

Leasehold Conditions

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STUDIES IN SCOTS LAW
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Leasehold Conditions

Peter Webster

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Preface

This is the updated version of my PhD thesis, submitted to Edinburgh University as long ago as 2008, with the title ‘The Relationship of Landlord and Successor Landlord in Scots Law’. Since then, there have been a few false summits preparing it for publication. To those who have borne with me, as other things got in the way: my thanks.

The book remains fundamentally based on the thesis, with the advantages and disadvantages which that brings. I have, however, done my best to bring the law up to date, to temper some of the youthful infelicities of expression and, where on reflection I saw things differently from how I apparently saw them in 2008, to adjust my argument. The changes introduced by the Land Registration etc (Scotland) Act 2012 have, in particular, necessitated quite substantial changes to parts of the text – there is a lesson, there, in speedily publishing something that one has committed to publish! I have also added discussion of some topics which had not been addressed in the thesis and included a conclusion in most chapters, to make the text easier to use both for any practitioner venturing into it and also more generally for those who do not have the time or inclination to delve into all of the detail.

I am grateful for the opportunity to publish the book in the *Studies in Scots Law* series. The list of people who helped directly and indirectly with the production of the thesis, and the book, is too long to set out in full. I was fortunate to have both George Gretton and Kenneth Reid as primary supervisors of my thesis and Laura Macgregor as secondary supervisor. Kenneth Reid also, with his customary efficiency, edited this text and helped to prepare it for publication. I also specifically thank (i) the Edinburgh Legal Education Trust and the Arts and Humanities Research Council, who funded my research and, in ELET’s case, also some research assistance in the final stages of producing this book when the COVID-19 pandemic meant that the Edinburgh Law Library was off limits to me; (ii) Reinhard Zimmermann and his colleagues, who welcomed me at the Max Planck Institute for Comparative and Private International Law in Hamburg in a beautiful autumn in 2005, in a stay which changed my outlook as a lawyer; (iii) the Clark Foundation which, some time ago now, kindly provided some funds to support my spending some time to produce this book; (iv) Andrew Sweeney, who assisted with obtaining materials from Edinburgh

University Law Library; and (v) Andrew Steven, who did much to encourage me to pursue postgraduate research in the first place.

The book refers in places to foreign language materials. Unless otherwise indicated, the translation is mine.

Peter Webster
August 2021

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1449 Act	Leases Act 1449 (APS ii 35 c 6, RPS 1450/1/16–17)
1857 Act	Registration of Leases (Scotland) Act 1857 (20 & 21 Vict c 26)
1979 Act	Land Registration (Scotland) Act 1979 (c 33)
1995 Act	Requirements of Writing (Scotland) Act 1995 (c 7)
2012 Act	Land Registration etc (Scotland) Act 2012 (asp 5)
2016 Act	Private Housing (Tenancies) (Scotland) Act 2016 (asp 19)
AD	Reports of the Appellate Division of the Supreme Court of South Africa
<i>Anderson Assignment</i>	RG Anderson <i>Assignment</i> (Studies in Scots Law vol 1, 2008)
<i>Bankton Institute</i>	Andrew McDouall, Lord Bankton <i>An Institute of the Laws of Scotland in Civil Rights, with Observations upon the Agreement or Diversity between them and the Laws of England</i> (1751–53; reprinted Stair Society vols 41–43, 1993–95)
<i>Bell Commentaries</i>	GJ Bell <i>Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence</i> (7th edn by J McLaren, 1870, reprinted 1990)
<i>Bell Leases</i>	R Bell <i>A Treatise on Leases</i> (4th edn, 1825, revised and enlarged by W Bell)

Bell <i>Principles</i>	GJ Bell <i>Principles of the Law of Scotland</i> (10th edn by W Guthrie, 1899, reprinted 1989)
Bell's Octavo Cases	R Bell <i>Octavo Cases, 1790–1792</i>
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
BGHZ	<i>Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen</i>
Br Sup	MP Brown <i>Supplement to the Dictionary of Decisions of the Court of Session</i> , 5 vols (1826)
CLJ	<i>Cambridge Law Journal</i>
Cockburn <i>Commercial Leases</i>	DW Cockburn <i>Commercial Leases</i> (2nd edn, 2011)
Conv	<i>The Conveyancer and Property Lawyer</i>
Cooper <i>Landlord and Tenant</i>	WE Cooper, <i>Landlord and Tenant</i> (2nd edn, 1994)
CPD	Reports of the Cape Provincial Division (South Africa)
Craig <i>Jus Feudale</i>	T Craig <i>Jus Feudale</i> (transl Lord Clyde, 1934)
D	Justinian's <i>Digest</i>
EdinLR	<i>Edinburgh Law Review</i>
Erskine <i>Institute</i>	J Erskine, <i>An Institute of the Law of Scotland</i> (8th edn by JB Nicolson, 1871, reprinted 1989)
Erskine <i>Principles</i>	J Erskine <i>Principles of the Law of Scotland</i> (21st edn by J Rankine, 1911)
FC	<i>Decisions of the Court of Session</i> , collected under the auspices of the Faculty of Advocates, 1752–1841

Gloag <i>Contract</i>	WM Gloag <i>The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland</i> (2nd edn, 1929, reprinted 1985)
Gordon and Wortley <i>Scottish Land Law</i>	WM Gordon and S Wortley <i>Scottish Land Law</i> (3rd edn) vol I (2009), vol II (2020)
Gray and Gray <i>Elements</i>	K Gray and SF Grey <i>Elements of Land Law</i> (5th edn, 2008)
Halliday <i>Conveyancing</i>	JM Halliday <i>Conveyancing Law and Practice in Scotland</i> vol II (2nd edn by IJS Talman, 1997)
Hume	D Hume <i>Decisions of the Court of Session, 1781–1822</i> (1839)
Hume <i>Lectures</i>	GCH Paton (ed) <i>Baron David Hume's Lectures 1786–1822</i> (Stair Society vols 5, 13, 15, 17–19, 1939–58)
Hunter <i>Landlord and Tenant</i>	R Hunter <i>A Treatise on the Law of Landlord and Tenant</i> (4th edn, 1876)
JJ	<i>Journal of Jurisprudence</i>
JR	<i>Juridical Review</i>
Kerr <i>Sale and Lease</i>	G Glover, <i>Kerr's Law of Sale and Lease</i> (4th edn, 2014)
LAWSA	WA Joubert et al (eds) <i>The Law of South Africa</i> (1st and 2nd reissues) with cumulative supplements
LQR	<i>Law Quarterly Review</i>
McAllister <i>Leases</i>	C Anderson and L Richardson <i>McAllister's Scottish Law of Leases</i> (5th edn, 2021)
McBryde <i>Contract</i>	WW McBryde <i>The Law of Contract in Scotland</i> (3rd edn, 2007)
Mackenzie <i>Observations</i>	G Mackenzie <i>Observations on the Acts of Parliament</i> (1687)
Megarry & Wade <i>Real Property</i>	E Cooke, S Bridge and M Dixon <i>Megarry & Wade: The Law of Real Property</i> (9th edn, 2019)

More <i>Lectures</i>	JS More <i>Lectures on the Law of Scotland</i> (ed J McLaren, 1864)
<i>Münchener Kommentar</i>	<i>Münchener Kommentar zum Bürgerlichen Geztzbuch: Band 3 Schuldrecht, Besonderer Teil I</i> (8th edn, 2020)
Paton and Cameron <i>Landlord and Tenant</i>	GCH Paton and JGS Cameron <i>The Law of Landlord and Tenant in Scotland</i> (1967)
Rankine <i>Leases</i>	J Rankine <i>A Treatise on the Law of Leases in Scotland</i> (3rd edn, 1916)
Reid <i>Property</i>	KGC Reid et al <i>The Law of Property in Scotland</i> (1996)
Rennie <i>Leases</i>	R Rennie et al <i>Leases</i> (2015)
Rn	<i>Randnummer</i>
Ross <i>Lectures</i>	W Ross <i>Lectures on the History and Practice of the Law of Scotland</i> (2nd edn, 1822)
RTD civ	<i>Revue trimestrielle de droit civil</i>
SLPQ	<i>Scottish Law & Practice Quarterly</i>
<i>SME Landlord and Tenant Second Reissue</i>	<i>The Laws of Scotland: Stair Memorial Encyclopaedia: Landlord and Tenant Second Reissue</i> (D Bain et al, 2021)
<i>Stair Institutions</i>	James Dalrymple, Viscount Stair <i>The Institutions of the Law of Scotland</i> (5th edn by JS More, 1832)
<i>Staudingers Kommentar</i>	<i>J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Buch 2: Recht des Schuldverhältnisse: §§ 562–580a</i> (revised edn, 2020)
Supreme Court Reports	Juta's Supreme Court Reports, Cape of Good Hope, 1880–1910
TPD	Transvaal Provincial Division Decisions, 1910–46 (South Africa)

Van Huyssteen et al <i>Contract</i>	LF van Huyssteen, GF Lubbe, MFB Reinecke, and JE du Plessis <i>Contract: General Principles</i> (6th edn, 2020)
Woodfall <i>Landlord and Tenant</i>	The Hon Lord Justice Lewison (ed) <i>Woodfall's Law of Landlord and Tenant</i> (looseleaf)

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1-01. At common law, a lease is a contract.¹ Were this all it could be, the tenant's position would be precarious. The tenant would be exposed to the danger of transfer by the landlord, as a contractual right to possession binds only the original landlord and would provide no defence against a new owner, should such owner seek to evict the tenant. Like many other legal systems,² however, Scots law protects the tenant against such a possibility. Since the

¹ *Stair Institutions* I xv 4, II ix 1–2; *Mackenzie Observations* 188; *Bankton Institute* II ix 1; *Erskine Institute* II vi 23; *Erskine Principles* II vi 9; *Bell Commentaries* I 64; *Bell Principles* §1177; *JS More Lectures on the Law of Scotland* (ed J McLaren, 1864) vol II 1–2; *Hume Lectures* II 56 and IV 73; *Hunter Landlord and Tenant* vol I 360; *Rankine Leases* 1 and 133.

² C Van der Merwe and A-L Verbeke (eds) *Time Limited Interests in Land* (2012): see the discussion of 'case 2' at 132 *et seq.*

coming into force of the Leases Act 1449 (the ‘1449 Act’),³ statute has provided that in certain circumstances, and contrary to the common law rule, a singular successor of the landlord is bound by the lease.

1-02. What, however, is the relationship that arises between the tenant and the successor landlord? That question is the focus of this book. This introductory chapter considers the requirements that must be satisfied before a lease will take effect against a successor to the landlord, and the effect on the contract of lease when the tenant’s right does bind a successor. The remaining chapters consider in detail a variety of issues that arise between the tenant and successor landlord in circumstances where the lease is binding on the successor.

A. WHEN DOES A LEASE BIND A SUCCESSOR?

(1) Introduction

1-03. Until recently, one could confidently say that Scots law provided two ways in which a tenant could render a lease binding upon a singular successor of the landlord: one was possession and the other registration in the Land Register. Today one must also include the possibility of a lease binding a successor by virtue of a statutory provision that applies to private residential tenancies, section 45 of the Private Housing (Tenancies) (Scotland) Act 2016.

1-04. Although the requirements of the 1449 Act and the registration statutes are not the focus of this book, they are briefly outlined here as a backdrop to the analysis to follow.⁴ All leases are contracts. Many, but not all, meet the requirements of the 1449 Act or registration statutes and so can be made to bind a successor landlord. A lease which cannot do so remains a contract, enforceable between the parties to it, and providing the tenant with contractual remedies if the landlord transfers the property during the subsistence of the lease without taking steps to protect the tenant’s position.⁵

1-05. Looking first at the general law, whether possession or registration is necessary to make a lease binding on a successor depends on whether the lease is registrable in the Land Register. The possibility of registering leases (at that time in the Register of Sasines) was introduced by the Registration of Leases (Scotland) Act 1857. Initially, registration was optional. But following the enactment of the Land Registration (Scotland) Act 1979 and the introduction of the Land Register, once an area became operational in the Land Register, registration became mandatory to make a registrable lease real. That rule is

³ Leases Act 1449 (APS ii 35 c 6, RPS 1450/1/16–17).

⁴ For more detail, see Rankine *Leases* 132–147; Paton and Cameron *Landlord and Tenant* 103–116; McAllister *Leases* [2.30] *et seq*; Rennie *Leases* Ch 5.

⁵ See para 8-43 below.

preserved under the Land Registration etc (Scotland) Act 2012, although the relevant statutory provisions are now once again to be found in the 1857 Act, as amended. A lease is a registrable lease (and therefore must be registered to bind successors) if it is a probative lease of lands and heritages for a period exceeding 20 years.

(2) Leases to which the 1449 Act applies

1-06. Protection for unregistrable leases derives from the Leases Act 1449. It is brief enough to be quoted in full:⁶

Item it is ordanit and statute that for the saueritie and favor of the pure pupil that laubouris the grunde that thai and al uthiris that has takyn or sal tak landis in tym to cum fra lordis and has termes and yeris tharof, that suppose the lordis sel or analy thai landis, that the takaris sall remayn withe thare takis^[7] one to the ische^[8] of thare termez quhais handis at evir thai landis cum to for sic lik male^[9] as thai tuk thaim of befor.

The 1449 Act remains of signal importance, all the more so since the economic downturn which began with the banking crisis of 2008. There has been a move away from the long commercial leases which are subject to a requirement of registration.¹⁰ Scottish Government research from 2011 stated that the average length of a lease was around five-and-a-half years.¹¹ Analysis of the UK commercial property market in 2019 showed that the average length of a lease granted in the first half of 2019 was 6.3 years and that 94 per cent of leases were for periods shorter than 15 years.¹² This demonstrates the continued importance of the 1449 Act.

1-07. The 1449 Act has been the subject of interpretation by the courts.¹³ For example, despite some early views to the contrary,¹⁴ it has been held that its application is not restricted to agricultural tenants.¹⁵ The following requirements have been established.¹⁶

⁶ Text from <https://www.rps.ac.uk/trans/1450/1/16>.

⁷ 'Tack', in its current spelling, is a traditional Scots word for 'lease'.

⁸ 'Ish' is the date on which a lease terminates.

⁹ 'Male' or, later, 'maill', is rent.

¹⁰ P Hunter and E Mellor 'Leases: where next?' 2012 57 JLSS July/32.

¹¹ *Consultation on Climate Change (Scotland) Act 2009: Section 63 regulations and guidance for non-domestic buildings* (2011: <http://www.scotland.gov.uk/Resource/Doc/217736/0121567.pdf>) 28.

¹² *UK Lease Events Review* (2019: <https://www.realestate.bnpparibas.co.uk/sites/default/files/2019-12/leaseeventsreport2019-final.pdf>) 6–7.

¹³ On the general approach to interpreting Acts of the Parliament of Scotland, see *Governors of George Heriot's Trust v Paton's Trs* 1912 SC 1123 (IH) at 1134–1135.

¹⁴ E.g. *Erskine Institute* II vi 27.

¹⁵ *Waddell v Brown* (1794) Mor 10309.

¹⁶ For more detail, see Rankine *Leases* Ch V; Paton and Cameron *Landlord and Tenant* Ch VII; McAllister *Leases* [2.30]–[2.38]; Rennie *Leases* Ch 5.

(a) *If the lease is for more than one year, it must be in writing*

1-08. The 1449 Act itself does not say that a lease needs to be in writing in order for the Act to apply. Until the Requirements of Writing (Scotland) Act 1995 entered into force, even if a lease was not executed in compliance with the requirements of writing which then applied, deficiencies in execution could be ‘cured’ by *rei interventus* and such a lease could still bind successors.¹⁷ However, the safest view of the current law is that if the 1995 Act applies to a lease, and the lease is for more than one year, in order for the rights created by that lease to bind a successor landlord there must be a document or documents which comply with the requirements of section 2 of the 1995 Act. This was the approach taken to section 1(2)(b) of the 1995 Act in *The Advice Centre for Mortgages v McNicoll*.¹⁸ Lord Drummond Young stated that section 1(2)(b) applies to a lease which the parties intend to be made real by possession and that the statutory personal bar provisions in section 1(3) and (4) do not apply. Further, he considered that, even if the statutory personal bar provisions did apply, they could only make the lease enforceable between the parties to it: a lease set up in such a way could not become real.¹⁹ This view was followed in *Gyle Shopping Centre General Partners v Marks & Spencer plc*.²⁰ There are difficulties with the reasoning in *Advice Centre* and generally with the application of the 1995 Act to leases.²¹ On the current state of the authorities, however, if the 1995 Act applies to the lease, one has to proceed on the basis that there needs to be a document or documents complying with the formal requirements of section 2 of the 1995 Act before the tenant’s rights will bind a successor landlord; the statutory personal bar provisions in section 1(3) and (4) cannot overcome the lack of writing so as to allow the lease to bind a successor. It is not obvious that such a change in the law in 1995 was intended or that it is beneficial. Importantly, the 1995 Act does not apply to private residential tenancies under the Private Housing (Tenancies) (Scotland) Act 2016.²²

¹⁷ Indeed, Rankine noted at 134 that the rules about the circumstances in which *rei interventus* rendered a lease binding ‘were illustrated in large part from cases which arose between tenants and singular successors of the lessor’.

¹⁸ [2006] CSOH 58, 2006 SLT 591 at [1]–[36]. This case is discussed in A McAllister ‘Leases and the requirements of writing’ 2006 SLT (News) 254; EC Reid ‘Personal Bar: Three Cases’ (2006) 10 EdinLR 437; KGC Reid and GL Grettton *Conveyancing 2006* (2007) 106–109.

¹⁹ Because it relies upon ‘personal bar’, which Lord Drummond Young held could not operate in a question with singular successors.

²⁰ [2014] CSOH 122, 2015 SCLR 171 at [14]–[16]. See also *Gray v MacNeil’s Exr* [2017] SAC (Civ) 9, 2017 SLT (Sh Ct) 83 at [21].

²¹ See A McAllister ‘Leases and the requirements of writing’ 2006 SLT (News) 254; McAllister *Leases* [2.9]–[2.20]; P Webster ‘Leases and the Requirements of Writing’ (2022) 26 EdinLR 51.

²² Requirements of Writing (Scotland) Act 1995 s 1(7A), inserted by Private Housing (Tenancies) (Scotland) Act 2016 Sch 4. This provides that a private residential tenancy is not a ‘real right in land’ for the purposes of s 1 of the 1995 Act. The requirements of s 1 therefore do not apply to it. The interaction between s 1(7A) of the 1995 Act and s 3 of the 2016 Act is not clear. For leases under the 2016 Act, see paras 1-26 to 1-32 below.

(b) *The lease must have a definite ish*

1-09. The Leases Act 1449 does not apply to a perpetual lease. In the well-known case of *Carruthers v Irvine*,²³ the Act was held not to apply to a lease which was granted ‘perpetually and continually as long as the grass groweth up and the water runneth down’. There has been debate – today to a large extent academic²⁴ – about whether there is a cap on the length of leases to which the 1449 Act can apply and, in particular, whether a lease which is so long as to be, in effect, perpetual benefits from the Act. Rankine’s view is that there is no such limit, provided that the duration of the lease is definite. Although the ish must be ‘definite’, that does not mean that it must be possible to ascertain the maximum duration of the lease from the moment the lease is created. It is sufficient that the ish is the occurrence of an event which is bound to happen, such as the death of the landlord.²⁵ By contrast, the 1449 Act would not apply to a lease framed to last until, for example, the landlord requires the property for the purposes of redevelopment or for the ‘duration of the war’;²⁶ those events are not bound to happen so such a lease would not have a definite ish.

1-10. In the English case of *Mexfield Housing Ltd v Berrisford*²⁷ the Supreme Court considered the position of a periodic tenancy which contained a restriction on the landlord’s power to terminate the lease. It held that, unless such a restriction is itself of certain duration (so that the maximum duration of the lease can be established at the outset), the restriction is not valid as a matter of land law and the parties’ agreement cannot create a tenancy according to the terms of the agreement. The case is of potential interest because Lord Hope considered how Scots law would treat such an agreement.

1-11. The case concerned an occupancy agreement between a housing association and occupier which provided that the premises were to be occupied on a month-to-month basis. The occupier was entitled to bring the occupancy agreement to an end by one month’s notice. The association’s powers to terminate were, however, more restricted: it could terminate only in the event of rent arrears or the occupier ceasing to be a member of the association. The court held that this agreement could not take effect as a tenancy under English law, because the restriction on the association’s power to determine the periodic

²³ (1717) Mor 15195.

²⁴ Because of a combination of (i) the rule that no lease granted after 28 November 2004 may endure for more than 175 years (Abolition of Feudal Tenure etc (Scotland) Act 2000 s 67), (ii) the rule that certain subsisting long leases will have been converted to ownership by the Long Leases (Scotland) Act 2012 on 28 November 2015, brought into effect by Long Leases (Scotland) Act 2012 (Commencement No 1) Order 2013, SSI 2013/322, and (iii) the fact that many long leases will be registrable and therefore will only bind a successor if registered.

²⁵ Paton and Cameron, *Landlord and Tenant* 107.

²⁶ To take two examples provided by English case law: *Ashburn Anstalt v Arnold* [1989] Ch 1 (CA); *Lace v Chandler* [1944] KB 368 (CA). There appear to be no analogous Scottish decisions.

²⁷ [2011] UKSC 52, [2012] 1 AC 955.

tenancy was not of certain duration.²⁸ The court was critical of the rule,²⁹ but held that it was clearly established.

1-12. Lord Hope considered how Scots law would treat such an agreement. He stated that the 1449 Act would not apply to it because that Act only applies to leases with a definite ish and the restriction upon termination of the periodic tenancy made the duration of the lease indefinite. He did, however, state that the contract would have been enforceable between the original parties.³⁰ Scots law was not the subject of argument in the case and, it is suggested, is not necessarily as Lord Hope describes.³¹ In *Campbell v M'Kinnon*³² the Inner House and then the House of Lords considered whether a lease for 99 years, which contained an obligation to renew the lease in perpetuity for further terms of 99 years, bound a successor. Both courts reserved their opinion on whether the obligation to renew the lease bound a successor landlord, but held that the 1449 Act *did* apply to the lease by virtue of which the tenant was currently in possession. There seems to be no reason why a lease subject to a restriction on exercising a notice to quit should be treated differently from one subject to an obligation to renew: both are contractual terms which affect the duration of the lease, albeit that they operate in different ways. It is suggested that a periodic lease containing a restriction on termination should be capable of binding a successor, but that the restriction itself – which creates the problem of the uncertain ish – should not bind the successor. Depending on the length of the period, the point may be of some significance. If, as in *Mexfield*, the period of the lease is one month, it is likely to be of little significance: a successor landlord, bound by the lease but not by the contractual restriction on termination, could terminate the lease and seek to remove the tenant. If the period is longer, however (for example, a lease from year to year, with a restriction upon termination), the question whether the lease benefits from the 1449 Act may be of some importance.

1-13. Private residential tenancies are an exception to the rule that a lease needs to have a definite ish,³³ and the 1449 Act will likely apply to such a lease even without a definite ish: that appears to be the intention behind section 5 of the Private Housing (Tenancies) (Scotland) Act 2016, which provides for

²⁸ Because of other rules of English law, the agreement took effect as a tenancy for a term of 90 years, which was determinable on the occupier's death or in line with the contractual termination provisions.

²⁹ See e.g. Baroness Hale at [96], quoting S Bridge 'Periodic tenancies and the problem of certainty of term' [2010] Conv 492.

³⁰ [2011] UKSC 52, [2012] 1 AC 955 at [79].

³¹ It is in any event probably now different in respect of private residential tenancies because of ss 4 and 5 of the Private Housing (Tenancies) (Scotland) Act 2016, discussed at para 1-13 below. The points made here are only in respect of the general law, to which that Act does not apply.

³² (1867) 5 M 636 (IH) at 649 and 652, affd *sub nom Campbell v M'Lean* (1870) 8 M (HL) 40 at 43 and 48. See, too, the decision of the House of Lords in the *Case of the Queensberry Leases* (1819) 1 Bligh 339 at 404.

³³ Private Housing (Tenancies) (Scotland) Act 2016 s 4(a).

‘tenancy’ and other related expressions to have an extended meaning in any other enactment and to encompass a private residential tenancy under the 2016 Act.

