from the provision by statute of certain special procedures for recovery of possession, but changes, as envisaged by the Law Reform Committee in recommending the adoption of a single form of action for use in all cases of recovery of possession of heritable property,[1] have now taken place as a result of which the special procedures formerly in use should eventually, at least, disappear.

Letter of removal

3.33 The question of the form of notice to be given by a tenant terminating a let, however, leads to consideration of the somewhat obscure topic of the letter of removal. As explained in the discussion of tacit relocation, a provision in gremio of a lease binding the

[1] Ibid, para. 8 as now reflected in the Sheriff Courts (Scotland) Act 1971 introducing the new summary cause; see particularly s. 35(1)(c).

tenant to remove at the ish without notice or other procedure is normally ineffective in bringing about a termination of the tenancy and permitting proceedings to be taken for the tenant's removal.[1] As the authorities on the common law indicate, however, an exception is made and effect given to such a provision, whether contained in the lease or in a separate document, provided that the document containing it is dated within a year of the removal date.[2] Although apparently little used in present-day practice, the letter of removal, as a means of terminating a tenancy without other notice, features in certain provisions of the Sheriff Courts (Scotland) Act 1907. Under section 35, if the tenant in possession of lands exceeding two acres, with or without a written lease, has either at the date of entering upon the lease or at any other time granted a letter of removal, holograph or attested by one witness, this letter has the effect of an extract decree of removing. This result is subject to due notice having been given, unless the letter is dated and signed within 12 months of the date of removal, when notice is unnecessary. The use of the form of letter of

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[1] Para. 2.17 above.

[2] Rankine op. cit. p.555; and see the cases of Paxton v. Slack (1803) Hume 568 and Brown v. Peacock (1822) 1S. 359 concerning clauses in leases; as explained in Paxton the limitation of time is justified on the grounds that a tenant may be unmindful of a clause in a lease entered into some years ago, but should not be in this position when the lease has been contracted as recently as within a year of the removal term and within the period during which notice can be given. As to letters of removal forming separate documents granted within a year of the removal term, see MacLaren v. Marquess of Breadalbane (1831) 10S. 163 and McNair v. Lord Blantyre's Tutors (1833) 11S. 935. In McNair the decision proceeded alternatively on the basis now displaced in agricultural holdings legislation that tacit relocation did not apply to farm lets for a single year.

removal provided by the Act for this section appears to be permissive and not mandatory.[1] While it has been assumed that section 35 will disappear in the course of the revisal of the law, there is, in the First Schedule to the 1907 Act, a more general and significant application of the letter of removal as a means of terminating a tenancy. In terms of Rule 110, an action of removing may be raised at any time provided the tenant has bound himself to remove by writing dated and signed within 12 months of the term of removal or of the first term where there are more than one. Apparently the requirement that the letter be holograph or witnessed does not apply here, which is consistent with the common law position whereby an informal and unstamped document has been held to suffice.[2] Both in section 35 and in Rule 110, the period of one year applying at common law is adopted, but the statutory provisions appear to proceed on the basis of a document separate from the lease. Thus, in any case where the special procedures prescribed by the 1907 Act are being used, as for example under section 37,[3] and perhaps in any action of removing proceeding in the sheriff court,[4] provision in the lease itself obliging the tenant to remove without notice will be of no effect irrespective of the date of the lease.

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[1] First Sched., Rule 111 and Form I.

[2] Bain v. Stewart (1852) 14D. 1007; MacLaren v. Marquess of Breadalbane, supra.

[3] Cesari v. Anderson (1922) 38 Sh.Ct.Rep. 137.

[4] See First Sched., Rule 110.

3.34 The question then would seem to arise whether, with the law amended to simplify the rules affecting the termination of tenancies and the taking of proceedings for recovery of possession, and the same form of notice being required for termination by either landlord or tenant, there would be any justification for the retention of the letter of removal as a means of initiating termination at the instance of the tenant. Before the introduction of procedure enabling removal and ejection to be effected in one action, the letter of removal or obligation to remove was no doubt useful in allowing the landlord, in the event of the tenant remaining in possession, to proceed directly for his ejection. Under modern procedure, however, it seems to represent little if anything more than an alternative or substitute for a notice to quit from the tenant. This is particularly so if the ruling[1] that the statutory provision requires a letter of removal separate from the lease can be taken as involving that the lease must be executed and delivered before a letter of removal can be granted.[2] Again a question may be said to arise as to the effect of an obligation to remove or letter of removal in cases where the tenant has some statutory security of

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[1] Cesari v. Anderson, supra.

[2] Cesari, supra. The sheriff referred to s. 37 of and Rule 110 of the First Sched. to the 1907 Act, as contemplating an already established relationship of landlord and tenant, that is to say a lease already in existence; but in this matter the wording of the 1907 Act is noticeably less explicit than wording used with this intent in certain other statutes, e.g. Agriculture (Scotland) Act 1948, s.48(4) and Agricultural Holdings (Scotland) Act 1949, s.5(3).

tenure. Under the Tenancy of Shops (Scotland) Act 1949, proceeding as it does on the basis of a notice to quit being given, the existence of a letter of removal or obligation to remove could apparently have the effect of depriving the tenant of the benefit of the Act's provisions. On the other hand, the only effect on a protected contractual tenancy under the Rent Acts would seem to be to convert the tenancy to a statutory one. Under the Agricultural Holdings Acts an obligation in gremio of the lease would clearly be rendered ineffective by the relevant statutory provisions,[1] and doubts have been expressed as to whether a separate letter of removal would be effective to terminate a tenancy.[2] In a recent English case the House of Lords rejected as ineffectual a provision of a lease purporting to preclude the tenant from taking certain necessary steps to protect his statutory security of tenure.[3]

Resumption

3.35 Requirement for notice. As has already been pointed out, the general provisions regarding notices to quit would have to be framed in terms covering breaks or other contractual provisions for premature termination of the tenancy.[4] Distinguishable from such provisions as operating in the landlord's favour are provisions

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[1] Agricultural Holdings (Scotland) Act 1949, ss. 3 and 24.

[2] Cushnie's Trs. v. Thomson 1954 S.L.C.R. 33.

[3] Johnson v. Moreton [1980] A.C. 37.

[4] See Strachan v. Hunter 1916 S.C. 901.

for resumption, that is to say reserved powers entitling the landlord during the currency of the tenancy to take back the whole or part of the subjects for some particular purpose or purposes. Such a power has been described in a recent case as "a right in the landlord, preserved or reserved in the formation of the contract and independent of his obligations thereunder."[1] In such cases the rules, statutory or otherwise, concerning the notice necessary before removal can be enforced, do not apply.[2] Yet the resulting prejudicial effect on the tenant's basic rights and security of tenure is in practice materially mitigated by refusal of the courts to sanction a resumption which constitutes what is sometimes termed a fraud on the lease, for example by leaving a tenant with a farm which is no longer a viable unit.[3] Resumption clauses, however, are sometimes framed in terms which could be construed as covering the whole subjects let and if, as indicated by one eminent judge,[4] they can be applied strictly according to their terms there may be cases in which such a plea will not be available to the tenant. It appears that it is only in agricultural leases that resumption provisions are in practice commonly used, and here the tenant's position is

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[1] Edmonstone v. Lamont 1975 S.L.T. (Sh.Ct.) 57 at p.59.

[2] Alston's Trs. v. Muir (1919) 2 S.L.T. 8: See Agricultural Holdings (Scotland) Act 1949, s.24(6)(a); cf. Sheriff Courts (Scotland Act 1907, s.34.

[3] Admiralty v. Burns 1910 S.C. 531; Turner v. Wilson 1954 S.C. 296; Glencruitten Trs. v. Love 1966 S.L.T. (Land Ct.) 5.

[4] Lord President Cooper in Edinburgh Corporation v. Gray 1948 S.C. 538 at pp. 545/546.

strengthened by the fact that the exemption from the provisions concerning notices to quit and security of tenure is now expressly limited to resumption for exclusively non-agricultural purposes.[1] A question, however, arises as to the form and duration of notice (if any) required when the landlord is exercising a power of resumption contained in the lease, being a power which may have to be enforced by means of an action of recovery of possession.[2] Resumption clauses commonly proceed on the basis that the landlord is entitled to exercise his powers at any time; they sometimes make no provision for notice, or if providing for notice, allow some period much less than the statutory minimum for a notice to quit.[3] In Scotland this practice has the support of certain judicial dicta. In Kininmonth v. British Aluminium Company,[4] the landlord was held entitled under a resumption clause to take possession of part of the subjects without prior notice to the tenant, but the judges' opinions disclose that certain correspondence which had passed between the parties was in fact regarded as constituting reasonable notice. Lord Mackay, commenting on that decision in the later case of Stevenson v. Galloway,[5] said:

[1] Agricultural Holdings (Scotland) Act 1949, s.24(6)(a) as amended by Agriculture Act 1958, Sched. 1 Part II. See Crawford v. Dunn 1981 S.L.T. (Sh.Ct.) 66.

[2] In some cases, e.g. Kininmonth v. British Aluminium Company 1915 S.C. 271 the matter arose in proceedings taken by the tenant to have the landlord interdicted from resuming without due notice.

[3] See Encyclopaedia of Scottish Legal Styles, Vol. 6, pp. 136 and 139.

[4] Sup.cit.; cf. Earl of Morton v. Gray (1920) 36 Sh.Ct.Rep. 67.

[5] 1931 unreported.

"On the one hand I am not prepared on any account to lay down that a resumption (where the agreement does not itself call for notice of any length) is necessarily a bad one for want of a precursor by any period of days of grace. I am of opinion that there is no rigid law which settles any antecedent days of grace. On the other hand, I think the court has always in these matters kept a grip on its equitable right to restrain within reason the factual execution of resumptions so, for instance, that sudden and destructive reduction of the area of let, imposed at inequitable junctures, might be controlled. 'Notice' in the sense of duration of time between the notification and the actual putting into force is one thing. 'Notice' in the stricter sense of 'notification' that the power is now to be 'either sooner or later' put into operation is another thing. In the latter sense I would as presently advised not approve of a sudden brevi manu entry by the landlord unpreluded by any 'notification' of his intention. Lord Salvesen, I think, in his obiter opinion in Kininmonth can barely be understood as saying more than that. The court's decision in that case must be understood as proceeding solely upon the facts:-

(a) that reasonable knowledge was given by letter so as to leave no doubt, so that notification did take place and

(b) that the length of time elapsing was a reasonable one and

(c) that no 'notice' in the sense of a month or three months or any fixed period was at law required."

3.36 In Edinburgh Corporation v. Gray,[1] although this question of resumption did not have to be decided, Lord President Cooper, referring to Kininmonth's case, said that unless provision was made for the giving of notice of

[1] 1948 S.C. 538; cf. Thomas v. Gair 1949 S.C. 425, per Lord Keith at p.430, and Alston's Trs. v. Muir (1919) 2 S.L.T. 8, per Lord Balckburn at pp. 8/9.

resumption by the landlord no notice was required, and he pointed out that the possibility of dispensing with notice was recognised by a statutory provision then in force.[1] In contrast with the provisions of the earlier Acts, the provisions now current in the Agricultural Holdings Acts[2] refer to a notice given in pursuance of a stipulation in a lease entitling the landlord to resume land for a non-agricultural purpose. Clearly this contemplates notice in some form being given. Accordingly, it may be said that a resumption in terms of a lease making no provisions for notice of resumption does not qualify for the exemption from the normal requirements of the Agricultural Holdings Acts as to notice. There is, however, no indication of the form in which the notice is to be given, or the period applicable. With Scottish authority on these matters apparently lacking, certain English decisions on the corresponding statutory provisions[3] merit consideration. It has been held in England[4] that provisions entitling a landlord to resume any part of an agricultural holding without giving such

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[1] Agricultural Holdings (Scotland) Act 1923, s.26(5).

[2] Agricultural Holdings (Scotland) Act 1949, s.24(6)(a).

[3] Agricultural Holdings Act 1948, s.23(1)(b); now Agricultural Holdings (Notices to Quit) Act 1977, s.1(2)(b).

[4] In re Disraeli Agreement [1939] Ch. 382; Coates v. Diment [1951] 1 All E.R. 890; Beckett v. Birmingham Corporation [1956] 6 P. & C.R. 352.

length of notice as will allow the tenant time to give due intimation of certain out-going claims,[1] being claims which require to be intimated one month before the land is vacated,[2] are invalid and wholly ineffective as amounting to a purported contracting-out of statutory rights of compensation which cannot be renounced conventionally.[3] The English view is that to be effective a resumption clause must provide for notice being given at least two months before the land is vacated.[4] Even if it be accepted that the English ruling would be applied in Scotland in a case arising under the current statutory provisions, it seems unsatisfactory that a tenant's right to reasonable notice of a resumption should be left to depend on an inference from certain other statutory rights instead of being covered by an express provision. The rule thus applied in England can have no application outwith the sphere of agricultural holdings.

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[1] The statutory provisions for compensation apply on the resumption as if the part resumed were a separate holding vacated in consequence of a Notice to Quit: Agricultural Holdings (Scotland) Act 1949, s.60(1).

[2] In Scotland the claims affected under the Agricultural Holdings (Scotland) Act 1949 would appear to be the claim for compensation for adoption of a special standard of farming under s.56, and the claim for compensation for disturbance if exceeding one year's rent, under s.35(2)(b). The tenant's right to remove fixtures and buildings under s.14 while requiring prior notice is subject to contracting out. (Premier Dairies v. Garlick [1920] 2 Ch.17).

[3] Agricultural Holdings Act 1948, s.65(1); cf. Agricultural Holdings (Scotland) Act 1949, s.64(1).

[4] Beckett v. Birmingham Corporation, supra.

3.37 Period of notice. While in Scotland all the reported decisions concern the use of resumption clauses in agricultural leases,[1] there is in principle no reason why a resumption provision should not be included in a lease of any subjects,[2] although the matter is obviously less significant in cases where there is no statutory security of tenure. The Council of the Law Society of Scotland, in a recommendation to the Northfield Committee of Enquiry into the Acquisition and Occupancy of Agricultural Land, which is not reflected in the Report of that Committee,[3] proposed that irrespective of the provisions of any agricultural lease a notice of resumption should be required to be given at least two months before the effective date of the

[1] I.e. leases of agricultural holdings as distinct from crofts, small holdings or statutory small tenancies. In these cases the question of notice by landlord to tenant does not arise, the procedure involving an application to the Scottish Land Court whose authority is required for a resumption: See Crofters (Scotland) Act 1886, s.2; Small Landholders (Scotland) Act 1911, s.32(15); and Crofters (Scotland) Act 1955, s.12.

[2] It is understood that resumption clauses occasionally occur in other forms of rural leases such as those granted for afforestation purposes. S.34 of the Sheriff Courts (Scotland) Act 1907, which recognises the special rights of a landlord under a provision for resumption is not confined in its application to agricultural subjects, but covers any lands exceeding two acres held under probative lease. As, however, the other provisions of the Act concerning removings make no provision for resumption there may be an inference that exemption from the statutory requirements as to notice could not be claimed in any other case.

[3] Cmnd. 7579 (1979).

resumption.[1] As has been indicated the two months period is adopted as the minimum within which the tenant can be expected to decide upon and take the necessary steps to intimate certain claims. If, however, it were considered that legislation in this matter should deal not merely with agricultural leases, but should provide the tenant under any lease with protection against resumption without reasonable notice, the selection of a suitable minimum period would require reconsideration. Quite apart from the question of the making of out-going claims, two months, representing as it does one sixth of the normal minimum statutory period,[2] may be said to be the shortest time reasonable for the vacation of land in agricultural use. The selection of a period of notice for other tenancies would seem to depend on the view taken on the question of the duration of notice to be given for termination of a tenancy in normal course. If either 40 days or 28 days is to be adopted for general application, it might fairly be prescribed that the full period of notice prior to resumption must be given. This would still leave the landlord in a position to resume part of the subjects at a time other than that at which the tenancy as a whole

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[1] This period which accords with the view taken by the Court in Beckett, supra, is adopted by the Agriculture (Miscellaneous Provisions) Act 1968, s.15(3) providing for certain additional compensation payable to tenants where part of a holding is resumed under a Scottish lease.

[2] Agricultural Holdings (Scotland) Act 1949, s.24(1).

could be terminated.[1] If, however, longer periods of notice were to be prescribed for the termination of leases in certain cases, consideration might have to be given to some reduction of the period for cases of resumption.

3.38 Further considerations. Whether any statutory provisions in this matter are to apply to tenancies generally, or only to agricultural holdings, there are certain points which should, it is thought, be kept in view:-

(1) resumption provisions should be kept distinct from break provisions and should be operative only for a particular purpose or category of purposes;[2]

(2) as it is possible, at least in certain cases of agricultural tenancies, for limited rights of resumption to be implied, for example, where there is a reservation of minerals,[3] any statutory provisions relating to notice should be so framed as to cover implied as well as express resumption rights;

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[1] Apart from the fact that resumption may be used for any non-agricultural purpose this represents in the case of an agricultural lease one real advantage from the landlord's point of view of a resumption as compared with a notice to quit affecting part of the holding under s.32 of the Agricultural Holdings (Scotland) Act 1949, a provision which applies only where the tenancy is running on a yearly basis and which is restricted to certain specified purposes.

[2] In Bell's Principles, 1271, a break in the landlord's option is described as "a reserved power of total resumption", but resumption in the sense in which the term is commonly used implies some limitation of scope and/or purpose. See the opinion of Lord Blackburn in Alston's Trs. v. Muir (1919) 2 S.L.T.8. While theoretically resumption may cover the whole subjects the courts will not permit it to be used for the perpetration of a "fraud" on the lease (see para. 3.35 above).

[3] Rankine op. cit. p.211.

(3) while basically the forms of notice to quit contemplated for general use and for use in agricultural tenancies respectively would seem to be adaptable to the case of resumption, it might usefully be prescribed that a resumption notice, as well as specifying or describing adequately the subjects affected and the date at which possession is to be taken, should bear to be given in exercise of a power of resumption express or implied as the case may be, and should state precisely the purpose for which the power is being exercised.[1]

Act of Sederunt of 1756

3.39 Under the subject of notice of termination of tenancy reference must be made to certain provisions of the Act of Sederunt of 1756, as subsequently embodied in

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[1] The current statutory provisions for resumption in agricultural holdings (Agricultural Holdings (Scotland) Act 1949, s.24(6)(a)) do not require the notice to indicate precisely the purpose for which the resumption power is being exercised and the requirement of "a specific purpose" to be contained in the lease has been held to be met by a reference to "any non-agricultural user" (Dow Agrochemicals v. Lane (1965) 192 E.G. 737 approved and followed in Paddock Investments v. Lory (1975) 236 E.G. 803 C.A.). Even accepting, however, that such a general provision may be sufficient in the lease it would seem to be reasonable to require the notice to indicate the landlord's intentions more precisely, as there may be an issue between the parties as to whether the intended use of the land to be resumed is in fact non-agricultural. Since a notice in respect of resumption, unlike a notice to quit, even if opposed is operative without judicial consent there is no possibility of creating a sanction for departure from the stated purpose by making the resumption subject to conditions (see Agricultural Holdings (Scotland) Act 1949, ss. 26(5) and 30).

a codifying Act of Sederunt of 1913, as these provisions appear still to be in force. By section 2 of that Act of Sederunt, the citation of the defender in a removing action called at least 40 days before the term of Whitsunday renders the removing action competent without any other notice of termination of the tenancy. As the scope and application of this provision is apparently doubtful, and the latest reported instances of its being invoked are now over 60 years old,[1] it is thought that it should be eliminated in early course of statute law revision.