(c) *The subjects of the lease must be land*

1-14. The 1449 Act has been said by Lord Deas to apply to ‘all heritable subjects capable of such open and continuous possession as may naturally suggest to a singular successor the existence of a lease’.³⁴ Many of the cases in which this issue has been raised consider whether a contract granting sporting rights is protected by the Act. The law in respect of game leases is complex and cannot be considered here.³⁵ However, the rule in respect of two types of sporting right can be stated clearly. Because salmon fishings are a separate tenement, a lease of salmon fishings is a lease of land and can be protected by the 1449 Act.³⁶ The 1449 Act is also applied by statute to leases of freshwater fishing in inland waters.³⁷

(d) *The tenant must possess the subjects by virtue of the lease*

1-15. The tenant must possess the lands which are the subject of the lease in order to obtain a right which is valid against a singular successor. This is the means by which the existence of the lease is publicised to the world and potential purchasers are alerted to its existence. Possession must be by virtue of the lease,³⁸ which means that it must be after the date of entry.³⁹ Possession by virtue of some separate arrangement prior to that date will not suffice.⁴⁰ Civil

³⁴ *Campbell v M’Kinnon* (1867) 5 M 636 (IH) at 651.

³⁵ Some of the cases are discussed by Paton and Cameron *Landlord and Tenant* 105–106. Since Paton and Cameron wrote, *Palmer’s Trs v Brown* 1989 SLT 128 (OH) has been decided. It held that a game lease was registrable, even although it did not confer on the tenant a right to exclusive possession of land. Part of Lord Davidson’s reasoning is that it is well settled that a lease which does not qualify for protection under the Leases Act 1449 may be valid by virtue of registration. Regardless, therefore, of any doubts about whether game leases may bind a successor by virtue of the 1449 Act, they can do so by registration: 131. It is true that the 1449 Act’s rules about duration and rent do not apply to registered leases. It is difficult to see, however, that what counts as ‘land’ can differ. The issue in *Palmer’s Tr* was whether the game lease in question was a lease of ‘lands and heritages’. The 1449 Act applies to leases of ‘land’; the Registration of Leases (Scotland) Act 1857 applies to leases of ‘lands and heritages’: see s 1.

³⁶ Mackenzie *Observations* 189; Erskine II vi 27; *Earl of Galloway v Duke of Bedford* (1902) 4 F 851 (IH) 864–865.

³⁷ Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 s 66(1). Such contracts are also registrable if of sufficient duration: Registration of Leases (Scotland) Act 1857 s 20D.

³⁸ Hume *Lectures* IV 81.

³⁹ Erskine *Principles* II vi 10; *Johnston v Cullen* (1676) Mor 15231. See para 5-06 below.

⁴⁰ *Millar v McRobbie* 1949 SC 1 (IH): an agricultural tenant was allowed on to the lands in order to perform various preparatory works before the start of the lease. The court held that this was

possession is as good as natural possession, so that for example possession by a sub-tenant validates a head-lease.⁴¹ The tenant must remain in possession in order to continue to benefit from the protection of the 1449 Act.⁴² In the present book, the main importance of the rule that the tenant must be in possession by virtue of the lease which, it is alleged, binds a successor can be seen in chapter 5, which discusses the various ways in which a lease can be renewed: if the parties ‘renew’ their lease by means of a lease to begin at some point in the future, that will not bind a successor who acquires in the meantime, because the tenant will not yet be in possession by virtue of the lease that is to begin in the future.⁴³

(e) *There must be a definite rent which is not elusory*

1-16. In order for a contract to be a lease, it must provide for the payment of rent.⁴⁴ If the contract is not a lease, the 1449 Act cannot apply to it.⁴⁵ An illustration is provided by *Mann v Houston*.⁴⁶ The owner of a garage agreed to allow a person to occupy it for ten years in return for a capital payment of £200. The contract provided that no rent was to be payable. However, the owner was entitled to terminate the agreement at each Whitsunday and Martinmas; if he exercised that option, he was bound to pay the occupier £20 in respect of each unexpired year of the agreement. The Inner House held that the complete absence of rent meant that this contract was not a lease and therefore that the 1449 Act did not apply to it.⁴⁷ In order for the 1449 Act to apply, the rent need not be payable in money: it can also consist of grain or services rendered by the tenant to the landlord. Nor need the rent be a fair rent or the market rent for the subjects.⁴⁸ The only requirement is that the rent is not elusory. In theory, the rent stands as ‘some equivalent of the possession of which the purchaser

by virtue of a limited right and privilege, and not the lease, and that, in any event, the acts which the prospective tenant had done had not been enough to amount to possession because they were not ‘exclusive’.

⁴¹ Bell *Principles* §1211; *Inglis v Paul* (1829) 7 S 469 (IH) at 473.

⁴² Bell *Commentaries* I 64.

⁴³ See paras 5-06 to 5-09 below.

⁴⁴ *Stair Institutions* I xv 1; *Bankton Institute* I xx 1; *Erskine Institute* III iii 14; Bell *Principles* §1177. See, also, e.g. *Shetland Islands Council v BP Petroleum Development* 1990 SLT 82 (OH).

⁴⁵ This is another point where private residential tenancies are subject to a different rule: once an agreement has given rise to a private residential tenancy, that agreement is to continue to be regarded as giving rise to such a tenancy despite the term of the agreement requiring the tenant to pay rent subsequently being removed from the agreement or otherwise ceasing to have effect: Private Housing (Tenancies) (Scotland) Act 2016 s 4(b). Section 5 of the 2016 Act provides that, unless the contrary intention appears, a reference in another enactment to a tenancy includes a private residential tenancy. There is room for debate about whether a private residential tenancy which contains no obligation to pay rent will benefit from the 1449 Act.

⁴⁶ 1957 SLT 89 (IH).

⁴⁷ 1957 SLT 89 at 92 (Lord President Clyde) and 94 (Lord Sorn).

⁴⁸ *Erskine* II vi 24. Cf JS More *Lectures on the Law of Scotland* (1864) vol II 4.

of the land is deprived'.⁴⁹ It is no objection that a grassum (a capital payment) was made to the original landlord, so long as some rent remains due. Chapter 6 discusses whether agreements to discharge rent or allow the tenant to retain rent in satisfaction of some other obligation affect successors to the landlord.⁵⁰

(f) *The grantor of the lease must have title to grant it*

1-17. This is not listed by Rankine or Paton and Cameron as a requirement for the 1449 Act to apply to a lease. Instead, they consider the requirement that landlords have title to the subjects leased in those sections of their texts which detail the requirements for a valid contract of lease,⁵¹ as opposed to those discussing whether the lease binds successors. However, the preferable view is that a landlord need not have title to the property to be able to conclude a valid contract of lease. That is consistent with the general principles of contract law.⁵² It is also consistent with the general rule of lease law that a tenant is not entitled to dispute his landlord's title.⁵³ It is the approach adopted in various other legal systems.⁵⁴ However, this approach is difficult to reconcile with two nineteenth-century decisions of the Second Division.⁵⁵ The point cannot be explored here.⁵⁶ Whether having title to the land is a condition of a valid contract of lease or is only a requirement that must be satisfied before a contract of lease can bind a successor, it certainly is a requirement in order for a lease to bind a successor. As it was put in 1760, 'the Act of Parliament which makes tacks a real right supposes that they proceed from one who was in the right himself'.⁵⁷

⁴⁹ Bell *Principles* §1199.

⁵⁰ Paras 6-19 *et seq* below.

⁵¹ Rankine *Leases* Ch II; Paton and Cameron *Landlord and Tenant* Ch IV.

⁵² That, providing performance is objectively possible, a contract is valid even although one of the parties is unable to perform: Stair *Institutions* I x 13. In respect of leases, see in particular R Pothier *Treatise on the Contract of Letting and Hiring* (transl GA Mulligan 1953) §20.

⁵³ Stair *Institutions* II ix 41; Bankton *Institute* II ix 54; Erskine *Institute* II vi 51; *King v Wieland* (1858) 20 D 960 (IH) at 964; Paton and Cameron *Landlord and Tenant* 252-253.

⁵⁴ England: *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 (HL); France: F Collart-Dutilleul and P Delebecque *Contrats civils et commerciaux* (11th edn, 2019) [443]; South Africa: Cooper *Landlord and Tenant* 27-28; Kerr *Sale and Lease* 346-347.

⁵⁵ *Weir v Dunlop* (1861) 23 D 1293 (IH); *Reid's Trs v Watson* (1896) 23 R 636 (IH). Each considered leases granted by a person who turned out to have no title and who then sought to assign the lease to a person who did have title. Each holds that the assignation could be of no effect because there was no lease in existence to assign. Lord Young dissented in *Reid's Trs*. His dissent, and the opinion of the Lord Ordinary, Lord Kyllachy, are persuasive. As Lord Kyllachy stated (as 639), 'there may . . . be a quite valid sale or hire of what is or turns out to be a *res aliena*'.

⁵⁶ The point is discussed in detail in P Webster 'The Continued Existence of the Contract of Lease' in RG Anderson, J MacLeod and AJM Steven (eds) *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 119.

⁵⁷ *Tenants of Killilung* (1760) 5 Br Sup 877.

(3) Registration of leases

1-18. The possibility of registering leases was introduced by the Registration of Leases (Scotland) Act 1857, primarily in order to allow leases to be used as security for lending.⁵⁸ That statute provided for registration in the Register of Sasines. Once an area became operational for the purposes of the Land Register, under the Land Registration (Scotland) Act 1979, registration became the only way for the tenant to obtain a real right in a ‘long lease’.⁵⁹ The grant of a lease triggered first registration in the Land Register.⁶⁰ After the Land Registration etc (Scotland) Act 2012, the key provisions regarding registration of leases are found in the Registration of Leases (Scotland) Act 1857 (as amended by the 2012 Act) as opposed to the general land registration statute.⁶¹ The Leases Act 1449 does not apply to a registrable lease⁶² so registration is the only way of making a registrable lease real.⁶³ However, a lease that was made real by possession before registration became required will continue to bind a successor.⁶⁴

1-19. The criteria which a lease must meet in order to be registrable have varied over the years⁶⁵ and differ from those which must be met in order for the 1449 Act to apply. The 1857 Act applies to ‘leases’, so the agreement to be registered must amount to a lease.⁶⁶ The 1857 Act contains three further

⁵⁸ W Guy ‘Registration of Leases’ (1908–1909) 20 JR 234.

⁵⁹ Land Registration (Scotland) Act 1979 s 3(3); ‘long lease’ is defined in s 28(1).

⁶⁰ Land Registration (Scotland) Act 1979 s 2(1)(a)(i).

⁶¹ Land Registration etc (Scotland) Act 2012 s 49.

⁶² Registration of Leases (Scotland) Act 1857 s 20C. This disapplies the 1449 Act to registrable leases.

⁶³ Subject, perhaps, to the application of the Private Housing (Tenancies) (Scotland) Act 2016, discussed below at paras 1-26 *et seq.*

⁶⁴ Under the Land Registration (Scotland) Act 1979 s 3(1), such a lease was an ‘overriding interest’, to which the registered owner’s rights were subject. Under the Land Registration etc (Scotland) Act 2012, the statutory architecture is different: there is no equivalent of s 3(1) of the 1979 Act, providing that the owner’s rights are subject only to a limited list of overriding interests. If the lease is real, it binds the owner, and will not be extinguished upon a good-faith acquisition: see s 91(4). Note, however, that the existence of a ‘long lease’ (even if not registered) is to be noted on the title sheet: s 9(1)(b).

⁶⁵ Three amendments were made by Land Tenure (Reform) (Scotland) Act 1974 Sch 6: (i) In its original form, s 18 of the Registration of Leases (Scotland) Act 1857 had provided that, in order for a lease to be registrable, it had to state the name of the lands leased, the subjects of the lease were not to exceed 50 acres (unless the lease was of mines or minerals), and the lease required to contain a statement to that effect. Section 18 was repealed. (ii) The 1857 Act originally applied only to leases with a duration of 31 years or more. That was changed to leases of more than 20 years. (iii) Originally, s 2 of the 1857 Act applied only to leases which had been registered at or subsequent to the date of entry. That rule was removed.

⁶⁶ There must, for example, therefore be a rent – see para 1-16 above. Private Housing (Scotland) Act 2016 s 4(b) is an exception to this.

requirements, and these apply whether the lease was being registered in the Register of Sasines or is now to be registered in the Land Register.⁶⁷

- (i) the lease must be probative;
- (ii) it must be of 'lands and heritages in Scotland'; and
- (iii) it must be for a period exceeding (or potentially exceeding) 20 years.

(a) The lease must be probative

1-20. Problematically this word was, for some time, used in two senses by Scots lawyers: first, to refer to a document which had been executed in compliance with statutory formalities (i.e. was valid in respect of formalities), and second, to indicate that the document was 'self-proving', that is to say that, because it appeared to have been executed in compliance with statutory requirements, it was presumed to be valid.⁶⁸ In a statute dealing with registration, the word is almost certainly being used in the second sense to indicate a deed which, on its face, complies with statutory formalities of execution.⁶⁹ The other interpretation would require a party seeking registration actually to prove that the lease was validly executed, which would be impractical. Although 'probative' is not a term used by the Requirements of Writing (Scotland) Act 1995, it is still generally understood to describe a document which is self-proving (because, now, it complies with the requirements of section 3 of the 1995 Act).⁷⁰ It is suggested that it carries this meaning in section 1 of the 1857 Act.⁷¹

1-21. The inclusion of 'probative' in the provisions regarding entitlement to registration means that a lease could be very long indeed but still not qualify as registrable for the purposes of the 1857 Act. The question arises whether such a lease could nevertheless become real under the Leases Act 1449. A distinction is sometimes drawn between 'short' and 'long' leases, with it being said that a 'long' lease cannot bind a successor without registration. That is appealing from a policy perspective. However, the inclusion of 'probative' in the definition of 'registrable' lease which controls the *entitlement* to register, and the use of the same definition to control the *obligation* to register to obtain a real right, means that the law is not clear on this point. It could be argued that a long lease which is not probative is not a 'registrable' lease and therefore that section 20C of

⁶⁷ They are set down by Registration of Leases (Scotland) Act 1857 s 1. Section 17 makes provision for calculating the duration of leases containing terms regarding renewal.

⁶⁸ Scottish Law Commission *Report on Requirements of Writing* (Scot Law Com No 112, 1988) [5.1]; AG Walker and NML Walker *The Law of Evidence in Scotland* (1964) 182.

⁶⁹ That is also how the word was used by Professor Menzies in his lectures published just one year before the 1857 Act: A Menzies *Conveyancing according to the law of Scotland* (1856) 122.

⁷⁰ The Scottish Law Commission used the word in that way in the materials which preceded the 1995 Act: *Report on Requirements of Writing* [5.1]. The word continues to be used in this way in conveyancing practice: GL Gretton and KGC Reid *Conveyancing* (5th edn, 2018) paras 18-02 *et seq.*

⁷¹ A lease which was not probative could not be registered because of Requirements of Writing (Scotland) Act 1995 s 6 and Land Registration etc (Scotland) Act 2012 s 22(1)(c).

the 1857 Act, which disapplies the 1449 Act to ‘a lease registrable under this Act’, does not apply to it.⁷² The alternative approach is to take a less technical view of section 20C and conclude that a lease for more than 20 years which is not probative was, when granted, ‘registrable’ for the purposes of that section, because the parties could, by executing it properly, have made it registrable. Though the *document* which they have granted is not itself registrable, their *agreement* was registrable if the parties had executed it properly. On that approach, the 1449 Act does not apply to such a lease.⁷³ It is suggested that that is the better approach, but the law is not wholly clear. Given this uncertainty, and for the sake of accuracy, this book refers to ‘long’ or ‘registrable’ leases and ‘unregistrable’ leases instead of ‘long’ and ‘short’ leases: on one possible view, a lease could be unregistrable yet very long indeed.

(b) *The lease must be of ‘lands and heritages’*

1-22. It has been held in the Outer House that a contract which confers the exclusive right of shooting on particular land is a lease of ‘lands and heritages’ and so is registrable.⁷⁴ The Scottish Law Commission does not, however, view that decision as settling the law beyond all doubt.⁷⁵ The Land Registration etc (Scotland) Act 2012 amended the 1857 Act to make clear that ‘lands and heritages’ include the seabed of the territorial sea of the United Kingdom adjacent to Scotland;⁷⁶ and also to make clear that it applies to a contract granting the right to fish for freshwater fish in any inland water which is of registrable length.⁷⁷ Current Register of Scotland practice is to accept for registration ‘leases’ of roofs of buildings in connection with solar panels, but Gretton and Reid’s view is that these cannot competently be registered.⁷⁸

(c) *Duration*

1-23. Section 1(1) of the Registration of Leases (Scotland) Act 1857 permits registration of probative leases ‘for a period exceeding 20 years’. Section 17

⁷² The same would also have been true for the definition of ‘long lease’ under the Land Registration (Scotland) Act 1979 s 28(1). The problem flows from using the same definition to control *entitlement* to registration and *requirement* to register.

⁷³ Note that this argument would not have been available under the Land Registration (Scotland) Act 1979, because of the different statutory technique used. Section 3(3) of the 1979 Act provided that registration was the only way by which a lessee under a long lease could obtain a real right, with the definition of ‘long lease’ including whether the lease was probative.

⁷⁴ *Palmer’s Trs v Brown* 1989 SLT 128 (OH).

⁷⁵ Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, 2010) vol I [9.48]. Some doubts about the reasoning in *Palmer’s Trs* are noted at n 35 above.

⁷⁶ Registration of Leases (Scotland) Act 1857 s 1(2).

⁷⁷ Registration of Leases (Scotland) Act 1857 s 20D.

⁷⁸ KGC Reid and GL Gretton *Land Registration* (2017) [20.5].

makes provision for leases containing obligations to renew, namely that a lease which contains an obligation on the grantor to renew 'from time to time at fixed periods, or upon the termination of a life or lives, or otherwise' is deemed to be a lease within the meaning of the 1857 Act, provided that the lease is, by the terms of the obligation, renewable from time to time so as to endure for a period exceeding 20 years. Some other jurisdictions permit or require registration of shorter leases; however, the Scottish Law Commission viewed the question whether Scots law should follow suit as one that fell outside the scope of its project on land registration.⁷⁹ It might be considered as part of the Commission's current review of the law of leases.

1-24. Aside from these requirements, there is no rule that, to be registrable, a lease must have a fixed duration or a rent that is not merely elusory.⁸⁰ Section 2 of the 1857 Act provides that, if a registrable lease is valid and binding in a question with a grantor, registration makes it 'effectual against any singular successor in the land and heritages thereby let, whose [title is completed after] the date of such registration'.⁸¹ A lease with no fixed duration or an elusory rent is valid in a question with the grantor of the lease. The 1857 Act provides that the effect of registration (either in the Register of Sasines or the Land Register) is the equivalent of possession.⁸² Furthermore, where the lease is registered in the Land Register, registration is said to vest in the tenant 'a real right in and to the lease' and any right or pertinent forming part of it.⁸³

1-25. It has been held that if a lease is registrable, but is not registered, the tenant cannot claim damages from the original landlord for loss resulting from the fact that the successor owner is not bound by the lease.⁸⁴

(4) Private residential tenancies

1-26. The Private Housing (Tenancies) (Scotland) Act 2016 introduced a new beast to the statutory jungle: the private residential tenancy. That is a tenancy under which property is let to an individual as a separate dwelling and the

⁷⁹ Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, 2010) vol I [9.10].

⁸⁰ Rankine *Leases* 147.

⁸¹ This applies to leases registered both in the General Register of Sasines and the Land Register: Land Registration (Scotland) Act 1979 s 29 and Sch 3.

⁸² Registration of Leases (Scotland) Act 1857 s 16. As the 1449 Act is disapplied to registrable leases, it is not clear what the effect of possession will be.

⁸³ Registration of Leases (Scotland) Act 1857 s 20B. This mirrors the Land Registration (Scotland) Act 1979 ss 3(1) and 3(3). The Scottish Law Commission did not consider these provisions of the 1979 Act to be clear but thought that their reform was outside the scope of its land registration project and that they should be re-enacted so as not unintentionally to change the law without the points begin considered.

⁸⁴ *Palmer's Trs v Brown* 1989 SLT 128 (OH) 131. One wonders whether this would be held to apply to a lease which would have been registrable had it been properly executed.

tenant occupies the property, or any part of it, as the tenant's only or principal home.⁸⁵

1-27. Section 45 of the Act makes provision for what happens if the landlord of a private residential tenancy transfers ownership of the subjects of the lease:

Landlord's interest transfers with ownership of property

When ownership of a property let under a private residential tenancy is transferred, the landlord's interest under the tenancy transfers with it.

There are questions regarding both the perceived need for this provision and its effect.

1-28. Section 45 is the result of a Government-backed amendment to the Bill which became the 2016 Act. The explanation given by the relevant Minister was that the amendment would ensure that private residential tenants will have the same protection as provided under the Leases Act 1449. 'It means that when the previous owner of a property was letting it out under a private residential tenancy, the tenancy will continue and the new owner will automatically take over as the landlord.'⁸⁶

1-29. Why was section 45 needed? The 1449 Act already applies to private residential tenancies, section 5 of the 2016 Act providing that, unless the contrary intention appears, then (among other things) (i) references to tenancy in other enactments are to include references to a private residential tenancy, and (ii) references to property being let are to include references to property being let under a private residential tenancy. This would appear to cover the 1449 Act, despite the dated language used by that Act. However, that would not in itself have been sufficient to ensure that the 1449 Act applied to every private residential tenancy. After all, a lease can be a private residential tenancy even if it does not satisfy all of the requirements which it would need to meet in order to be protected against singular successors under the 1449 Act.⁸⁷ There can, for example, be a private residential tenancy even though there is no ish. Further, once a private residential tenancy has been created, it continues to be such a tenancy even if the requirement to pay rent is subsequently removed or ceases to have effect.⁸⁸ Saying – as does section 5 of the 2016 Act – that a reference in the 1449 Act to property being let includes a reference to property being let pursuant to a private residential tenancy does not change the substantive requirements of the 1449 Act. If, therefore, such a tenancy does not meet the requirements of the 1449 Act, the tenancy is not protected. Section 45 will still, however, apply to such a lease.⁸⁹

⁸⁵ Private Housing (Tenancies) (Scotland) Act 2016 s 1, provided that the tenancy is not one which Sch 1 of the 2016 Act states cannot be a private residential tenancy.

⁸⁶ Scottish Parliament *Official Report: Meeting of the Parliament* 17 March 2016 p 74.

⁸⁷ As to which see paras 1-06 to 1-17 above.

⁸⁸ Private Housing (Scotland) Act 2016 s 4.

⁸⁹ It might also have been included because the application of the 1449 Act to private residential tenancies was not properly appreciated.

1-30. Turning to the requirements of section 45: it does not state that the tenant must be in possession under the lease in order for it to apply. Given the importance of possession as a sign of the existence of rights affecting third parties (i.e. what is sometimes referred to as the publicity principle), it might be argued that section 45 should be read in such a way as to comply with that general principle,⁹⁰ especially as the intention behind section 45 was apparently to ensure that private residential tenants had protection equivalent to that provided by the 1449 Act.⁹¹

1-31. What is the position of a tenant whose lease is protected *only* by section 45? The precise effects of section 45 are not clear. First, it applies only when *ownership* of a property let under a private residential tenancy is transferred. Read literally, it does not apply where the relevant tenancy is a sub-lease and the mid-tenant assigns. Further, it might not apply in the same way as the 1449 Act in the event of landlord insolvency. Second, if section 45 does apply, its stated effect is that ‘the landlord’s interest under the tenancy transfers with [ownership]’. Although the drafting is infelicitous, the likely effect of this is that the new owner is bound by the obligations under the lease as well as becoming entitled to rights arising under it. Given the mischief at which section 45 seems to be aimed, that is the most likely legislative intention; and the term ‘landlord’s interest’ can be read as including the bundle of rights and obligations incumbent on the landlord. However, one can mount arguments the other way, most obviously (i) that referring to ‘transfer’ of the landlord’s ‘interest’ is more apt to refer to a transfer of rights than of obligations, and (ii) that to render transferees bound by obligations to which they have not consented is a significant interference with liberty and the property which they are acquiring and would require clear statutory language, which is lacking here.⁹² Third, section 45 refers only to the position of successors to the landlord: the tenant would have to rely upon other rules to secure possession against *other* third parties.