Notice as admission of right or title

3.40 The Law Reform Committee's Report[2] contained a recommendation for a statutory provision making it clear that service of notice of removing should not be held to imply the recognition of any title in the person on whom the notice was served. The Committee made this proposal as a solution of the difficulties which sometimes arise in

[1] In Green v. Young (1919) 35 Sh.Ct.Rep. 201 compliance with the Act of Sederunt was held sufficient without written notice to render competent an action under s.37 of the Sheriff Courts (Scotland) Act 1907 in respect of a tenancy of a dwellinghouse, and the same view was taken in Kerr v. Young (1920) 36 Sh.Ct.Rep. 184; but in Plumb v. Maynall (1921) 37 Sh.Ct.Rep. 23, in which neither Green nor Kerr appear to have been cited, it was held in similar circumstances that notice independent of the action was necessary. Elsewhere doubts have been raised as to whether the Act of Sederunt applies to urban tenancies, or is restricted to rural or agricultural lets; see Rankine op. cit. pp. 533/4; Dobie, p.414 and Wright v. Wightman (1875) 3R. 68.

[2] Cmnd. 114 (1957), para. 14.

determining whether a party in occupation of another person's property has or has not a title to occupy it. In such circumstances the giving of notice might imply an acknowledgement of right, whereas proceedings for recovery of possession not preceded by notice will be rendered incompetent if it emerges that there is some form of tenancy right making an ejection process incompetent. On the other hand, it is established that an action of removing taken against a defender who is shown to have no title is not for that reason incompetent.[1] The problem of the selection of the appropriate process which concerned the Law Reform Committee[2] has, for most purposes at least, been resolved by the adoption of their recommendation for one form of process for the recovery of possession of heritable property.[3] Where, however, a landlord and tenant relationship of any kind exists, it continues to be necessary for due notice to have been given before a landlord can proceed with an action. There does not appear to be any reported case in which an occupier has succeeded in establishing a tenancy right simply on the basis that he has been served with a notice to quit. It may be that in disputed or inconclusive circumstances the fact of notice having been given might tip the scale in the defender's favour, but arguably such a result could be avoided by the owner who was denying the existence of any right or title on the part of the occupier giving his notice expressly without prejudice to his position in

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[1] Breadalbane v. Cameron 1923 S.L.T. (Sh.Ct.) 6; Earl of Eglinton v. McLuckie 1944 S.L.T. (Sh.Ct.) 21.

[2] Cmnd. 114 (1957), para. 7.

[3] As now provided in Sheriff Courts (Scotland) Act 1971, s.35(1)(c).

this respect.[1] In an article[2] in which he discusses various recommendations of the Law Reform Committee, Sheriff A G Walker suggests that notice of at least the minimum period should be given before any action for recovery of possession, even where the occupier is believed to be a squatter, which suggestion must involve acceptance of the Law Reform Committee's view that the giving of notice should not per se imply the admission of any right or title in the recipient.

3.41 There is an increasing tendency in modern legislation for statutory provisions to require, in particular cases, some addition to what may be regarded as the basic content of a notice to quit,[3] such additional content concerning or affecting the enforceability of the notice and/or the rights of the recipient consequent upon or in relation to the notice and its enforcement. If effect were here being given to the Law Reform Committee's proposal, the statutory provision might be so framed as to make clear that, irrespective of its content, the giving of a notice to quit or notice of termination to an occupier of any heritable property would not imply the admission of a right or title of any kind or category on the part of that occupier.

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[1] See Colquhoun's Trs. v. Purdie 1946 S.N.3.

[2] 1957 S.L.T. (News) 97.

[3] E.g. Agricultural Holdings (Scotland) Act 1949, s.25(2); Agriculture Act 1958, s.6(3); Agriculture (Miscellaneous Provisions) Act 1968, ss.11 and 18; Notices to Quit (Prescribed Information) (Protected Tenancies and Part VII Contracts) (Scotland) Regulations 1980 affecting the Rent (Scotland) Act 1971, s. 131 as amended by Housing Act 1974, s.123(1).

Termination on death

3.42 Succession (Scotland) Act 1964. In section 16 of the Succession (Scotland) Act 1964, a statute passed since the Law Reform Committee reported, there are provisions for the termination of a tenancy following upon the tenant's death. These provisions take effect when the tenant's interest has not been disposed of within a period of a year from his death (or in the case of agricultural tenancies from the conclusion of proceedings concerning the succession to the tenancy), or such longer period as may be agreed, or fixed by the court (subsection (3)). They are intended to resolve the difficulties which may arise when a tenant's death occurs during the currency of a lease by enabling the tenancy to be terminated prematurely, either by the landlord or by the tenant's executor, subject to any claims to which termination may in the circumstances give rise (subsection (4)). They do not represent any significant departure from the existing rules affecting the period of notice. For agricultural tenancies, they adopt the statutory period of notice of one to two years before a Whitsunday or Martinmas term, failing agreement to the contrary (subsection (4)(a)). For other leases, they prescribe a minimum of six months notice, but this again is subject to the application of a shorter period where that applies by law to the lease in question (subsection (4)(b)). It would appear that the changes envisaged in the proposals made by the Law Reform Committee, if adopted, would not involve anything other than minor, consequential alterations of these provisions of the 1964 Act, and that these special provisions, relating as they do to the termination of tenancies on

death only, should remain part of the statute law dealing with succession and not be incorporated, except perhaps by reference, in legislation dealing with the termination of tenancies generally.

3.43 Absence of executor. In the case of agricultural tenancies, the landlord's right of objection to a tenant's successor, testate or intestate, has necessitated provision for his receiving, within a limited period, information of a bequest of the tenancy or of its transfer by the tenant's executor to a successor tenant.[1] While landlords have no such right of objection in non-agricultural tenancies, it is suggested that provision for intimation of these events applicable to tenancies generally would, as well as ensuring so far as possible that where intestacy applies the appropriate action is taken, and taken timeously, by the executor, result in the landlord receiving without delay information which he may require for the exercise of his rights as regards termination of the tenancy.[2] It is thought that it was not the intention of the 1964

[1] Agricultural Holdings (Scotland) Act 1949, ss. 20 and 21.

[2] In domestic tenancies under the Rent Acts the provisions of the Succession Act will not affect a statutory tenancy arising on the tenant's death which will subsist although the landlord may exercise a right to terminate the protected contractual tenancy. If, however, a contractual tenancy by succession is to be claimed there will have to be intimation to the landlord. See Grant's Trs. v. Arrol 1954 S.C. 306; cf. Campbell v. Wright 1952 S.C. 240.

Act that the death of a tenant should have the effect of deferring the date at which the tenancy could otherwise have been terminated in normal course. Professor Meston,[1] however, has pointed out that the Act's provisions create a problem for the landlord seeking to give notice to quit after his tenant has died, but before an executor of the tenant has been appointed and confirmed; there being no longer an heir at law to succeed automatically to the heritable estate of the deceased, it is not clear who owns that estate between his death and the appointment and confirmation of his executor.[2] As Professor Meston observes, this may result in a landlord being delayed in exercising his right to obtain possession because he is unable to find

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[1] The Succession (Scotland) Act 1964, 3rd. edn., p.90.

[2] In the rare case of a lease containing a special destination of the tenancy this problem would not arise; but in Cormack v. McIldowie's Exrs. 1975 S.L.T. 214 the exclusion of heirs-portioners as commonly found in leases entered into before the Succession Act was held not to make the destination a special one within the meaning of s.36(2)(a) of the Act so as to exclude the tenancy interest from the estate confirmed to by the executors. The decision has been criticised by Professor J.M. Halliday (see "What is a Special Destination?" 1977 J.L.S.S.16). It might possibly be argued that in a lease excluding assignees, the heir at law may come in as a successor, taking not by succession but by destination (see Paton and Cameron op. cit. p.179). This line of argument was rejcted in Cormack's case where, however, the court were considering the position with executors already confirmed.

someone on whom he can serve the requisite notice.[1] Professor Meston refers to a suggestion for a provision whereby service could be effected on the tenant's "representatives" per the sheriff clerk of the appropriate county so that the notice would come to the attention of the executors when appointed, but he indicates that there is at present no clear answer to the problem.

3.44 English practice. In England, if a person dies testate, his whole estate, including any interest he may have as tenant under a lease, vests immediately in the executors of his will.[2] If he dies intestate, vesting in the administrator is deferred till the grant of Letters of Administration, but from the date of death until that grant the estate is vested in the President of the Family Division of

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[1] If notice cannot be served in time to take effect at the first date at which the tenancy could be terminated in normal course there will be an extension by tacit relocation which may be for as much as a year. An even longer delay in recovering possession can result where the death prevents notice being given in time to take effect at a break provided for in the lease. Should the let subjects continue to be occupied after the tenant's death without any steps being taken to have an executor confirmed and the rights of the occupants as successors established or regularised, an action for removal of these occupants will succeed, but apparently only after at least a year has elapsed from the tenant's death, making it no longer possible for disposal of the tenancy to take place as prescribed in s.16 of the Succession Act; see Rotherwick's Trs. v. Hope 1975 S.L.T. 187.

[2] See Hill and Redman, Landlord and Tenant (14th edn.), p.597.

the High Court.[1] If the tenant has left a will, service of a notice addressed to his executors, who need not be named therein, at the address of the tenanted property appears to be effective.[2] If he has died intestate and Letters of Administration have still to be granted, the notice is effectively served on the President of the Family Division.[3] As it may, in some circumstances, be doubtful whether there is testacy or intestacy, the approved practice appears to be to serve notice both on the President and on the executors at the tenancy address.[4]

3.45 Position in Scotland. In Scotland, under the relevant statutory provisions,[5] the estate of the deceased, whether

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[1] Administration of Estates Act 1925, s.9 as amended by Administration of Estates Act 1970, s.1, Sched. 2.

[2] Hill and Redman, op. cit. p.1858.

[3] In terms of a Practice Direction ([1965] 3 All E.R. 230) the notice is given per the Treasury Solicitor. It is a question of circumstances whether the occupants can be regarded for this purpose as agents of the President making service on them effective as service on the President: see Clarkson's (Holdings) Ltd. v. Bolsover 1966, 116 New Law Journal 1291.

[4] As to this practice adopted in agriucltural tenancies see Muir Watt, Agricultural Holdings (12th edn.), pp. 62/3 and Scammell and Densham's Agricultural Holdings (6th edn.), pp. 243/4.

[5] Succession (Scotland) Act 1964, s.14(1).

he be testate or intestate,[1] vests in his executors for the purposes of administration by virtue of their confirmation. It appears, however, that where there is a will containing a general conveyance of the estate to trustees or executors, they may use that will alternatively to the confirmation as a link of title to heritage.[2] Whether or not this implies some form of vesting a morte and independently of the confirmation, it would seem to be arguable that a notice can be effectively served on an

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[1] The exclusion of the tenant's assignees commonly included in formal leases will result that in many cases although the tenant dies testate his tenancy interest will have to be treated as intestate estate. His executors nominate may, however, be vested by confirmation in the tenancy and responsible for dealing with it in terms of s.16 of the Succession Act. But see Reid's Trs. v. Macpherson 1975 S.L.T. 101, showing that a wording commonly adopted in wills may exclude the tenancy from the trust or executry estate. It appears that even where there is an effective bequest of the tenancy it vests for purposes of administration in the executors. (See in this connection the amendment of s.20(6) of the Agricultural Holdings (Scotland) Act 1949 made by the Succession Act, Sched. 2, para. 20).

[2] Meston op. cit. p.85. For technical reasons it is doubtful whether the legatee with a direct bequest of heritage can use the will as a link of title or must obtain his title through the executors. It might, however, be contended that the legatee under a bequest of a tenancy has from the date of death such an interest as would qualify him to receive notices such as notices to quit and take any necessary action in respect thereof. S.20 of the Agricultural Holdings (Scotland) Act 1949 proceeds on the basis that a legatee is tenant as from the date of death despite the vesting in the executors for administration purposes, and requires him to intimate the bequest to the landlord within three weeks of the death unless unavoidably prevented from doing so.

executor nominate who has still to be confirmed and likewise on an executor dative appointed but not yet confirmed. Certain actions can be taken by executors before confirmation,[1] and these would appear to include any steps urgently necessary to protect and preserve the estate which is to be under their charge. Thus such executors designate should be in a position to take, or at least initiate, any steps necessary to avoid the consequences of a notice such as a notice to quit going unchallenged,[2] and they may therefore be regarded as qualified to receive service of such a notice. A different situation, however, arises in an intestacy with an executor dative still to be appointed. Even if it is possible to identify the person who will subsequently be appointed executor, it is questionable if, pending his appointment, that person will be qualified to receive service. At that stage he would seem to lack any capacity entitling him to take action in response to the notice.[3]

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[1] See Garvie's Trs. v. Garvie's Tutors 1975 S.L.T. 94; Emslie v. Tognarelli's Exrs. 1967 S.L.T. (Notes) 66; Currie, Confirmation of Executors (7th edn.), p.236; Wilson and Duncan, Trusts, Trustees and Executors, p.443.

[2] For instance, the tenant of an agricultural holding having received notice to quit from his landlord and seeking to assert his security of tenure must serve, within a month, either a counter-notice or a demand for arbitration; see Agricultural Holdings (Scotland) Act 1949, ss. 25(1) and 27(2).

[3] The position may, however, be different under certain statutory provisions such as s.93(1) of the Agricultural (Holdings) Scotland Act 1949 giving wide definitions of the terms "tenant" and "landlord".

3.46 Possible solutions. Whatever views may be taken on these issues it seems clear that some provision is required in Scotland for the service of notices, such as notices to quit, between the date of death of the tenant and the confirmation of his executors. A provision applying alike to testate and intestate cases would obviate the necessity for certain enquiries which it may be difficult to pursue expeditiously, and also render unnecessary the duplication of notices as apparently resorted to in England. Such a provision should fulfil two basic requirements. Firstly, it should permit of the tenancy being terminated when it could have been terminated had the tenant survived. Secondly, it should ensure, so far as possible, that the tenant's successors or representatives have the opportunity of taking, in respect of the notice, such action as may in their interests be appropriate. The suggestion of service on the tenant's "representatives" per the sheriff clerk mentioned by Professor Meston seems, like the provision operative in England for service on the President of the Family Division, to meet only the first and not the second of these requirements.[1] In the case of some tenants, no executors may be nominated or appointed and/or confirmed. In many cases, the appointment and confirmation of executors of the tenant may come too late for effective action to be taken in response to a notice of which they

[1]The situation is exemplified in a number of English cases such as Fred Long & Sons Ltd. v. Burgess [1949] 2 All E.R. 484. It appears that no action is taken administratively on the receipt by the Treasury Solicitor of a notice addressed to the President of the Family Division.

only then become aware. In this respect, provision for service on the executors (not necessarily named) at the address of the tenanted subjects would seem to be preferable.[1] In most cases, it should result in the notice coming to the attention of someone interested or concerned, in time for the necessary action to be taken. If such a provision were being made it might include a requirement that a copy of the notice be sent to the local sheriff clerk's office where it would be available for the information of executors who had not become aware of the service of the notice at the tenancy address.[2]

3.47 While executors nominate or dative of the late tenant, although unconfirmed, would appear to be entitled to take any necessary action on receipt of a notice such as a notice to quit, there remains for consideration the situation where there are no executors nominate and no executor dative yet appointed. It is suggested that in these circumstances any action necessary or appropriate for the purpose of preventing the termination of the

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[1] In England notice given on these lines has in some cases been held effective: see Harrowby v. Snelson [1951] 1 All E.R. 140; Egerton v. Rutter [1951] 1 K.B. 472; and Wilbraham v. Colclough [1952] 1 All E.R. 979.

[2] There would appear, however, to be a difficulty about the operation of any provision for intimation to the sheriff clerk in that the tenant's domicile may not be in the district of the let subjects, and may even be furth of Scotland.

tenancy, wholly or partially,[1] in terms of the notice to quit or other notice duly served on the tenant before his death,[2] or deemed to be duly served on his executors, be allowed to be taken by any person or persons interested in the late tenant's estate either under his will[3] or on intestacy.

3.48 Death of landlord. While in practice the death of a landlord seems less likely to give rise to the problems which have been discussed in relation to a tenant's death, it would appear that any provision made for the service of a notice to quit or other notice between death and confir-

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[1] In agricultural holdings, notices of resumption and notices to quit affecting part of the subjects let have to be provided for. See Agricultural Holdings (Scotland) Act 1949, ss. 24(6)(a) and 32.

[2] The tenant having died after receiving such a notice, it could be dealt with by his executors whether or not confirmed.

[3] A will may instruct bequests without appointing executors, or again the executors nominated may decline office.

[4] Under s.90(4) of the Agricultural Holdings (Scotland) Act 1949 a tenant, until he has received notice of a change of landlord with the name and address of the new landlord, may continue to serve notices of any kind on the former or original landlord. This provision appears only in agricultural holdings legislation in which there is no reciprocal provision for the landlord. It seems to be intended to cover the situation in which an estate comprising a tenanted farm or farms has been sold and/or divided without the tenants being notified of the changes of ownership. It is at least doubtful if it applies to the transmission of the landlord's interest by operation of law as on his death.

mation of executors should apply mutatis mutandis where the death is that of the landlord.[1]

3.49 Also requiring consideration is the situation arising where the landlord or tenant has died at or near the time at which a notice to quit terminating the tenancy should be given to the other party to the contract. Such notice could no doubt be given by executors nominate or dative although unconfirmed,[2] but it might be thought undesirable to confer on any other interested party a right to take such action as initiating the termination

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[1] As the question of action necessary to prevent the termination of the tenancy would not normally arise here, it may be considered unnecessary to empower parties other than executors to take action in relation to notices such as notices to quit. There are, however, cases in which action in the landlord's interest should follow promptly upon receipt of a notice from the tenant, as for example, a notice of intention to carry out an improvement given in terms of s.52 of the Agricultural Holdings (Scotland) Act 1949: or again under s.27(1) of that Act where application for consent to the operation of a notice to quit must be made by the landlord within a month of his receiving the tenant's counter notice.

[2] Garvie's Trs. v. Garvie's Tutors, supra: see also Lucas's Exrs. v. Demarco 1968 S.L.T. 89 as referred to by the Land Court in Garvie (at p.32). In the case of agricultural holdings s.80 of the Agricultural Holdings (Scotland) Act 1949 provides that the landlord, whatever may be his estate or interest, may for the purposes of the Act "give any consent, make any agreement or do or have done to him any act which he might give or make or do or have done to him if he were absolute owner of the holding." The section is entitled "Powers of limited owners to give consents" etc. and seems intended to cover such cases as liferenters and trustees. As appearing in earlier legislation it applied only in questions of compensation for improvements, but although it it not now thus restricted it would appear that, despite the wide definition of landlord in s.93 of the Act, s.80 would not benefit or affect any party whose status or capacity remained to be established.

of a tenancy even in the absence of executors. In such circumstances, it is for the interested parties to have an executor appointed with the minimum of delay, and it may have to be accepted that where a landlord or tenant has died without nominating executors it will sometimes not be possible to have the tenancy terminated by the deceased's successors at the earliest date at which it could have been terminated by him had he survived.