⁹⁰ Applying interpretative principles discussed in D Feldman, D Bailey and L Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) ch 26. Section 1(1)(b) of the 2016 Act provides that a tenancy is a private residential tenancy where (among other things) the tenant occupies the property, or any part of it, as the tenant’s only or principal home. If that is to be read as meaning that the tenancy becomes a protected tenancy only once the tenant actually takes occupation, the requirements of the publicity principle may be satisfied that way, as s 45 will apply only if that is satisfied.

⁹¹ Scottish Parliament *Official Report: Meeting of the Parliament* 17 March 2016 p 74 (Margaret Burgess MSP, Minister for Housing and Welfare): ‘Since 1449, legislation has protected Scottish tenants from losing their tenancies when ownership of the properties that they lease changes hands, whether by sale, deeds, death or otherwise. Amendment 25 ensures that private residential tenants will have that protection. It means that when the previous owner of a property was letting it out under a private residential tenancy, the tenancy will continue and the new owner will automatically take over as the landlord.’

⁹² If the effect of section 45 is that landlord’s interest in the lease *is* transferred, that gives rise to all of the various questions which are the subject of this book, e.g. do *all* of the terms of the parties’ agreement transfer or only those which are referable to the relationship of landlord and tenant?

1-32. Section 45 is hardly well-drafted or well thought-through.⁹³ It would have been much simpler to provide that the 1449 Act applies to private residential tenancies (even if the 1449 Act's requirements are not all satisfied, if that is the intention), instead of creating a new bespoke provision with doubts both about when that provision will apply and its effect when it does.

B. THE CONTRACTUAL CONSEQUENCES OF TRANSFER

1-33. This book does not consider in any more detail the requirements for a lease to be protected by possession or registration. Instead, and on the assumption that the lease is so protected, its focus is upon the contractual relationship between the new owner and the tenant after transfer is completed. A system in which there is no such relationship is imaginable.⁹⁴ The model would be as follows. A tenant in possession under a lease complying with the requirements of the 1449 Act or which has been registered is both party to a contract of lease (which binds only the original landlord) and holder of a real right of lease (which is enforceable *erga omnes*). If the landlord transfers ownership of the subjects, the tenant is able to remain in possession because of the tenant's prior-ranking real right. The transfer has, however, no effect on the contract of lease, which remains a contract between the tenant and the original landlord. Most likely the landlord would assign the right to rent to the transferee, but in order for the transferee to be bound by the landlord's obligations, there would have to be a delegation, and that would require the tenant's consent.⁹⁵

1-34. Although possible, such an approach would be impractical. It is not the one adopted by Scots law. Instead, the successor of the landlord is substituted into the landlord's place in the contract of lease: the successor is vested in the landlord's rights and bound by the landlord's obligations. In respect of

⁹³ Further, the interaction of s 45 with the rules regarding registration of leases is potentially problematic. As noted above, s 20C of the Registration of Leases (Scotland) Act 1857 disapplies the 1449 Act in respect of registrable leases. It is possible to conclude a private residential tenancy which is longer than 20 years, and hence is registrable: Sch 4 para 1 of the 2016 Act disapplies Land Tenure Reform (Scotland) Act 1974 s 8(1) (which provides that it is a term of a long lease that no part of the property shall be used as a private dwelling house). If such a private residential tenancy binds a successor via s 45 of the 2016 Act without needing to rely upon the 1449 Act (which appears to be the position), it could do so without being registered: section 20C of the 1857 Act is circumvented. Further, a lease does not need to be in writing to be a private residential tenancy (though by s 11 the landlord is obliged to provide a document setting out the terms of the tenancy).

⁹⁴ KGC Reid 'Obligations and Property: Exploring the Border' 1997 *Acta Juridica* 225, 239, noting that this model was said to be South African law by JG Lotz 'Lease' in WA Joubert (ed) *The Law of South Africa* vol 14 (1981). See also G Griolet and C Vergé *Nouveau Code civil annoté et expliqué d'après la jurisprudence et la doctrine* vol IV, Pt I (1905–07) Art 1743 [42]–[49].

⁹⁵ *Stair Institutions* III i 2; *Gloag Contract* 258; *Anderson Assignment* [3-04]–[3-05].

obligations, that has been clear certainly since *Arbuthnot v Colquhoun* in 1772.⁹⁶ And if there was any doubt in respect of the landlord's rights, it was removed by Lord Cockburn in 1847 in *Hall v M'Gill*:⁹⁷ '[t]he singular successor is entitled, without any special assignation, to enforce the contract'. *Hall* is one of three mid-nineteenth-century decisions of the Inner House which make clear that the successor becomes party to the contract of lease.⁹⁸ When protected by the 1449 Act or by registration, a lease, as the phrase goes, 'runs with the lands'.⁹⁹ In *Barr v Cochrane*, Lord Ormidale – albeit in a dissenting opinion – stated:¹⁰⁰

The general rule that the purchaser of an estate, or, in other words, a singular successor like the pursuer, comes into the place of his predecessor in all leases existing at the date of his purchase, and is entitled to all the future rents and other benefits of such leases, and liable in all the obligations prestable against the landlord subsequent to his date of entry, is, I apprehend, undoubted . . .

As will be seen, it is not correct to say that the successor becomes party to *all* the rights and obligations of a lease. But, subject to that qualification, Lord Ormidale's statement is a useful formulation of the law.

1-35. In South Africa it has been argued, unsuccessfully, that, because such a transfer of a contract is an anomaly in terms of contract law, the tenant should have an election to terminate the contract when the landlord transfers ownership.¹⁰¹ Such an argument, it is suggested, would also not succeed in Scotland.

C. COMPARATIVE LAW

(I) The effect of transfer by the landlord in other legal systems

1-36. When Scots law holds that the landlord's successor steps into the contract of lease, it adopts a position common to many other legal systems.¹⁰² In such systems, the rule is often summarised by a catchy maxim. Reference is made throughout this thesis to rules of English, French, German and South African law, so the general approach of those systems is set out here. The South African maxim, derived from Roman-Dutch law, is *huur gaat voor koop*: hire

⁹⁶ (1772) Mor 10424.

⁹⁷ (1847) 9 D 1557 (IH) at 1566.

⁹⁸ *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH) at 1102–1103; *Hall v M'Gill* (1847) 9 D 1557 (IH); *Barr v Cochrane* (1878) 5 R 877 (IH) at 883.

⁹⁹ Rankine *Leases* 475; Paton and Cameron *Landlord and Tenant* 94.

¹⁰⁰ (1878) 5 R 877 (IH) at 883.

¹⁰¹ *Genna Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (AD). The court held that the tenant had no such option.

¹⁰² See the collection of national reports in response to case 2 in C van der Merwe and A-L Verbeke *Time-Limited Interests in Land* (2012).

goes before sale.¹⁰³ It is now recognised that, upon transfer, the new owner of leased property is substituted *ex lege* for the original lessor in the contract of lease.¹⁰⁴

1-37. The German equivalent is *Kauf bricht nicht Miete* – sale does not break lease. The relevant provision of the BGB is §566 I, which makes clear that the successor of the landlord acquires his predecessor's personal rights and is bound by his obligations:¹⁰⁵

If the leased residential space is transferred by the lessor to a third party after delivery to the lessee, the acquirer takes the place of the lessor in the rights and obligations arising from the lease during the period when he is owner.

1-38. The relevant provision of the French civil code, Art 1743 *Code civil*, certainly provides that the tenant may remain in the subjects after sale by the landlord, but it is not explicit as to the behaviour of the contract on transfer.¹⁰⁶

Where a lessor sells a leased thing, the purchaser may not evict the agricultural tenant, sharecropper or tenant who has an authentic lease or one the date of which is undisputable. He may, however, evict a tenant of non-rural property if he has reserved that right by the contract of lease.

After initial debate about whether the successor should become party to the contract of lease,¹⁰⁷ the prevailing view is that Art 1743 has a similar effect on those contracts of lease to which it applies as do South African, German and Scots law: 'l'acquéreur est substitué dans les droits et obligations du vendeur'.¹⁰⁸

1-39. In English law the chess pieces are different, but the result the same.¹⁰⁹ Although a lease is a contract, it usually also results in the creation of an estate in land.¹¹⁰ That estate binds those acquiring the reversion (i.e. the landlord's estate). The benefit and burden of certain covenants of the lease run with the

¹⁰³ See, generally, Cooper *Landlord and Tenant* Ch 19; Kerr *Sale and Lease* Ch 21; LAWSA vol 14 [43]–[46].

¹⁰⁴ *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (AD); *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (AD) at 939A–C.

¹⁰⁵ [Wird der vermietete Wohnraum nach der Überlassung an den Mieter von dem Vermieter an einen Dritten veräußert, so tritt der Erwerber anstelle des Vermieters in die sich während der Dauer seines Eigentums aus dem Mietverhältnis ergebenden Rechte und Pflichten ein.]

¹⁰⁶ [Si le bailleur vend la chose louée, l'acquéreur ne peut expulser le fermier, le colon partiaire ou le locataire qui a un bail authentique ou dont la date est certaine. Il peut, toutefois, expulser le locataire de biens non ruraux s'il s'est réservé ce droit par le contrat de bail.]

¹⁰⁷ E.g. G Griotet and C Vergé *Nouveau Code civil annoté et expliqué d'après la jurisprudence et la doctrine* vol IV, Pt I (1905–07) Art 1743 [42]–[49].

¹⁰⁸ B Vial-Pedroletti Fasc 289 in *Juris-Classeur* (2005) [25]. And see [26]. [The purchaser is substituted into the rights and obligations of the seller.]

¹⁰⁹ See, generally, Megarry & Wade *Real Property* Chs 16 and 19; Gray and Gray *Elements* [4.1.1]–[4.1.20] and [4.5.1]–[4.5.96]; TM Fancourt *The Enforceability of Landlord and Tenant Covenants* (3rd edn, 2014), Ch 1 of which provides an overview.

¹¹⁰ *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 (HL) at 415B.

reversion and so benefit and burden an assignee of the reversion. The fact that leases could be used to impose positive obligations upon successors in title is one of the reasons why leasehold title is as prevalent in England as it is.¹¹¹

1-40. In German law there has been considerable discussion of exactly what happens to the contract of lease upon transfer by the landlord: is the contract transferred to the successor or is there a contractual novation, so that the lease is constituted anew between the successor and the tenant?¹¹² This is an issue which Scots law might consider once the basic rules of lease law in the field are better understood and once there has been more discussion of the general approach to the transfer of contracts.¹¹³

(2) Justification for use of comparative material

1-41. The recourse made in this book to the law of jurisdictions other than Scotland should be explained. This is a work on Scots law. It is not the product of a comparative lawyer. It draws no system-neutral conclusions. It does, however, make considerable reference to the law of other legal systems. Why? Scots lease law is underdeveloped. Although since an early date it has benefited from four detailed textbooks,¹¹⁴ it has for the most part been immune from the increased academic attention from which Scots law has profited in recent years.¹¹⁵ There

¹¹¹ Gray and Gray *Elements* [3.3.31].

¹¹² *Münchener Kommentar* §566 Rn [26].

¹¹³ For a start, see Anderson *Assignment* [3-28]–[3-37]. For French law, see J Ghestin, C Jamin and M Billiau *Traité de droit civil: les effets du contrat* (3rd edn, 2001) [1024]–[1082] and P Malaurie, L Aynès and P Stoffel-Munck *Droit des Obligations* (8th edn, 2016) [849]–[871], and for German law, KW Norr, R Scheyhing and W Pöggeler *Sukzessionen: Forderungszession, Vertragsübernahme, Schuldübernahme* (2nd edn, 1999) Pt II.

¹¹⁴ R Bell *A Treatise on Leases* (1st edn 1803; 2nd edn 1805; 3rd edn 1820, edited by W Bell; 4th edn 1825, revised by W Bell); R Hunter *A Treatise on the Law of Landlord and Tenant* (1st edn 1833; 2nd edn 1845; 3rd edn 1860; 4th edn 1876, edited by W Guthrie); J Rankine *The Law of Leases in Scotland* (1st edn 1887; 2nd edn 1893; 3rd edn 1916); GCH Paton and JGS Cameron *The Law of Landlord and Tenant in Scotland* (1967). Later texts include R Rennie et al *Leases* (2015); D Bain et al *The Laws of Scotland: Stair Memorial Encyclopaedia: Landlord and Tenant Second Reissue* (2021); and C Anderson and L Richardson *McAllister's Scottish Law of Leases* (5th edn, 2021). There are also texts on specific types of lease, such as agricultural, commercial and residential tenancies: B Gill *Agricultural Tenancies* (4th edn 2017); D Cockburn and R Mitchell *Commercial Leases* (2nd edn, 2011); KS Gerber *Commercial Leases in Scotland: a practitioner's guide* (3rd edn, 2016); MJ Ross, DJ McKichan, AH Primrose and MF Fleming *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn 1993); P Robson and MM Combe *Residential Tenancies: Private and Social Renting in Scotland* (4th edn, 2019). Finally, there is a Scottish report, written by the author of this book, in a comparative text which focuses on the proprietary aspects of leases: C van der Merwe and A-L Verbeke (eds) *Time Limited Interests in Land* (2012).

¹¹⁵ On which, see KGC Reid 'The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland' in HL MacQueen (ed) *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (1996) 39, 43–46; R Zimmermann 'Double Cross: Comparing Scots

is, therefore, much that can be taken from other legal systems which have considered similar issues to those which Scots law faces. The results reached in other systems need not be accepted; indeed it is doubtful whether the fact that one system adopts a particular position is even of persuasive value. However, it is valuable to see the types of issue that arise, and the arguments made in respect of them. In short, comparative law is a source of ideas for how Scots law can be analysed and developed. In Kenneth Reid's terminology, this approach is that of the 'system builder'.¹¹⁶ Such an approach has a considerable heritage. As Lord Reed commented extra-judicially:¹¹⁷

In developing the common law, Scottish and English judges have for centuries drawn on ideas developed in other jurisdictions (both common law and civilian), including each other's. Judicial reasoning has been seen as a process of rational inquiry, in which there are not in principle any sources of ideas which are off limits. Judicial reasoning in this country has not been thought of in national terms, with non-national sources of ideas being regarded as suspect: on the contrary, it has long been thought sensible to consider how others, from Ancient Rome onwards, have resolved similar problems. . . . This open-minded approach is particularly understandable in a jurisdiction which is relatively small . . .

In my view, what goes for judicial reasoning should also go for academic.

1-42. Why refer to English, French, German and South African law in particular? English law has traditionally not exerted the influence in this area of lease law which it has in other areas of Scots law. It is a common feature of mixed legal systems that property law remains one of the fields least affected by English influence.¹¹⁸ The use made of English law in this book will hopefully show that, in fact, it can serve as a useful point of reference if used sensibly. This is particularly because the English rules have been the subject of reform in modern times.¹¹⁹ French and German law demand attention as the parent systems of the two main legal traditions within the Civilian legal family. Finally, South African law offers the experience of a fellow mixed legal system. It has been more exposed than Scots law to systematising continental influence and offers materials written in English.

and South African Law' in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 1, 28–31.

¹¹⁶ KGC Reid 'The Idea of Mixed Legal Systems' (2003) 78 *Tulane L Rev* 5, 18.

¹¹⁷ R Reed 'Foreign Precedents and Judicial Reasoning: The American Debate and British Practice' (2008) 124 *LQR* 252, 261. See also TM Bingham "'There is a world elsewhere": the changing perspectives of English law' (1992) 41 *ICLQ* 513, especially 527 *et seq*; JM Smits 'Comparative Law and its Influence on National Legal Systems' in M Reimann and R Zimmermann (eds) *Oxford Handbook of Comparative Law* (2nd edn, 2019) 502, 514 in particular.

¹¹⁸ VV Palmer 'A Descriptive and Comparative Overview' in VV Palmer (ed) *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn, 2012) 19, 69. In Scotland, lease law is seen as part of property law, whereas in Civilian systems, it is seen as part of contract law.

¹¹⁹ Landlord and Tenant (Covenants) Act 1995.

1-43. Engaging in any comparative study entails the risk of misunderstanding foreign materials, whether due to linguistic or broader difficulties, and also of making only partial reference to the materials available in the other jurisdictions. A work which focuses on one system whilst making reference to various others is particularly vulnerable to these dangers. Such a work is also open to the further charge, which a detailed comparative study would not be, that its approach is illogical: why refer to one writer rather than another; German law on one point, but French on another?¹²⁰ The fact that the reference is made to foreign law as a source of ideas rather than as a persuasive authority in its own right makes both of those difficulties less serious than they would otherwise be. Were more foreign law to have been considered, then less Scots law could have been. If that results in what some would see as an imperfect product, then, in my view, that is a price worth paying.

D. MAP

1-44. This book may be viewed as comprising three unequal parts. The first, consisting solely of chapter 2, considers whether the law limits the terms which can run with the land to those which are detailed in a document of lease, or whether a successor may also be affected by terms (such as variations) which do not feature in such a document. The treatment of registered leases in this regard receives special consideration. In short, this chapter considers which terms are ‘available for transmission’ to successors.

1-45. The second part of the book, comprising chapters 3 to 7, considers the substantive controls that determine which of the terms available for transmission actually do transmit to a singular successor of the landlord. In other words, this part considers how one determines which terms of a lease are ‘real conditions’ and which are ‘personal conditions’. In chapter 3, the reasons for drawing such a distinction are explained and the general test adopted in Scots law explored. Chapter 4 considers whether, as a matter of legal policy, the distinction is one which the law should continue to draw. Chapters 5 to 7 then consider, in light of the general test in chapter 3, the treatment of specific types of term: chapter 5, those relating to the duration of the lease, including variations to the lease and options to renew; chapter 6, a mixture of terms, including options to purchase and provisions dealing with the retention of rent; and chapter 7, terms which relate to property other than the subjects of the lease, such as access rights and exclusivity clauses.

¹²⁰ See Lord Rodger’s similar objection to the Inner House’s treatment of Roman law in *Sloans Dairies v Glasgow Corporation* 1977 SC 223 (IH): A Rodger ‘Roman Law Comes to Partick’ in R Evans-Jones (ed) *The Civil Law Tradition in Scotland* (1995) 198, 211.

1-46. In its third part, the book turns away from lease law to consider whether what is known as the ‘offside goals’ rule can produce a different result from the rules of lease law considered in the second part of the work. Does that rule apply to render a personal condition binding upon a successor who acquired gratuitously or with knowledge of the terms of the lease? Because of the requirements of the offside goals rule (considered in chapter 9), the focus is on obligations to confer a real right upon the tenant and, more particularly, upon options to purchase, which have been the subject of various controversial cases. Chapter 8 lays the groundwork by considering the obligations to which the grant of an option gives rise. This is a topic of considerable importance in its own right. Chapter 9 then considers whether the offside goals rule can apply to the terms of leases and discusses the results which it would produce in respect of some lease terms. Mirroring the case law, the focus is on options to purchase.

E. TWO UNANSWERED QUESTIONS

1-47. There are two particular issues which this book does not address which one might expect to see covered in a text such as this. They are noted in outline here and their omission explained.

(1) Is a lease a real right?

1-48. The question whether a lease which binds a singular successor of the landlord is a real right has given rise to considerable academic discussion in Civil Law systems.¹²¹ Common Law systems have recently debated a similar point,

¹²¹ J Derruppé *La nature juridique du droit du preneur à bail et la distinction des droits réels et des droits de créance* (1952) reviews the early French debate. See also J Dainow *La nature juridique du droit du preneur à bail dans la loi française et dans la loi de Québec* (1932). The name which is more than any other associated with the ‘realist’ theory that Art 1743 *Code civil* had converted lease into a real right is that of Troplong. But his argument was unsuccessful. It was rejected by the *Chambre des Requêtes* of the *Cour de Cassation* when Troplong was himself President of the Court: Req 6 mars 1861, D 1861 I 417, 419. As for Germany, see: C Crome ‘Die juristische Natur der Miethe nach dem Deutschen Bürgerlichen Gesetzbuch’ (1897) 37 *Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1; H Weiß *Ist die Grundstücksmitte ein dingliches Recht?* (1932); G Otte ‘Die dingliche Rechtsstellung des Mieters nach ALR und BGB’ in O Behrends et al (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (1978) 463; C Möller ‘Die Rechtsstellung des Mieters in Rom und Karlsruhe’ (1997) 197 *Archiv für die civilistische Praxis* 537; H Wieling ‘Die Grundstücksmitte als dingliches Recht’ in J Jickeli, P Kreutz and D Reuter (eds) *Gedächtnisschrift für Jürgen Sonnenschein* (2003) 201. For an historical treatment, see: B Jüttner *Zur Geschichte des Grundsatzes ‘Kauf Bricht Nicht Miete’* (1960); K Genius *Der Bestandschutz des Mietverhältnisses in seiner historischen Entwicklung bis zu den Naturrechtskodifikationen* (1972). For an overview in English of the history, see P du Plessis ‘Historical evolution of the maxim ‘sale breaks hire’ in C van der Merwe and A-L Verbeke (eds) *Time-Limited Interests in Land* (2012) 19. There is also a general discussion in

although from a different starting point: thus it has been argued – unsuccessfully – that contractual doctrines such as frustration and repudiation do not apply to leases because a lease is an estate in land and not a contract.¹²² Binding singular successors of the grantor and surviving the grantor's insolvency are often said to be the hallmarks of a real right. In Scots law a lease can do both.¹²³ But it can also do so in France¹²⁴ and Germany,¹²⁵ and the view of both modern French¹²⁶ and modern German law¹²⁷ is that leases confer personal rights only, albeit privileged ones. In South Africa, a registered long lease¹²⁸ is viewed as a real right; case law holds,¹²⁹ and a leading writer agrees,¹³⁰ that a tenant with a short lease to which the rule *huur gaat voor koop* applies also acquires a real right, but others dispute this and maintain that such a lease is only a personal

English of the nature of a tenant's right in TJR Stadnik 'The Doctrinal Origins of the Juridical Nature of Lease in the Civil Law' (1980) 54 Tulane L Rev 1094.

¹²² *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) at 690E (frustration); *Hussein v Mehman* [1992] 2 EGLR 87 (County Court) at 88H–90J (repudiation); *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 (HCA) at 29, 51–53. For a summary of the debate, see Gray and Gray *Elements* [4.1.8]–[4.1.20]. See e.g. J Morgan 'Leases: Property, Contract or More?' in M Dixon (ed) *Modern Studies in Property Law* vol 5 (2009) 419.

¹²³ The effects of the landlord's insolvency on the contract of lease differ from those of transfer to a purchaser. The case law appears only to have considered the position in sequestration. The tenant's right to possession binds the trustee in sequestration, but, unless the trustee adopts the lease, the tenant's claim in respect of contractual obligations of the lease is against the insolvent estate. If the trustee adopts the lease, he becomes personally liable in the obligations of the lease, but only to the extent of the rents received. What amounts to 'adoption' is unclear. See *Harvie v Haldane* (1833) 11 S 872 (IH); *Harkness v Ratray* (1878) 16 SLR 117 (IH); *Bertram v Guild* (1880) 7 R 1122 (IH) at 1128. It may be that what is called the *Lundy Granite* principle (which has hitherto only been applied to the tenant's insolvency) may also be relevant: *Lundy Granite Co, Re* (1870–71) LR 6 Ch App 462, applied in Scotland in *Cheshire West and Chester Borough Council, Ptrs* [2010] CSOH 115, [2011] BCC 174. For discussion, see A Sweeney, *The Landlord's Hypothec* (Studies in Scots Law vol 10, 2021) [11–68]–[11–75].

¹²⁴ *Derruppé La nature juridique du droit du preneur à bail* 175; the French response to case 3 in Van der Merwe and Verbeke *Time Limited Interests* 166–167.

¹²⁵ Gesetz über die Zwangsversteigerung und die Zwangsverwaltung §57a; Insolvenzordnung §111. There are, however, particular rules about the termination of leases which apply to creditors who attach land subject to a lease or to those acquiring such land from an insolvency official: the creditor or purchaser can terminate the lease in accordance with certain statutory provisions. See the German response to case 3 in Van der Merwe and Verbeke *Time Limited Interests* 168–169.

¹²⁶ One of the best summaries, albeit now a little dated, is M de Juglart in H Mazeaud, L Mazeaud and J Mazeaud (eds) *Leçons de droit civil Tome III* vol II *Principaux contrats* (3rd edn, 1968) 294–307. More recently, see P Malaurie, L Aynès and P-Y Gautier *Les contrats spéciaux* (11th edn, 2020) [441] who view the debate as a vain controversy.