Mixed tenancies

3.50 Adoption of the Law Reform Committee's proposals for one form of notice of termination of tenancy, with the nature of the subjects of tenancy no longer affecting the requisite period of notice, would result that in the case of urban lets, mixed or divided use of the subjects should not give rise to problems in the giving of notice.[1] The Law Reform Committee, however, was not dealing with agricultural tenancies, for which it is clear that the period of notice, and perhaps also the form of notice, must continue to be different. This raises the question of how a party is to proceed in giving notice to terminate a tenancy of subjects which are partly agricultural and partly non-agricultural in character and use. In the case of McGhie v. Lang,[2] the Scottish Land Court, dealing with the question of consent to a notice to quit as arising under the Agricultural Holdings Acts, took the view that they were entitled, and indeed required, in the case of such mixed subjects to excise the non-agricultural portion and deal with the remainder as by

[1] Cmnd. 114 (1957), paras. 12 and 13.

[2] 1953 S.L.C.R. 22.

itself forming an agricultural holding. This results either that a notice to quit for the whole subjects must be given in conformity with the Agricultural Holdings Acts, or that separate notices must be given for the respective parts of the subjects. A different view has been taken by the courts in England, who have applied a test of predominant user to determine whether or not there is a tenancy of an agricultural holding.[1] In reaching their decision in McGhie's case, the Land Court founded on a ruling of the Court of Session in the case of McNeill v. Duke of Hamilton's Trustees.[2] In that case, the Court of Session was concerned with the interpreation of certain provisions of the legislation affecting small holdings which incorporated from the Agricultural Holdings (Scotland) Act of 1908[3] the definition of agricultural holding as "any piece of land held by a tenant which is either wholly agricultural or wholly pastoral or in part agricultural and as to the residue pastoral". By contrast, the statutory definition now applying both in Scotland and in England is "the aggregate of agricultural land comprised in a lease".[4] In McNeill's case, having regard to the 1908 definition and certain other considerations, the Court decided to apply the principle of excision to

[1] See Howkins v. Jardine [1951] 1 K.B. 614; Monson v. Bound [1954] 3 All E.R. 228 and Scammell and Densham, Law of Agricultural Holdings (6th edn.), p.15.

[2] 1918 S.C. 221.

[3] S.48(1).

[4] Agricultural Holdings (Scotland) Act 1949, s.1(1).

eliminate the non-agricultural portion of the holding while leaving the remainder with a statutory security of tenure. In McGhie's case, the Land Court, despite having before them the change in the definition of "agricultural holding", took the view that excision of the non-agricultural part of the holding was the appropriate course and within their powers as a court. They declined to follow the precedents of certain English decisions to the opposite effect.[1] While it appears that this question has not again arisen for decision in Scotland in any reported case since the McGhie decision, the Land Court in a recent case concerning the 1976 crofting legislation[2] made some significant obiter dicta in referring to McGhie's case. They pointed out that the word "wholly" had dropped out of the definition of a holding for the purpose of the current Agricultural Holdings Acts, and that in light of the definition now applying both in Scotland and England the English courts took the view that the test should be that of predominant user. "Hence", reads the court decision, "the decision of this court in McGhie v. Lang which was a notice to quit case under the 1949 Act may require to be reconsidered in so far as following McNeill it countenanced excision".

3.51 It would appear that the doubt which must persist in Scotland, unless and until McGhie's case is actually

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[1] Including Howkins v. Jardine, supra.

[2] Cameron v. Duke of Argyll's Trs. 1979 Strathclyde R.N. 121.

overruled,[1] should now be resolved by a statutory provision applying the rule adopted in England, whereby predominant user will be the criterion in determining whether or not a notice to quit, to be effective, must comply with the requirements of the Agricultural Holdings Acts. In the event of this matter being in dispute, it will be for the court to decide the question of predominant

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[1]The matter is referred to incidentally in Connell's Agricultural Holdings (Scotland) Acts, (6th edn.), p.174, in a note concerning s.60(2) of the Agricultural Holdings (Scotland) Act 1949. By that section where subjects leased are not an agricultural holding only because they include land which, owing to the nature of the buildings thereon or to the use to which it is put, would not if separately let be an agricultural holding, compensation for improvements and for disturbance shall, unless otherwise stipulated, apply to the agricultural portion of the leased subjects treated as a separate holding. These provisions had previously appeared in s.33(1) of the Agricultural Holdings (Scotland) Act 1923 and in the English statute of the same year. In England, however, they were repealed and not included in the consolidating Act of 1948, being the counterpart of the 1949 Scottish Act. The retention of the provision in Scotland but not in England seems surprising, as in both countries a definition of "agricultural holding" so worded as to eliminate the requirement of exclusively agricultural user was adopted in the consolidating Acts (see 1949 Act, s.1(1)), and again, because the object of the provision appears to be to ensure that a tenant is not deprived of his rights to compensation simply because a small part of his holding is in non-agricultural use. Such protection would seem to become unnecessary if the definition of agricultural holding is regarded as making the criterion of prodominant user applicable for all purposes. Standing s.60(2), however, a note in Connell's work poses the question whether notice to quit under s.24 of the 1949 Act should be given as regards the entire subjects including the non-agricultural part, or only as regards the part which falls to be treated as a holding in terms of the section, and suggests that the safer course is to give notice in respect of the whole subjects.

user,[1] but the party giving notice in these circumstances, particularly the landlord, may have difficulty in deciding whether or not to comply with the requirements of the Agricultural Holdings Acts. A notice given in conformity with these requirements will almost certainly fulfil the less onerous requirements applying to non-agricultural tenancies, but it seems desirable that it should be made possible for such a notice to be given without it constituting an admission of the existence of an agricultural holding with all the consequences in the form of security of tenure and compensation rights.[2]

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[1] As the question at issue will be whether or not there is a tenancy of an agricultural holding s.74 of the Agricultural (Holdings) (Scotland) Act 1949 referring to arbitration all questions between landlord and tenant of such holdings will not apply.

[2] This would be consistent with certain proposals already made (see paras. 3.40 and 3.41 above) and with the general proposition of the Law Reform Committee that service of a notice to quit should not *per se* constitute admission of the existence of a tenancy of any kind.

CHAPTER 4 TITLE TO SUE

4.1 This topic which seems to call for somewhat fuller examination than it receives in the Report of the Law Reform Committee is examined in relation to:-

(1) Proprietors (including co-proprietors and their successors (paras. 4.2-4.11).
(2) Liferenters and fiars (paras. 4.12-4.13).
(3) Lessees or tenants seeking possession (paras. 4.14-4.15).
(4) Debtors under ex facie absolute securities (para. 4.16).
(5) Heritable creditors (para. 4.17).
(6) Trustees and other administrators (para. 4.17).
(7) Agents or factors for proprietors (para. 4.18).

Proprietors

4.2 The Law Reform Committee recommended an alteration of the law to permit decree for recovery of possession to be taken by persons having right to the subjects by a title not completed but capable of completion.[1] This proposal, affecting all actions for recovery of possession whether of the nature of removings or ejections, is made under reference to a statement that as the law stands such actions can be brought only by a proprietor infeft "or the pursuer must take infeftment before decree passes." The authority cited here is the case of Walker v. Hendry.[2] The opinions delivered in that case, particularly that of Lord Alness, show how the law developed from a position in

[1] Cmnd. 114 (1957), para. 17.
[2] 1925 S.C. 855.

which the pursuer had to be infeft when he raised the action, and in some cases when he gave any notice required to precede the raising of the action, to a position in which infeftment could be taken at some later stage in the process. The requirement of infeftment, it is explained, is based on the view that a tenant should only be removed by and required to cede possession to someone who has a valid and complete title to the property. It is perhaps not absolutely clear that completion of title or infeftment can be made at any time before decree is granted, although in most of the cases that view appears to have been taken.[1] It is, however, established that infeftment after decree is ineffective to validate such decree.[2] Presumably the recommendation of the Law Reform Committee would fall to be implemented on the basis that a pursuer would have until the stage of decree to fulfil the requirements proposed. It might have made for simplicity to provide that the requirements now proposed must be fulfilled from the start of the proceedings, and likewise when any necessary notice was being given. There

[1] Campbell v. McKellar (1808) Mor. Appendex Removing 5; Scott v. Fisher (1832) 10 S. 284; Tennent v. Macdonald (1836) 14 S. 976. See also Mitchell v. Shanks 1923 S.L.T. (Sh.Ct.) 9 and Saxelby v. Calder 1923 S.L.T. (Sh.Ct.) 12.

[2] Scott v. Fisher, supra, as referred to in Mackintosh v. Munro (1854) 17D. 99 where infeftment was taken after reponing against a decree in absence but before the final decree in foro was pronounced.

are, however, circumstances in which it is desirable that a party not yet having the form of title proposed should be able to take the initial steps in the matter.[1]

4.3 While proceedings in the nature of ejection involve that the pursuer must aver and if necessary establish his right or title to the subjects,[2] in proceedings at the instance of the party who granted the lease the lessee as defender is precluded from denying or challenging the title of the pursuer, as the person from whom he himself has derived his only right.[3] In this case, the question of the state of the pursuer's right or title will not arise unless the pursuer is someone other than the original lessor, or it is being maintained that the pursuer, although the original lessor, has in some way divested himself of the property.

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[1]For example, unconfirmed executors (para. 4.8 below). See also Alexander Black & Sons v. Paterson 1968 S.L.T. (Sh.Ct.) 64, which held that the purchaser under missives (who never completed title) fulfilled the statutory definition of landlord of an agricultural holding and so competently served a notice to demand arbitration as to rent, but the sheriff indicated that a different position would obtain in the case of a notice to quit.

[2]See forms of writ exemplified in the Encyclopaedia of Scottish Legal Styles, Vol. 4, pp. 349 et. seq.and Dobie, Sheriff Court Styles, p.136.

[3]Rankine, Leases, p. 513; Paton and Cameron, Landlord and Tenant, pp. 252/3; York Building Co. v. Carnegie (1764) Mor. 4054; Hamilton v. Crawford (1583) Mor. 13784: Earl of Arran v. Crawford (1583) Mor. 14023; Penman v. Martin (1832) 1S. 485.

4.4 There may be said to be three stages at which the right or title of the pursuer or intending pursuer arises in relation to removing proceedings. Firstly, it affects the right to give the notice of termination of tenancy on which the action will normally be based. This aspect of the matter has already been examined,[1] but two points arising out of the earlier discussion may be mentioned here.

4.5 Notice by co-proprietors. While on one view any co-proprietor is entitled himself to give notice of termination to a tenant, this right is of limited significance so long as it remains necessary for all co-proprietors to concur or be conjoined in removing proceedings.[2] With a tenant remaining in possession, as he will be entitled to do, it becomes extremely difficult, if not impossible, to have the co-proprietor's ultimate remedy of division and sale effectively applied unless there is a co-proprietor able and willing to buy out any other interests on acceptable terms. The difficulty resulting from the requirement that all co-proprietors must concur in taking the steps to secure vacant possession arises also where one co-proprietor is in possession, as tenant or otherwise,

[1] See paras. 2.22-2.30 above.

[2] See Price v. Watson 1951 S.C. 359, per Lord Keith at p.365. A proprietor's authority where he has such to represent himself and his co-proprietors in the granting of a lease does not imply authority to remove tenants on his own initiative. In such circumstances, contrary to the normal rule, the title to sue of the party who granted the lease may be challenged by the defender: Murdoch v. Inglis (1679) 3 B.S. 297; Grozier v. Downie (1871) 9M. 826.

although in that case he will be bound to vacate the subjects if acquired by someone else as a result of division and sale procedure.[1] If it is considered that the law is or should be that any one co-proprietor is entitled to give notice, a co-proprietor who, having given notice, cannot obtain the co-operation of the other co-proprietors in taking proceedings for recovery of possession should be enabled to take these proceedings himself, calling his co-proprietors as additional defenders for their interests.[2] The co-proprietor's right to individual action in this matter should apply likewise where the tenant or occupier is himself a co-proprietor, in which case he will be the real defender.

4.6 As matters stand one co-proprietor may himself seek a remedy such as interdict or an order ad factum praestandum to prevent or terminate the encroachment on or infringement of property rights by squatters or unauthorised persons,[3] but such courses are not available when there is or may be any tenancy relationship. An exceptional position, however, appears to exist with co-adjudgers. An adjudger for debt, provided he holds a decree of maills and duties, can proceed for removal of tenants,[4] but a removing at the instance of one adjudger

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[1] Price v. Watson, supra, per Lord Keith at p.366.

[2] This should eliminate the possibility of any objection on the ground of all parties not being called or in respect of the decree even if granted in foro not being res judicata as regards all proprietors.

[3] Johnston v. Craufurd (1855) 17D. 1023; Lade v. Largs Baking Co. (1863) 2M. 17.

[4] Graham Stewart, Diligence, p.521; Lockhart (1628) Mor. 13790.

cannot proceed without the concurrence of any co-adjudger unless the pursuer offer a more solvent lessee or a greater rent, but in that case the interest of any one party is not permitted to prevent the common advantage being obtained.[1] Again it appears that one co-adjudger will be allowed to proceed for removing on his finding caution for payment of rents.[2] These departures from the general rules affecting joint interests are regarded as justified by the special nature of the adjudger's right, he having a common interest along with the proprietor to have the property so managed that the rents go as far as possible in extinguishing the debt.[3]

4.7 Notice by purchaser under missives. It has been seen that a party in the position of a purchaser under missives cannot competently give a tenant notice to quit.[4] This accords with the principle that a notice of termination of tenancy can be given only by and to parties currently in the relationship of landlord and tenant. It appears, however, that when notice has been given by the seller, the

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[1] A v. B (1680) Mor. 2448.

[2] Halliday v. Bruce (1681) Mor. 2449.

[3] Hunter, Landlord and tenant, Vol. II, p.13.

[4] See para. 2.24 above and Alexander Black & Sons v. Paterson, sup. cit.

purchaser, having taken entry and acquired title and being thus in the position to take proceedings for recovery of possession, needs an assignation of the notice from the seller to render proceedings on the basis of that notice competent.[1] This is a technical requirement which might reasonably be eliminated.

4.8 Raising of action. Secondly, the question of title arises at the raising of the action. It is clear that a party such as a purchaser holding an unrecorded disposition entitling him to the rents is in a position to raise the action,[2] and that is so even if he has to account to some predecessor for the rent presently payable.[3] We have, however, to consider what nature of right or title, short of that envisaged by the Law Reform Committee as qualifying the pursuer to take decree, should be acceptable at the outset and during the course of the proceedings. The Succession (Scotland) Act 1964 has eliminated a number of problems arising under the previous law, such as the position of apparent heirs[4] as pursuers, but, as explained in relation to notices to quit,[5] it creates problems by reason of a

[1] In Grant v. Bannerman (1920) 36 Sh.Ct.Rep. 59, Sheriff A O Mackenzie held with reluctance that assignation of the notice was necessary to render the purchaser's action competent.

[2] Grandison v. Mackay 1919 1 S.L.T. 95; James Grant & Co. Ltd. v. Moran 1948 S.L.T. (Sh.Ct.) 8.

[3] Lennox v. Reid (1893) 21R. 77.

[4] Mackenzie v. Gillanders (1853) 16D. 158.

[5] See paras. 3.42-3.49 above.

doubt as to the right or title to the property of a deceased in the interval between death and confirmation of executors. It is thought that as the law at present stands unconfirmed executors would, in some cases at least, be entitled to initiate proceedings for recovery of possession either in respect of a notice given by them or of a notice given by the deceased.[1] When executors have been confirmed they will have a title as envisaged by the Law Reform Committee qualifying them to take decree. While it seems appropriate that executors should not be entitled to require a tenant or occupier to cede possession to them until they are confirmed,[2] it is also desirable that, in certain circumstances, at least, they should be able to initiate proceedings without awaiting confirmation.[3] There may be other parties who would or should be entitled to initiate proceedings before acquiring a title as envisaged by the Law Reform Committee,[4] but it is not suggested that this facility should be extended to persons such as purchasers under missives. Until a purchaser takes over and obtains a title, the seller can raise any proceedings necessary to

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[1] See para. 3.49 above.

[2] But see para. 4.9 below.

[3] See para. 3.49 above as to the right to give notice prior to confirmation.

[4] An example might be a party in right of a specific bequest of the subjects let who could not obtain a title except through the trustees or executors of the will.

secure vacant possession of the subjects.[1] A different position exists where a proprietor or lessor has died when no-one other than his executors (or a judicial factor appointed to administer his estate) will be able to take any action.

4.9 Decree and infeftment. Thirdly, we have the position where a decree of removing or ejection is to be taken and the pursuer should, as regards title, be in the position proposed by the Law Reform Committee. In the simple case of feudal ownership, beneficial or fiduciary, there will be held an unrecorded dispositon or a general conveyance so tha title could at any time be completed by the recording of the disposition or the expeding and recording of a notice of title. That is to say, the person concerned will be in a position to complete title without the aid of anyone else or the order of any court. Confirmed executors are in this position, as are trustees or executors under a will containing a general conveyance of the testator's estate.[2] In the

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[1] In Grandison v. Mackay, supra, Lord Sands held that where missives are exchanged for future entry the seller has until entry all rights of the proprietor re. outputting and inputting tenants. It would appear that any problem arising from delay in settlement could be resolved by purchaser and the seller conjoining in the action.

[2] Meston, The Succession (Scotland) Act 1964 (3rd. edn.) p.85 referring to a joint opinion of the Professors of Conveyancing indicating that a will containing a general conveyance of the testator's estate may be used by trustees or executors nominate alternatively to the confirmation as a link of title. It would seem to follow that in some cases at least the law changed as proposed by the Law Reform Committee would result that executors, although unconfirmed, could proceed and obtain decree in an action for recovery of possession of the deceased's property, a situation which might be thought undesirable.

same position are judicial factors and trustees appointed by the court,[1] and also trustees in bankruptcy[2] or under trust deeds for creditors. The view of the Law Reform Committee appears to have been that as such holders of unrecorded titles may dispose of and convey the property without going to the expense of completing title, completion of title should not be necessary simply for the purpose of asserting the right to vacant possession. Presumably they regarded the holding of title, though without actual infeftment, as meeting the point made in Walker v. Hendry (supra) that a pursuer must be able to demonstrate that he is the party entitled to dispossess the defender.

4.10 Legislation implementing the Law Reform Committee's proposal as discussed above will now have to take account of the replacement of recording in the Sasine Register by registration in the Land Register, with registration of title being progressively introduced in terms of the Land Registration (Scotland) Act 1979. In principle this

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[1] Conveyancing (Amendment) (Scotland) Act 1938, s.1.

[2] Bankruptcy (Scotland) Act 1913, s.97(2). In the case of a company in liquidation the title remains in name of the company although the liquidator, and not the directors, executes any necessary deeds. The liquidator is empowered to take, in the company's name, any proceedings the company could have taken in relation to the tenancy. It appears that a receiver under a floating charge would be similarly placed (see Companies (Floating Charges and Receivers) (Scotland) Act 1972, s.15(1)(p)).

should make no difference, but the relevant legislation should provide for the pursuer in an action for recovery of possession of heritable property holding either a title capable of completion by recording in the Register of Sasines or, where registration of title applies, a title registrable in the Land Register.

4.11 The Law Reform Committee's proposal has, however, to be considered not only in relation to cases of full and single ownership, but also in its application to cases where the rights of the prospective pursuers are shared with others or limited or restricted in some way. Reference has already been made to the position of co-proprietors. Since the law at present requires that all co-proprietors concur in a removing action concerning joint or common property, it follows that all must be infeft in their shares before decree is granted. Infeftment would no longer be necessary under the proposal of the Law Reform Committee but each propreitor would require to have a title capable of completion. If, however, the suggestion made above for the enfranchisement of an action by a single proprietor whose co-proprietors will not co-operate were adopted, the question would seem to arise whether decree should be obtainable irrespective of the state of the title or titles to the other interests if the pursuer has the necessary title. It would seem to be reasonable for that to be so.