¹²⁷ *Münchener Kommentar* §566 Rn [3]; *Staudingers Kommentar* §566 Rn [4]–[6]; JF Baur and R Stürner *Sachenrecht* (18th edn, 2009) I §3 [47].

¹²⁸ The maximum length of a short lease is ten years: Cooper *Landlord and Tenant* 70 and 276.

¹²⁹ *Kessoopersadh v Essop* 1970 1 SA 265 (A) at 278; *Kain v Khan* 1986 4 SA 251 (CPD) at 254G–I.

¹³⁰ Cooper *Landlord and Tenant* 277.

right, albeit one which is, anomalously, enforceable against successor landlords in certain circumstances.¹³¹

1-49. The point has not been the subject of much debate in Scots law.¹³² In my view, certainly the tenant of a lease which has been registered in the Land Register has a real right, for the Land Registration (Scotland) Act 1979 said so,¹³³ as now does the equivalent section 20B inserted into the Registration of Leases (Scotland) Act 1857. However, the Leases Act 1449 does not use that language; nor did the original text of the 1857 Act. They provide (or provided) only that the tenant may not be removed by a successor landlord or that the lease is effectual in a question with a successor landlord; and a contract of lease does not need to be a ‘real right’ in order to affect a successor landlord. Certainly, there are many instances in the case reports and texts in which a tenant has been described as having a ‘real right’.¹³⁴ But there are also statements which refuse to go that far and which state only that leases are contracts which have, by statute, been given some of the characteristics of a real right.¹³⁵

¹³¹ That is the position adopted in the fourth edition of Kerr *Sale and Lease* 531 (cf the position in earlier editions). See also S-M Viljoen *The Law of Landlord and Tenant* (2016) 46 *et seq.* For an overview of the South African debate, see AJ van der Walt and S Maass ‘The enforceability of tenants’ rights’ 2012 *Tydskrif vir die Suid-Afrikaanse Reg* 35 and 228.

¹³² Until recently, the only two discussions of any detail were W Guy ‘Registration of Leases’ (1908–09) 20 *JR* 234 and C Hugo and P Simpson ‘Lease’ in R Zimmerman, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 301, 306–308. More recently, Lord Gill considered the point in detail in ‘Two Questions in the Law of Leases’ in F McCarthy, J Chalmers and S Bogle (eds) *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 255.

¹³³ Land Registration (Scotland) Act 1979 s 3(3).

¹³⁴ E.g. *Case of the Queensberry Leases* (1819) 1 *Bligh* 339 (HL) at 458; *Inglis v Paul* (1829) 7 *S* 469 (IH) at 473 (‘a tack is a real right by force of the statute 1449’), but cf Lord Balgray at 474; *Brock v Cabbell* (1830) 8 *S* 647 (IH) at 652 and 661, in which the proper analysis was much discussed; *Hamilton v Hamilton* (1845) 8 *D* 308 (IH); *Campbell v McKinnon* (1867) 5 *M* 636 (IH) at 649 (Lord Curriehill: ‘Their possession under the rights of lease . . . have also the further effect of rendering the rights of lease real rights’. This was ‘trite law’); cf Lords Deas and Ardmillan at 651 and 655, who refer only to the lease binding or being valid against singular successors: 651 and 655; on appeal to the House of Lords, *sub nom Campbell v M’Lean* (1870) 8 *M* (HL) 40 at 46; *Edmond v Reid* (1871) 9 *M* 782 (IH); *Earl of Galloway v Duke of Bedford* (1902) 4 *F* 851 (IH) at 860, 865; *Gillespie v Riddell* 1908 *SC* 628 (IH) at 644; *Gardiners v Stewart’s Trs* 1908 *SC* 985 (IH) at 990; *Millar v McRobbie* 1949 *SC* 1 (IH) at 4; *Mexfield Housing Ltd v Berrisford* [2011] *UKSC* 52, [2012] 1 *AC* 955 at [75].

¹³⁵ *Inglis v Paul* (1829) 7 *S* 469 at 474 (‘To say that a lease is a real right, is a most egregious mistake in point of law.’); *Brock v Cabbell* (1830) 8 *S* 647 (IH) at 654; *Campbell v McKinnon* (1867) 5 *M* 636 at 644 (‘There is nothing but a personal contract. A lease is in legal character one other, though by statute it is made effectual against singular successors.’ This was the Lord Ordinary’s opinion. The approach adopted in the Inner House differed); *Robertson v Cockburn* (1875) 3 *R* 21 (IH) at 24 (Lord Neaves: ‘To some extent, and upon certain leases, the statute 1449 has conferred the character of real rights’).

1-50. One of the few cases in which the characterisation of the right was relevant to the decision is *Edmond v Reid*.¹³⁶ The Second Division held that a landlord could rely upon principles of contract law to terminate the lease for the tenant's breach and was not limited, as the earlier case of *Hamilton*¹³⁷ might have been taken to suggest, to cases where a legal or conventional irritancy could be shown.¹³⁸ While the Lord Justice-Clerk (Moncreiff) 'did not question . . . that a lease confers a real right on the tenant, it remains notwithstanding a mutual contract' and was therefore subject to rules of breach of contract.¹³⁹ Lord Neaves stated that the 1449 Act 'prevented the vendees of the lessor from turning out the lessee . . . but that is not making it, properly speaking, a real right'.¹⁴⁰

1-51. As for the leading modern commentators on property law: while Gordon and Wortley carefully state that lease has 'in certain cases been given a real character by legislation',¹⁴¹ Reid is of the view that 'sufficient time has now elapsed [since 1449] for leases to be fully assimilated to other real rights'.¹⁴² In an academic essay, Lord Gill also recently argued that a tenant does acquire a real right.¹⁴³ A plausible position – which this book uses as its working theory – is that a lease can be both a contract and a real right.¹⁴⁴ lease is a contract;

¹³⁶ (1871) 9 M 782 (IH).

¹³⁷ *Hamilton v Hamilton* (1845) 8 D 308 (IH), an action for declarator of irritancy. The majority reasoned that because a lease conferred a real right on the tenant, it was therefore subject to irritancies, but that no irritancy had been established on the facts. If the court had thought it possible to terminate in reliance upon general principles of contract law, one might have expected that to have been made clear.

¹³⁸ The availability of contractual remedies for breach of leases is discussed in M Hogg 'To irritate or to rescind: two paths for the landlord?' 1999 SLT (News) 1.

¹³⁹ *Edmond v Reid* (1871) 9 M 782 (IH) at 784.

¹⁴⁰ (1871) 9 M 782 at 785. Indeed he stated that the fact that the lease was a heritable contract 'is a totally different matter from its being a real right'.

¹⁴¹ Gordon and Wortley *Scottish Land Law* [18-136].

¹⁴² Reid *Property* [5].

¹⁴³ Lord Gill 'Two Questions in the Law of Leases' in F McCarthy, J Chalmers and S Bogle (eds) *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 255. The other part of the argument advanced by Lord Gill in this chapter is that 'the common law personal lease is no longer part of the law of Scotland' (274). That, however, is not correct. See in more detail in P Webster 'The Continued Existence of the Contract of Lease' in RG Anderson, J MacLeod and AJM Steven (eds) *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 119.

¹⁴⁴ That is the position in Louisiana: VV Palmer *The Civil Law of Lease in Louisiana* (1997) § 1–2. It was advocated by some French writers: *la théorie mixte*. See J Derrupé *La nature juridique du droit du preneur à bail et la distinction des droits réels et des droits de créance* (1952) [11]–[13]. One might draw support from this approach from the Scottish cases. In *Inglis v Paul* (1829) 7 S 469 (IH) at 473 the majority stated that '[t]acks, in one respect, are personal; and in another, real rights'. In *Skene v Greenhill* (1825) 4 S 26 (IH), Lord Glenlee stated that lease was a mutual contract and Lord Alloway, concurring, stated that it was a real right. In *Edmond v Reid* (1871) 9 M 782 (IH), Lord Justice-Clerk Moncreiff stated (at 784) that a lease was both a real right and a contract.

in certain circumstances (namely, when the requirements of the 1449 Act are complied with or the lease is registered) the tenant obtains a real right, but this is in addition to and not in substitution for the contract.

1-52. Whether it is appropriate to view the tenant as obtaining a real right is not a point which this book seeks to answer definitively. The behaviour of the contract of lease upon transfer by the landlord, which this book considers, and the question whether a tenant has a real right, are not logically connected. Scots law is clear that when a lease is protected by the 1449 Act or by registration, any successor of the landlord becomes party to the contract of lease. There is no need to resort to the tenant having a real right to explain this. And, because the successor is bound by the contract, one need not rely on the tenant having a real right in order to explain the fact that the tenant can continue to possess the subjects after transfer.¹⁴⁵ Equally, however, the tenant having a real right is no impediment to a successor landlord becoming party to the contract of lease.¹⁴⁶ In order to assess whether it is correct to view the tenant as having a real right in the full sense of the term, a study would require to consider a variety of topics, such as (1) how the tenant protects his possession against persons who are not bound by the contract of lease, namely third parties such as encroaching neighbours or trespassers or those who dispossess the tenant; (2) the rules about how the tenant's right is transferred; (3) how competitions between leases and other rights, and between competing claimants to leases, are resolved; (4) the behaviour of leases in the landlord's insolvency. These are distinct matters from the topic of this book.

1-53. The issue which this book analyses, namely the contractual relationship between the tenant and a successor landlord, arises regardless of whether or not one chooses to conceive of the contract of lease as also conferring upon the tenant a real right (as do the South Africans, and the English – albeit in different terms) or as amounting simply to a contract which behaves in a particular fashion upon transfer by the landlord (as do the French and Germans). The characterisation of the tenant's right does not seem to influence the decisions which one would reach in respect of matters considered here. This book therefore proceeds in the same way as other writers in this area of Scots law have done: using the term 'real right' to describe the tenant's position when the tenant's right is enforceable against a successor landlord, but in the knowledge that the tenant may not have a real right in the full sense of the term.¹⁴⁷

¹⁴⁵ Cf if the new owner did not become party to the contract of lease yet was still bound by the tenant's right to possess the subjects: one would require to invoke a real right in order to explain that situation.

¹⁴⁶ There is no support of which I am aware for the other possible position, namely that a tenant obtains a real right and, when he does so, those terms of the contract of lease which are real conditions are re-constituted as real conditions of the real right of lease, and supersede the terms of the original contract. That is unnecessarily complex.

¹⁴⁷ E.g. Rankine *Leases* 132.

(2) Do the same rules apply upon transfer by a tenant?

1-54. A second issue with which this book does not engage is how the contract of lease behaves upon transfer by the tenant. Provided there is no restriction on transfer, a tenant may transfer a lease by way of assignation. This involves the transfer of rights and the delegation of obligations.¹⁴⁸ The assignee takes the assignor's place in the contract of lease. Many of the issues which this book considers could arise in respect of such an assignation. Is the assignee affected by a variation which took place before transfer? Is the same distinction between real and personal conditions drawn in respect of transfer by the tenant as is drawn in respect of transfer by the landlord? Although there would seem to be clear potential for these issues to arise, they appear not to have been litigated. Instead, cases concerning assignation have considered such questions as whether the original tenant is freed from liabilities accruing after the assignation¹⁴⁹ and whether the assignee is liable for arrears of rent which accrued prior to the assignation.¹⁵⁰ Perhaps further research into the assignation of leases would discover cases which consider the issues considered in this book. Perhaps, too, it would reveal that the principles and policies involved in a transfer by the tenant are different: care should be taken in simply assuming that what is true for transfer by the landlord must also be true for transfer by the tenant. Research into assignation must await another day. As things stand, the imbalanced nature of this book reflects the seemingly imbalanced nature of the underlying case law and the existing commentary.

¹⁴⁸ As Lord Glenlee noted in *Skene v Greenhill* (1825) 4 S 26 (IH).

¹⁴⁹ The assignor is freed: *Skene v Greenhill* 1825) 4 S 26 (IH); *Lord Elphinstone v The Monkland Iron and Coal Co Ltd* (1886) 23 R (HL) 98 at 102. This was a departure from the law as stated in *Bankton Institute* II ix 14 and *Ersikine Institute* II vi 34, who wrote that the original tenant remained liable after transfer.

¹⁵⁰ The assignee is liable for rent arrears: *Ross v Monteith* (1786) Mor 15290. Whether he is liable for other accrued obligations is unclear. He is not liable to compensate the landlord for the consequences of breach of contract which occurred prior to the assignation: *Sinclair v Caithness Flagstone* (1898) 25 R 703 (IH) at 706.

2 Variation and Associated Doctrines

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A. INTRODUCTION

2-01. There are persistent suggestions that a landlord's singular successor is affected only by terms contained in the actual document of lease. Gloag's formulation is typical: 'singular successors are not bound by private agreements

between landlord and tenant which do not appear in the lease'.¹ This chapter considers whether that is an accurate statement of the law. It considers both variations to the lease, and also the status of terms of side-letters and missives of let which, for some reason, were not implemented when the lease was granted.

2-02. Clearly terms which are implied in fact² or in law³ into the contract may transmit although they are not actually written in the contract of lease. This, however, is not an exception to a rule that a term must be in the lease document if it is to transmit, for an implied term is part of the contract, even although it is not expressed. The real concern is with terms which are recorded, if they are recorded at all, in separate documents from the lease. A rule that such terms do not transmit is different from one that certain terms do not transmit because of their content. Scots law certainly has a rule of the latter type: it is the focus of chapters 3 to 7 below. The subject of the present chapter is the potential existence of the former type of rule. The chapter considers, first, the rules in respect of unregistered leases (where there is a fair volume of case law, which allows the law to be stated with a fair degree of confidence), before analysing the rules in respect of registered leases, where, thanks to poorly drafted legislation and a complete lack of case law, the law is harder to state.

B. UNREGISTERED LEASES

(1) Variations

(a) Early authorities

2-03. In this and the next section the authorities are analysed in order to assess whether the general rule is as Gloag and others formulate it. An important early case is *Thomson v Terney*.⁴ Burns let to Terney for 19 years with entry at Michaelmas.⁵ As Terney did not receive entry until closer to Martinmas, Burns granted a signed and tested missive to Terney stating that 'he cannot be obliged to remove before the said term [Martinmas], notwithstanding the tenor of his tack'. This was held by the Inner House to have become an article of the tack and to be effective against Thomson, the purchaser of the lands, whose attempt to remove Terney at Michaelmas therefore failed. Hume's report contains a detailed commentary. He notes that tacks are unlike feudal rights, in that they

¹ Gloag *Contract* 233. There are similar passages in Rankine *Leases* 267 (cf 478) and Paton and Cameron *Landlord and Tenant* 94. See, too, Erskine *Institute* II vi 29, n 105.

² *Bell v Lamont* 14 June 1814 FC 645 (IH) is a well-known example of a successor landlord being bound by a term which was implied into the lease as a result of custom. A purchaser was held bound by an obligation to reimburse the tenant the value of the houses built on the property because this was customary in the locality.

³ The default rules of the nominate contract of lease.

⁴ (1791) Hume 780.

⁵ This is one of the English quarter days: 29 September.

may be qualified by separate and latent writings. This is true both in questions with assignees of the tack and with singular successors of the landlord. The passage is sufficiently important to be quoted at length.⁶

A tack is not in the same favourable condition as a feudal right, with respect to its liability to be qualified by separate and latent writings, to the prejudice of a purchaser of the lands, or an assignee of the tack. Feudal rights must enter certain records, which have been provided by a series of statutes, for the information and security of the lieges; such rights are therefore not liable to be modified or abated by private and extrinsic writings, to the prejudice of a purchaser, who has acquired on the faith of these records. But no such provisions have been made, nor was there the like need of them, for the safety of assignees or purchasers of tacks, which are neither the subjects of a summary and daily traffic, like the *ipsa corpora* of moveables, nor of such important and interesting negotiations as those concerning the property of land. A tack retains, accordingly, its native and original character of a contract, in this respect, that an assignee, how fair and onerous soever, is in the same condition as his author, and liable to the same exceptions. So that if the original tenant has, by any relative writing, shortened the duration of his tack, or heightened the rent, or renounced a power of subsetting given in the tack, this writing qualifies and becomes an article of the tack, and shall be available equally to the landlord against an assignee of the tack, as against the granter and his heirs. . . . It is equally true, on the other hand, that if by some relative though later writing, the heritor has amplified his tenant's right – has explicitly and permanently abated the rent – has delayed the term of removal – has bestowed a power of assigning or subsetting – such a writing becomes consolidated with the original tack, and is effectual in a question with a purchaser of the lands.

2-04. Two other decisions reported by Hume⁷ considered whether rent abatements granted by a previous landlord could be enforced against a singular successor. The answer in both cases was that they could not. This was due to the nature of the abatements involved, which were viewed as *ad hoc* arrangements, and not because of some general principle that variations of a lease do not transmit against a successor.⁸ At first instance in another early case, however, *M'Neil v Sinclair*,⁹ just such a principle was expounded. The decision was, however, reversed on appeal. The tenant sought to have a successor landlord held bound by a separate missive granted by the original landlord, by which the original landlord gave the tenant permission to erect various buildings and undertook to pay for them upon his removing. The Lord Ordinary held that the obligations did not bind the successor as they did not appear *ex facie* of any lease and 'a purchaser or singular successor

⁶ (1791) Hume 780 at 780.

⁷ *Riddick v Wightman* (1790) Hume 776 (IH) and *Grant v Watt* (1802) Hume 777 (IH).

⁸ In fact, in *Riddick* (at 777) the singular successor accepted that he would be bound by variations of the lease. His argument was that this required an express written agreement, which was lacking in that case. *Riddick* is cited by Gloag *Contract* 391 as authority for the previous evidential rule that a written contract could not be varied by verbal agreement.

⁹ (1807) Hume 834 (IH).

cannot be bound by any latent agreement between the tenant and the former proprietor'. The Lord Ordinary's decision was reversed by the Inner House, which accepted the tenant's argument that the two missives 'effectually qualified and became parts of the tack' and so held the successor bound.

2-05. Despite the Inner House's rejection of a rule that a successor could not be bound by a latent agreement between the landlord and tenant, at least two other decisions might be considered as supporting just such a rule: *Bruce v McLeod*¹⁰ and *Turner v Nicolson*.¹¹ These are the cases which are typically cited in support of a general rule that latent agreements do not bind successor landlords. They must therefore be considered in detail.

2-06. *Bruce* concerned an obligation upon the landlord to reimburse one particular tenant of an estate for improvements made to the leased property. The lease provided that the tenant was to be paid the value of the meliorations up to a cap of £200. In a subsequent letter the landlord agreed to increase that amount. The land was transferred. When it emerged that the tenant's claim would exceed £1600 the purchaser disputed his liability for this sum. The House of Lords, restoring on this point the decision of the Sheriff Depute and reversing that of the Outer and Inner Houses, held that the purchaser was liable to the tenant only to the extent of the £200 mentioned in the tack. The seller remained personally liable to the tenant for the remaining sum. However, the contract of sale gave the seller a right of relief against the buyer, so the buyer was ultimately liable.

2-07. Only a note of the House of Lords' reasoning is available. The rubric in Shaw's report states that 'a singular successor or purchaser is not liable to implement in favour of a tenant an obligation for payment of meliorations granted by the former proprietor, *not contained in his tack or title of possession*, but that the obligation is effectual only against the former proprietor'.¹² However, the interlocutor simply states that the obligation in the letter was 'not obligatory' on the purchaser.¹³ The reasoning for that conclusion is not clear from the report.¹⁴ The letter in question was written in the first person, and stated:¹⁵

¹⁰ (1822) 1 Sh App 213.

¹¹ (1835) 13 S 633 (IH).

¹² Emphasis added. This is the proposition for which Hunter cites the case: *Hunter Landlord and Tenant* vol II 238.

¹³ *Bruce v McLeod* (1822) 1 Sh App 213 at 219. This was also the wording of the Sheriff Depute: 216.

¹⁴ Copies of the parties' arguments are available in the Faculty of Advocates' library and I am grateful to it for having made them available. The appellant (purchaser) argued that a successor was not bound by 'latent personal obligations'. The first respondent (the seller) argued that it was perfectly competent to modify an existing lease and that, when that was done, the modified right is just as much protected by the Leases Act 1449 as the original lease was. In addition, the second respondent (the tenant) argued that, because leases themselves can bind a successor even although they are 'latent', there was no reason why a modification to a lease should not bind. Had the provision in question been in the original lease, it would have bound the successor even had he not known of it, and a modification should also do so.

¹⁵ (1822) 1 Sh App 213 at 215.

I agree to allow you meliorations to the amount of the value of those houses now erected, and £100 sterling additional for a new byre . . .

It may be that the successor was held not to be bound because the terms of the letter, and the circumstances, were such that this particular commitment was to be viewed as a personal obligation undertaken only by the grantor of the letter, and not because there is a fixed rule that a successor landlord is never bound by variations of leases. Such a fixed rule would have been difficult to reconcile with the existing case law, noted above.

2-08. *Turner v Nicolson*¹⁶ is also susceptible to such an alternative explanation. In that case, the original landlord's heir wrote to the tenant permitting him to make further improvements and promising to pay more than the £45 which the lease originally provided. The letter was in these terms:

I hereby promise and oblige myself, as my father's heir, to allow you the sum of £200 sterling for ameliorations at the end of your lease . . .

A trustee for creditors appointed on the landlord's estate refused to permit any deduction over and above that mentioned in the lease. The trustee argued that he was not bound as the obligation did not form part of the tenant's 'title of possession'.¹⁷ This argument seems clearly to have been influenced by *Bruce v McLeod*, and the Second Division upheld his stance. However, the case is not the authority which one might imagine for the proposition that terms which are not in the document of lease do not transmit to a successor. The report of the judges' opinions is brief. Both Lord Justice-Clerk Boyle and Lord Glenlee stated that the letter did not bind the trustee because it was extrinsic to the lease. But Lord Medwyn, with whom Lord Meadowbank concurred, confessed to doubts: 'if there had been added to it [the letter] the words, "and on the same conditions therein contained"', he would have had great difficulty in holding the trustee not to be bound.¹⁸ It is submitted that *Turner* is best viewed as a decision reached due to the particular terms of the letter in question, and not due to a general rule that only terms in the document of lease transfer.

¹⁶ (1835) 13 S 633 (IH).

¹⁷ (1835) 13 S 633 at 634.

¹⁸ (1835) 13 S 633 at 635. I have assumed that 'extrinsic' was being used in the sense of physically extrinsic, but another meaning is possible. It might denote a type of term which, for *substantive* reasons, was viewed as 'personal' and so 'extrinsic' to the contract of lease. If 'extrinsic' was being used in this second sense, then *Turner* is not authority for a rule that variations do not transmit. 'Extrinsic' was used in that second sense in e.g. *Montgomerie v Carrick* (1848) 10 D 1387 (IH) at 1395: see paras 3-25 to 3-26 below. This is unlikely to have been the objection to the term in *Turner*, however: there was, at that time, no *substantive* objection to the transmission of terms binding the landlord to pay for meliorations. *Arbuthnot v Colquhoun* (1772) Mor 10424 established that such liability could transmit and has been followed ever since: see paras 6-30 *et seq* below.

2-09. *Bruce* and *Turner* both receive attention in the textbooks, but their treatment is inconsistent. There is support for the following positions:

- terms expressed in a document separate from the written contract of lease may transmit;¹⁹
- terms expressed in a document separate from the written contract of lease may transmit only if the successor is aware of them (i.e. they are not 'latent');²⁰
- terms expressed in a document separate from the written contract of lease cannot transmit.²¹

All three cannot be the law.

(b) *Later authorities*

2-10. The case law since *Bruce*²² and *Turner*²³ is now considered. It reveals that variations to written leases have been held to bind singular successors, and that transmission is not dependent upon the successor's knowledge. The first of these three formulations is therefore correct. So when Gloag states that 'singular successors are not bound by private agreements between landlord and tenant which do not appear in the lease',²⁴ the emphasis should be on the word 'private' and not on the fact that the agreement is not in the lease. In other words, *Bruce* and *Turner* should be viewed as decisions reached due to the terms of the letters in question, which should be interpreted as having been intended only to bind the grantors; the decisions are not the result of a general rule about variations. A difficulty with this view of these two cases is that, as will be seen later,²⁵ a lenient approach to interpretation is usually adopted when determining whether parties intended a term to bind successors: in order for a term to be held to be merely personal to the original parties because the parties

¹⁹ Rankine *Leases* 478.

²⁰ Rankine *Leases* 267. See also the concession to this effect by the respondent in *Fraser v Maitland* (1824) 2 Sh App 37 at 42, and Lord Curriehill's discussion in *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH) at 1105. His reasoning in that decision is criticised below: para 3-31. Lord Deas also mentioned *Bruce v McLeod* (1822) 1 Sh App 213 in *M'Gillivray's Exrs*, but he viewed it as an example of a purchaser not being bound by an extrinsic agreement even although he knew of it: 1107.

²¹ Gloag *Contract* 233; Paton and Cameron *Landlord and Tenant* 94. Paton and Cameron cite *Turner* as authority for the proposition that 'singular successors are not generally bound by private agreements between the original landlord and tenant not appearing in the lease itself'. They cite only one decision (*Page v Strains* (1892) 30 SLR 69 (IH)) going in the opposite direction, ignoring the many others, and the text contains no real attempt to reconcile the conflicting authorities or to indicate which should be followed.

²² *Bruce v McLeod* (1822) 1 Sh App 213, just discussed.

²³ *Turner v Nicolson* (1835) 13 S 633, just discussed.

²⁴ Gloag *Contract* 233.

²⁵ This point is discussed in paras 3-58 *et seq* below.

so intended (instead of because the term, as a matter of substance, cannot be a real condition), the parties' intention must be very clear. Writing a letter in the first person (or otherwise so that it refers to the landlord for the time being) will not always suffice. If, however, the approach to these cases proposed here is not accepted, then they must simply be rejected as inconsistent with the vast majority of case law, even though *Bruce* is a decision of the House of Lords.

2-11. Even in the interlude between *Bruce* and *Turner*, variations to leases were being held to bind the landlord's singular successors.²⁶ This trend continued after *Turner*. In *Lindsay v Webster*²⁷ a landlord instructed his factor to give the tenants a 20 per cent reduction in rent, which was to continue during the currency of their leases. The landlord's trustee in sequestration sued for the full rent, citing *Bruce* in support of his position. He was unsuccessful before the Second Division and was held bound by the reduction granted by the landlord. The reasoning is brief, but Lord Moncreiff does indicate that the decision did not depend upon some speciality relating to trustees in sequestration, who take property *tantum et tale*.²⁸

2-12. The rule that a successor can be bound by a variation is to be seen particularly clearly in three nineteenth-century decisions of the Inner House. One of the issues facing the Second Division in *Hall v McGill*²⁹ was whether a successor landlord was prevented from suing the tenant for damage resulting from miscropping because of the predecessor landlord's acquiescence.³⁰ That aspect is considered in more detail below. As part of the analysis, Lord Cockburn considered what would have been the position had the lease been varied.³¹

The pursuer [the successor], by his purchase, acquired all the rights of the seller, and was entitled to demand implement of all the obligations laid upon the tenant. The pursuer, therefore, was not liable to be affected by any mere acquiescence by the seller in deviations by the tenant from the proper course of husbandry. A landlord may overlook, or permit, a violation of the lease; but this will not necessarily bind a singular successor acquiring from him to do the same. The singular successor is entitled, without any special assignation, to enforce the contract. *Not absolutely to enforce the original lease; because undoubtedly an original lease may be changed during its currency by the parties; and if it be, this altered lease becomes the contract between them, and is the one that the singular successor acquires. If anything, therefore, had occurred which bound the seller to submit to the infringement of the tack, the acquirer of his right might be bound also.* But no such permanent obligation

²⁶ *Macra v Mackenzie* (1828) 6 S 935 (IH); *Moon v Roger* (1828) 6 S 1118 (IH).

²⁷ (1841) 4 D 231 (IH).

²⁸ (1841) 4 D 231 at 234. The letter was also written in the first person. If *Bruce* and *Turner* are rightly analysed as cases where the successor was not bound because of the personal phrasing of the variation, one might have expected the same result to follow in *Lindsay*.

²⁹ (1847) 9 D 1557 (IH).

³⁰ See para 2-21 below on the distinction between variation and acquiescence.

³¹ (1847) 9 D 1557 (IH) at 1566 (emphasis added).

is implied in the original landlord's merely acquiescing, as it is called; that is, not objecting to the tenant's miscropping. He may do this once or twice, or any number of times; but this will not create a legal obligation to continue this apathy forever. Now, there is nothing else here. And, therefore, as the original landlord himself might have recurred to his full rights, so might his disponent.

The discussion of variation is, admittedly, *obiter*, and Lord Moncreiff expressly reserved his opinion on the effect in a question with a successor of a written discharge of one of the terms of the lease.³² However, the remaining two Inner House decisions, in which the point was decisive, take the same approach as Lord Cockburn.

2-13. In the first, *Baillie v Fraser*,³³ a purchaser was held entitled to claim the rent, as varied, from the tenant. The variation operated in the landlord's favour. The focus was upon whether there had been variation of the contract. Allowing a deviation from a written contract, it was remarked, is always a hazardous proceeding, but there was sufficient evidence in this case to hold that the lease had been permanently varied.

2-14. The case which definitively put paid to suggestions that extrinsic variations of a lease may not bind successors, or that they are not binding without knowledge, is *Page v Strains*.³⁴ Here, a document granting a reduction of rent was not shown to the purchaser, who pursued the tenant for the full rent stipulated in the lease, citing *Bruce*³⁵ and *Turner*.³⁶ The Second Division distinguished those cases and held the successor entitled only to the rent as varied. The only issue was seen as being whether the document was part of the contract of lease at the time of sale.³⁷ The court accepted that, if the lease had been varied, the successor was bound, and on the evidence held that it had indeed been varied. Lord Rutherford Clark stated that if the lease was varied, there could be no claim for the higher rent on the simple ground that 'the contract upon which the pursuer is basing his claim had ceased to exist'.³⁸ This is an important decision. The Second Division held a successor bound by a latent variation to the lease. The fact that the purchaser was not aware of the variation was 'a matter entirely between him and the seller'.³⁹

³² (1847) 9 D 1557 at 1568. The Lord Ordinary (Cunninghame) thought that such a discharge would affect a successor: 1563.

³³ (1853) 15 D 747 (IH).

³⁴ (1892) 30 SLR 69 (IH).

³⁵ *Bruce v McLeod* (1822) 1 Sh App 213.

³⁶ *Turner v Nicolson* (1835) 13 S 633 (IH).

³⁷ Presumably the original landlord would actually retain the power to vary the contract of lease until the date of transfer of ownership, not the date of the contract of sale.

³⁸ (1892) 30 SLR 69 (IH) at 70.

³⁹ *Page v Strains* (1892) 30 SLR 69 (IH) at 70. 'If there be no special warrandice, such of them [i.e. the real conditions of the lease] transmit against [the landlord's] singular successors without involving a claim of relief against him': Rankine *Leases* 478, citing *Murray v Selkirk* 26 Jan 1815 FC.

2-15. Finally, various other cases which have also taken that approach should be noted. In *Mackenzie v Imlay's Trs*,⁴⁰ bondholders who entered into possession were held not to be bound by an exclusivity clause in letters granted by the landlord after the constitution of the security. (Presumably if the bondholders had sold the land, a purchaser would have been similarly free of the obligation.) However, the Sheriff Substitute opined, *obiter*, that if the security had been constituted after the letter had been granted, the exclusivity clause would have been enforceable against the bondholders.⁴¹ It seems likely that the decision was reached because of the rule of security law that transactions by the debtor after the grant of the security and which are not 'ordinary acts of administration' do not bind the secured creditor, and thus not because of a rule that a variation to a lease is ineffectual in a question with a successor. Two more modern cases, *BP Oil Ltd v Caledonian Heritable Estates Ltd*⁴² and *Optical Express (Gyle) Ltd v Marks & Spencer plc*,⁴³ are underlain by the assumption that a singular successor becomes party to the lease as varied by a predecessor.⁴⁴

2-16. Variations of some terms may be subject to special rules. Chapter 5 discusses whether the lease can be varied or whether, instead, the lease must be renounced and a new one granted.⁴⁵ Although it is apparently common practice to extend a lease by varying its terms, there is some doubt whether such a variation binds successors. Chapter 5 suggests that it should do so. A variation of the subjects of the lease is thought to be possible, but will be treated as a new lease⁴⁶ or a renunciation, as the case may be. The general rule is, however, well-established: if the contract of lease has been varied when ownership of the subjects of lease passes to a successor, the successor becomes party to the lease as varied.

⁴⁰ 1912 SC 685 (IH). See, too, *Carron Co v Henderson's Trs* (1896) 23 R 1042 (IH) at 1055, where Lord McLaren stated, *obiter*, that a written variation to a lease, which had been acted upon, would affect a successor to the landlord.

⁴¹ 1912 SC 685 at 689.

⁴² 1990 SLT 114 (OH).

⁴³ 2000 SLT 644 (OH) at 650F.

⁴⁴ In *BP Oil Ltd* the successor landlord conceded as much: 1990 SLT 114 at 116A.

⁴⁵ See paras 5-13 *et seq* below.

⁴⁶ This is discussed in the Registers of Scotland (internal) Legal Manual. The Manual in respect of the Land Registration (Scotland) Act 1979 noted, at [19.14], that the 'Keeper is regularly asked to accept for registration deeds which purport to increase or vary the area of ground affected by a registered leasehold title' and that, '[w]hile there is no conclusive authority supporting the validity of such deeds, the Keeper's policy is that provided both landlord and tenant are parties to the variation then the presumption is that such deeds are acceptable'. Such a deed was treated as a new lease of the additional ground. The Manual in respect of the replacement Act of 2012 notes, in the section entitled 'Variations that incorporate additional subjects, where the remaining duration is less than 20 years', that if a variation both varies the terms of the existing lease and incorporates additional subjects, but the remaining duration is less than 20 years, the deed will be accepted for registration but only be given effect insofar as it is registrable, i.e. the new subjects will not be added.

(c) *Publicity*

2-17. One point which has not been addressed as a separate issue in any of the cases, but which requires consideration, is what the publicity principle requires in respect of variations. In George Gretton's formulation, '[w]hat is sometimes called the "publicity principle" lays down that where a private law right is to have third-party effect it should be accorded some degree of publicity'.⁴⁷ The public act which the law requires in respect of short leases is that the tenant be in possession. This alerts potential acquirers to the existence of a lease; the prudent purchaser will then enquire of its terms.⁴⁸ It is not, however, sufficient that the tenant be in possession. Rather, the rule is that 'the possession which shall serve to validate a tack must be possession upon the particular title or very tack which is in question between the parties'.⁴⁹ Details of that rule have been worked out in cases concerning agreements to extend leases (discussed in full in chapter 5).⁵⁰ A lease can be extended in various ways. The key distinction is between a contract which is to take effect in the future (a new lease to commence at the end of the current one) and a contract which is to take effect immediately (a new lease to commence immediately). If the subjects of the lease are transferred before the existing lease expires, the question arises whether the landlord's singular successor is bound by the new lease. A successor is not bound by a lease to commence at some point after the successor becomes owner, because the tenant is not in possession by virtue of that lease at the time of transfer. If, however, there is a new lease to commence immediately, the successor will be bound if the tenant possessed the subjects at the time of transfer by virtue of that new lease. The issue is: how may the tenant make clear that possession is by virtue of the new lease and not the original one? Express renunciation is obviously the clearest way. Failing that, it is commonly said that there must be a change in rent paid in order to make it clear that the tenant is in possession by virtue of the new lease.⁵¹ It is argued in chapter 5 that in fact no such rule exists and that if the parties have concluded a new lease to start immediately, they have impliedly renounced the existing lease and only the new lease provides a basis for possession from its date of entry.

⁴⁷ GL Gretton 'Registration of company charges' (2002) 6 *EdinLR* 146, 146. Gretton accepts that the principle's demands are rather vague. This is the *Publizitätsprinzip* in German law, on which see e.g. *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Drittes Buch: Einleitung zum Sachenrecht*: §§ 854–882 (2018) Rn [137]–[140] and JT Füller *Eigenständiges Sachenrecht?* (2006) Ch 4. The principle is also recognised in South Africa: CG van der Merwe 'Things' in *The Law of South Africa: First Reissue* vol 27 (2002) [200]. For (partial) Scottish judicial expression of the principle, see *Kemp v Magistrates of Largs* 1939 SC (HL) 6 at 13.

⁴⁸ Hume *Lectures* IV 79.

⁴⁹ Hume *Lectures* IV 81.

⁵⁰ See paras 5-06 *et seq* below.

⁵¹ Presumably an alteration to any other term which results in an immediate change in the party's conduct would also suffice.

2-18. Variations are treated in much the same way as extensions. In order for the contract as varied to bind a successor, the tenant must possess by virtue of the contract as varied. Does this mean that the variation will only bind a successor if it results in some change in the tenant's behaviour which makes it clear that possession is attributable to the varied lease and not to the original one? In some cases, such as a variation of rent, or perhaps of a clause regarding permitted use, a variation will result in an immediate change in the manner of performance and so any such rule would be satisfied. It is not difficult, however, to conceive of circumstances in which this will not be the case. Consider this variant to the facts of *BP Oil Ltd v Caledonian Heritable Estates Ltd*.⁵² A lease provides that the tenant may use the subjects for the sole purpose of erecting a petrol filling station. Some years into the lease the tenant wishes to use part of the premises as a sales forecourt, and so the parties vary the clause regarding permitted use. Before the tenant begins to use the premises in a different way, the landlord goes into liquidation and the property is sold. Is the purchaser bound by the varied clause or the original one? At the moment of transfer, there has been nothing to demonstrate that the possession was attributable to the lease as varied.

2-19. In fact, there is probably no requirement that a variation must result in some observable change in the nature of the tenant's possession in order to affect a singular successor. From the date on which the variation becomes contractually effective, it is the lease as varied which is the basis for the tenant's possession. That may explain why the point is not made in variation cases.⁵³

(d) Constituting a variation

2-20. The position, therefore, is that, subject to the substantive controls discussed in the following chapters of this book (which control the content of terms which transmit to successor landlords), terms which do not appear in the lease document may transmit to a successor of the landlord, even if they are 'latent', provided that they amount to variations of the contract of lease. The successor becomes party to the whole contract of lease and not only to the legal relationship recorded in one particular document.

2-21. This means that it is important to identify what amounts to a variation. What amounts to a variation of contract is not an issue specific to the relationship with a singular successor so it is not discussed in detail here.⁵⁴ The

⁵² 1990 SLT 114 (OH).

⁵³ In *Page v Strains* (1892) 30 SLR 639 (IH) the tenant averred that he possessed by virtue of the varied lease, but there is no trace in the judgments of a requirement such as that just discussed in the text. The issue was simply whether the contract of lease had been varied. (This, though, was a case in which the variation would have resulted in a change in the tenant's behaviour.)

⁵⁴ See McBryde *Contract* Ch 25. The main cases concerning leases are summarised in J Rankine

main question is whether the agreement is intended as a variation of a term of the lease or simply as permission for a temporary departure from a term of the lease which would not even bind the parties to it for the future.⁵⁵ In particular, although the distinction might not always be easy to draw on the facts, variation may be distinguished from acquiescence by the landlord in a departure from the terms of the lease: while acquiescence will bar a complaint about past conduct, and possibly also mean that the landlord cannot insist on strict compliance in the future without giving the tenant a reasonable opportunity to bring his behaviour back into compliance with the contract,⁵⁶ it does not imply that future breaches will also be tolerated.

2-22. In due course it will be necessary to discuss the circumstances in which acquiescence/personal bar can affect a successor landlord.⁵⁷ This present section, however, considers what written formalities are needed in order to constitute a variation and whether an improperly constituted variation can take effect in a question with a successor.

2-23. Previously, just as a lease could be constituted by informal writing followed by acts amounting to *rei interventus*, and this lease would bind a successor,⁵⁸ so too could a variation.⁵⁹ Rankine went as far as to say that proof of a verbal innovation on a lease followed by *rei interventus* would vary the contract

A Treatise on the Law of Personal Bar in Scotland (1921) 78–81. *Carron Co v Henderson's Trs* (1896) 23 R 1042 is a key case. See more recently, and by way of illustration, *BP Oil Ltd v Caledonian Heritable Estates Ltd* 1990 SLT 114 (OH). The impact of a contractual clause providing that a variation will not be effective unless constituted in a particular way (most typically, a non-oral modification) might also need to be borne in mind: in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119 the Supreme Court held such a clause is effective in English law, although in certain circumstances a 'variation' denied effect by such a clause can nevertheless take effect via estoppel. In *CGI IT UK Ltd v Agilisys Ltd* [2018] CSOH 112 Lord Bannatyne proceeded on the basis that Scots law would also give effect to such a clause: see [46] *et seq.* For earlier discussion of these clauses, see F Wagner-von Papp 'European Contract Law: Are No Oral Modification Clauses Not Worth the Paper They Are Written On?' (2010) 63 *Current Legal Problems* 511.

⁵⁵ Rankine *Leases* 336, discussing rent abatement. Most of the discussion distinguishes between 'temporary easements', which do not bind even the parties to the agreement for the future, and 'permanent' amendments, which are to apply to the whole future of the lease. However, that does not exhaust the field: there is no logical reason why there may not be a binding amendment which is to endure for, say, 10 years of a 20-year lease.

⁵⁶ *Whitbread Group Ltd v Goldapple Ltd (No 2)* 2005 SLT 281 (OH) at 290F.

⁵⁷ See paras 2-42 to 2-51 below.

⁵⁸ Rankine *Leases* 134, referring to 116–131; Paton and Cameron *Landlord and Tenant* 107. Two significant cases are *Wilson v Mann* (1876) 3 R 527 (IH) and *Buchanan v Harris and Sheldon* (1900) 2 F 935 (IH). See also Erskine *Institute* (7th edn by A Macallan, 1838) II vi 24, n 1; Bell *Principles* §1190.

⁵⁹ Examples are *Lindsay v Webster* (1841) 4 D 231 (IH); *Baillie v Fraser* (1853) 15 D 747 (IH); *Stonehaven Unionist Club v Blacklaws* 1930 SLT (Sh Ct) 64.

and bind a successor,⁶⁰ though Hume,⁶¹ Gloag⁶² and Paton and Cameron⁶³ took the opposite position in respect of a purely oral variation.

2-24. On the current state of the authorities, the Requirements of Writing (Scotland) Act 1995 has tightened the law in this respect.⁶⁴ It is clear that a variation now needs to be in writing: that is the effect of one or both of section 1(2)(a)(i) and section 1(2)(b).⁶⁵ However, it is less certain whether an improperly constituted variation may be ‘cured’ by conduct, with the tenant relying on what are often called the ‘statutory personal bar’ provisions in section 1(3) and (4). In *Gyle Shopping Centre*⁶⁶ Lord Tyre stated, *obiter*, that writing is required to vary a lease because of section 1(2)(b) of the 1995 Act and that neither the statutory personal bar provisions of the 1995 Act nor the common law of *rei interventus* can apply to render an imperfectly constituted variation effective. In so doing, he applied to a variation the approach applied to leases in the earlier Outer House case of *Advice Centre*.⁶⁷

2-25. There is, however, room for argument about whether the current approach to the scope of the statutory personal bar provisions is correct. The 1995 Act’s application to leases is far from straightforward. In the view of the present writer⁶⁸ and of McAllister and the authors of the latest edition

⁶⁰ Rankine *Leases* 478, citing *Baillie v Fraser* (1853) 15 D 747 (IH).

⁶¹ Hume *Lectures* IV 77.

⁶² Gloag *Contract* 395–397: a verbal alteration followed by *rei interventus* could vary the contract between the parties but could not affect successors.

⁶³ Paton and Cameron *Landlord and Tenant* 107, citing Hume *Lectures* IV 77.

⁶⁴ The Act was the fruit of Scottish Law Commission recommendation in its *Report on Requirements of Writing* (Scot Law Com No 112, 1988). See, generally, KGC Reid *Green’s Annotated Acts: Requirements of Writing (Scotland) Act 1995* (2nd edn, 2015); R Rennie ‘Requirements of Writing: Problems in Practice’ (1996) 1 SLPQ 187, 191–192; McAllister *Leases* [2.3]–[2.20]; Rennie *Leases* Ch 3. Key decisions are *The Advice Centre for Mortgages Ltd v McNicoll* [2006] CSOH 58, 2006 SLT 591; *Gyle Shopping Centre General Partners Ltd v Marks & Spencer plc* [2014] CSOH 122, 2015 SCLR 171; and *Gray v MacNeil’s Exrs* 2016 SLT (Sh Ct) revd [2017] SAC (Civ) 9, 2017 SLT (Sh Ct) 83. The decision in *Advice Centre* regarding the 1995 Act is discussed in: A McAllister ‘Leases and the requirements of writing’ 2006 SLT (News) 254; EC Reid ‘Personal Bar: Three cases’ (2006) 10 EdinLR 437; KGC Reid and GL Gretton *Conveyancing 2006* (2007) 106–109. The decision in *Gyle Shopping Centre* is discussed in L Richardson ‘The limits of statutory personal bar: leases and the Requirements of Writing (Scotland) Act 1995’ (2016) 20 EdinLR 66. The decision in *Gray* is discussed in KGC Reid and GL Gretton *Conveyancing 2017* (2018) 175 *et seq.*

⁶⁵ The logic of the decision in *Gray v MacNeil’s Exrs* [2017] SAC (Civ) 9, 2017 SLT (Sh Ct) 83 is that writing would not be required for a variation to have contractual effect, but this is not correct.

⁶⁶ *Gyle Shopping Centre General Partners Ltd v Marks & Spencer plc* [2014] CSOH 122, 2015 SCLR 171.

⁶⁷ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591.

⁶⁸ The issues are explored in more depth in P Webster ‘Leases and the Requirements of Writing’ (2022) 26 EdinLR 51.

of McAllister's textbook,⁶⁹ a broader view should be taken to the scope of the statutory personal bar provisions than has been adopted in the case law to date. However, the safe view of the law as matters stand is that the statutory personal bar provisions do not apply to a variation of a lease, at least where it is sought to rely on the variation in a question with a successor landlord. On that view, therefore, an improperly constituted variation cannot take effect in a question with a successor landlord.

2-26. Section 1(2) provides that a written or electronic document complying with section 2 or 9B of the 1995 Act is required for certain types of juridical act. This includes:

- section 1(2)(a)(i): 'the constitution of a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land';
- section 1(2)(b): 'the creation, transfer, variation or extinction of a real right in land, otherwise than by the operation of a court decree, enactment or rule of law'.

In certain circumstances, the statutory personal bar provisions of section 1(3) and (4) of the 1995 Act apply to provide that a contract or variation⁷⁰ which is not constituted in compliance with the Act shall not be regarded as invalid. Where one person (A) has acted or refrained from acting on reliance on the contract or variation with the knowledge and acquiescence of the other party (B), B is not entitled to withdraw from the contract or variation, and the contract or variation will not be regarded as invalid, if the following condition is satisfied: that A, as a result of acting or refraining from acting has been affected to a material extent, and as a result of such withdrawal would be adversely affected to a material extent. These statutory personal bar provisions apply only to a contract, obligation or trust to which section 1(2)(a) applies. They do not apply to the juridical acts to which section 1(2)(b) applies. This is why the question whether section 1(2)(a)(i) applies to a variation of a lease is important.⁷¹

2-27. In *Gyle Shopping Centre*⁷² Lord Tyre stated that a variation of a lease was covered by section 1(2)(b) of the 1995 Act and that the statutory personal bar provisions could not apply to it. He also said that the common law of *rei interventus* was inapplicable because of section 1(5). The case concerned

⁶⁹ See McAllister *Leases* [2.20]; McAllister 2006 SLT (News) 254 at 260 (arguing that 'in any future cases, his [Lord Drummond Young's] approach [in *Advice Centre*] should not be followed without a more extensive examination of authority'. Despite this, in *Gyle Shopping Centre* the approach in *Advice Centre* was applied with approval.

⁷⁰ Section 1(6) provides that s 1 applies to the variation of a contract as it applies to the constitution thereof, but as though references to acting or refraining from acting in reliance on the contract and withdrawing from the contract were references to reliance on or withdrawing from the variation.

⁷¹ The same issue arises in respect of the constitution of a lease in the first place.