Liferenters and fiars

4.12 Another case of limited or divided ownership giving rise to questions of title to sue is that of liferent and

fee. The authorities here[1] deal with proper or direct liferents as opposed to liferents created through the medium of a trust as more commonly encountered in modern practice. For the proper or direct liferent, there would appear to be no difficulty in substituting for infeftment the Law Reform Committee's proposal of a title capable of completion. There appears, however, to be some doubt as to the extent to which the rule that all parties with proprietary interests in the subjects affected must join in any removing proceedings applies where liferents are involved. A liferenter has an implied power to grant leases for the duration of his life but not beyond it.[2] On general principles, a tenant holding a lease granted by a liferenter will be barred from challenging the title of that liferenter to pursue an action of removing. A question, however, arises when during the subsistence of a liferent it is desired to terminate a tenancy not created by the liferenter himself. On the one hand, we have the view of the older writers, such as Rankine[3] and Hunter,[4] that where a lease has been granted by a liferenter and fiar acting together, or by their common author, both liferenter and fiar must join in any proceedings for removal of the tenant. On the other hand, Dobie[5] considers that, on general principles,

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[1] See Rankine op. cit. pp.517/518 and Hunter op. cit. pp. 4 and 12; cf. Paton and Cameron op. cit. p.256.

[2] Rankine op. cit. p.78.

[3] Ibid, p.517.

[4] Loc. cit.

[5] Dobie, Liferent and Fee, p.75.

a liferenter should be entitled to bring such actions as may be necessary to vindicate or enforce his rights and ensure his enjoyment of the liferent, these including enforcement of the terms of the lease generally and, in particular, taking steps for removal of tenants when necessary. He does not, in terms, restrict this view to the case of leases granted by the liferenter himself,[1] but points out that reported cases on this topic are generally speaking inconclusive. It appears, however, to be settled that during the subsistence of a liferent the fiar cannot alone proceed for removal of a tenant having a lease from the common author.[2] Again there is authority to the effect that a removing action at the instance of the liferenter alone is incompetent when the lease has been granted by the liferenter and fiar jointly.[3]

4.13 In the Agricultural Holdings (Scotland) Act 1949, there is a provision to the effect that a landlord of a holding, whatever may be his estate or interest, may, for the purposes of the Act, do or have done to him any act which he might do or have done to him if he were absolute owner.[4] This provision is not confined in its application

[1] In Slowey v. Robertson (1865) 4M. 1 however there is an instance of a liferenter pursuing an action for removing in a tenancy which he had created, and doing so with the concurrence of the fiar.

[2] Buchanan v. Yuill (1831) 9S. 843; Zuill v. Buchanan (1833) 11S. 682. In Ardwel v. McCulloch (1632) Mor. 13798 it was held that the fiar could not give effective notice himself while the liferenter survived.

[3] McChristie v. Fisher (1825) 4S. 11, a case in which irritancy was the ground of action.

[4] S.80.

to matters of improvements, as was the case with its counterpart in earlier legislation.[1] Even so, the reference to the purposes of the Act may be said to restrict its application to such matters as the giving or receiving of notices or consents. Thus interpreted, however, it would still be significant in removing the diffiuclty affecting the giving of notices where there are interests of liferent and fee, and enabling one or other party to give a valid notice, if not to proceed with a removing action on the basis of that notice. Whether such a provision could usefully be extended to affect leases generally is a matter for consideration. The widespread adoption of the trust liferent, with the trustees having all the necessary powers, including that of removing tenants,[2] may be thought to make it unnecessary to amend this particular aspect of the law.[3] If, however, an amendment were to be made, it might be suggested that a liferenter, like a co-proprietor, should be entitled by himself to give notice and take proceedings for recovery of possession, subject to calling the fiar as an additional defender, or at least intimating the proceedings to him.

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[1] Agricultural Holdings (Scotland) Act 1923, s.39.

[2] Trusts (Scotland) Act 1921, s.4(c).

[3] Trust liferents have, however, become less popular under the present-day taxation code which has perhaps led to some revival of interest in the proper liferent.

Tenants

4.14 The proposal of the Law Reform Committee appears to be directed to the case of an action at the instance of a proprietor against his tenant, but the matter of title to sue must also be considered as affecting cases where there has been a sub-let, or where in some way the pursuer finds himself in the position of a lessee from the proprietor. Here there would appear to be four distinguishable situations. Firstly, in the case where the tenant who has sub-let is proceeding against his sub-tenant, the question of title to sue will not arise, as the basic rule will prevent the sub-tenant from impugning the title of the party from whom he derived his own right. Secondly, where after sub-letting has taken place there is a change in the identity of the main tenant, or principal lessee, the successor to the main tenancy proceeding for removal of sub-tenants will have to establish his title as based on an assignation or other form of transmission.[1] A third case may be said to arise out of provisions for interposed leases contained in section 17 of the Land Tenure Reform (Scotland) Act 1974. In terms of that section, the interposed lease creates a relationship of tenure between the grantee of that lease and the original lessee, putting the latter in the position of a sub-tenant. Here the interposed lease would itself constitute the grantee's title to proceed for removal of the original lessee as sub-tenant. Finally, there is the case which in the past has caused certain difficulties, this being the situation where, with the property already let wholly or partially, the owner grants a lease to a new tenant, leaving him to

[1] Sinclair v. Leslie (1887) 14R. 792; Forsyth v. Stronach (1946) 62 Sh.Ct.Rep. 127.

take the necessary steps to secure possession. It appears that, to enable him to proceed against existing tenants, the new lessee, unless there is specific power given to him in his lease or that lease has a duration of not less than 19 years, must have obtained possession of the property, which in the case of property already let would seem to mean that he has been collecting on his own behalf the rents of the tenants.[1]

4.15 Possession in the case of a lessee is the counterpart of infeftment taken by a person acquiring the proprietary interest in creating a real right to the interest acquired. Accordingly, it would appear that, for application to the case of a lessee pursuer, the rule proposed by the Law Reform Committee should be adapted to provide that the pursuer should hold a right or title giving him a legal right to immediate possession, physical or civil, as the case may be. That would seem to meet the practical requirements of the second, third and fourth cases mentioned above, and remove certain difficulties exemplified in the authorities as affecting the fourth case. In formulating this rule, however, a distinction should be made between registered or registrable leases on the one hand, and non-registrable leases on the other. While in the past possession has been available to any lessee as a means of obtaining a real right, whether or not his lease has been registrable,

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[1] Gentle v. Henry (1747) Mor. 13804; Johnston v. Dickson (1831) 9 S. 452; Logie v. Corsie (1847) 9D. 1164 and Sinclair v. Leslie, supra.

when registration of title is in operation, registration in the Land Register will be the only means of attaining a real right to a registrable lease.[1] Accordingly, it should be provided that when registration of title applies a lessee pursuer founding on a registrable lease must hold a title to the tenancy capable of registration in the Land Register,

Debtors under ex facie absolute securities

4.16 Certain difficulties have arisen with removing proceedings at the instance of parties whose interest in their property is subject to a security constituted by ex facie absolute disposition.[2] While the Conveyancing and Feudal Reform (Scotland) Act 1970 put an end to the creation of such securities over heritable property, their widespread use for long-term arrangements, such as building society loans, means that these problems are likely to remain of practical moment for some considerable time. The basic rule already noted results that if a lease was granted by the debtor/proprietor with the ex facie absolute security already in existence, his title to sue for removal could not be impugned by a tenant deriving right from him. If, after granting a lease, the lessor was feudally divested by an ex facie absolute disposition to a creditor, it appears that his title to sue will not be prejudiced provided there is a back letter or other document establishing his retention of the radical

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[1] Land Registration (Scotland) Act 1979, s.3(3)(a).

[2] Paton and Cameron op. cit. pp. 253/254.

right.[1] Where, however, the debtor/proprietor who is pursuer in an action for recovery of possession is not the granter of the lease under which the defender is in possession, two conditions must be fulfilled for that debtor/proprietor to have a title to sue: (i) he must have been infeft before the granting of the security,[2] and (ii) there must be satisfactory evidence of the subsistence of his radical right.[3] The case giving rise to difficulty is that in which, as commonly happened, a party financing his purchase by building society loan was never infeft in the property, but consented to a disposition by the seller to the building society. In these circumstances it is at least doubtful whether the borrower/proprietor, even with his reversionary right duly evidenced, has a title to sue in an action of removing against a tenant whose lease was granted by some previous owner. This problem could be eliminated if it were provided that, subject always to the relevant terms of any agreement with the creditor, the debtor in a loan for which there is an ex facie absolute security recorded in the Sasine Register will be entitled, on production of the appropriate evidence of his radical or reversionary right, to initiate and carry through proceedings for recovery of possession of the property whether or not he himself has had a title to that property.

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[1] Traill v. Traill (1873) 1R. 61; Barclay v. Miller (1921) 37 Sh.Ct.Rep. 96 (an ejection case); Fraser v. Sharp 1957 S.L.T. (Sh.Ct.) 14.

[2] Kerr v. Young (1920) 36 Sh.Ct.Rep. 184.

[3] Traill v. Traill, supra.

Heritable creditors

4.17 It appears that the holder of a heritable security, unless he is the granter of the lease, has no title to sue for a tenant's removing if he is not in possession or proceeding with the proprietor's consent or holding a decree of maills and duties.[1] The same applies to an adjudger for debt.[2] A decree of maills and duties, however, is not required, at least in the case of heritable creditor, to enable him to have a person such as a squatter or tenant at will ejected.[3] The position of administrators, such as trustees, as pursuers in proceedings for removing or ejection creates no special problems, the taking of such proceedings being within the power normally belonging to persons coming within the wide statutory category of trustees.[4]

Agents or factors

4.18 In the case of agents or factors, the basic rule established by authority of long standing is that, even if empowered to grant leases in name of their constituents, they are not, without express authority, entitled to take steps for the removal of tenants or other occupiers.[5] To

[1] Sinclair v. Hughes (1954) 70 Sh.Ct.Rep. 137: cf. Hutchison v. Alexander (1904) 6F. 532. But this view cannot square with the decision in Trade Development Bank v. Warriner & Mason 1980 S.L.T. 223.

[2] Graham Stewart, Diligence, p.521; Lockhart (1628) Mor. 13790.

[3] Graham Stewart, loc. cit.; Blair v. Galloway (1853) 16D. 291.

[4] Trusts (Scotland) Act 1921, ss. 2 and 4(1)(c), as amended by Trusts (Scotland) Act 1961, s.3 and Succession (Scotland) Act 1964, s.20 (covering executors dative).

[5] York Building Company v. Carnegie (1764) Mor. 4054; Rankine op. cit. p.518.

this rule, however, there is a statutory exception, now represented by Rule 68 of the Summary Cause Rules (Sheriff Court) 1976, reproducing Rule 115 from the First Schedule to the Sheriff Courts (Scotland) Act 1907. It provides that a summary cause for the recovery of possession of heritable property raised under section 38 of the 1907 Act may be at the instance of a proprietor or factor or any other person by law authorised to pursue a process of removing. It appears that this rule was incorporated in the new Summary Cause Rules because it was not among the rules from the 1907 Schedule incorporated by reference in the relative Act of Sederunt. Section 38 of the 1907 Act deals with summary removings from heritable properties let for less than a year, and provides that any person by law authorised may present the summary application for removing, a special form for which appears under letter K in the Schedule to the Act. As pointed out by Lewis,[1] Rule 115 as contained in that Schedule amplifies the wording of the section by introducing the reference to factors. The inclusion of this provision in the new Summary Cause Rules would seem to give rise to certain questions:-

(i) Is it intended, despite the adoption of one common form of action for recovery of possession of heritable property, to maintain in this respect the distinction between summary removings as provided for in section 38 and the relative rules in the 1907 Act, on the one hand, and proceedings for recovery of possession generally, on the other?

[1] Sheriff Court Practice (8th edn.) p.274.

(ii) Is it intended that there should continue to be, in the case of removings affecting lets for less than a year, a facility which will not be available in other cases to which the new summary cause applies?

4.19 Affirmative answers to these questions would involve that when the provisions of the 1907 Act are replaced, as intended, by new legislation, there will have to be incorporated in some form the relative content of section 38 of the 1907 Act.

CHAPTER 5 DEFENDERS

5.1 This matter is not discussed in the Report of the Law Reform Committee, but requires consideration, particularly in relation to certain problems concerning sub-tenants. Where there is more than one tenant, just as where there is more than one landlord, any notice excluding tacit relocation and terminating the tenancy must be given to all parties affected by it. In the case of tenants, the right to receive notice or warning of termination will as a general rule coincide with the right to be called as defenders in any ensuing removing proceedings. All persons in possession as of right are entitled to be warned or called if their removal is being sought,[1] although it is apparently competent to restrict the warning and calling to one or more of a number of co-tenants where the intention is that they alone should be removed.[2]

5.2 Certain problems, however, arise where a tenancy has been assigned or where there has been sub-letting, total or partial. The Act of Sederunt of 1756, now embodied in the codifying Act of Sederunt of 1913 (chapter xv, section 3), provides that where an assignation of a lease has not been intimated by instrument, or where the subjects of a lease have been wholly or partly sub-let, removing proceedings or warnings directed against or given to the principal or original tenant are effectual against

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[1] McDonald (1807) Hume 580.

[2] Rankine op. cit. p.520; Macdonald v. Sinclair (1843) 5D. 1253 and see para. 2.29 above.

the assignee or sub-tenants. The application of these provisions appears to be restricted to agricultural tenancies,[1] but their effect has been described as largely declaratory of the common law as affecting tenancies generally.[2]

Assignees

5.3 In the case of assignation, the Act of Sederunt appears to be contemplating a transfer of the whole tenancy interest, although partial assignations are in some cases competent, particularly under the much later statutory provisions for registration of leases.[3] Clearly, an assignation of the tenant's whole interest, if permissible under the terms and conditions of tenancy, express or implied,[4] and duly intimated to the landlord, or an assignation expressly consented to by the landlord, must put the assignee in the place of the original tenant for all purposes, including removing proceedings. A question, however, arises as to the form of intimation to the landlord necessary to bring about this result. The Act of 1756 refers to intimation by instrument. According to Rankine,[5] this meant notarial intimation of some

[1] Wright v. Wightman (1875) 3R. 68.

[2] Rankine op. cit. p.520.

[3] E.g. Registration of Leases Act 1857, Sched. A.

[4] In some cases, e.g. agricultural tenancies of normal duration, assignees like sub-tenants are by implication excluded. In other cases, such as urban lets, the exclusion is not implied but depends on the terms of the lease. Any assignation in face of an exclusion, express or implied, must put the assignee in the position of a possessor without right or title, similar to that of an unauthorised sub-tenant. See para. 5.4 below.

[5] Op. cit. p.521.

kind, but he suggests that less formal intimation may be acceptable, although the private knowledge of the landlord would not suffice. The various forms of intimation to landlords recognised in practice are listed by Rankine in another context[1] where he clearly indicates that writing in some form is required, verbal intimation being ineffective. It is thought, however, that where the lease and the assignation thereof can be and are registered in the Sasine Register, or in the Land Register, the publication thus involved must be regarded as constructive if not actual intimation to all concerned, including the landlord. It would appear, too, that a landlord who knows of the assignee's existence and has been accepting rent from him should not be allowed to disregard him in taking steps for termination of the tenancy. In any case affected by the Act,[2] and likewise at common law, the position will, however, be that, failing due intimation or its equivalent, the landlord is entitled to have the assignee removed on the basis of warnings given to and proceedings directed against the original tenant alone. On the other hand, an assignee having intimated his interest to the proprietor or landlord for the time being should be entitled to assume such intimation has been duly transmitted to the successor, singular or universal, of the proprietor.

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[1] Op. cit. p.182.

[2] I.e. the Act of Sederunt of 1756.

Sub-tenants

5.4 More difficulty arises with sub-tenancies, particularly where these are legitimate, either by reason of the conditions of let, express or implied, or because they have the landlord's consent. Sub-letting excluded by the lease or by legal implication, and not having the landlord's consent, makes the sub-tenant a possessor without right or title against whom the landlord may take ejection proceedings requiring no prior notice or warning.[1] The better view, however, appears to be that, even in such a case, the principal tenant should be called as an additional defender.[2] In cases of agricultural tenancies affected by the old Act of Sederunt, the giving of warning to and taking of removing proceedings against the principal tenant alone will entitle the landlord, having obtained decree in such proceedings, to have the

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[1] Paton and Cameron op. cit. pp. 224 and 257; Rankine op. cit. pp. 520/521.

[2] In certain early cases this appears to have been regarded as unnecessary, at least where the whole subjects had been sub-let and the principal lease was being terminated on its expiry. See Lady Maxwell v. Tenants (1628) Mor. 2228 and per contra Lady Nithsdale v. Tenants (1627) Mor. 2227. More recently however the view has been taken that the principal tenant should always be called as he may have an interest to object and/or may have grounds of defence unknown to the sub-tenant. See Cromar v. Duke of Gordon (1830) 8S. 353; Earl of Elgin v. Walls (1833) 11S. 585; and Morison v. Grant (1893) 11 Sh.Ct.Rep. 201.

authority for the view that the notice to the sub-tenant may competently be given by the proprietor himself.[1] A sub-tenant in possession as of right who has not received notice either from the landlord or from the principal tenant cannot be ejected by the former despite the termination of the main tenancy.[2] In the case of domestic tenancies affected by the Rent Acts, there is a provision for a sub-tenant who remains after the termination of the main tenancy becoming tenant of the landlord or proprietor on the terms on which he had held from the principal tenant.[3] Again, under the statutory provisions for interposed leases, the termination of the interposed tenancy during the subsistence of the original tenancy which has become a sub-tenancy re-establishes the relationship between proprietor and occupier under the original tenancy.[4] These cases apart, the position of a sub-tenant remaining after the termination of the main tenancy is unclear. The statutory provisions concerning agricultural tenancies[5] might be said to proceed on an

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[1] Robb v. Menzies, supra, and Robb v. Brearton, supra.

[2] Robb v. Brearton, supra. As shown by the cases of Carmichael v. Bertram (1711) Mor. 13833 and Johnston's Trs. (1803) Mor. 15207 this rule applies likewise on the death of a tenant holding a liferent lease, although in that case no tenancy interest passes to any successor of the main tenant: see Hunter op. cit. pp pp. 59/60.

[3] Rent (Scotland) Act 1971, s.17.

[4] Land Tenure Reform (Scotland) Act 1974, s.17.

[5] See above.

assumption that the termination of the main tenancy results in the simultaneous termination of any sub-tenancy as the security of tenure provisions, although operative as between principal tenant and sub-tenant, are not available to the sub-tenant when the landlord terminates the main tenancy. As has been indicated, however, the occupier under a legitimate sub-let who has not received notice of termination is not liable to ejection on the termination of the main tenancy.[1] The question arises whether, following upon the termination of the main tenancy, proceedings for recovery of possession directed against such a sub-tenant are competent without prior notice. In a leading case in this branch of the law, the court reserved their opinion on this question which they were not required to decide.[2] If tacit relocation were regarded as in the circumstances applying to the sub-tenancy, the appropriate period of notice would have to be given before a removing action could be raised and there might be some doubt as to the duration of the tenancy on which the sub-tenant should be regarded as occupying the property.[3] In the same case, opinions were expressed that the sub-tenant's position as regards tacit

[1] The decision in the case of South Western Farmers Ltd. v. Gray 1950 S.L.T. (Sh.Ct.) 10, an ejection action against a sub-tenant, is inconsistent with this proposition but appears to ignore the authorities on the matter to which no reference is made in the sheriff's note.

[2] Robb v. Brearton, supra.

[3] Rankine op. cit. p. 198 indicates under reference to the case of Robb v. Menzies, supra, that the sub-tenant may be ejected at the end of the main tenancy but not summarily like a squatter.

relocation might be less favourable than that of the principal tenant holding direct from the landlord.[1] Accordingly, it might be argued that proceedings could be raised without notice or at least following upon the minimum statutory period of notice, with the effective date of such notice not tied to any particular term.

5.6 Identity of sub-tenant unknown. The same case[2] reveals another difficulty which may affect the landlord seeking vacant possession of tenanted subjects which have been legitimately sub-let. It is possible, particularly when sub-letting has not required the landlord's consent, that the identity of the sub-tenants in occupation at any particular time may not be known to or readily ascertainable by the landlord. Except under the Rent Acts,[3] or in virtue of the terms of a particular lease, there is no obligation on a tenant entitled to sub-let to notify his landlord of the identity of the sub-tenants or other

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[1] Per Lord McLaren in Robb v. Brearton, supra, at p.888; and see the discussion of this matter in paras. 2.29 and 2.30 above.

[2] Robb v. Brearton, supra, see also Johnston Brothers v. Feggans, supra.

[3] S.121 of the Rent (Scotland) Act 1971, dealing with sub-letting of dwellinghouses let on or subject to protected or statutory tenancies, requires a tenant who is sub-letting to notify certain particulars of the sub-let to his landlord. The only sanction for breach of this section is a fine. The object of requiring notification to the landlord of particulars of sub-tenancies appears to be the disclosure of sub-letting at excessive rents which is a ground for dispossession of the principal tenant. (See Sched. 3, Case 9).

particulars of the sub-letting. The landlord may thus be in a difficulty as regards notifying the termination of tenancy to the sub-tenants and calling them as defenders in the removing proceedings. At one time this difficulty might, in urban tenancies, have been overcome by the procedure of chalking the door,[1] but that procedure seems to have fallen into disuse and, in any event, never applied outwith the field of urban tenancies. It may, however, be for consideration whether, for cases of this kind, there should be statutory provision made for notification to an occupier who is unidentifiable, by addressing to occupants unnamed a notice which would be placed on some prominent part of the property, or delivered or left at the place where postal delivery would normally be made.[2] In the context of proposals for reform of the law in relation to irritancies in leases, consideration was given to the desirability of conferring on sub-tenants, as well as on tenants, a right to receive notice of warning of the proprietor's intention to invoke an irritancy, subject, in the case of sub-tenants, to their interest having been notified to or being otherwise known to the proprietor.[3] The difficulties involved in the application of the concept to irritancies would apply equally to notification of sub-tenants on termination of the main tenancy in normal course. The sub-tenant who should notify his interest to

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[1] Robb v. Brearton and Johnston Brothers v. Feggans, both supra.

[2] Cf. Agriculture (Scotland) Act 1948, s.83(4).

[3] See Scottish Law Commission Memorandum No.52 on Irritancies in Leases (April 1981), paras. 6.04 and 6.06.

the proprietor may be unaware of the identity of the head landlord or proprietor, or even of the existence of a main tenancy. Again, notification having been given, a change of ownership of the property during the subsistence of the main tenancy may result in the proprietor invoking the irritancy being unaware of the sub-tenancy interest or the parties in right of it.[1]

5.7 The Land Tenure (Reform) Scotland) Act 1974, dealing with removing proceedings in respect of a breach of the statutory prohibition of residential use in long leases, provides for intimation of the proceedings to sub-tenants whose interests are disclosed by a search in the Sasine Register, an examination of the valuation roll, "or otherwise".[2] The search in the Sasine Register, of course, arises only under registered leases, and will disclose only such sub-lets as qualify for registration as long leases. While the valuation roll should reveal the names of occupiers for the time being, it is by no means certain to disclose all sub-tenants and will often omit those whose lets are of short duration. The use of the words "or otherwise" in the subsection would appear to recognise that search and examination as prescribed should not be regarded as exhaustive or conclusive as regards the existence of sub-tenancies.

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[1] See Report on Irritancies in Leases (Scot. Law Com. No. 75, 1983), para. 5.3.

[2] S.10(2)(b).

5.8 While the procedure prescribed in the 1974 Act may be appropriate in the special circumstances for which it provides, it might be considered unreasonable that a proprietor seeking recovery of possession on the termination of a tenancy in normal course should be put to such additional trouble and expense to safeguard the interests of sub-tenants. In that case if, when proceedings for recovery of possession have to be taken, there is uncertainty about or difficulty in ascertaining the identity of the sub-tenants to be called as defenders, the procedure proposed for citation of unidentified defenders in proceedings against possessors vi clam aut precario[1] might be made available for adoption with the sanction of the court.

5.9 Termination by tenant. The position of sub-tenants as defenders in removing proceedings has been discussed on the assumption that the initiative in terminating the main tenancy is being taken by the landlord or proprietor. It appears that in Scotland there is no direct authority on the position arising when a principal tenant who has legitimately sub-let voluntarily terminates the main tenancy with the sub-tenancy still subsisting.[2] In such circumstances, the view taken in England is that a sub-tenant who has not received notification of termination retains, in a

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[1] See paras. 7.7-7.9 below.

[2] The situation seems to have arisen although the issue was apparently not canvassed in the case of the Earl of Marchmont v. Fleeming (1743) Mor. 13839.

question with the landlord or proprietor, the rights which he has derived from the principal tenant until his sub-tenancy is terminated in the appropriate manner.[1] If that view were to be adopted in Scotland the position of the sub-tenant in such circumstances would be at least as strong as that of the sub-tenant who does not receive notice when the landlord is terminating the main tenancy as discussed above.

[1] See Brown v. Wilson (unreported but commented on in [1949] 208 L.T. 144), a case in which the notice given to the sub-tenant was rendered ineffective by certain provisions of the agricultural holdings legislation. In deciding the case the court referred to certain observations made by the judges in Mellor v. Watkins [1874] L.R. 9 Q.B. 400.

CHAPTER 6 CAUTION FOR VIOLENT PROFITS

6.1 The Law Reform Committee recommended that in all actions for recovery of possession of heritable property it should be competent for the sheriff in his discretion to order the defender to find caution for violent profits.[1] In discussing the state of the law in this matter they referred to a doubt as to whether an order for caution for violent profits was competent in an action of ejection.[2]

6.2 Prior to the passing of the Sheriff Courts (Scotland) Act of 1907, the position had been regulated by an Act of Sederunt of 1839 enacted under the Sheriff Courts Act of 1838. By section 34 of that Act of Sederunt, in actions of removing and in summary applications for ejection, the defender was required "to come prepared with a cautioner for violent profits at giving in his defences or answers, unless he instantly verify a defence excluding the action". That provision ceased to have effect when the 1838 Act was repealed by the Act of 1907[3] under which, in any defended action of removing,[4] the sheriff has a

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[1] Cmnd. 114 (1957), Appendix, para. 7.

[2] Ibid (Report), para. 16.

[3] Inglis' Trs. v. Macpherson 1910 S.C. 46.

[4] An action is not defended and accordingly the order will not be made when the defender without lodging defences intimates that he is to invoke a statutory provision under which the court can suspend the execution of an order for possession. See Blythswood Friendly Society v. O'Leary 1966 S.L.T. (Sh.Ct.) 64 where the defender was founding on the Protection from Eviction Act 1964.

discretionary power to order the defender to find caution for violent profits.[1] While the order for caution has thus become discretionary and not mandatory, it appears that the practice has been for the discretion to be exercised having regard to the nature of the defence submitted, that having been the determining factor under the former rule.[2] What constitutes an instantly verifiable defence must be a matter of opinion depending on the circumstances of the particular case.[3] While an objection to the form of notice or the manner in which it has been given may justify refusal of a motion for caution,[4] tacit relocation founded on lack of notice of termination of let was not regarded as an instantly verifiable defence for a tenant who was bound by special agreement to remove without notice.[5] Likewise a lease which was unstamped

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[1] Sheriff Courts (Scotland) Act 1907, Sched. 1, Rule 110. In summary removings the defender's entitlement to lodge written defences is dependent on his having found caution or its having been dispensed with (Rule 121).

[2] See Milne v. Darroch (1937) 53 Sh.Ct.Rep. 3. But the sheriff can dispense with caution even where the defence appears unsatisfactory.

[3] Rankine, p.580 and the cases of: Wilson v. Henderson (1823) 2 S. 380 (old edition 428); Johnstone v. Maxwell's Trs. (1845) 7D. 1066; and Robb v. Menzies (1859) 21D. 277; the first being a case arising before the 1839 provision and the other two being cases decided with that provision in force.

[4] Kirk v. Aitchman (1929) 45 Sh.Ct.Rep. 31.

[5] Johnstone v. Maxwell's Trs., supra.

and improbative was held not to verify the tenant's defence of entitlement to continued possession.[1] On the other hand, an order for caution will not be made if some element in the landlord's case requires proof,[2] a situation more likely to arise in extraordinary removings than in ordinary removings.[3]

Actions of ejection

6.3 As regards actions of ejection, two questions require consideration. (a) Does there exist power on the part of the court to order caution for violent profits in such cases? and (b) if that is not so, or if there is doubt on the point, should statutory provision for such power now be made?

6.4 Standing the observations of the Court of Session in the case of Inglis' Trs. v. McPherson,[4] as referred to by

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[1] Forsyth v. Aird (1853) 16D. 197.

[2] Rankine loc. cit.; Oliver v. Weir's Trs. (1870) 8M. 786, per Lord Cowan at pp. 788/9.

[3] Extraordinary removings as affected by this question are discussed in paras. 6.6-6.8 below. They do not fall within the provisions of the Sheriff Courts (Scotland) Act 1907, and doubts had been expressed as to whether they were covered by s.34 of the 1839 Act of Sederunt. See Rae v. Henderson (1837) 15S. 653, per Lord Corehouse, founding on Douglas v. Idington (1628) Mor. 13892; see also Ross v. Duff (1899) 15 Sh.Ct.Rep. 227.

[4] 1910 S.C. 46. See in particular the opinion of Lord Kinnear that caution for violent profits cannot be imposed except in terms of the statute or otherwise under some long-established practice. See also Douglas v. Frew (1910) 26 Sh.Ct.Rep. 355 where, following Inglis, the order for caution was refused in an action of summary ejection against the debtors in a heritable security, the pursuer being the purchaser on a sale under the bond.

the Law Reform Committee in their Report,[1] it would appear that the answer to the first question must be in the negative but, as pointed out by the Committee, there have been, since that decision, sheriff court cases of ejection in which caution for violent profits has been ordered.[2] On the other hand, the order was refused as

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[1] Cmnd. 114 (1957), para. 16.

[2] The Committee's report refers to Glasgow Lock Hosptial v. Ashcroft 1949 S.L.T. (Sh.Ct.) 58 and Fife County Council v. Hatten 1950 S.L.T. (Sh. Ct.) 13. Later decisions to the same effect are found in Thomson's Trs. v. Harrison (1958) 74 Sh.Ct.Rep. 77 and Cheshire v. Irvine 1963 S.L.T. (Sh.Ct.) 28. In the Glasgow Lock Hosptial case Sheriff Principal Black distinguished Inglis' Trs. (supra) as a decision resting on a statute (the Heritable Securities Act 1894) dealing with a contract whereas there was no contract in the case with which he was dealing. His decision was followed in the other three cases cited here although with some hesitation in Thomson's Trs. and Cheshire both being cases in the Glasgow Sheriff Court where the sheriffs substitute concerned regarded themselves as bound by Sheriff Black's decision.

incompetent in the latest reported case.[1] Accordingly, if it is considered that orders for caution for violent profits should be within the court's power in ejection proceedings, statutory provision appears necessary at least to clarify the position.

6.5 On the question of the desirability or otherwise of such a provision, we have the view of the Law Reform Committee that, in this matter, a squatter should not be

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[1] MacKays v. James Deas & Son Ltd. 1977 S.L.T. (Sh.Ct.) 10. Here in the Edinburgh Sheriff Court Sheriff Principal Bryden, who as sheriff substitute in the Glasgow Sheriff Court had considered himself bound by Sheriff Black's decision in deciding Thomson's Trs., supra, reversing the sheriff held that the process of ejection was not covered by the provisions of the 1907 Act (Rules 110 and 121) and that following the decision in Inglis' Trs. there had since the 1907 Act been no statutory authority for an order except in the limited classes of case covered by the provisions of that Act which did not include ordinary actions of ejection. This view accords with that of Dobie (Sheriff Court Practice, p.416) and also with that of a much earlier author, namely McGlashan (Sheriff Court Practice (4th edn.) p.439) to which Sheriff Principal Bryden referred. See also McDonald v. Burt (1950 C.L.Y. 4959) where a sub-tenant was seeking suspension in respect of a decree of ejection granted against the main tenant: Lord Mackintosh refused a motion for caution for violent profits which could not be granted in the course of a remedy which was not a removing nor a process designed to bring a removing under review.

placed in a better position than a tenant.[1] While there is a suggestion in the latest reported case that the exclusion of ejections from the 1907 rule may have been done advisedly and with justification,[2] it is difficult to see any ground for a distinction between actions of removings and actions of ejection in this matter, particularly as the same form of action, namely a summary cause for the recovery of possession of heritable property, is now the normal form of process in each case.[3]

Extraordinary removings

6.6 The Law Reform Committee's proposal is presumably intended to cover extraordinary as well as ordinary removings although extraordinary removings were not affected by the provisions of the 1907 Act and there have been certain doubts as to whether in these removings an order for caution for violent profits is competent.[4] An

[1] Cmnd. 114 (1957), para. 16.

[2] Sheriff Principal Bryden in Mackay's case, supra, referred to a comment in McGlashan op. cit. that " it is difficult to enforce the provision in cases of ejection without prior warning and often may lead to great oppression". The authorities cited by the author for this proposition namely Forsyth v. Aird (1853) 16D. 197 and Robb v. Menzies (1859) 21D. 277 do not appear to support his view, and in any event it would appear that with the order now being made a matter of discretion the risk of oppression should be minimised if not eliminated.

[3] Sheriff Court (Scotland) Act 1971, s.35.

[4] On one view at least these actions were unaffected by the provisions for caution for violent profits in the 1839 Act of Sederunt, s.34. See Oliver v. Weir's Trs. (1870) 8M. 786 and Rae v. Henderson (1837) 15S. 653.

early decision proceeded on the basis that defenders in such cases were not required to find caution unless it was so stipulated as a term of the tenancy.[1] Two factors appear to have complicated the development of the law in this particular matter. Firstly, a motion for caution will often be met by the argument that there are certain facts which a pursuer such as a landlord seeking an irritancy of the lease will have to prove before decree in his favour can be granted. Until these facts have been proved, the defender whose tenancy it is sought to terminate prematurely will not be in the position of a vicious intruder liable for violent profits.[2] It appears, however, that the order for caution is competent and will be made in a case where, with the landlord's averments established or admitted, the tenant is in the position of having to prove certain facts for the purpose of his defence.[3]

6.7 Agricultural tenancies. The second complicating factor has been the existence of certain provisions in an Act of Sederunt of 1756. That Act applied only to

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[1] Douglas v. Idington (1628) Mor. 13892, followed in Rae v. Henderson, supra.

[2] St Clair v. Grant (1687) Mor. 13893; Oliver v. Weir's Trs., supra; Ross v. Duff (1899) 15 Sh.Ct.Rep. 227; Mackenzie v. Mackenzie (1848) 10D. 1009; Reid v. Bruce (1902) 18Sh.Ct. Rep. 247 (an action described as a summary ejection but more properly classified as an extraordinary removing).

[3] But see para. 6.8 below concerning the case of Simpson v. Goswami. For earlier authority see Cossar v. Home (1847) 9D. 617 (a case which should perhaps have been dealt with under the Act of Sederunt 1756) and Burton v. Mechie (1903) 21 Sh.Ct.Rep. 63 (where the tenants admitted bankruptcy constituted a conventional irritancy and the action, although described as a summary ejection, would appear to have been properly classified as a removing).

agricultural tenancies,[1] but as it happens most of the reported cases of extraordinary removings have concerned such tenancies. By section 5 of the 1756 Act,[2] a tenant who has his rent a year in arrears, or has deserted or abandoned his farm leaving it uncultivated, may have raised against him by his landlord an action in which he can be ordained within a certain time to find caution for the arrears and for payment of the rent for five crops following, or during the outstanding currency of the lease, if less. His failure to implement this order will result in decree for his removal. In cases where the ground of action is arrears of rent, this provision has been replaced and superseded by a provision in the Agricultural Holdings Acts entitling the landlord whose tenant is six months in arrear with his rent to raise an action of removing in the sheriff court, in which the sheriff may, unless the arrears of rent are paid or satisfactory caution found for them and for one year's further rent, order the tenant's removal.[3] It is provided also that the above-mentioned provision of the 1756 Act, as incorporated in the codifying Act of Sederunt, shall not apply in any case where the procedure under the section in the 1949 Act is competent.[4] Thus, the 1756 provision remains available only

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[1] Wright v. Wightman (1875) 3R. 68.

[2] Now s.5 in the codifying Act of Sederunt, chapter xv.

[3] See Agricultural Holdings (Scotland) Act 1949, s.19.

[4] Ibid, ss. (3).

in the rare case of the tenant's desertion or abandonment of the farm, and it has been suggested that even in that case the remedy of caution and removing as provided for in the old Act is now practically withheld from a landlord.[1] In the past there appears to have arisen, in cases of extraordinary removing involving agricultural subjects, some confusion as between the 1756 provision and the matter of caution for violent profits as based on the general law, there being cases where the distinction is clearly enough recognised[2] but others in which that is not so.[3]

6.8 Urban tenancies. The most recently reported case involving an extraordinary removing,[4] however, concerned an urban tenancy and so did not give rise to any question under the 1756 provision. Here the sheriff had allowed the defender in an action of irritancy and removing based on arrears of rent to lodge defences on condition that he first consigned a sum in respect of arrears of rent and as caution for violent profits. The sheriff principal who reversed this decision, while allowing the consignation to remain so far as it related to past rents, held that in an extraordinary as opposed to an ordinary removing where it

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[1] Rankine op. cit. p.336 where the learned author would appear to be assuming that in the case of desertion or abandonment there will also be arrears of rent bringing the case within the provisions of the Agricultural Holdings Acts.

[2] Oliver v. Weir's Trs., supra.

[3] Cossar v. Home, supra, distinguished in Mackenzie v. Mackenzie, supra.

[4] Simpson v. Goswami 1976 S.L.T. (Sh.Ct.) 94.

is sought to cut short the tenancy because of some extraneous fact, such as default in payment of rent, the facts relevant to the irritancy must be established before the defender can be regarded as a violent possessor and the court entitled to order caution for violent profits. Here the defender had averred certain defaults in the pursuer's obligations as landlord which, if established, would justify his retention of the rent, and that matter must be investigated before any question of caution for violent profits could arise. A different ruling might perhaps have been expected with the arrears of rent apparently admitted, and the tenant having the onus of proving the alleged defaults by the landlord, but in any event the decision does not cast any doubt on the competency of an order for caution for violent profits being made in an extraordinary removing in appropriate circumstances.[1] Thus, the adoption of the Law Reform Committee's proposal giving the court a discretion to make an order for caution in all actions for recovery of possession of heritable property would not be changing the law in respect of extraordinary removings, but merely clarifying any doubt there might be as to the competency of an order in these cases.