⁷² [2014] CSOH 122, 2015 SCLR 171.

variations to the rights in common areas which had been granted by Marks & Spencer's lease of their unit at the Gyle Centre in Edinburgh. Proposed changes were discussed at meetings and minuted, but no formal variation was concluded and Marks & Spencer came to deny that the lease had been varied. Gyle argued that Marks & Spencer was barred from doing so, under section 1(3) of the 1995 Act or under the common law of *rei interventus*. Lord Tyre's discussion is *obiter*, because he held that there was in any event no informal agreement or unilateral obligation to which personal bar could apply.⁷³ However, Lord Tyre agreed with, and applied, a previous decision in *The Advice Centre for Mortgages v McNicoll* about the proper approach to section 1(2) of the 1995 Act. On this approach, the 1995 Act draws a fundamental distinction between transactions that create personal rights (covered by section 1(2)(a)) and transactions that give rise to real rights (covered by section 1(2)(b)), with the statutory personal bar provisions being available only in respect of the former.⁷⁴ Applying this approach, Lord Tyre concluded that, although the statutory personal bar provisions could apply to an *agreement* to vary the lease, they could not apply to the variation of the terms of the lease itself.⁷⁵ Lord Tyre also stated, again consistently with Lord Drummond Young in *Advice Centre*,⁷⁶ that the common law rules of *rei interventus* cannot be applied to cure informal constitution of something to which section 1(2)(b) applies.⁷⁷ Although section 1(5) of the 1995 Act provides only that subsections (3) and (4) above replace the rules of law known as *rei interventus* and homologation 'in relation to the constitution of any contract, obligation or trust mentioned in subsection 2(a)', the approach adopted is that those rules have been replaced for all purposes and that the statutory replacement in section 1(3) and (4) is markedly narrower than the previous law.

2-28. The 1995 Act was the product of a Scottish Law Commission project.⁷⁸ As noted above, there were many cases in which a lease perfected by *rei interventus* was held binding upon a successor⁷⁹ and also in which variations were perfected by *rei interventus* and also held binding on a successor⁸⁰ (although these did not receive detailed consideration by the Scottish Law Commission). There is no trace in the materials preceding the 1995 Act of

⁷³ [2014] CSOH 122, 2015 SCLR 171 at [18] and [22].

⁷⁴ [2014] CSOH 122, 2015 SCLR 171 at [14]–[17].

⁷⁵ [2014] CSOH 122, 2015 SCLR 171 at [17]. On the facts in *Gyle Shopping Centre* that should, it seems, have been sufficient, as there was no issue of a successor landlord. If there had been an agreement to vary, Gyle could have enforced that via the statutory personal bar provisions and compelled Marks & Spencer to execute a variation.

⁷⁶ [2006] CSOH 58, 2006 SLT 591 at [22].

⁷⁷ [2014] CSOH 122, 2015 SCLR 171 at [19]–[22]. Cf J Chalmers and M Ross *Walker and Walker The Law of Evidence in Scotland* (5th edn, 2020) [25.1.2], who argue that s 1(5) does not completely abolish the previous law.

⁷⁸ Scottish Law Commission *Report on Requirements of Writing* (Scot Law Com No 112, 1988).

⁷⁹ See the authorities cited in n 58. See, too, McAllister 2006 SLT (News) 254 at 260; Reid (2006) 10 EdinLR 437 at 439.

⁸⁰ See the authorities cited in n 59.

an intention to make a substantial change to the existing law in this respect.⁸¹ Indeed, the Commission's initial intention had been to retain the existing law.⁸² It considered that the continued operation of personal bar 'could be essential to avoid injustice'.⁸³ The intention of the Commission was that the existing rules of *rei interventus* were to be broadly preserved by the 1995 Act, albeit put into modern statutory language, and that the rules were in some respects to be loosened.⁸⁴ These are all points which support an interpretation of the 1995 Act that preserves the availability of the statutory personal bar provisions for leases and for variations thereto.⁸⁵

2-29. It is submitted that the proper interpretation of the 1995 Act differs from the approach that was adopted in *Advice Centre* and *Gyle Shopping Centre*.⁸⁶ Instead, a variation to a lease should, at least in most circumstances,⁸⁷ be held to be covered by section 1(2)(a)(i). If landlord and tenant agree to vary a term of their pre-existing lease, that can perfectly naturally be described as a 'contract for the variation of a real right in land' to which section 1(2)(a)(i) applies. A variation is a contract or agreement to vary another right. Thus, section 1(2)(a) applies to it, and the statutory personal bar provisions of section 1(3) and (4) can also apply. If the variation is set up by the statutory personal bar provisions, the clear words of section 1(3) should receive effect, potentially by viewing the variation as created by the operation of an enactment or rule of law such that section 1(2)(b) does not apply.

⁸¹ The exception is in respect of the situation in which a lease is granted pursuant to a prior contract. While noting that the distinction between the previous contract could be 'very blurred', the Scottish Law Commission's *Report* [2.50] stated that, where there is a contract to grant a lease but an invalid lease is granted, the remedy should lie in enforcing the underlying obligation to grant a lease (in the same way as one would enforce the obligation to grant a valid disposition).

⁸² Scottish Law Commission *Report on Requirements of Writing* (Scot Law Com No 112, 1988) [2.40].

⁸³ *Report on Requirements of Writing* [2.39].

⁸⁴ *Report on Requirements of Writing* [2.40]–[2.42].

⁸⁵ It is a general principle of statutory interpretation that the law should not be subject to casual change: D Feldman, D Bailey and L Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) §26.7. Note, however, that in both *Advice Centre* and *Gyle Shopping Centre* the Court dismissed arguments based on the previous law. The extent to which submissions were made in those cases about the previous law is not clear. In any event, it is suggested that those cases (i) took too narrow an approach to the previous law, and (ii) gave insufficient weight to the facts that the continued operation of *rei interventus* (via the new statutory personal bar) was viewed as essential to avoid injustice and there was no intention to narrow, very substantially, the application of *rei interventus* as it applies to leases.

⁸⁶ This is explored in more detail in P Webster 'Leases and the Requirements of Writing' (2022) 26 EdinLR 51. There is already discussion in e.g. McAllister *Leases* [2.9]–[2.20].

⁸⁷ An exception might be if the parties have concluded a prior agreement to vary the lease and they then conclude a formal variation which, for some reason, is imperfectly executed. In the parallel situation in respect of a lease, as in respect of missives followed by a disposition, the Scottish Law Commission considered that the remedy lay in enforcing the underlying agreement to be granted a valid document: *Report on Requirements of Writing* [2.50].

2-30. This analysis of the meaning of section 1(2)(a) is supported by the fact that ‘real right in land’ – which controls the scope of section 1 of the 1995 Act – is a defined term and seems likely to carry a broader meaning than it usually has in property law. In particular, it appears to cover purely personal rights of use or occupancy, such as a licence or a lease which is purely contractual. The term is defined in section 1(7) as follows:

In this section ‘real right in land’ means any real right in or over land, including any right to occupy or to use land or to restrict the occupation or use of land, but does not include –

- (a) a tenancy;
- (b) a right to occupy or use land; or
- (c) a right to restrict the occupation or use of land,

if the tenancy or right is not granted for more than one year, unless the tenancy or right is for a recurring period or recurring periods and there is a gap of more than one year between the beginning of the first, and the end of the last, such period.

2.31 The wording is infelicitous. One might read it as applying only to rights which property law categorises as real rights. However, the matters covered at paragraph (b) (i.e. a right to occupy land which is not a tenancy) are not real rights. As originally enacted, the 1995 Act referred to ‘interest in land’ rather than ‘real right in land’, which was defined as meaning ‘any estate, interest or right in or over land, including any right to use land or restrict the occupation or use of land’ (subject to further provision about the duration of the right). It therefore applied to purely contractual rights regarding the occupation of land.⁸⁸ That indeed had been the Scottish Law Commission’s express intention.⁸⁹ The amendment to the definition was a tidying-up exercise as part of feudal abolition.⁹⁰ There is no indication that this process of amendment was intended to narrow the substantive scope of the requirements of writing.⁹¹ Although the point has not been the subject of decision, it appears that the definition of ‘real right’ is *not* limited to rights which are real rights in property law but that

⁸⁸ *Caterleisure Ltd v Glasgow Prestwick International Airport Ltd* [2005] CSIH 53, 2006 SC 602 is an illustration of the Act being applied to a contractual licence. The point was not controversial between the parties.

⁸⁹ *Report on Requirements of Writing* [2.18].

⁹⁰ Abolition of Feudal Tenure etc (Scotland) Act 2000 Sch 12. Apparently, this was to achieve ‘greater precision’: Scottish Law Commission *Report on Abolition of the Feudal System* (Scot Law Com No 168, 1999) [9.5].

⁹¹ It is presumed that Parliament, when making amendments to one Act which are purely consequential upon another Act, did not intend to make any fundamental change in the former Act: D Feldman, D Bailey and L Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) Part 3, §8.5. There is nothing indicating that the Scottish Parliament did intend to change the substance of the Requirements of Writing (Scotland) Act 1995 s 1(7) when it passed the Abolition of Feudal Tenure etc (Scotland) Act 2000.

the defined term carries a broader meaning.⁹² Specifically, it includes ‘a right to occupy or use land’ regardless of whether that right is real or personal and therefore includes licences and leases which are purely contractual. But even if that were not to be accepted,⁹³ and the definition in section 1(7) were read as applying only to real rights in the strict sense, there would still be debate about how to analyse a variation of a lease.

2-32. If, as is argued here, section 1(2)(a) does apply to a variation of a lease, the consequence is that the statutory personal bar provisions apply to the variation. If the requirements of section 1(3) and (4) are then satisfied, section 1(3)(b) provides expressly that the variation ‘shall not be regarded as invalid’ on the ground that it is not properly constituted. This approach gives rise to a potential conflict in the legislation, because section 1(2)(b) provides that writing is needed for the variation of a real right in land. Nonetheless, there are a number of reasons which support the view that the informal variation should receive legal effect.

2-33. First, in the report which led to the 1995 Act the Scottish Law Commission acknowledged that the continued operation of personal bar could be essential to avoid unfairness.⁹⁴ Views of legal policy can differ, but it is suggested that it would manifestly be unfair if, for example, parties to a lease expressly agreed to a variation of the clause regarding permitted use, the tenant thereafter spent a very substantial amount of money adapting the premises, and the landlord was, after all that, nevertheless free to maintain that there had been no variation because of minor non-compliance with a statutory formality.⁹⁵

2-34. Second, the Law Commission acknowledged that the distinction between section 1(2)(a) and 1(2)(b) could become ‘very blurred’ in respect of leases.⁹⁶ In those circumstances, it is suggested that the courts should not strive to interpret the legislation in such a way as to restrict the application of the statutory personal bar provisions in respect of leases.⁹⁷

⁹² That is the approach adopted in KGC Reid and GL Gretton *Conveyancing 2017* (2018) 176. This argument is set out in more detail in P Webster ‘Leases and the Requirements of Writing’ (2022) 26 EdinLR 51.

⁹³ The approach adopted in KGC Reid *Green’s Annotated Acts: Requirements of Writing (Scotland) Act 1995* (2nd edn, 2015) 9. It is suggested that this should not be followed. *Report on Requirements of Writing* (Scot Law Com No 112, 1988) [2.39] and [2.42].

⁹⁴ E.g. because the parties’ signatures were both on a separate sheet instead of at least one being on an operative page. The view that the parties have only themselves, or their legal representatives, to blame for not complying with straightforward requirements is an unappealing approach. Further, in many circumstances acquiescence would apply to protect the tenant, which begs the question whether there can be such a strong policy need to uphold the requirements of the 1995 Act.

⁹⁵ *Report on Requirements of Writing* [2.50].

⁹⁷ In *Gray v MacNeil* [2017] SAC (Civ) 9, 2017 SLT (Sh Ct) 83, in a different context, it was recognised that to apply s 1(2)(b) to a lease could result in considerable unfairness. The Sheriff Appeal Court sought to avoid that result by holding that the 1995 Act simply did not apply

2-35. Third, section 1(2)(b) requires writing only for the constitution of a real right in land ‘otherwise than by the operation of . . . [an] enactment or rule of law’. If section 1(2)(a)(i) and 1(3) apply to a lease, or a variation thereof, section 1(3) provides expressly that the lease or variation ‘shall not be regarded as invalid’. This explicit statutory instruction should receive effect,⁹⁸ and the wording in section 1(2)(b) provides a means for doing so: this is the operation of an ‘enactment’.

2-36. Although the decision pre-dates both *Advice Centre*⁹⁹ and *Gyle Shopping Centre*,¹⁰⁰ at first instance in *Ashford and Thistle Securities LLP v Kerr Sheriff Poole* held that the statutory personal bar provisions could apply to a variation.¹⁰¹ The point was not taken in the subsequent case of *Coatbridge Retail No 1 Ltd v Oliver*,¹⁰² which was argued on the basis that the statutory personal bar provisions do apply to a variation of a lease.

2-37. A further question is: even if the statutory personal bar provisions do apply to a variation, can an improperly constituted variation which is cured by personal bar affect a singular successor? In *Advice Centre for Mortgages* it was said that rights and obligations set up by personal bar were personal only and could not affect a successor.¹⁰³ The same approach was adopted in *Gyle Shopping Centre*.¹⁰⁴ Again, this approach involves a considerable departure from the pre-1995 Act law, in which imperfectly constituted leases and variations which benefited from *rei interventus* were regularly held to bind successors

at all to the creation of personal rights and obligations. The trouble with that approach is that s 1(2)(a) plainly does apply to personal rights, regardless of the view taken of the meaning of ‘real right in land’ in s 1(7). Although the outcome in *Gray* seems correct, the reasoning is flawed.

⁹⁸ Even if s 1(2)(b) did not contain the wording on which reliance is placed here, the court would need to resolve the conflict between s 1(3) and 1(2)(b). In those circumstances, it is submitted that the specific provision in s 1(3) should receive effect. See D Feldman, D Bailey and L Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) §21.1: ‘Where two enactments within an Act or other instrument appear to conflict, it may be necessary to treat one as modifying the other. Lord Herschell LC said in *Institute of Patent Agents v Lockwood* ([1894] AC 347 at 360) that where there is a conflict between two sections in the same Act: ““You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other”.’

⁹⁹ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591.

¹⁰⁰ *Gyle Shopping Centre General Partners Ltd v Marks & Spencer plc* [2014] CSOH 122, 2015 SCLR 171.

¹⁰¹ Edinburgh Sheriff Court, 19 December 2005 (revd 2007 SLT (Sh Ct) 60). The appeal turned on a different point.

¹⁰² 2010 GWD 19-374.

¹⁰³ [2006] CSOH 58, 2006 SLT 591 at [23]. The same conclusion was reached at first instance in *Ashford and Thistle Securities LLP v Kerr*, Edinburgh Sheriff Court, 19 December 2005, Sheriff Poole holding that, even if an oral variation did benefit from the statutory personal bar provisions, it did not bind a successor landlord.

¹⁰⁴ [2014] CSOH 122, 2015 SCLR 171 at [16].

to the landlord.¹⁰⁵ And indeed there is a perfectly plausible statutory basis for concluding that a lease, or a variation, set up by personal bar can affect a singular successor, though this would require a departure from the *obiter* views in *Advice Centre*. Abstract reasoning about how personal bar cannot affect a successor is not convincing in this context: *rei interventus* was a species of personal bar, yet a contract or variation ‘cured’ by *rei interventus* could affect a successor to the landlord.

2-38. The proper approach depends on the wording of section 1(3) and (4). Section 1(3) provides (emphasis added):

Where a contract, obligation or trust mentioned in subsection (2)(a) above is not constituted in a written document complying with section 2 of this Act, but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust (‘the first person’) has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other party to the contract, the debtor in the obligation or the truster (‘the second person’) –

- (a) the second person shall not be entitled to withdraw from the contract, obligation or trust; and
- (b) *the contract, obligation or trust shall not be regarded as invalid, on the ground that it is not so constituted, if the condition set out in subsection (4) below is satisfied.*

Although the conditions for the application of section 1(3) are formulated by reference to what the ‘first person’ and ‘second person’ have done,¹⁰⁶ and although paragraph (a) focuses only on the ‘second person’ not being entitled to withdraw from the obligation, paragraph (b) is broader. It states simply, but clearly, that ‘the contract . . . shall not be regarded as invalid’. That is not limited in its effect to the ‘second person’ not being able to do something. Rather, it is an express statutory instruction that the contract (or variation, in this case) shall not be regarded as invalid on the ground that it is not constituted in compliance with section 2. If, then, there is such a contract or variation, there is a plausible argument that the Leases Act 1449 can take effect on it, just as it used to do under the old law on leases or variations set up by *rei interventus*. The effect on a successor landlord flows as a result of the operation of these enactments or rules of law, meaning that section 1(2)(b) does not impose a separate requirement of writing.¹⁰⁷

2-39. It is thus perfectly possible to interpret the 1995 Act in such a way as to preserve the availability of statutory personal bar to leases, and variations

¹⁰⁵ See, again, the authorities cited in nn 58 and 59. Indeed, Rankine *Leases* 134 noted that the rules about the circumstances in which *rei interventus* rendered a lease binding ‘were illustrated in large part from cases which arose between tenants and singular successors of the lessor’.

¹⁰⁶ Section 1(4) also refers to ‘such a withdrawal as is mentioned in’ s 1(3).

¹⁰⁷ Even if it did, one might say that, given the difficulties in interpretation of the 1995 Act, the provision in s 1(3) should be given priority given the contradiction between the provisions.

thereof, and also for such leases and variations to take effect in a question with a singular successor of the landlord. That seems the preferable approach to the interpretation of the 1995 Act. It also avoids the oddity that acquiescence (i.e. something less than an agreement) can in some circumstances affect a successor to the landlord – as is discussed below¹⁰⁸ – but an agreed albeit improperly constituted variation in reliance on which the parties have acted, potentially for a long period of time, will not do so. It must, however, be acknowledged that this is not the approach adopted in current Outer House authorities. It is suggested that the point should be approached differently in future cases. At the very least, there is considerably more to be said for the view that the statutory personal bar provisions can apply to variations than has been acknowledged to date.

(e) *Comparative law*

2.40 Other legal systems also recognise that the transferee of the subjects of a lease becomes party to the agreement as constituted at the moment of transfer. That is the rule, for example, in South African law.¹⁰⁹ Specifically, there is there no requirement that the transferee have knowledge of the variation. In *Essop Ebrahim and Sons v Hoosen Cassim*¹¹⁰ a purchaser argued that he was not bound by an oral variation of a lease because he had no knowledge of it. This was the response of Dove Wilson JP, a judge who had received his legal training in Scotland:¹¹¹

That, however, appears to me to be a limitation upon the rule that hire goes before sale, for which there is no warrant. The rule was introduced into the Roman-Dutch Law in favour of the tenant. It was not so under the Roman law, by which the purchaser of land was not bound by a lease by a former owner in the absence of special stipulation. That was felt to be inequitable, and, accordingly, by the Roman-Dutch law a tenant is permitted to insist, as against a purchaser, on remaining in occupation for the whole term of the lease made by the former owner, provided, of course, that he is prepared to pay the purchaser the rent accruing during the unexpired period of the lease. In other words, his lease gives him a right according to its terms to the use and occupation of the property preferent to that of the purchaser; and I know of no authority for saying that that right is dependent to any extent on the purchaser's knowledge of the terms of the lease, or, indeed, of the existence of a lease at all. That being so, it is idle for the purchaser to say, as in the present case, that the tenant cannot rely upon one term of the lease merely because the purchaser was unaware of it; and it adds nothing to the purchaser's position that the term which he seeks to exclude as against himself has not been reduced to writing, provided that it is an undoubted term of a *bona fide* lease. What may be the position as between the purchaser and seller we are not concerned with.

¹⁰⁸ Paras 2-42 to 2-50.

¹⁰⁹ Cooper *Landlord and Tenant* 298; Kerr *Sale and Lease* 278–279.

¹¹⁰ 1920 NPD 73.

¹¹¹ 1920 NPD 73 at 78–79. On Dove Wilson, see SD Girvin 'An evaluation of the career of a Scots colonial judge: John Dove Wilson of Natal' 1990 JR 35.

Although, as has just been discussed, the safe view is that Scots law adopts a different approach in respect of oral variations, the general force of Dove Wilson JP's argument applies equally in Scotland: there is no requirement that a purchaser have knowledge of the terms of the lease in order to be bound by them,¹¹² although the law does take certain steps to alert the purchaser to the existence of a lease.¹¹³ The South African view is that the purchaser should:¹¹⁴

enquire from the seller/landlord whether the written lease represents the full and correct terms of the agreement between the parties, and if the latter misrepresents the position the purchaser would have a right of recourse against him.

2-41. German law similarly holds the successor landlord affected by alterations and amendments: 'The acquirer must accept the contract of lease in the condition in which it exists at the moment of the transfer of ownership.'¹¹⁵ The approach of English law is similar. In *System Floors Ltd v Ruralpride Ltd*¹¹⁶ a purchaser was held bound by the terms of a side-letter, which differed from those of the lease, but of which the purchaser was unaware. The letter had been executed on the same day as the lease. In respect of leases granted on or after 1 January 1996 ('new tenancies' in terms of the Landlord and Tenant (Covenants) Act 1995), landlord or tenant covenants in a 'collateral agreement' will transmit to successors.¹¹⁷ As Fancourt puts it: 'terms, conditions and obligations contained in any agreement supplemental to or qualifying the terms of the tenancy agreement, and whether made before or after the tenancy was created, may be "covenants" within the meaning of the Act'.¹¹⁸ The Law Reform Commission of Ireland has expressed its dissatisfaction with the English rule, suggesting that agreements entered into 'outside' the lease should only bind successors who have notice of them.¹¹⁹ However, the reasoning in the South African case of *Essop*,¹²⁰ mentioned above, is more persuasive.

¹¹² *Bell v Lamont* 14 June 1814 FC (IH) is but one example of a successor being bound by a term of which he had no knowledge. See para 4-06 (text at n 8) and Ch 9 below.

¹¹³ See paras 2-17 to 2-19 above and paras 2-59 *et seq* below.

¹¹⁴ *Kruger v Pizzicanella* 1966 (1) SA 450 at 455. Kerr *Sale and Lease* 281 notes that the tenant may be estopped from denying that the lease is as expressed in the original agreement if, for example, he fails to correct the successor's misapprehension.

¹¹⁵ *Staudingers Kommentar* §566 Rn [38]: 'der Erwerber muß den Mietvertrag in dem Zustand hinnehmen, in dem er sich im Augenblick des Eigentumswechsels befindet'.

¹¹⁶ [1995] 1 EGLR 48 (CA). See also *Lotteryking Ltd v AMEC Properties Ltd* [1995] 2 EGLR 13 (Ch D).

¹¹⁷ Landlord and Tenant (Covenants) Act 1995 s 28(1).

¹¹⁸ TM Fancourt *Enforceability of Landlord and Tenant Covenants* (3rd edn, 2014) [11.02].

¹¹⁹ Law Reform Commission of Ireland *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28, 2003) [3.05] and *Report on the Law of Landlord and Tenant* (LRC 85, 2007), Appendix B, Draft Bill, s 16(2)(b). A draft Bill was put out to consultation by the Irish government in April 2011: <http://www.justice.ie/en/JELR/Pages/PR11000046>. As of 13 July 2020, no Bill has been introduced to the Irish Parliament.

¹²⁰ 1920 NPD 73, discussed at para 2-40 above.

(2) Acquiescence/personal bar

2-42. There are various cases that have considered whether a successor landlord is affected where the previous landlord had consented to or tolerated a departure from the terms of the lease but this did not amount to a variation.¹²¹ The circumstances in which a successor will be affected are not clear.¹²² It is suggested that, despite some passages that could be interpreted to the contrary, a successor landlord can be affected in certain circumstances by a predecessor's consent to the tenant's departure from the terms of the lease, even if this does not amount to a variation of the lease. The exact effect on the successor landlord will vary depending on the circumstances: the successor will not necessarily be obliged to continue to allow the departure on a permanent basis. It has been said in another context in respect of personal bar that its effect is that the landlord cannot insist on strict compliance in the future without giving the tenant a reasonable opportunity to bring his behaviour back into compliance with the contract.¹²³ The following paragraphs analyse prominent decisions involving successor landlords.

2-43. In *Hall v M'Gill*¹²⁴ a successor landlord (Hall) claimed, among other things, damages for miscropping contrary to the terms of the lease. Hall's date of entry was Whitsunday 1837. The lease had been due to end in 1837 but continued for two years on the basis of tacit relocation. The tenant maintained that the miscropping claim was barred by the predecessor landlord's acquiescence in the tenant's approach to cropping. This defence was sustained by the sheriff¹²⁵ but the decision was reversed by the Lord Ordinary, who held that the plea of homologation or acquiescence was 'irrelevant against a singular successor'.¹²⁶ Although the Inner House also found the tenant liable in damages, the opinions do not support the view that a predecessor's acquiescence will always be irrelevant.