Summary causes

6.9 The process in which these questions of caution for violent profits will now arise will normally be a summary

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[1]See Paton & Cameron, pp. 281/2; Rankine op. cit. p.582.

cause under the Sheriff Courts (Scotland) Act 1971.[1] The competency of such an order in a summary cause was considered in a recent, unreported case.[2] This concerned the tenancy of a dwellinghouse for which a notice to quit had been issued by the landlord and had expired. There were averments of arrears of rent which were not admitted. It was agreed that the tenancy was, or had been, a protected one in terms of the Rent Acts, and the defender's contention was that it became a statutory tenancy on the expiry of the notice to quit. The pursuers moved for an order for caution for violent profits but the sheriff, although taking the view that it was within his discretion to make the order, concluded that, as in the case of a protected or statutory tenancy he could not in the end of the day grant decree of removal unless satisfied it was reasonable for him to do so, he should not make the order. He took account of the fact that proof was due at an early date, and also that the defender's inability or failure to comply with the order must result in his being removed with the protection given by the Rent Acts elided. In his note, the sheriff also referred to two arguments put forward on behalf of the defender against the competency of the order for caution. The

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[1] S.35: but any amending provisions should be framed having in view the cases in which some other form of process may be used in virtue of the exception in s.35(c) or again by the introduction of declaratory conclusions as commonly used in extraordinary removings based on irritancy.

[2] Nisbet v. Thomson, Stirling Sheriff Court, 9 October 1980.

first of these was based on the operation of section 3(1)(b) of the Rent (Scotland) Act 1971, making the tenant a statutory tenant after the termination of the contractual or protected tenancy on the expiry of the notice to quit. On this basis, it was argued that the defender was not possessing violently but as a matter of statutory entitlement until the court pronounced decree against him, and until then his ultimate liability was for rent and not for violent profits. It appears that the sheriff would have regarded this argument as in itself conclusive[1] had not there been the element of rent arrears which resulted that the tenancy was possibly terminable by way of irritancy when the protection of the Rent Acts would not have applied. From the information available to the court, it was not possible to say whether the action was in substance an extraordinary removing based on irritancy. The sheriff took the view that an order for caution would be competent in such a case, but indicated that in the particular circumstances he would have refused the application, the position as he saw it being a fortiori of section 10 of the Rent (Scotland) Act 1971.

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[1] A conclusion which appears consistent with the decision in Heritable and General Assets Co. Ltd. v. Asple (1918) 35 Sh.Ct.Rep. 14 concerning a similar provision in the Increase of Rents etc. Act 1915, but the ruling in Milne v. Darroch (1937) 53 Sh.Ct.Rep. 3 shows that a plea founded on the protection given by the Rent Acts will not necessarily preclude the making of an order for caution for violent profits.

6.10 The defender's other argument was that section 35(1)(b) of the Sheriff Courts (Scotland) Act 1971 having effectively created a new type of action, distinct from an action of removing or an action of ejection, there was no statutory authority for an application for caution for violent profits. In rejecting this argument the sheriff expressed the view that section 35 merely substituted a new form of process by which an action of removing or ejection must be raised in stipulated cases, as opposed to abolishing actions of removing and ejection in such a situation. The former statutory provisions in relation to such actions had not been repealed, and when there was a pecuniary crave of the type mentioned in the section an ordinary action would still be appropriate. He also referred to Rule 68 of the Act of Sederunt of 1976 authorising the raising of actions under section 38 of the 1907 Act (summary removings) by factors or similar persons, a provision which he regarded as showing that there was no intention to abolish the concept of removing. Again he pointed out that section 3(7) of that Act of Sederunt applied Rules 110 to 114 from the Schedule to the 1907 Act to summary causes, thus making it clear that in such causes, which were in essence actions of ordinary or summary removing, the discretion of the court to order a defender to find caution for violent profits remained. As regards extraordinary removings, he took the view that, if and insofar as these were not covered by Rule 110 of the 1907 Schedule, an order for caution for violent profits was competent in terms of established practice, although the court might hesitate to grant it in the normal case.

Further considerations

6.11 The reported cases on caution for violent profits disclose two incidental or procedural points which should perhaps be kept in view in formulating any amending legislation. Firstly, there is the question of the stage in the proceedings at which the order can be made. Under the old law, as has been mentioned, the defender had to come with his cautioner when he appeared to defend.[1] Under the Sheriff Courts (Scotland) Act 1907, the order for caution became a matter in the discretion of the court, but the rule in summary removings proceeding under that Act was that the defender must have found caution or had caution dispensed with before he could present written answers.[2] An impression, however, seems to have persisted in some quarters that the matter of caution for violent profits could only be raised and dealt with at a very early stage in a removing process.[3] This view does not appear to be supported by authority,[4] there being decisions

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[1] Act of Sederunt, 1839, s.34.

[2] Sheriff Courts (Scotland) 1907, Sched. 1, Rule 121. The Rule assumed the existence of the sheriff's discretion to order caution or decline to do so in terms of Rule 110. Rule 121 is not incorporated in the rules for the new summary cause in which the position will accordingly be regulated by Rule 110 in all cases.

[3] See Paton and Cameron op. cit. p.281 stating that the motion for caution should be made as soon as appearance is entered.

[4] In the case of King v. Wieland (1858) 20D. 960, cited by Paton and Cameron loc. cit., the reason why an order for caution was refused in the Inner House when the motion was made with the case on appeal was that the motion for caution made at an earlier stage had been withdrawn without explanation.

showing that the matter will be considered at as late a stage as the closing of the record,[1] and probably even at the stage of appeal,[2] although it will normally be in a pursuer's interest to raise the matter at the earliest possible stage. It is suggested that, whatever statutory changes are being made, it should be left open to the court to deal with the matter in the exercise of its discretion at any stage at which it may be raised in the proceedings. As matters stand, it might be said to be in the court's power to order caution ex proprio motu, but there appears to be no reported case in which an order has been made without a motion to that effect.

6.12 Another matter meriting consideration is the means by which an order for caution, failure to implement which must result in decree of removing or ejection, is to be implemented by a defender. In a recent case of ejection in the Edinburgh Sheriff Court,[3] the sheriff had required the defenders, as a condition of lodging defences, to consign a sum of £800 as caution for violent profits. On appeal, the sheriff principal recalled the order holding that caution for violent profits did not apply in ejection proceedings but, obiter, he observed that where an order for caution is pronounced it should normally take the form of a bond of caution since it would be oppressive and

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[1] Milne v. Darroch (1937) 53 Sh.Ct.Rep. 3; Thomson's Trs. v. Harrison (1958) 74 Sh.Ct.Rep. 77.

[2] King v. Wieland, supra; cf. Robertson v. Thorburn 1927 S.L.T. 562.

[3] MacKays v. James Deas & Son Ltd., supra.

might result in serious injustice to require consignation. In practice, however, a tenant or other occupier defending an action for recovery of possession may find it no easier to produce a satisfactory cautioner, such as an insurance or guarantee company, than to consign the necessary sum. In another recent case[1] of an extraordinary removing where consignation for violent profits and arrears of rent had been ordered by the sheriff, the sheriff principal, although revoking the order quoad the violent profits element, did not make any adverse comment on the consignation procedure. It may therefore be the position that the courts, in dealing with the matter of caution for violent profits, have regarded themselves as entitled, in the exercise of a discretionary jurisdiction, to order consignation as an alternative to, or substitute for, the provision of caution, but perhaps it might usefully be enacted that a defender ordered to find caution for violent profits should always have the option of equivalent consignation.[2]

Discretion to order caution

6.13 In accordance with the proposal of the Law Reform Committee, it appears that the court should now be given

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[1] Simpson v. Goswami, supra, which like MacKays case, supra, was decided by Sheriff Principal Bryden in the Edinburgh Sheriff Court,

[2] Consignation as required here should of course be a condition of proceeding with the defence, but not an order ad factum praestandum. See Jack v. Carmichael (1894) 10 Sh.Ct.Rep. 242.

a discretion to order caution for violent profits in all actions directed to or containing conclusions for recovery of possession of heritable property.[1] As it would be difficult, if not impossible, to define or describe the conditions for the existence of this discretion under reference to the nature of the defence put forward or otherwise, the discretion should remain unqualified. The sanction for failure to implement the order, namely immediate decree of removal or ejection, must remain, as being the only really effective means of enforcing the order, although there are cases in which it may be appropriate for the rigour of the rule to be relaxed by means such as the superseding of extract.[2] In the past, the rule appears to have been that an appeal against an order for caution for violent profits could be made, but only with leave of the court pronouncing the order.[3] Under the new summary cause procedure there will be no appeal.[4]

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[1] The alternative seems appropriate to cover not only summary causes in terms of the 1971 Act but also cases where for any reason such as the inclusion of a pecuniary conclusion as contemplated in s.35(1)(c) of the 1971 Act the action "takes" some other form and is raised perhaps on the ordinary roll of the sheriff court or in the Court of Session.

[2] Buchanan v. Dickson (1934) 51 Sh.Ct.Rep. 41.

[3] Jack v. Carmichael, supra.

[4] Sheriff Courts (Scotland) Act 1971, s.38 under which only appeals on point of law from final judgment are competent.

In view of the serious consequences of failure to implement the order, it may be for consideration whether an appeal should be made available, with or without leave, either to the sheriff principal or to the Court of Session.

6.14 The foregoing observations on the subject of caution for violent profits assume the replacement of the 1907 rules by a new statutory provision affecting actions for recovery of possession generally. The Law Reform Committee in making their proposals were of course leaving out of account agricultural tenancies. Prima facie, it would appear that in this matter there should be no distinction according to the nature of the tenancy, and that what remains of the 1756 provisions, which for reasons already mentioned can seldom if ever be invoked in present day practice, should be repealed, if only to avoid confusion in cases where the question of caution arises in relation to an agricultural tenancy. This would, of course, leave unaffected the provisions for a legal irritancy under the Agricultural Holdings Act with its special provision for caution.[1]

6.15 Again it has been assumed, as the Law Reform Committee apparently accepted, that it is desirable to retain caution for violent profits as a feature of proceedings for recovery of possession of heritable property. Liability for violent profits depends ultimately on rules of law the examination of which is not within the scope of this study, but it is perhaps open to question whether, when a defender in proceedings of this kind is to be required to find caution or provide any other form of

[1] Agricultural Holdings (Scotland) Act 1949, s.19.

security for his potential liabilities, it would be sufficient if the requirement were limited to securing rent or its equivalent as it accrued. While in practice the measure of two terms' rent is sometimes applied, the court making an order for violent profits has theoretically at least to prescribe some notional or estimated amount which may or may not be a fair assessment of what will ultimately be due.[1] The case for some form of security to a landlord for loss arising from delay in recovery of possession is strongest in cases where the hypothec for rent does not apply or cannot be effective. In the first category are most agricultural tenancies, and in the second furnished lets of dwellinghouses. In such cases at least it is reasonable that a tenant/defender in arrears with rent, and perhaps any tenant/defender who does not appear to have an effective defence, should be ordered to find caution for outstanding rents and for certain rents still to become due.[2]

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[1] As brought out in Buchanan v. Dickson, supra, the motion for caution does not specify an amount.

[2] S.19 of the Agricultural Holdings (Scotland) Act 1949 in effect proceeds on this basis. The practice in relation to furnished lets is illustrated in Lewis op. cit. pp. 522/3 and Dobie, Sheriff Court Styles, pp.420/422.

CHAPTER 7 THE SUMMARY CAUSE

7.1 Under this head are discussed:-

(1) The position of the new procedure in relation to the pre-existing procedure and rules (para. 7.2).

(2) Certain aspects of the application of the new procedure in actions against parties such as squatters (paras. 7.3-7.6).

(3) Problems concerning the citation of defenders such as sub-tenants and squatters (paras. 7.7-7.9).

(4) Licensees (paras. 7.10-7.11).

(5) Criminal sanctions (para. 7.12).

(6) Ejection without court order (para. 7.13).

(7) Actions raised by agents or factors (para. 7.14).

(8) Appeals (para. 7.15).

(9) Scope of the summary cause in proceedings for recovery of possession and examples of cases not covered (paras. 7.16-7.20).

New and old procedures compared

7.2 Under the Sheriff Courts (Scotland) Act 1971,[1] all actions for recovery of possession of heritable property, unless concluding for payment of sums exceeding £1,000, are to be dealt with as summary causes within the meaning of that Act. The Act created a new form of summary cause, replacing the summary cause and small debt procedure as operative under earlier legislation. The rules for the conduct of proceedings in this new summary cause, as

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[1] S.35(1)(c).

contained in Acts of Sederunt[1] promulgated under the powers given by the 1971 Act,[2] have made available the results or effects of the processes which, according to the circumstances of the case would formerly have been appropriate. The various forms, 10 in number, were listed in the report of the Law Reform Committee.[3] Processes or procedures now obsolete or never used in practice have been disregarded.[4] Thus, it is provided that decree for recovery of possession shall have the same force and effect as a decree of removing or a decree of ejection, or a summary warrant of ejection or a warrant for summary ejection in common form, or a decree pronounced in a summary application for removing in terms of sections 36, 37 and 38 of the 1907 Act.[5] It is understood that certain provisions of the 1907 Act, including those referred to in the Summary Cause Rules have been left in force meantime because they contain rules for periods and forms of notice which must be replaced before these provisions can be removed from the statute book. It follows, however, that when a satisfactory solution has been found to the various

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[1] Act of Sederunt S.I. 1976/476 as amended by Acts of Sederunt S.I. 1978/112, S.I. 1978/805, S.I. 1980/455 and S.I. 1981/842.

[2] S.32.

[3] Cmnd. 114 (1957), para. 5; cf. Paton and Cameron op. cit. pp. 261/2.

[4] Ss. 34 and 35 of the 1907 Act, in so far as providing for summary diligence against tenants, are described in the Report of the Law Reform Committee as "so drastic and their operation so fraught with hazard to any who seek to invoke them that they are seldom if ever used".

[5] Rule 69.

problems concerning notice as affecting proceedings for recovery of possession, these provisions will be superseded by new legislation, and it may be unnecessary to refer to older forms of process in defining the effect of a decree for recovery of possession in a summary cause.

Expedited procedures

7.3 With the introduction of the new summary cause, a position has been reached in which a party seeking to exercise a right of recovery of possession of heritable property is able, subject always to his having given any requisite notice or warning, to raise proceedings without having to commit himself as to the status of the occupier in selecting a particular form of process. The status of the occupier will, however, be important in some instances at least in relation to the subsequent course of procedure in an action. The Summary Cause Rules now contain, in Rule 68A, provisions enabling the sheriff, in an action for recovery of possession of heritable property against a person in possession vi clam aut precario and without right or title to possess or occupy the property, in his discretion and on the verbal application of a party, to shorten or dispense with any period of time provided for anywhere in the Rules. To enable a pursuer to invoke this provision, it would appear that his statement of claim as lodged with the summons in the summary cause[1] should contain averments to the effect that the defender is a squatter or person similarly placed.[2]

[1] Rule 2.

[2] Thus following the former practice in this matter: Holly v. Lang (1867) 5M. 951; Lowe v. Gardiner 1921 S.C. 211; Scottish Supply Association v. Mackie 1921 S.C. 882; Christie's Trs. v. Munro 1962 S.L.T. (Sh.Ct.) 41; Cook v. Wyllie 1963 S.L.T. (Sh.Ct.) 29.

7.4 Effect of introduction. The introduction of Rule 68A[1] gave rise to protest from the organisation named SHELTER, who contended that "it reduces the scant existing protection for people occupying property but who are neither owners nor tenants to virtually nil".[2] It has been suggested that as a result of the change the landlord wishing to evict an alleged unlawful occupier could do so within a matter of hours, with the induciae of service so reduced that there would be little or no opportunity to prepare a defence, and that this situation could be seriously prejudicial not only to the individuals responsible for occupying the premises but also to families residing with them there. On the other hand, it can be said that the provision in question did not affect any change in the substantive law, but merely remedied an omission in the Summary Cause Rules as originally drafted, by enabling sheriffs to exercise the discretion which had formerly been theirs to expedite procedure in actions of ejection. But it may be doubted if the practical effect of the change is quite so limited.

7.5 Before the introduction of the new summary cause, ejections were common law actions proceeding as ordinary causes under the rules contained in the 1907 Act,[3] which make no special provision for ejections, but enable the induciae on service in any case to be reduced to 48 hours.[4] Again they prescribe a period of seven days for the issue

[1] By Act of Sederunt S.I. 1980/455.

[2] See "The Scotsman", letter to the editor, 31 May 1980.

[3] Dobie, p.417.

[4] First Sched., Rule 6.

of extract of a decree in absence[1] and 14 days for the issue of extract of a decree *in foro*,[2] but in the latter case with power to the sheriff to shorten the period. In the new Summary Cause Rules, the power to shorten the *induciae* to 48 hours is retained for all cases,[3] but, apart from the special rule introduced as aforesaid for ejections,[4] there is no power to shorten the period of extracting decree which is fixed for all cases at 14 days.[5] It appears, however, that the effect of the special rule concerning ejections is to extend the sheriff's discretion as compared both with the position under the 1907 Act and with that existing under the Summary Cause Rules as originally drafted. In ejection actions, he can now shorten to any extent or even eliminate the *induciae*, and he can deal likewise with the period for extract, not only in the case of a decree *in foro* but also in the case of a decree in absence. The application of Rule 68A to an action does not make it competent to shorten or dispense with the period for appeal[6] which is to stand despite the early issue of extract decree, but the lodging of a note of appeal will not operate as a sist of diligence unless the sheriff directs otherwise.[7]

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[1] *Ibid*, Rule 24.

[2] *Ibid*, Rule 85.

[3] Rule 4(2), in which the minimum period is stated as two days.

[4] Rule 68A, *supra*.

[5] Rule 89.

[6] 14 days from the date of decree under Rule 81(1).

[7] See Rule 81A.

7.6 While the discretion of the sheriffs will no doubt continue to constitute a substantial safeguard in these matters, it would appear that the Summary Cause Rules as they now stand provide for the expediting of procedure in ejections more drastically than was formerly possible. Theoretically, at least, there is nothing to prevent a summons being issued without induciae followed by a decree in absence with immediate extract and execution of diligence forthwith, leaving the defender with minimal information and no time to prepare for removal. Even in the case of a defender who is truly a squatter, this might seem rather drastic and in cases where, although ejection is appropriate, possession has not been entirely unauthorised or unwarranted it could be regarded as inequitable.[1]

Problems relating to citation

7.7 Occupiers not identifiable. It is assumed that the law whereby the squatter, or other precarious possessor, may hav ejection proceedings raised against him without any prelim-

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[1] E.g. an employee occupier on termination of his employment: Cairns v. Innes 1942 S.C. 164; a bankrupt proprietor: White v. Stevenson 1956 S.C. 84; a defaulting debtor in a heritable security: Inglis' Trs. v. Macpherson 1910 S.C. 46 (in which case the procedure by way of summary application would now appear to be appropriate: see para. 7.16 below). See also Eastman v. Barclay (1930) 47 Sh.Ct.Rep. 90 for comments on the position under the former procedures.

inary warning or notice is to be retained.[1] The rules for the new summary cause make provision for the situation where for any reason a defender cannot have process served on him in the normal way.[2] In cases of illicit or unauthorised occupation, however, particularly where there is a plurality of occupants, there may be great difficulty in identifying the party or parties to be called as defenders. As matters stand, an ejection process, whether in the form of a summary cause or otherwise, has to be directed against a named defender or defenders, but it is suggested that in some circumstances it should be permissible for the pursuer to make application to the sheriff, without naming any defender, craving a warrant to have all possessors other than the pursuer or persons there with his authority ejected from the subjects in question.[3] The

[1] It has been suggested that all occupants irrespective of status should be entitled to notice before proceedings are taken for their exclusion from the premises; see article "Reforming Procedure for Removings and Ejections" 1957 S.L.T. (News) 97.