¹²¹ E.g. *Hall v McGill* (1847) 9 D 1557 (IH); *Carnegie v Guthrie* (1866) 5 M 253 (IH); *Pickard v Reid* 1953 SLT (Sh Ct) 5; *What Every Woman Wants* (1971) Ltd v *Wholesale Paint and Wallpaper Co Ltd* 1983 SLT 133 (OH); *BP Oil Ltd v Caledonian Heritable Estates* 1990 SLT 114 (OH). See generally EC Reid and JWG Blackie *Personal Bar* (2006) [10-35]–[10-38].

¹²² That is in line with the law generally about the circumstances in which acquiescence can affect a singular successor. In *Michael v Carruthers* 1998 SLT 1179 (OH) Lord Hamilton stated at 1187 that '[t]he question whether a proprietor can be bound by acquiescence by his predecessor in title appears not to be authoritatively settled'. There is some discussion in G Junor 'Acquiescence – and the singular successor' 2010 JR 217. See also JM Halliday 'Acquiescence, singular successors and the baby linnet' 1977 JR 89, 93. It is not clear why the analogy has not been drawn with real burdens in feus, where acquiescence did affect successors. That is also discussed in Halliday's article and, more recently, in S Wortley 'Real Burdens and Personal Bar' in R Rennie (ed) *The Promised Land: Property Law Reform* (2008) 25, 52–56. In English law, doctrines similar to personal bar do affect acquirers of the landlord's or tenant's interest in a lease: *Brikom Investments Ltd v Carr* [1979] 1 QB 467 (CA).

¹²³ *Whitbread Group Ltd v Goldapple Ltd (No 2)* 2005 SLT 281 (OH) at 290F.

¹²⁴ (1847) 9 D 1557 (IH).

¹²⁵ (1847) 9 D 1557 at 1159 and 1562.

¹²⁶ (1847) 9 D 1557 at 1561 and 1563.

2-44. The important passage from Lord Cockburn's opinion is quoted at paragraph 2-12 above. The passage continues: 'I cannot think that the tenant is liable in damages for deviations from the proper course of cropping during the last two years, which, if any, were made necessary by the deviations previously sanctioned.'¹²⁷ The state of the evidence did not allow this to be worked out easily. The Lord Justice-Clerk (Hope) felt 'considerable difficulty' in respect of the claim, stating that 'I am not satisfied that we can entirely throw out of view the state of matters under the management of the former proprietor'. He was not certain that it could be held that the 1838 crop had been miscropped without looking to what had been permitted in previous years.¹²⁸

2-45. If *Hall v M'Gill* was not completely clear, *Carnegie v Guthrie*¹²⁹ holds that a new landlord cannot maintain that the tenant is in breach of the lease because of conduct that is a necessary consequence of conduct approved by a previous landlord. *Carnegie* was another miscropping case, in which the tenant departed from the provisions of the lease with the landlord's knowledge or permission, the landlord then sold the farm, and the new landlord claimed damages from the tenant for alleged breach. Lord President McNeill stated:¹³⁰

[T]he new landlord is not entitled to demand from the tenant damages because of not getting these fields in grass in 1863, when that condition of matters was the obvious and inevitable consequence of what the tenant, by permission, had done before the pursuer became the purchaser.

The Lord President also noted that the new landlord either knew or ought to have known of the status of the farm and the difference from the provisions in the lease.¹³¹ However, his Lordship seems to have viewed that as a separate point. It is suggested that, on a proper interpretation of *Carnegie*, knowledge (either actual or potential) by an incoming landlord is not necessary for the conduct of the previous landlord to affect the successor landlord's ability to enforce the terms of the lease.

¹²⁷ (1847) 9 D 1557 at 1567.

¹²⁸ (1847) 9 D 1557 at 1570.

¹²⁹ (1866) 5 M 253 (IH).

¹³⁰ (1866) 5 M 253 at 255.

¹³¹ The lease contained a provision allowing the tenant to adopt a different course of cropping from that specified in the lease if the landlord gave permission: see 255. It is not thought that the outcome should differ depending on whether the lease contains such a clause, although one can see an argument to that effect. If the lease does contain such a clause, the only question should be whether the landlord did consent and, if so, what is the proper interpretation of the consent: e.g. was it a temporary permission? permission for the duration of the lease? permission only so long as the landlord remained landlord or the tenant remained tenant? An English case in which that question arose in the context of consent to change of use was *Rose v Stavrou* 1999 LandTR 133 (Ch D, Neuberger J). In *Mount Eden Land Ltd v Prudential Assurance Co Ltd* (1997) 74 P and CR 377, consent to building works that had been provided by a previous landlord was effective in a question between the tenant and a successor landlord.

2-46. *Pickard v Reid*¹³² is a Sheriff Court decision which takes a narrower approach. A successor landlord was held entitled to remove the tenant for breach of a prohibition against sub-letting, despite the fact that the sub-letting had been known to and acquiesced in by the previous landlord's factor, who had accepted rent in the knowledge of the sub-lets. At debate the Sheriff-Substitute's view¹³³ was that a defence based solely on the acquiescence of the former landlord's factor was irrelevant. Following a proof the approach of a different Sheriff-Substitute¹³⁴ was that the defence could not succeed without a plea that the successor landlord herself either acquiesced in the breach or that she was aware of the sub-letting before the purchase. The Sheriff-Substitute viewed it as being implicit in discussion in Rankine's *Personal Bar*,¹³⁵ and the various cases discussed in that text, that 'in the absence of such notice or knowledge, the singular successor is not bound'.¹³⁶ In the absence of a pleading to this effect, he held that the tenant's argument failed. This, however, is not to say that in the circumstances of that case, a case of notice could not have been advanced. Indeed, sub-letting is something which one could argue could readily have been perceived. Further, it is suggested that knowledge or notice on the part of the successor landlord is not essential (though plainly, given *Pickard*, it will be sensible to aver the existence of such knowledge or notice).

2-47. In *What Every Woman Wants (1971) Ltd v Wholesale Paint and Wallpaper Co Ltd*¹³⁷ a successor landlord sought to irritate a lease for failure to pay rent on the contractually specified date. Lord Brand rejected the tenant's argument that the successor landlord was not entitled to do so because the previous landlord had, on numerous occasions, invoiced for rent (instead of acting on the basis that rent was just to be paid on the due date),¹³⁸ whereas no invoice had been rendered on this occasion. Lord Brand held that the previous landlord's behaviour was *res inter alios acta*. He did, however, state that 'the position might have been different if it had been averred that the pursuers knew of and had acquiesced in the practice of their predecessors'.¹³⁹ Again, it is submitted that it is too absolute to say, as did this case, that the conduct of the previous landlord is irrelevant unless the new landlord had knowledge of it.¹⁴⁰ That is not to say, however, that the result should have been any different on the facts of that case.

¹³² 1953 SLT (Sh Ct) 5.

¹³³ Sheriff A G Walker.

¹³⁴ Sheriff W J Dobie.

¹³⁵ J Rankine *A Treatise on the Law of Personal Bar in Scotland* (1921) 62.

¹³⁶ 1953 SLT (Sh Ct) 5 at 7.

¹³⁷ 1984 SLT 133 (OH).

¹³⁸ Indeed, the new landlord had, on the first occasion that rent fell due, issued an invoice four months after the due date and accepted payment, with no complaint.

¹³⁹ 1984 SLT 133 (OH) 134.

¹⁴⁰ It would not accommodate the situation illustrated by *Carnegie v Guthrie* (1866) 5 M 253 and *Hall v McGill* (1847) 9 D 1557 in which the previous landlord consented to something with long-lasting effects.

2-48. Finally, in *BP Oil Ltd v Caledonian Heritable Estates Ltd*¹⁴¹ a 20-year lease obliged the tenants to use the subjects as a petrol filling station. Later, the tenant used part of the property as a car display and sales area. The landlord acquiesced in this, indicating in a letter that it consented to the change of use on the condition that the car sales and display area continued to be part of the arrangement between the tenants and their filling station operator. A successor landlord, however, objected to this use as a breach of the lease and threatened irritancy. The tenants sought declarator that the lease had been varied. Lord Kirkwood held that it had not been¹⁴² and that the correspondence amounted only to ‘a personal arrangement between the parties which, it followed, was not binding on a singular successor.’¹⁴³

2-49. Yet the approach adopted in *BP Oil* to interpreting a permission given by a landlord to particular conduct by the tenant will not be appropriate in every case. There is no reason in principle why the landlord’s consent to the tenant acting in a particular way, if it has long-lasting consequences, should be interpreted as being permission only for as long as the landlord remains landlord. Indeed, often the natural reading will be the opposite.

2-50. In conclusion, while there are passages on which one could rely to argue that conduct which would give rise to a personal bar between the tenant and original landlord is irrelevant after a transfer to the successor landlord, and that is the predominant approach in the more recent cases, this seems too narrow an approach. The law here lacks a statement of overall principle. On the basis of the authorities as they stand, there is support for the propositions that (i) if the successor had knowledge of, or notice of, the previous landlord’s conduct, a plea of personal bar can affect the successor’s ability to enforce the lease terms; similarly, (ii) if the previous landlord’s consent was to conduct which, necessarily, had longer-term consequences, the new landlord cannot maintain that the tenant is in breach because of those consequences.¹⁴⁴

2-51. Another question which might arise, but which seems not to have been considered in the cases, is what happens if the lease provides that the tenant can do certain things only with the landlord’s consent and that consent has been duly given. It is suggested that, if consent has been provided, such consent will remain effective in a question with a successor.¹⁴⁵

¹⁴¹ 1990 SLT 114 (OH).

¹⁴² For example, the letter contained no reference to the relevant clause of the lease.

¹⁴³ 1990 SLT 114 at 116.

¹⁴⁴ Often such conduct will be of the nature that it will be obvious to a successor (e.g. sub-letting; change of use; change in pattern of cropping). But that is not necessarily so.

¹⁴⁵ In the English case of *Mount Eden Land Ltd v Prudential Assurance Co Ltd* (1997) 74 P and CR 377, consent to building works given by a previous landlord took effect in a question between the tenant and a successor landlord.

(3) Back-letters

2-52. Until now, the focus of discussion has been variations made to a contract of lease after it has been concluded. Sometimes, however, terms are recorded in separate documents from the outset of the lease. Such ‘back-letters’ (or ‘side-letters’, as they are sometimes called) are common and will often be granted at the start of a lease. They might, for example, be used to grant a concession such as a rent-free period, a relaxation of a use restriction, or an exclusivity clause to a particular tenant. There may be many reasons for their use. One is that ‘landlords prefer that concessions extracted for individual tenants in specific market conditions should remain out of public gaze, in respect of negotiations for either future lettings or on rent reviews’.¹⁴⁶ Often the landlord will undertake in a back-letter to secure that the landlord’s successor will grant a letter in identical terms to the tenant. Such a ‘chain clause’ is, however, only as strong as its weakest link and exposes the tenant to the risks of breach by the landlord or the landlord’s insolvency. A standard security would offer some¹⁴⁷ protection against that risk, but is cumbersome. Are the terms of such a letter real conditions, so that they bind a successor of the landlord automatically? That question arose in *Optical Express (Gyle) Ltd v Marks & Spencer plc*,¹⁴⁸ where a tenant of a unit in a shopping centre sought to enforce an exclusivity clause contained in a back-letter against a successor landlord. Lord Macfadyen refused to grant the tenant’s application for interim interdict against a successor landlord granting a lease in breach of the clause. He approached the issue in two stages. He asked first whether the letter amounted to a variation of the lease and secondly whether the nature of the obligation was such that it could transmit against a singular successor. He held that the tenant’s case that the lease had been varied was arguable but not very strong, but that the tenant failed to show that there was a *prima facie* case that the exclusivity clause could bind a successor. The application for interim interdict therefore failed. The second point is considered later.¹⁴⁹

2-53. It might be thought that there is something odd in asking whether a document executed virtually contemporaneously with the main lease document amounts to a ‘variation’ of that contract of lease. Part of the confusion arises from the use of the word ‘contract’ in two senses, to mean both a legal agreement and the document in which such an agreement is recorded. Although the terms

¹⁴⁶ Cockburn *Commercial Leases* [2.34].

¹⁴⁷ But not entire: because a standard security is enforced by sale, it is not well suited to securing obligations *ad factum praestandum*. For discussion, see Scottish Law Commission *Discussion Paper on Heritable Securities: Pre-default* (Scot Law Com DP No 168, 2019) [4.34] *et seq.*

¹⁴⁸ 2000 SLT 644 (OH). Rather oddly it does not appear that *Bruce v McLeod* (1822) 1 Sh App 213, discussed earlier, was cited. *Turner v Nicolson* (1835) 13 S 633 was cited, but was not relied upon to make the simple point for which it seems to be taken as authority, namely that any term not contained in the document of lease could not bind a successor.

¹⁴⁹ See ch 3 below (generally) and paras 7-28 *et seq* (specifically).

of a contract will typically all be recorded in one document, they may, equally, be recorded in two (or more) documents. In that event, it is not so much that one document varies the other as that all of the documents – taken together – detail the terms of the entire agreement between the parties. However, use of the terminology of ‘variation’ can be supported. Some contracts – lease is one – require to be in writing. The parties may have agreed that there is to be a lease and that the tenant is to benefit from an exclusivity clause. In a non-technical sense, that is their ‘contract’. But no enforceable contract comes into existence until the document of lease is executed, and that contract does not contain the term which will feature in the back-letter. When the back-letter is executed, the exclusivity clause becomes an enforceable contract and it is suggested that it technically does vary the pre-existing contract of lease.

2-54. Whatever terminology is used should not obscure the fact that the issue in *Optical Express* was not whether the terms of both the lease and the back-letter bound the original landlord for the future. As already seen, that is often the issue in cases where it is disputed whether a variation to a lease binds a successor;¹⁵⁰ but that was not the issue in *Optical Express*. The original landlord was clearly bound by the terms of the back-letter. In that sense, at least, it was a variation of the contract of lease. Rather, the issue in *Optical Express* was whether the exclusivity clause should be held to transmit to a successor despite the parties choosing to detail it in a back-letter separate from the lease document.¹⁵¹ It is suggested that what Lord Macfadyen in fact considered, albeit under the guise of asking whether the contract of lease was varied, was whether the parties intended the exclusivity clause to be personal to the original landlord. That can be seen by considering some of the factors which led him to the conclusion that the tenant had an ‘arguable but not strong case’ that the back-letter amounted to a variation of the lease.¹⁵² The use of a back-letter was said to ‘point fairly strongly to a desire to maintain a distinction between the terms of the lease and the obligation constituted in the back letter, and to present that back letter as separate from and collateral to the lease rather than as an integral part of the same contract’. The lease was registered in the Books of Council and Session whereas the back-letter was not. Although it was said to be common for the transmissibility of the burden of exclusivity clauses to be addressed expressly, by providing for the landlord to take successors bound by the obligation, that had not been done in this case. All of these factors, noted by Lord Macfadyen, point not to a conclusion about whether the agreement between the original landlord and tenant contained this term (undoubtedly it did), but rather to a conclusion about whether the term was intended to be ‘personal’ to the original landlord.

¹⁵⁰ See paras 2-03 *et seq* above.

¹⁵¹ Paras 3-58 *et seq* below discuss the extent to which parties’ intention can convert a term which would otherwise be a real condition into a personal condition and prevent it from transmitting to a successor landlord.

¹⁵² *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 649F–650F.

2-55. Although use of a back-letter will usually indicate that the parties intend the benefit of its term to be personal to the original *tenant* (or perhaps to a group of permitted assignees, such as companies in a group), it does not necessarily indicate an intention that the burden be personal to the original *landlord*. There are a variety of reasons for using a back-letter. One cannot say that use of a back-letter always reveals one intention rather than another. In the hackneyed phrase, much will depend on the circumstances of the case and the drafting used. A well drafted back-letter will make the point clear.¹⁵³ Does the back-letter refer to the landlord as a defined term, which includes successors, but to the tenant only by name? That would indicate that, although the letter is intended to be personal to the tenant, it is not intended to be personal to the landlord. It might be that a back-letter is used precisely because the parties wish to ensure that a particularly important term binds a successor landlord, but, because of the uncertain state of the law, they cannot be sure that it will count as a real condition of the lease. The tenant therefore seeks additional protection in the form of a back-letter containing the core obligation on the landlord and also an obligation on the landlord that if he transfers his interest, the successor will abide by the terms of the letter or, better, grant the tenant a further letter in identical terms. If the term used would otherwise bind a successor as a real condition, it should not cease to do so simply because it is constituted in a back-letter as opposed to in the lease itself. Parties would, however, be well advised to make their intentions clear.

2-56. It is also possible for a back-letter to be executed before the lease. In that case, it is more difficult to view it as varying the contract of lease (although English law recognises the concept of pre-contractual variation).¹⁵⁴ Again, much will depend upon the circumstances. However, there is nothing inappropriate in principle in viewing the back-letter and main lease document together as constituting the contract of lease. The statutory presumption that a written document which appears to comprise all the express terms of a contract does in fact do so¹⁵⁵ will require to be overcome, but that should not be difficult. The approach of the English Court of Appeal in *Weg Motors Ltd v Hales*¹⁵⁶ commends itself. It viewed a lease and an option to take a further lease (executed shortly before the lease) as aspects of a single agreement which

¹⁵³ As did, for example, the first style back-letter in *Green's Practice Styles* (April 2011) C1006/2–3, in which the landlord (a) consents to certain alterations to the lease *so long as it remains landlord* and (b) undertakes to bind any successor to grant a letter in the same terms.

¹⁵⁴ *Brikom Investments Ltd v Carr* [1979] 1 QB 467 (CA). The following all take the view that this creates a 'collateral contract': E Peel *Treitel: The Law of Contract* (15th edn, 2020) [3-065]; HG Beale (ed) *Chitty on Contracts* (33rd edn, 2018) [4-080]; S Wilken and K Ghaly *Wilken and Ghaly The Law of Waiver, Variation, and Estoppel* (3rd edn, 2012) [2.10]–[2.13].

¹⁵⁵ Contract (Scotland) Act 1997 s 1(1), which provides: 'Where a document appears (or two or more documents appear) to comprise all the express terms of a contract or unilateral voluntary obligation, it shall be presumed, unless the contrary is proved, that the document does (or the documents do) comprise all the express terms of the contract'.

¹⁵⁶ [1962] Ch 49 (CA) 71.

the parties merely chose to record in two documents. The burden of the option could, therefore, run with the reversion. If that approach is accepted, it should satisfy the requirement that possession has to be by virtue of the contract of lease which is said to bind a successor.¹⁵⁷

2-57. *Optical Express*¹⁵⁸ therefore adds a further dimension to the analysis. Although a term being in a collateral document is not an absolute bar to its transmission, the fact that the parties have chosen to record a term in a back-letter instead of in the lease itself should be taken into account when considering whether they intended the benefit and burden of the term to be personal. Much will depend on the wording of the letter and its background circumstances. The situation with a back-letter is slightly different from that of formal variation, considered earlier in this chapter: there, the parties' decision to vary the lease by means of a separate agreement does not of itself indicate a desire that the term inserted be personal, for this is the only way for achieving their objective, other than executing an entirely new lease.

(4) Terms in missives/agreements for lease

2-58. Sometimes instead of immediately concluding a lease, the parties will first enter into a preliminary contract, variously called 'missives of let' or an 'agreement for lease', which provides for a lease to be concluded at a later date. May terms in the missives, but which are not repeated in the subsequently executed lease, transmit to a successor? Such facts gave rise to litigation in *Davidson v Zani*¹⁵⁹ and *Allan v Armstrong*,¹⁶⁰ but in neither did the issue of whether unimplemented terms of missives of let transfer as part of the lease receive attention. It is submitted that they can do,¹⁶¹ but that this will be rare. As was discussed above in the context of back-letters, what transmits to a successor landlord is the contract of lease in the sense of the agreement, and not of the agreement as expressed in any particular document. Providing that the missives of let contain the essentials of a lease, and are properly executed, they create a contract of lease.¹⁶² If the missives of let provide for the later grant of a

¹⁵⁷ See paras 2-17 *et seq* above.

¹⁵⁸ *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644, discussed above.

¹⁵⁹ 1992 SCLR 1001 (Sh Pr).

¹⁶⁰ 2004 GWD 37-768 (OH).

¹⁶¹ Cf KGC Reid and GL Gretton *Conveyancing 2004* (2005) 106.

¹⁶² *Stair Institutions* II ix 6; Rankine *Leases* 100–102. One may ask: if the missives themselves constitute a contract of lease, why is there any need for a separate contract of lease? The answer will often be practical. The agreement of lease might make the grant of the lease subject to various conditions precedent or impose obligations on one or other of the parties which are only relevant prior to the tenant taking entry, such as an obligation on the landlord to carry out refurbishment works. The parties will likely wish neither type of term to feature in the contract of lease, which is to remain in place for some time to come and may be transferred by the landlord or tenant to parties for whom those initial terms would be irrelevant.

formal lease, the effect of section 2(1) of the Contract (Scotland) Act 1997 is that unimplemented terms of the missives remain contractually binding despite their omission from the deed executed in implement of the contract, unless the parties have derogated from this rule. Parties may derogate from the rule by using an 'entire agreement' clause in the subsequently executed lease.¹⁶³ It might also be that the terms of the missives become unenforceable as a result of waiver or other analogous doctrines. If, however, unimplemented terms of missives subsist, of what contract do they form part but the lease? Unless the document of lease states that it contains all of the terms of the parties' agreement, it is wrong to view terms agreed in previous missives as intransmissible for the sole reason that they feature only in missives and not a subsequent formal lease executed in terms of those missives. The rule that the tenant must possess by virtue of the lease which is alleged to bind a successor is satisfied, for the term in the missives is part of the contract of lease, even if it is not repeated in the formal lease document. The fact that the parties omit the term from the formal lease is, however, of relevance when assessing whether they intended it to be personal to the original parties. A positive choice to omit such a term surely indicates an intention that the term be personal. Accidental omission, though, reveals no such intention. *Allan v Armstrong*¹⁶⁴ is a modern case along these lines. Missives of let contained a break option, but this was omitted from the lease which was executed in implement of the missives. When the omission was spotted, the landlord acknowledged the continued existence of the option. In those circumstances, it seems that the term in the missives should transmit as a real condition of the lease.

C. REGISTERED LEASES AND OFF-REGISTER VARIATION

(1) Introduction

2-59. A requirement of registration is the paradigm example of a rule supported by the publicity principle. A system of registration might choose simply to record the fact that a lease has been granted, echoing the publicity function performed by possession at common law and leaving it to the prospective purchaser to enquire as to the terms of the lease. Alternatively, the register could provide details of terms of the lease. The latter is the approach adopted by the Scottish system of registration, although the mechanics differ between the Register of Sasines and the Land Register (and, indeed, between the approach in the Land Register before and after the Land Registration etc (Scotland) Act 2012).

¹⁶³ This type of clause is discussed in *Macdonald Estates plc v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123, 2007 SLT 791 at [126]–[131]. Separately from an 'entire agreement' clause of the type considered in that case, it might be argued that the formal lease amounts to a novation of the original contract, extinguishing unimplemented terms of the missives. But that would reintroduce the old supersession rule which s 2(1) of the Contract (Scotland) Act 1997 was meant to replace, so this is surely not the law.

¹⁶⁴ 2004 GWD 37-768 (OH).

2-60. The fact that the register can reveal the terms of a lease does not, however, mean that only terms that are on the register will affect a successor landlord. This section considers whether a term must be registered in order to bind a singular successor. In other words, it asks whether a prospective purchaser of the lease subjects can rely on the details provided by the register, or whether the purchaser must make further enquiries to ascertain whether the terms of the lease are different from those registered, as may be the case if there is an unregistered variation or back-letter. It does not consider again what amounts to a variation and whether the use of a particular type of deed reveals an intention that a term be personal: those points were considered above in the discussion of unregistered leases.

2-61. An example illustrates the issue. L grants T a 25-year lease. It is registered. Six months later L agrees that T is to have the option of terminating the lease after five years. The variation is in writing but it is not registered. In year three L transfers to S. In year five T seeks to exercise the break option. S refuses to accept this termination, arguing that the option is not disclosed by the register and S is bound only by registered terms.¹⁶⁵

2-62. The contemporaneous operation of two systems of registration means that there are a number of possibilities to consider.