[2] Rule 6. Its provisions for citation by advertisement in the case of a defender whose address is unknown appear to be an innovation, while its provisions for the case where service cannot be effected at the defender's known address seem to follow and take the place of the older procedure of keyhole citation - see Lewis, Sheriff Court Practice, 8th edn. pp.92/3.

[3] If it were considered impracticable to adapt the Summary Cause Rules to meet this contingency the procedure of a summary application might be adopted; see Sheriff Courts (Scotland) Act 1907, ss.3(p) and 50; Lewis op. cit. pp.66/67 and Dobie, op.cit. pp. 101 et seq.

court should be required, before allowing the application to proceed, to order such publication, advertisement or other notification as in the circumstances seems appropriate. This could include, in addition to advertisement in the local press, delivery of copies of the application to the premises and/or their attachment to some prominent part of the subjects, the advertisement and copies thus delivered indicating a date by which parties claiming rights or interests in the premises must notify the court. Procedure would then follow according as parties did or did not come forward to oppose the application. Such an arrangement, while removing for an intending pursuer the obstacle represented by unidentifiable defenders, would seem to be reasonably fair to occupants of the premises in taking all possible steps to ensure that they became aware of the proceedings for their exclusion from the premises and had the opportunity of intervening in these proceedings.

7.8 This problem was taken up in 1975 by Professor D M Walker of Glasgow University, who was then concerned particularly with the matter of student occupations of university premises and workers' occupation of factories. He apparently considered that the procedure of ejection was "too slow and formal" to meet such situations, and was often frustrated by the need to direct an action, serve the writ on, and obtain decree against, specific named defenders when the potential pursuer lacked the necessary information to do so. To some extent at least, the criticism of slowness and formality in the ejection process may be regarded as met by the Summary Cause Rules as now

operative.[1] For the other difficulty, Professor Walker proposed a solution not unlike that suggested above, this being the adoption of a rule in operation in England permitting service on persons unknown at present in occupation of certain premises.[2] He added that, on decree being granted, it should be competent to obtain also an interdict against the return of these persons or any of their sympathisers.

7.9 Ejection and interdict. In some cases, particularly those of the type contemplated by Professor Walker, an interdict as well as a decree of ejection would be necessary to provide a remedy of lasting effect,[3] but there would seem to be obvious difficulties in the adoption of the form of interdict proposed by Professor Walker. Another solution to the problem of unidentified defenders which has been

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[1] Particularly Rule 68A.

[2] See in this connection the provisions of Order 113 introduced by the Rules of the Supreme Court (Amendment No.2) 1970 (S.I. 1970/44) covering the case of occupiers who are both unauthorised and unidentifiable, but perhaps not applying to houses within the rateable limits of the Rent Acts (See The Supreme Court Practice 1976, Vol. 1, p.1520).

[3] The inclusion of a conclusion for interdict will, however, take the action out of the category of a summary cause in terms of s.35(1)(c) of the 1971 Act. Thus the pursuer could not claim the benefit of Rule 68A. As to jurisdiction and competency in actions for recovery of possession and interdict, see para. 7.19 below.

suggested is to permit an intending pursuer to take out a summons, leaving blank the name of the defender, and then to accompany a sheriff officer or messenger-at-arms to the locus to point out the defenders he wishes to call, with the officer being entitled to demand the true name and address of such persons, whose refusal would constitute contempt of court. Decree of ejection and interdict could then be granted against the defenders. To this course again, however, there would seem to be serious objections. Even repeated calls at the locus by the pursuer and officer, with consequent heavy expense, might not result in identifying the true defenders who deliberately or otherwise might be unavailable when sought. On the whole matter, a reasonable conclusion would seem to be that, while there are means whereby the difficulty of the unidentified defender can be overcome in an action for ejection alone, an interdict, if required, may have to be the subject of a separate action directed against any party or parties threatening or attempting to resume possession and raised after decree of ejection on the initial proceedings has been granted.[1]

Licensees

7.10 In this connection it seems appropriate to mention briefly the category of occupiers sometimes described as licensees. The term "licensee" as applied to an occupier of heritable or real property has for long been familiar

[1] While interdict is not a competent remedy for a party seeking recovery of possession it is available to prevent re-occupation by the defender after the right of recovery has been established: See Baillie v. Mackintosh (1882) 19 S.L.R. 352 and Boswell's Trs. v. Pearson (1886) 24 S.L.R. 32.

in England and in recent times the concept has been used in attempts, some of them successful, to avoid the application of the Rent Acts to occupancies of residential accommodation. While the use of the term "licensee" in this context is not unknown in Scotland, it has never been authoritatively defined here[1] and even in England its precise meaning seems to be somewhat indefinite.[2] In general, however, it may be said to signify an occupier of premises with rights insufficiently exclusive to constitute a tenancy and/or terms of occupancy in some way inconsistent with the normal incidents of a tenancy. In England, the term has been applied to some arrangements of a tenancy nature qualifying for protection under the statutory provisions forming the counterpart of Part VII of the Rent (Scotland) Act 1971.[3] In Scotland, such arrangements might be regarded as constituting a let rather than a licence. If, however, possession by an occupant is to be attributed to an arrangement which is merely a licence, tacit relocation will presumably not apply and, unless the contract or licence so provides, the occupier will not be entitled to any notice of its termination but on the expiry of its prescribed period will be liable to ejection as if he were a squatter. In

[1] For a discussion of the concept of licence in relation to heritable property in Scotland see Paton and Cameron op. cit. pp. 12-16.

[2] For a review of the English decisions see the article "Distinguishing between Tenancies and Licences" 1980 New Law Journal 939-942 and 959-961.

[3] Marchant v. Charters [1977] 3 All E.R. 319.

equity, there may be said to be a case for prescribing some minimum period of notice for licensees, at least in residential subjects, but before such a provision could be proposed some adequate definition of the status of licensee would have to be formulated.

7.11 This problem may have to be considered in relation to some future amendment of the Rent Acts if in fact the concept of licence is being used either in England or here in widespread evasion of the provisions of these Acts. The Housing Act 1980, being the Act which in England provides for secure tenancies in the public sector, has provisions extending the secure tenancy privileges to certain residential licensees occupying property belonging to bodies such as local authorities where the licensees would have been secure tenants had their licences been tenancies.[1] This protection, however, does not apply in cases of non-exclusive or shared occupation, although applicable in other cases where the occupancy is of the nature of a licence and not a tenancy.[2] Understandably perhaps, with "licence" in this context not being nomen juris in Scotland, Part I of the Tenants' Rights, Etc. (Scotland) Act 1980 contains no corresponding provisions. In England, however, it has been suggested following upon the appearance of these provisions in the Housing Act, that consideration should be given to an extension of the Rent Acts to confer security of tenure on certain licensees in privately owned accommodation.[3]

[1] S.48(1).

[2] Shared or non-exclusive occupation does not constitute a secure tenancy in terms of s.28 of the Act.

[3] See New Law Journal, loc. cit.

Criminal Sanctions

7.12 In England, the Criminal Law Act 1977[1] makes it an offence punishable by fine and/or imprisonment for a person to fail to vacate premises on being required to do so by or on behalf of a displaced residential occupier, i.e. a person whom he has excluded or dispossessed, or by or on behalf of a protected intending occupier, i.e. a person who has acquired and is seeking to assert a right of occupation in a capacity such as purchaser or lessee. The only corresponding provisions in Scotland are more than a century old. The Trespass (Scotland) Act 1865[2] provides that every person who lodges in any premises or encamps on any land, being private property, without the consent of the owner shall be guilty of an offence, while the Vagrancy Act 1824[3] includes among persons deemed rogues and vagabonds liable to three months imprisonment every person wandering abroad and lodging in any deserted or unoccupied building and not giving a good account of himself. Although prosecutions under the Act are not infrequent, the most recent reported case in which that provision of the Trespass Act was invoked appears to be Paterson v. Robertson[4], where the conviction of a sub-tenant re-entering after the termination of his let was upheld on appeal. The Court, however, pointed out that the section does not represent an alternative method of bringing a tenancy or occupancy to an end where there is a dispute as to the occupier's rights.

[1] S.7.

[2] S.3.

[3] S.4 as applied to Scotland by the Prevention of Crimes Act 1871, s.15.

[4] 1944 J.C. 166.

Ejection without court order

7.13 Abuse in the form of brevi manu dispossession of occupiers appears to have been less common in Scotland than in certain other jurisdictions. At common law, however, physical ejection without court order of occupiers lacking right or title was permissible in certain circumstances including, in particular, the case of an employee occupier retaining possession after the termination of his employment. In a number of cases,[1] reparation claims for wrongful ejections were unsuccessful, although the approved course appears to be an action of ejection.[2] The Rent Act 1965[3] introduced a prohibition of eviction without due process of law which specifically covers the case of the employee occupier.[4] As there may, however, be other situations in which a proprietor might be disposed to proceed without taking the matter to court, it is desirable that there should be available an expeditious remedy in the form of proceedings to which parties will be induced to resort rather than taking matters into their own hands.

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[1] Scott v. McMurdo (1869) 6 S.L.R. 301; Macdonald v. Watson (1883) 10R. 1079; Macdonald v. Duchess of Leeds (1860) 22D. 1075; Sinclair v. Tod 1907 S.C. 1038

[2] Cairns v. Innes 1942 S.C. 164. See also Brash v. Munro & Hall (1903) 5F. 1102 showing that a person possessing on any ex facie title cannot be ejected brevi manu.

[3] S.32 originally applying at the termination of tenancies not statutorily protected (as defined in s.34) and now extended by the Tenants' Rights, Etc. (Scotland) Act 1980, s.42 to cover parties who have had contracts under Part VII of the Rent (Scotland) Act 1971.

[4] S.32(2).

Actions raised by agents or factors

7.14 Arising out of the suggestion that a new action leading to an omni-purpose decree has been created by the Summary Cause Rules, reference may be made parenthetically to a matter discussed earlier,[1] namely the retention in the new summary cause procedure of the facility for proceedings in the name of an agent or factor for a landlord, as existing under section 38 of the 1907 Act, in respect of tenancies of less than a year in duration.[2] It may be that, in practice, this has been found such a valuable facility that it is desirable it should be preserved, despite the departure that this involves from the uniformity or generality of the new procedure. If so, the appropriate content from section 38 will be required to be included in the Summary Cause Rules when that section and the other procedural provisions and rules in the 1907 Act are repealed.

Appeals

7.15 Another matter calling for consideration is that of appeals. Section 38 of the Sheriff Courts (Scotland) Act 1971 provides that in summary causes there is to be an appeal to the sheriff principal on any point of law from the final judgment of the sheriff, and to the Court of Session on any point of law from the final judgment of the sheriff principal if he certifies the case as suitable for appeal. These are to be the only appeal facilities. While these provisions create facilities for appeal which

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[1] See para. 4.18 above.

[2] Rule 68.

were not available in summary removings conducted in the small debt court,[1] they result in some reduction or restriction of the facilities for appeal in actions for recovery of possession of heritable property which could formerly have proceeded as ordinary causes.[2] In more complex and important actions, these limited appeal facilities might be regarded as inadequate and, accordingly, as forming an inducement to proceed otherwise than by summary case. The restriction of the scope of appeal to points of law follows inevitably from the fact that in

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[1] By Rule 119 of the Sheriff Courts (Scotland) Act 1907, First Sched. even the limited rights of appeal available in small debt procedure generally were excluded here (see Dobie op. cit. p.406).

[2] Stated in general terms, there is by virtue of s.27 of the Sheriff Courts (Scotland) Act 1907 an appeal from sheriff to sheriff principal against the final judgment as defined in s.3(h) of that Act (which definition applies also under s.33 of the 1971 Act) and with leave against an interlocutory judgement (see Lewis op. cit. pp. 311-313). As regards appeal to the Court of Session, it is generally considered, although not actually decided, that an Act of Sederunt of 12 July 1938 changed the former position under which a tenant could not challenge a decree of removing by way of appeal but only by way of suspension and made appeal to the Court of Session competent in removings and ejections alike against final judgments and with leave generally against interlocutory judgments (see Lewis op. cit. pp.278/279; Dobie op. cit. pp.418/419; Paton and Cameron op. cit. p.287). The contrary view is expressed in Walkers, Civil Remedies, p.260, but the authorities cited there all precede the 1938 Act. On the question of appeals against interlocutory judgements, see Lewis op. cit. p.319 et. seq. and Sheriff Courts (Scotland) Act 1907 ss. 27 and 28.

a summary cause the evidence is not recorded verbatim[1] and so the appeal must be by way of stated case.[2] The limitation of the right of appeal to the final judgment, however, means that in some important steps, such as the ordering of caution for violent profits, there will be no review of the decision, even with the leave of the sheriff making it, although that decision may be in effect conclusive of the particular litigation.[3]

Scope of the summary cause

7.16 As has been seen, the recommendation of the Law Reform Committee was that one form of action should apply in all cases of proceedings for recovery of possession of heritable property.[4] In fact and in practice, however, the effect of the statutory provision implementing this recommendation[5] appears to be less comprehensive than might have been expected or intended. It is thought that "recovery" in this context was not meant to be read as restricted to cases where the pursuer or his predecessors in title had formerly been in possession of the subjects.[6]

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[1] Sheriff Courts (Scotland) Act 1971, s.36(3).

[2] Rules 81 to 85. The time limit operative under these Rules is basically a period of 14 days compared with the period of three months generally applicable in an ordinary cause but the shorter period may be regarded as consistent with the expedition sought to be achieved by summary cause procedure generally.

[3] See para. 6.13 above.

[4] Cmnd. 114 (1957), para. 8.

[5] Sheriff Courts (Scotland) Act 1971, s.35.

[6] But the recent case of Prestwick Investment Trust v. Jones 1981 S.L.T. (Sh.Ct.) 55 appears to have been decided on that restricted view.

There are many cases of actions for possession of heritage where that is not the position, for example, the trustee in bankruptcy dispossessing the bankrupt,[1] or the heritable creditor or ex facie absolute security holder dispossessing the debtor. The trustee's action will now proceed as a summary cause. It has apparently been the practice, however, for possessory actions by creditors under heritable securities in exercise of their statutory powers to proceed as summary applications[2] and, in view of the terms of section 29 of the Conveyancing and Feudal Reform (Scotland) Act 1970 concerning proceedings under Part II of that Act, that practice is apparently to continue despite the provisions of section 35 of the Sheriff Courts (Scotland) Act 1971.[3] On the other hand, an action for possession by the holder of an ex facie absolute security, not being covered by any of the provisions in the Conveyancing Act, should apparently proceed as a summary cause.[4] Again, the Tenants' Rights, Etc. (Scotland) Act 1980,[5] in dealing with secure public sector tenancies, provides expressly for proceedings for recovery of possession being taken by way of summary cause.

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[1] See White v. Stevenson 1956 S.C. 84 where the competency of an ejection was confirmed.

[2] See para. 7.7 above.

[3] This accords with the directions and forms of writ provided in Professor Halliday's book on the Conveyancing and Feudal Reform (Scotland) Act 1970 (1st edn., pp. 165-169) and retained unaltered in the second edition of the work published after the passing of the 1971 Sheriff Courts Act (see pp. 198-202).

[4] An ejection action was held incompetent under the former procedure: Scottish Property Investment Co. Building Society v. Horne (1881) 8R. 237.

[5] S.14(1).

7.17 Another case excluded from the scope of the summary cause, and in this case by express statutory provision made after the passing of the 1971 Act, is an action of removing under section 9 of the Land Tenure Reform (Scotland) Act 1974. The section deals with the use as a dwellinghouse of property subject to a long lease in contravention of section 8 of the Act, and prescribes that the procedure in the action of removing is to be that in an ordinary cause, with the court entitled to sist extract of the decree to enable any facts to be established which would constitute a defence and, on being satisfied on such facts, to vary or rescind the decree.[1]

7.18 Extraordinary removings. Apart from express statutory exceptions, it is clear that, in terms of section 35(1) of the 1971 Act, any sheriff court action craving the removal or ejection of a tenant or other occupier and not having any other craves except for payment of sums not exceeding £1,000 and for expenses must proceed as a summary cause.[2] While, however, this applies to ordinary removings taking effect at or as from the natural termination of a tenancy, whatever form they would have taken under the previous law, a different position obtains with extraordinary removings. These will normally be based on irritancy or similar grounds. Such actions are not affected by the rules and forms of

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[1] Ss. (6).

[2] In Tennent Caledonian Breweries Ltd. v. Gearty 1980 S.L.T. (Sh.Ct.) 71 an amendment designed to render competent by the introduction of declaratory and pecuniary conclusions an action of ejection raised as an ordinary action was disallowed.

process prescribed in the Sheriff Courts (Scotland) Act 1907 for removings, although that Act[1] confirms the jurisdiction of the sheriff court concurrently with the Court of Session to entertain them. In the sheriff court, they proceed as ordinary causes. The remedy of irritancy as applying to tenancies in general is a common law one, whether the irritancy be of legal or conventional origin.[2] In the case of rural or agricultural tenancies, an Act of Sederunt of 1756 providing for an irritancy in respect of two years of arrears of rent superseded the irritancy on the same grounds implied at common law, but this statutory legal irritancy has itself been superseded and in practice rendered obsolete by the provisions of the agricultural holdings legislation[3] sanctioning an action in the sheriff court for removal of a tenant six months in arrears with his rent. The position, however, might be simplified or clarified by a repeal of the 1756 provision, leaving the provisions of the Agricultural Holdings Acts as the sole basis of the legal irritancy in agricultural tenancies.[4] In urban tenancies, the only legal irritancy of statutory origin has disappeared with the repeal of the relevant

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[1] S.5(4)

[2] Paton and Cameron op.cit. p.262.

[3] Agricultural Holdings (Scotland) Act 1949, s.19; see particularly ss. (2).

[4] At the same time the provisions of s.5 of the 1756 Act providing for a procedure which could lead to an extraordinary removing as referred to in para. 6.7 above in connection with caution for violent profits should be repealed.

Act,[1] but a common law irritancy for two years' arrears of rent apparently survives,[2] although generally neglected in practice.[3]

7.19 Composite actions. In an action based on irritancy, the first and primary conclusion will normally be for declarator of the irritancy.[4] It appears to have been accepted that this takes the action out of the category of the new summary cause into that of an ordinary action. This would appear to be consistent with the practice under which actions leading to a decree of removing, although basically not within the jurisdiction of the Court of Session, have been entertained by that Court when they included conclusions

[1]House Letting and Rating (Scotland) Act 1911, s.5 repealed by Local Government (Scotland) Act 1973, Sched. 29.

[2]See Halyburton v. Cunningham (1677) Mor. 13801 and Nisbet v. Aikman, the latter cited in Paton and Cameron, op. cit. p.229, where it is stated that the Court of Session has exclusive jurisdiction in an action based on this irritancy (cf. Gloag and Henderson's Introduction to the Law of Scotland, 8th. edn., p.45). This statement seems inconsistent with the terms of s.5(4) of the Sheriff Courts (Scotland) Act 1907.

[3]In Paton and Cameron loc. cit. the common law irritancy is referred to in the past tense. Again, in the Encyclopaedia of the Laws of Scotland (Vo. 8, p.983), this irritancy is described as of no practical importance in view of the more summary remedies competent to a landlord. That comment was, however, written with the House Letting and Rating Act 1911 in force entitling a landlord in the cases to which it applied to terminate a domestic tenancy for rent arrears of seven days.

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

such as declarator, interdict or reduction.[1] It follows that a superior seeking to obtain possession by irritating the feu can proceed either by action in the Court of Session or by ordinary action in the sheriff court.[2] While the reasons for the inclusion of a declarator in an action for recovery of possession of heritable property can vary, the inclusion of an interdict may, particularly in certain ejection proceedings, be a practical necessity to ensure the continued effectiveness of the decree. Interdict, like declarator of irritancy, not being among the forms of process to which the summary cause procedure applies, it might be expected that a composite action for recovery of possession and interdict against the defender's return to the premises raised in the sheriff court would come within the court's residual jurisdiction as an ordinary cause. That view has, however, been rejected in a very recent case[3] where the sheriff sustained a plea to the competency of an ordinary action craving the defender's ejection from certain property and an interdict prohibiting his subsequent return thereto. The sheriff held that the action, although including a crave for interdict, was an action for recovery of possession of heritable property within the meaning of the statutory provision[4], in terms of which provision the only exception to the mandatory application of the summary cause procedure

[1] Paton and Cameron op. cit. p.283

[2] As to procedure see Sheriff Courts (Scotland) Act 1907 First Sched. Rule 110 and Dobie op. cit. pp. 120/121.

[3] Disblair Estates Ltd. v. Jackson, Aberdeen Sheriff Court, 24 November 1982.

[4] Sheriff Courts (Scotland) Act 1971, s.35(1)(c).

to such actions arose in the case where payment of more than £1,000 was also craved. It is clear that he accepted that the inclusion of the crave for interdict resulted that the action in its composite form could not have been raised as a summary cause. He in fact indicated that the pursuer's appropriate course would have been to raise an action for recovery of possession as a summary cause and a separate action of interdict as an ordinary cause, with the possibility that the additional expense thus involved could be minimised by the action of recovery of possession being remitted to the ordinary roll[1] and conjoined with the interdict action. On the question of competency, it seems difficult to reconcile the sheriff's ruling with the position adopted, for example, in actions of irritancy and removing unless the crave for interdict is to be regarded as secondary and subordinate to the crave for possession. While the inclusion in the section of a specific exception in respect of actions for possession craving also payment of sums over £1,000 may be said, *prima facie* at least, to support the sheriff's interpretation of the section, it could perhaps be argued that the exception has been included because actions for payment up to but not exceeding that sum are within the scope of the summary cause procedure and does not imply that composite actions with conclusions for possession and other conclusions outwith the scope of the process to which the summary cause procedure applies are to be incompetent in the ordinary court.

[1] *Ibid.*, s.37(2).

7.20 Remit to ordinary roll. While it is clear that there are certain processes involving recovery of possession of heritable property to which the summary cause procedure does not apply, it appears that in some cases declaratory or other conclusions not really essential for the effectiveness of the proceedings are introduced, simply for the purpose of excluding the summary cause procedure.[1] The adoption of this course may reflect a view that a procedure dispensing with formal pleadings[2] and giving such limited rights of appeal is unsuitable for resolving the complicated issues which may arise in these proceedings, particularly where legislation such as the Rent Acts or the Agricultural Holdings Acts apply. Such a criticism could be met by providing for all actions of recovery of possession of heritage in which a defence is lodged being remitted automatically to the ordinary roll, but considerations of delay and expense however would make that course difficult to justify. It would probably be pointed out that in the past summary removings, even when defended, were dealt with under small debt procedure. In any event, provision is made in the new Summary Cause Rules for the sheriff, on the motion of either party or ex proprio motu, remitting the cause at any stage to the ordinary roll.[3] It seems

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[1] But on the view taken in Disblair Estates Ltd., supra, this could result in the composite action raised as an ordinary cause being held incompetent.

[2] Although as brought out in the cases of McInnes v. Alginate Industries Ltd. 1980 S.L.T. (Sh.Ct.) 114 and Lochgorm Warehouses v. Roy 1981 S.L.T. (Sh.Ct.) 45 the Summary Cause Rules do not involve a total rejection of the concepts of relevancy and admissibility of evidence.

[3] By the Sheriff Courts (Scotland) Act 1971, s.37(2).

desirable that this course should be taken in all cases involving difficulties or specialties not suitable for investigation under the summary cause procedure,[1] but there is no appeal from the decision of the sheriff on this matter.

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[1] See Hamilton District Council v. Sneddon 1980 S.L.T. (Sh.Ct.) 36 where Sheriff Principal C H Johnson commented adversely on the fact that an action for recovery of possession of heritage in which there had been a defence of improper conduct on the part of the pursuers had not been remitted to the ordinary roll.

CHAPTER 8 ENFORCEMENT OF DECREE

Issue of extract

8.1 Under Rule 89 of the Summary Cause Rules 1976, extract of the decree may be issued only after the lapse of 14 days from its granting. Except in the case of ejections,[1] there is no power to shorten this period. It follows that, in some cases, the pursuer in a removing action proceeding as a summary cause may have to wait longer than formerly for the extract on which diligence can proceed.[2] Perhaps some discretionary provision for shortening this period on the lines of the 1907 rules[3] would be appropriate in the case of removings, if not in relation to decrees generally.

Period of charge

8.2 A form of extract decree in an action for recovery of possession of heritable property is provided in the schedule appended to the Summary Cause Rules.[4] As originally framed,

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[1] See para. 7.4 above.

[2] In an ordinary cause under the Sheriff Courts (Scotland) Act 1907, First Sched., Rule 24, extract of a decree in absence may be issued on the expiry of seven days from its date, while in terms of Rule 85 a decree *in foro* can be extracted in 14 days, the sheriff having however a discretion to shorten this period. In summary removings as formerly conducted under the small debt procedure it appears that immediate extract was available, although it might be delayed for three days in view of the defender's right to be reponed against a decree in absence in terms of Rule 117; see Lewis *op. cit.* p.276.

[3] Rule 85, *supra*.

[4] Form U3. There is also a form of extract warrant for ejection and warrant to relet, for use in a case of a rent sequestration and sale (U5).

this form provided for a charge of 14 days being given prior to diligence, which was in conformity with the terms of Rule 91 prescribing that a charge on a decree granted in a summary cause is to be for a period of 14 days. Reference to the period of charge has now been deleted from this form of extract decree (and from certain other forms in the same schedule),[1] but Rule 91 prescribing the 14 days' period stands unaltered. In the past, diligence on an extract of a decree granted in an action of removing has had to proceed on a 48 hours charge, while diligence on an extract of a decree granted in an action of ejection has required no charge. Such has been the position under the Sheriff Courts (Scotland) Extract Act 1892, the provisions of which remain in force.[2] That Act,[3] however, did not affect summary removings as subsequently provided for in section 38 of the Sheriff Courts (Scotland) Act 1907. In these, it appears that diligence without charge was permitted.[4] Again it seems that a warrant for summary ejection granted in terms of section 37 of 1907 Act could be executed without a charge.[5] It is understood that the amendment made in 1978[1] to the forms of extract decree in the schedule to the Summary Cause Rules proceeded on the view that reference to a charge of 14 days in such forms did not apply to cases in which a charge was not a

[1] By Act of Sederunt of 26 January 1978 (S.I. 112).

[2] S.7(4) and Form 10 relate to decrees of removings and provide for a charge of 48 hours before diligence. By contrast, Form 9, being an extract warrant of summary ejection, makes no provision for a charge.

[3] See s.2.

[4] See Sheriff Courts (Scotland) Act 1907, First Sched., Form L(1).

[5] See Reid v. Anderson (1920) 36 Sh.Ct.Rep.11, opinion of Sheriff Principal Irvine.

necessary preliminary to diligence on the particular extract decree. In the case of removings it was considered that, since the extract was in the form of a warrant to eject, a charge would not be required, and accordingly Rule 91 would not apply. This argument appears to proceed on a view that the action for recovery of possession under these Rules is a new action leading to an omni-purpose decree, the extract of which warrants ejection at a stated date, regardless of what the remedy might have been under the earlier law. At first sight at least, it is not easy to reconcile this view with the differentiation of the effects of decrees made by Rule 69, referring to the various forms of process in existence under the former law.[1] If there was to be a change making a charge unnecessary in all such cases proceeding as summary causes, one might have expected to find this reflected in the terms of the Rules rather than being left dependent on the wording of a Form in the schedule.[2]

8.3 In the Scottish Law Commission's Memorandum No.48, on Diligence, there is an extended discussion of the matter of a charge as a prerequisite of poinding, with consideration given to the question whether, in that context, the charge serves a useful purpose and justifies the trouble and

[1] See in this connection the sheriff's opinion in the unreported case of Nisbet v. Thomson, 9 October 1980, as referred to at para. 6.9 et. seq. supra.

[2] It appears clear that this change is within the rule-making powers given by the Sheriff Courts (Scotland) Act 1971 (see s.32(1)(a)) but for consistency perhaps the relevant rules should be similarly altered where removing is one of the conclusions in an ordinary action, or a removing action raised as a summary cause is remitted to the ordinary roll.

expense it entails. Inquiries revealed that a substantial proportion of debts are settled after a charge has been given, without the necessity for proceeding with the poinding and sale, and on this ground it is suggested, subject to certain modifications of procedure, that the charge should be retained as a step in the debt recovery process. Somewhat different considerations may, however, apply to the charge as a step in the procedure for repossession of heritage. As has been seen, a charge has never been required where the process takes the form of an ejection. Again, it has not been required in summary removings proceeding under sections 37 and 38 of the Sheriff Courts (Scotland) Act 1907 and as just mentioned, it is, in one view at least, not required in any recovery process proceeding as a summary cause.[1] It follows that there are only a limited number of cases in which a charge is at present a necessary step in procedure. The period of charge is only 48 hours.[2] This allows very little time for a defender who has not already arranged to remove in compliance with the court's decree to do so in response to the charge. As the facilities for service of the charge by post do not apply in cases of recovery of possession of heritage,[3] the cost of service will in some cased be not inconsiderable. It may, however, be said that the charge is a valuable step in bringing to the defender's notice the existence of a decree against him of which he may not otherwise be aware. It appears that in summary removing cases, being cases where a charge has not been required,

[1] See para. 8.2 above.

[2] Sheriff Courts (Scotland) Extracts Act 1892, s.7 and Sched. 10.

[3] S.2(1)(b) of the Execution of Diligence (Scotland) Act 1926 providing for postal service of a charge applies only to decrees for payment of money.

it has been the practice of sheriff officers to notify defenders either personally or by post of the date and time when they propose to execute the decree.[1] It is suggested that this is a useful step which, if made mandatory and applicable generally, could justify dispensing with a charge in all cases. The period between notification and execution may require consideration. A period rather longer than the period of charge - perhaps 72 hours - might be appropriate, with the court being empowered to vary the period, within limits, according to circumstances. The difficulty of effecting a notification to parties such as squatters unnamed as defenders could be overcome by the posting of notification at the locus in the same way as in the service of process in such cases.[2]

Effective date of decree

8.4 Related to the matters of issue of extracts and execution of diligence is a point raised by the Law Reform Committee on the operation of decree.[3] The Committee pointe out that, apart from considerations which are recognised in such statutes as the Rent Acts and the Tenancy of Shops (Scotland) Act 1949, there are often circumstances, such as the nature of the defence and of the legal questions involved, which render it reasonable that there should be

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[1]Maher, A Textbook of Diligence, p.134.

[2]See para. 7.7 above.

[3]Cmnd. 114 (1957), para. 11.

some postponement of the date upon which a decree should operate. They remarked that the period of charge before diligence, although giving the defender some latitute, was fixed and not related to the circumstances of the particular case. The Committee accordingly recommended that, in all decrees for recovery of possession of heritable property, the courts should fix the date at which the decree will become effective. As the forms of extract decree provided in the Summary Cause Rules,[1] like the forms previously used in summary removings, appear to contemplate or at least permit of the court fixing a date in this way,[2] specific provision on this matter in the Rules may be unnecessary.[3] Any such provision could only be in very general terms.

8.5 In certain cases of domestic tenancies coming under the Rent Acts, the courts are given discretionary power to adjourn proceedings, to sist or suspend execution of orders for possession or to postpone their effective dates. In

[1] Summary Cause Rules, Form U3; cf. Sheriff Courts (Scotland) Act 1907 First Sched. Rule 120 and Form L(1) as introduced by Act of Sederunt 3 February 1933, para. 7 and Sheriff Courts (Scotland) Extracts Act 1892, Form 10, the latter still apparently applying to removings proceeding as ordinary causes.

[2] While the writ in a removal or ejection process may include a crave for removal or ejection at a certain point of time, the court, in granting decree, may or may not follow the crave in fixing an effective date.

[3] In the Encyclopaedia of the Law of Scotland, Vol. 6, para. 269, it is stated without reference to authority that in all ejection processes (which in this context appear to include removings) the judge, even if the pursuer demands immediate ejection, may allow a short period before execution of the warrant.

exercising these powers, the courts may impose conditions as regards payment of rent or the arrears thereof or compensation for loss of possession or otherwise. On fulfilment of any conditions thus imposed, the court may, if thought fit, discharge or rescind an order for possession. The attachement of conditions on the basis that their fulfilment may be a ground for discharge of the order seems appropriate only where there is statutory security of tenure but otherwise the terms of the provision might be considered for more general application. The case for such a provision is doubtless stronger in domestic tenancies than in other types of let. The somewhat similar provision for the benefit of agricultural workers occupying dwellinghouses under the terms of their employment entitles the court to postpone the operation or suspend the execution of a decree of removing or warrant of ejection or other like order on conditions, fulfilment of which does not affect the ultimate enforcement of the order.[1] In conjunction with the provisions of the Rent Acts, there are Acts of Sederunt[2] which, although passed under earlier legislation, have been

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[1] Rent Act 1965, s.33.

[2] 1 December 1923 and 17 December 1923; the procedure followed under these Acts is described in Dobie op. cit. pp. 119/120.

continued in force under the current statutory provisions.[1] It may be for consideration whether these Acts of Sederunt, including as they do provisions relating to small debt procedure, as formerly used for summary removings, require some adaptation or modification in the light of the procedure operative in the new summary cause.

Execution of diligence

8.6 There appears to be little direct authority bearing on the matter of the execution of diligence in the process for recovery of possession of heritage.[2] It is established that execution cannot be delayed indefinitely beyond the point at which decree takes effect, but it was held not sufficient to invalidate execution that the charge on a removing decree was not executed within three weeks after the term at which a removal was ordered.[3] It has been

[1] Rent (Scotland) Act 1971, Sched. 19, para. 1. The Sheriff Courts (Scotland) Act 1971 does not, as it does in the case of applications in appeals under the Rent Acts to the sheriff on matters other than possession (see Sched. 1, para. 4 amending s.123 of the Rent Act), contain specific provision for the new summary cause procedure applying in cases under s.11 of the Rent Act. Again there is no specific provision for the application of that procedure in cases coming under s.33 of the Rent Act 1965, but such application may be said to result from the provisions of s.45 of the 1965 Act read along with s.35(1)(b) of the 1971 Sheriff Courts Act. That Act, however, provides specifically for summary cause procedure replacing small debt procedure in applications under the Tenancy of Shops (Scotland) Act 1949.

[2] It is understood that only in a very few cases of proceedings for recovery of possession is ejection by diligence found necessary.

[3] Taylor v. Earl of Moray (1892) 19R. 399.

held that ejection cannot be carried out during the night but the only reported case on the matter[1] leaves the position somewhat idefinite, with the limits of day and night not necessarily coinciding with sunrise and sunset and the question being treated as one of circumstances for determination by a jury. The question of whether an ejection diligence can be carried out on a Sunday or on a public holiday as canvassed in connection with the process of poinding does not appear to have arisen for decision in relation to ejections or processes for recovery of possession.

8.7 Again, there appears to be a lack of specific authority on the duties and obligations of the officer executing a diligence for recovery of possession.[2] He must have the house cleared completely of all effects[3] belonging to the tenant and his family. The practice is to have the premises secured against re-entry, with new locks fitted to the outside doors on which will be chalked, with the royal initials, the date of ejection and the officer's name. The officer must take reasonable care in the handling of the tenant's effects and will be liable for any damage occurring avoidably in the course of their removal. On the other hand, there appear to be no arrangements prescribed

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[1] Macgregor v. Viscount Strathallan (1864) 2M. 339.

[2] As to practice, see Maher, loc. cit.

[3] Other than items such as medicines which it may be unsafe to leave in a public place.

for the disposal of the goods if they are not to be left in the public street, perhaps causing an obstruction.[1] In many cases, of course, the goods will not be remaining at the disposal of the party ejected but will be subject to attachment for pecuniary claims such as arrears of rent or expenses of process.

8.8 It appears to be accepted, again without specific authority, that there are circumstances in which the ejection should be suspended by the officer, for example, on the grounds of illness of an occupant of the premises.[2] It might be an advantage if the officer had a statutory duty to refer back to the court for directions in respect of such a suspension but in practice the situation occurs only rarely.

Summary diligence

8.9 The foregoing paragraphs have been dealing with diligence following upon a decree of the court. Sections 34 and 35 of the Sheriff Courts (Scotland) Act 1907 provide a procedure which, in the cases to which it applies, is in effect a form of summary diligence for the recovery of possession of heritage. As mentioned earlier,[3] the Law

[1] Where the pursuer is a local authority, accommodation for deposit of the goods by the officer may be made available in some vacant or disused premises.

[2] As certified by a doctor in which case the problem may be resolved by the patient's removal to hospital.

[3] See para. 7.2 above.

Reform Committee commented on the apparent neglect of these provisions in practice and on the dangers inherent in their use, it being implicit in their comments that they were recommending the repeal of the provisions without replacement. Quite apart from the fact that the provisions appear to have fallen into disuse, it would seem to be arguable that while summary diligence is, in certain circumstances at least, an appropriate procedure for the enforcement of pecuniary claims against the debtor's effects, it is never an appropriate process to apply to the recovery of possession of heritable property, which can entail depriving the defender of his home and/or livelihood. It would appear to be particularly inappropriate in cases such as domestic or agricultural tenancies where, subject to the discretionary powers of the court, the tenants may have security of tenure. Execution of this summary diligence requires to proceed on a charge, as the relevant provisions[1] make the relative documents equivalent to a decree of removing but, with the period of charge limited to 48 hours, the tenant is being given very brief warning of his impending ejection.

Letters of ejection

8.10 It appears still to be the case that a decree for recovery of possession of heritage pronounced in the Court of Session does not in itself form a warrant for diligence.[2] After the execution and registration of the necessary

[1] Sheriff Courts (Scotland) Act 1907, ss. 34 and 35.

[2] Encyclopaedia of the Law of Scotland, Vol. 6, para. 266.

charge, letters of ejection passing the signet have to be obtained.[1] These are directed to the sheriff of the county or area in which the property is located and require him to eject the occupant and put the holder of the decree in possession. It is suggested that the law might now be amended to make this somewhat cumbrous proceeding unnecessary, particularly if the necessity for a charge is to be dispensed with in all cases of recovery of possession of heritage.

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[1]See Encyclopaedia of Scottish Legal Styles, Vol. 4, p.253.