- (a) First, both the landlord's and the tenant's title might be recorded in the Register of Sasines. The passage of time means that it is now unlikely that the question whether an unregistered variation binds a successor landlord could arise in a question with the landlord whose title is on the Register of Sasines: the issue arises only if there has been a transfer of ownership by the landlord, and a recent transfer would have triggered (first) registration in the Land Register.¹⁶⁶
- (b) Second, both landlord's and tenant's titles might have been registered in the Land Register. The registration could have taken place when the Act establishing the Land Register, the Land Registration (Scotland) Act 1979, was still in force or after the Land Registration etc (Scotland) Act 2012 had taken its place.
- (c) Finally, the tenant's title might have been registered in the Register of Sasines and the landlord's registered on the Land Register. This would arise if the lease was granted before the area became operational for the Land Register, and ownership was later transferred.¹⁶⁷

¹⁶⁵ The introduction of registration of title, as opposed to registration of deeds, gives rise to another possibility: some terms of the original lease may be erroneously omitted from the register because of an error at Register House.

¹⁶⁶ The last counties became operational in the Land Register in April 2003, and the seabed in December 2014.

¹⁶⁷ The fourth logical possibility is a lease granted by a landlord whose title was in the Register of Sasines but the lease was registered in the Land Register. A subsequent transfer by the landlord would have been registered in the Land Register. This is therefore covered by (b).

2-63. As time passes, more and more plots will be registered in the Land Register.¹⁶⁸ The 1979 Act introduced registration of title to Scotland. The 2012 Act made various important changes to the legislative framework as well as to the underlying principles of the land registration system. The vast bulk of the provisions of the 2012 Act came into force on 8 December 2014, the ‘designated day’.¹⁶⁹ When considering the extent to which a successor landlord can be affected by an off-register variation, it is necessary to consider the provisions of both the 1979 Act and the 2012 Act, because (i) the provisions of the 1979 Act remain relevant for determining the effect of registration before the designated day, and (ii) the approach of the 2012 Act in respect of leases is, for reasons explained below, in large part to re-enact the provisions of the 1979 Act, even though their effect is in places uncertain. This section first considers the position under the Register of Sasines, then the position of the Land Register under the 1979 Act, before finally addressing changes made by the 2012 Act.

2-64. The Keeper does not warrant in respect of a plot on the Land Register that a lease has not been varied (or terminated) without that being registered.¹⁷⁰ However, other than this, definite conclusions are difficult to come by in this area, given the lack of authority and the difficulty of the statutory provisions.

(2) Landlord’s title in the Register of Sasines

2-65. The Register of Sasines is a register of deeds. Where a lease was recorded in the Sasine Register, which first became possible as a result of the Registration of Leases (Scotland) Act 1857, the deed itself was registered and was what those checking the register consulted. There is no state guarantee of title. Did the system of registration established by the 1857 Act at least guarantee to successor landlords that, where a lease was registered, they would be affected only by terms which the register disclosed? There seems to be no case which considers the question, but there are various reasons to think that it does not.

2-66. The 1857 Act as enacted made no provision for the registration of variations, though it did provide for the registration of assignments, adjudications, renunciations, discharges (of assignments in security) and decrees of reduction. The 1857 Act was more concerned with the existence of and title to the lease than with the terms of the lease itself, consistent with the fact that the purpose of the 1857 Act was to facilitate the use of leases as security. Despite the lack

¹⁶⁸ Especially with the advent of ‘automatic plot registration’, introduced by the 2012 Act. This means that registration of the plot in the Land Register is triggered by a broader range of transactions than triggered first registration under the 1979 Act. This includes various transactions regarding leases of unregistered land: see Land Registration etc (Scotland) Act 2012 ss 21, 24, 25 and 30. See, generally, KGC Reid and GL Gretton *Land Registration* (2017) [7.9] *et seq.*

¹⁶⁹ Land Registration etc (Scotland) Act 2012 (Designated Day) Order 2014, SSI 2014/127.

¹⁷⁰ Land Registration etc (Scotland) Act 2012 s 73(2)(g).

of a provision for the registration of variations, it is understood that Registers of Scotland did accept them for registration.¹⁷¹ That does not determine, however, whether registration is necessary for a variation to bind a successor.

2-67. The lack of a statutory provision for registration of a variation might suggest that the draftsman:

- (a) saw no need for a provision, because it was thought that leases were not varied;
- (b) saw no need for a provision, because leases could be varied without registration;
- (c) intended that, once a lease was registered, it was to remain on those terms for all time coming; or
- (d) overlooked the issue or viewed it as being outside the scope of the legislation being drafted.

(a) and (c) seem unlikely. It is not possible to discount (d), especially because the primary purpose of the 1857 Act was to allow leases to be used as security for borrowing and it therefore focuses upon matters which affect who has title to the lease. Be that as it may, there are good reasons to think that an unregistered variation does bind a successor. In particular, there is a parallel in the law which applied to grants of land in feu: it would have been in line with the general approach of that law for a successor landlord to be bound by a term which could not be discovered from the register.

2-68. Although one reads much of Scots law's commitment to the publicity principle, and a general requirement that burdens on land be registered, a successor to a feudal superior *was* bound by conditions of the feudal grant that were not disclosed by the Register of Sasines. This was the background against which the 1857 Act was passed and operated. Though the feudal system has long since been abolished, reference to rules about feudal land rights is justified in this context. There are many examples of cross-pollination in lease and feudal decisions.¹⁷² Stair famously described a feu as a perpetual location.¹⁷³ The similarity was not only analytical: prior to feudal abolition,¹⁷⁴ feus were often used in a similar way to long leases, e.g. in structuring the relationship between parties to a construction project. The tendency to cross-refer in decisions seems to have increased in the later stages of feudalism when the idea

¹⁷¹ See Registers of Scotland *Sasines Manual* [13.8].

¹⁷² See e.g. the argument in *Clark v City of Glasgow Life Assurance Co* (1850) 12 D 1047 (IH) at 1050; *Marshall v Callander and Trossachs Hydropathic Co Ltd* (1895) 22 R 954 (IH) at 965 (Ld Ord).

¹⁷³ Stair *Institutions* II xi 31. See M Hogg 'Leases: Four Historical Portraits' in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000) vol I, 363, 369–371.

¹⁷⁴ The feudal system was abolished on 28 November 2004 ('the appointed day'), when the relevant provisions of the Abolition of Feudal Tenure etc (Scotland) Act 2000 were brought into force.

of the 'feudal contract' was at its strongest. This was the idea that a feu gave rise to a contract between superior and vassal which ran with the land, just as we now view lease.¹⁷⁵ The use of the concept of feudal contract was criticised by Reid¹⁷⁶ but Gordon was more sympathetic.¹⁷⁷ It is not necessary to enter into a debate about the appropriateness and utility of the concept here. Suffice it to say that various decisions expounded and relied upon the notion of a feudal contract, and such decisions may serve as a useful indicator of how the parallel issue in respect of a lease should be decided. This potential is brought out most clearly by treatments such as Gloag's and Gordon's, which discuss feudal and non-feudal real burdens separately.

2-69. In *Stewart v Duke of Montrose*¹⁷⁸ and *Hope v Hope*,¹⁷⁹ two important nineteenth-century cases, it was made clear that a singular successor of a superior could be bound by an obligation which could not be discovered from the register. Both cases concerned an obligation to relieve the vassal from increases in burdens. Thus Lord Deas in *Stewart*, which is a decision of the Whole Court:¹⁸⁰

A purchaser from the superior, in order to be safe, must look at the superior's own title, to ascertain his obligations to the Crown; and at the feu-rights granted by him (which, in a transfer of the superiority, are always excepted from the warrandice), to ascertain his obligations to his vassals. He cannot trust to find the superior's obligations in the vassal's sasine, which may feudalise and perfect certain burdens on the *dominium utile*, but not on the *dominium directum*. Conditions which are inherent in the grant must be looked for in the grant itself.

Lord Curriehill in *Hope* stated the position even more adamantly:¹⁸¹

It was stated with great force for the defender,¹⁸² that these two conditions do not appear in the record of sasines, not even in the registration of the sasine on the original feu charter; and that, therefore, they are not binding on a singular successor of the original superior. That undoubtedly is a hardship; but such is the law. It is in the original contract of feu itself, and both parties here are assignees of the contract, and the party founding on it must give effect to it. This is just one of the considerable number of hardships against which our records, admirable as they are, do not afford protection.

¹⁷⁵ Gloag *Contract* 226–227.

¹⁷⁶ Reid *Property* [382] and [393].

¹⁷⁷ WM Gordon *Scottish Land Law* (2nd edn, 1999) [22-01].

¹⁷⁸ (1860) 22 D 755 (IH: Whole Court), aff'd (1863) 1 M (HL) 25.

¹⁷⁹ (1864) 2 M 670 (IH).

¹⁸⁰ (1860) 22 D 755 at 804.

¹⁸¹ (1864) 2 M 670 at 675. For another instance of the contractual approach, see *Robertson v North British Railway Co* (1874) 1 R 1213 (IH) at 1219, where the suggestion is that the right to enforce feudal conditions was carried by the assignation of writs clause.

¹⁸² Presumably this should read 'pursuer', as here the superior sought a declarator of non-entry.

Various commentators accept this as an authoritative statement of the then law.¹⁸³ It has been said that the principle that a successor should be able to rely on the position as disclosed by the Register of Sasines was relatively weak when it came to the terms of feudal grants. According to Halliday, '[i]t has always been recognised that in matters which affect obligations or conditions of title the doctrine of sanctity of the register is much more vulnerable to equitable considerations'.¹⁸⁴ These cases had not been overruled by the time the feudal system was abolished in November 2004.¹⁸⁵

2-70. Some points may be made to detract from the force of the analogy between *Stewart* and *Hope* on the one hand and the transmission of terms of leases on the other. Whereas, once leases could be registered at all they were registered in full, the arrangements for feudal grants¹⁸⁶ were more patchy – hence the two cases.¹⁸⁷ Prior to 1858, only an instrument of sasine was recorded (and not the grant itself), and this merely summarised the provisions of the feudal grant. Some terms of the feudal grant might not appear on the register. The rule developed in *Stewart* and *Hope* was therefore more necessary in feudal conveyancing than in respect of leases. Further, these cases concerned terms of the original feudal grant, not variations. However, these points do not detract from the fact that the established law was that a successor to a superior could be bound by an obligation which the register did not disclose and therefore had to rely upon his own investigation of rights granted by the seller. It would have been natural, against that background, for the same rule to apply in respect of leases. The reasoning adopted in *Stewart* and *Hope* could equally apply to leases: the term transmitted against the superior's successor because he was an 'assignee' of the liabilities under the feudal contract; similarly, a successor landlord becomes party to the contract of lease.

2-71. There is no binding precedent about the situation in respect of leases in the Register of Sasines. No doubt if the issue arose, arguments would be

¹⁸³ Gloag *Contract* 226; DM Walker *Principles of Scottish Private Law* vol III: Property (4th edn, 1988) 58; Reid *Property* [394]. Cf the position previous adopted by Bankton *Institute* II iii 11.

¹⁸⁴ JM Halliday 'Acquiescence, singular successors and the baby linnet' 1977 JR 89, 96. See, too, *Glasgow Feuing and Building Co Ltd v Watson's Trs* (1887) 14 R 610 (IH) at 620–621, where Lord Young states that the purpose of the Register of Sasines is to record title to land, and burdens on it, and not to detail 'incidental obligations'. There a feu writ erroneously stated the extent of obligations on the superior. A purchaser of the *dominium utile* was held not to be entitled to rely upon the formulation of the obligations in the recorded writ.

¹⁸⁵ A different rule applied in respect of the vassal's right. It was suggested in *Robertson v North British Railway Co* (1874) 1 R 1213 (IH) at 1219 that a vassal's successor could be bound by an unregistered condition, but this was rejected in *Liddal v Duncan* (1898) 25 R 1119 (IH) at 1131.

¹⁸⁶ A feudal grant took the form either of a (unilateral) feu charter or disposition or of a (bilateral) feu contract.

¹⁸⁷ Titles to Land (Scotland) Act 1858 s 1 changed the law and introduced direct recording of the deed itself: see Halliday *Conveyancing* [31-57]; DA Brand, AJM Steven and S Wortley *Professor McDonald's Conveyancing Manual* (7th edn, 2004) [6.9].

made about the importance of registration as a means of protecting purchasers. However, in this context, as noted above, the importance of being able to rely on the registers has historically not been especially strong. Further, it is not axiomatic that a variation *should* have to be registered in order to bind a successor.¹⁸⁸ A number of points may be made which suggest, at a policy level, that an unregistered variation should bind a successor. If, for example, the parties to a 25-year lease agree that, due to poor trading conditions, the lease should be varied and the rent reduced for three years, why should the successor landlord's claim to have relied upon the register trump the sitting tenant's position? Having been alerted to the existence of the lease by the register, the successor will, in all likelihood, have sought information from the seller about its status: for example, whether the tenant was in breach of the lease in any respect. That investigation will probably have revealed the variation. For the lease to revert to its registered state confers a windfall on the successor. Further, it will often be impractical and unfair for a variation to be ineffectual in a question with a successor landlord. Frequently a variation will involve one party rendering immediate performance in exchange for incremental performance over time from the other party. For example, a tenant might pay the landlord to be released from a restriction on use or the landlord might agree to carry out improvement works in exchange for an increase in rent. If that variation does not transmit to the successor landlord, and the contract of lease 'snaps back' to its original form when the landlord transfers, what is to happen? In the first case, the tenant has paid the previous landlord yet obtains nothing in return.¹⁸⁹ In the second, the tenant has obtained the benefit of the works (which cannot be undone) yet does not have to pay for them. Neither is an attractive result. Similarly, one or both of the parties might take irreversible action on the strength of the variation: for example, if the tenant is freed from a building restriction. It is then impractical for the lease to revert to its former terms when it no longer reflects the reality of the subjects of the lease. Finally, it would be a harsh approach to conclude that an unregistered variation did not bind a successor when the 1857 Act made no provision for registering a variation and contained no provision indicating such a requirement, especially given the backdrop in respect of feudal rights.

2-72. The above discussion suggests that terms of contracts running with the land (such as lease) have been viewed for some time as an exception to the requirement of registration.¹⁹⁰ The better view, therefore, seems to be that, where

¹⁸⁸ Certainly the Scottish Law Commission did not view the policy as obvious when it considered the issue in its review of land registration: *Report on Land Registration* (Scot Law Com No 222, 2010) [9.28].

¹⁸⁹ A remedy might be available in these circumstances against the previous landlord, but that would be of little consolation to the tenant.

¹⁹⁰ Given the lack of cases and academic discussion, it is difficult to talk of an 'understanding' of what the law was in respect of registered leases. However, it is of note that Halliday, writing at the time when the Land Registration (Scotland) Act 1979 was enacted, expected variations to a lease to bind a successor even although they had not been registered: see annotations to s 12(3)(m)

both titles were in the Register of Sasines, an unregistered variation could bind a successor landlord. This remains of importance today in respect of a person acquiring from a landlord holding on a Sasine title.

(3) Landlord's title in the Land Register: 1979 Act

(a) Introduction

2-73. Whereas the Register of Sasines is a register of deeds, the Land Register is a register of title. Such a register seeks to record the legal effect of deeds as well as the deeds themselves. The two types of register are underlain by different principles. In the terms coined by Theodore Ruoff, the three principles of a system of registration of title are the 'mirror', 'curtain' and 'insurance' principles.¹⁹¹ The exact manner in which these are implemented can differ between registration systems; however, in overview the first two principles prescribe respectively that (i) the register is a complete and accurate repository of all rights and burdens which affect the property (it 'mirrors' them), and (ii) it is possible to rely on the register as an accurate record of those rights (hence 'curtain': one does not need to look behind the curtain). Both principles are qualified to a certain extent. Some rights are effective without registration – in the Scottish system, a lease to which the Leases Act 1449 applies is an example. Occasionally, information provided by the register is inaccurate and needs to be corrected ('rectified'). This latter possibility creates the need for the third principle: Land Register titles come with a state or official guarantee. The guarantee has two variants.¹⁹² It may be either that the position will remain as is stated on the register (i.e. that the register will not be rectified) or that the register can be rectified, but that the party losing rights as a result will be indemnified for any resulting loss.¹⁹³ Only aspects of title which are subject to the 'mirror' and 'curtain' principles (i.e. in respect of which the register is to be the sole source of information) are subject to the 'insurance' provided by the official guarantee.

2-74. The Land Registration (Scotland) Act 1979 provided for registration of 'interests in land'. Interests which had their own title sheet in the register were

in JM Halliday Annotations to *The Land Registration (Scotland) Act 1979* in *Current Law Statutes Annotated*, discussed at para 2-85 below.

¹⁹¹ T Ruoff 'An Englishman looks at the Torrens system' (1952) 26 Australian LJ 118. In fact the principles are not unique to registration of title; registers of deeds share some of them, primarily the mirror principle: Scottish Law Commission *Discussion Paper on Land Registration: Void and Voidable Titles* (Scot Law Com DP 125, 2004) [1.21].

¹⁹² *Discussion Paper on Land Registration: Void and Voidable Titles* [3.13]. The holder of a registered right obtains either 'money' or 'mud', as it was put by TW Mapp *Torrens' Elusive Title* (1978) [4.24].

¹⁹³ Land Registration (Scotland) Act 1979 s 12.

ownership and a long lease.¹⁹⁴ The question whether, in respect of a registration carried out under the 1979 Act, a successor landlord is affected by a variation or term not disclosed on the register requires three matters to be considered: first, section 3(1) of the 1979 Act, which made provision about the effect of registration of the landlord's interest; second, section 3(3), which made provision about the effect of registration of the tenant's interest; and third, section 12(3)(m), which restricted the scope of the guarantee provided in respect of the terms of leases.

(b) *Section 3 of the 1979 Act*

2-75. The effect of registration in the Land Register under the 1979 Act was provided by section 3(1). In Ruoff's terminology, it provided for the statutory 'curtain'. One might think, therefore, that it would have made clear whether the curtain is drawn over unregistered variations to leases. Section 3(1) does not do so. It is ambivalent as to whether the terms of a long lease must be registered in order to affect a successor. Section 3(1)(a) is the important provision for present purposes, because it set out the matters to which an acquirer of the landlord's interest is subject. However, the remainder of section 3(1) is important for points discussed later, so section 3(1) is quoted in full. It provided as follows (emphasis added):

(1) Registration shall have the effect of –

- (a) vesting in the person registered as entitled to the registered interest in land a real right in and to the interest and in and to any right, pertinent or servitude, express or implied, forming part of the interest, *subject only to the effect of any matter entered in the title sheet of that interest* under section 6 of this Act so far as adverse to the interest or that person's entitlement to it *and to any overriding interest* whether noted under that section or not;
- (b) making any registered right or obligation relating to a registered interest in land a real right or obligation;
- (c) affecting any registered real right or obligation to the registered interest in land,

insofar as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, or being made real or, as the case may be, of being affected as a real right.

Section 3(1)(a) specified the effect of registration: it vested a real right 'in and to' the interest in land subject only to (i) the 'effect of any matter entered in the title sheet of that interest' and (ii) 'overriding interests'. 'Overriding interest' was a concept under the 1979 Act, meaning rights that were effective without

¹⁹⁴ Prior to the abolition of the feudal system, the interests of feudal superior and vassal (or sub-vassal, etc) would also have their own title sheet.

registration. The Act contained a purportedly exhaustive list of such interests.¹⁹⁵ A 'long lease' was not an overriding interest as that is defined in section 28(1),¹⁹⁶ nor were the terms of such a lease. Thus, under section 3(1)(a), in order for an owner to be bound by a long lease, the lease had to be 'entered' on his title sheet. Section 6(1)(e) provided for a real right to be entered on a title sheet.

2-76. Land Register practice was simply to record on the landlord's title sheet that a lease had been granted and then to provide a cross-reference, either to the tenant's title sheet (if the lease was registered in the Land Register) or to the lease itself (if the lease was registered in the Register of Sasines). If the lease was exceptionally complex, the tenant's title sheet might simply have made reference to the lease, which would have been included in the land certificate.¹⁹⁷ The terms of the lease were, therefore, not all entered on the landlord's title sheet. Instead, the bare details of the lease were given in a schedule of leases in the A (property) section of that title sheet while the D (burdens) section would state that 'the rights of the tenants under the Leases specified in the Schedule of Leases in the Property Section are burdens on the subjects in this title'.¹⁹⁸ However, it would not recite the terms of the lease. The explanation offered for this by the Registers of Scotland's *Legal Manual* is section 12(3)(m) of the 1979 Act, which excluded indemnity in respect of most terms of leases.¹⁹⁹ That provision is discussed below.

2-77. Section 3(1)(a) therefore provided no guidance about whether the landlord whose title was registered when the 1979 Act was in force was subject only to those lease terms which are entered in the register. It did not state that the landlord is bound only by registered terms of registered leases. Instead, it provided that the owner was subject only to 'the effect of' any matter entered in his own title sheet. The fact that a lease exists is entered on that title sheet. The question remains: what is the 'effect' of such a lease? Can its terms have real effect without being registered? Section 3(1) did not answer that question.

¹⁹⁵ Land Registration (Scotland) Act 1979 s 28(1).

¹⁹⁶ Unless it had been made real by possession prior to the Land Register becoming operational: s 28(1).

¹⁹⁷ Scottish Law Commission *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP 128, 2005) [2.11].

¹⁹⁸ 1979 Act *Legal Manual* [19.17.4(g)].

¹⁹⁹ The parallel issue arose in respect of the title sheet of a feudal superior. In that respect, the 1979 Act *Legal Manual* stated at [10.23]: 'With regard to superiority, the Henry Committee recommended that no attempt should be made to disclose on the superior's title sheet all the conditions in the feus granted out of that title, on the grounds that it would be too arduous and would make the title sheet too cumbersome. That recommendation was followed in section 12(3)(m) of the 1979 Act in respect of both feus and leases . . . No attempt will, therefore, be made to disclose on the superior's title sheet any of the feuing conditions which the superior may have the right to enforce.'

2-78. At first glance, section 3(3) appeared to provide an answer, where the lease was one which itself had to be registered under the 1979 Act.²⁰⁰ It provided:

A lessee under a long lease . . . shall obtain a real right in and to his interest as such only by registration; and registration shall be the only means of making rights and obligations relating to the registered interest in land of such a person real rights or obligations or of affecting such real rights or obligations.

A first impression is that this did require that a term be registered in order for it to affect a successor, given the statement that registration is the only means of making rights relating to the registered interest in land real rights.²⁰¹ However, closer consideration suggests that this may not be the case. It depends on the meaning of ‘rights and obligations *relating to* the registered interest in land’. In short, is a term of the lease a right or obligation ‘relating to’ the lease?²⁰²

2-79. This meaning of this language was considered by the Scottish Law Commission, which noted an argument that the reference to ‘rights and obligations relating to the registered interest in land’ is a reference to subordinate rights – such as a right in security – over the lease, not a reference to the terms of the lease itself.²⁰³ The argument depends upon a close analysis of section 3(1), from which the language of section 3(3) is drawn.

2-80. The point regarding the construction of section 3(1) can be illustrated by means of an example. Consider a transaction which involved the grant of a break-off disposition of land, granting real burdens and servitudes in favour of the disposed land, reserving real burdens and servitudes in favour of the retained land, and also the grant of a standard security over the disposed land. In respect of registration of the disposition, section 3(1)(a) vested ownership in the disponee. With its reference to ‘vesting . . . a real right . . . in and to any right, pertinent or servitude forming part of that interest’, section 3(1)(a) also made the granted servitudes and real burdens real and vested those rights in the disponee as registered owner of the disposed land. Section 3(1)(b) was therefore not needed for that purpose. It would also be possible to view the effect of registration of any interest in land (such as the remaining standard security, and the real burdens and servitudes in favour of the retained land) as also being dealt with by section 3(1)(a). That, however, would deprive section 3(1)(b) and (c) of much purpose. Instead, the Scottish Law Commission suggests that it was

²⁰⁰ The scope of this provision remains relevant under the Land Registration etc (Scotland) Act 2012 as its substance has been re-enacted.

²⁰¹ Given the way the Land Register operated under the 1979 Act, the details would be registered on the tenant’s title sheet or referred to there.

²⁰² A similar issue could arise in respect of, for example, real conditions of a standard security or servitude conditions.

²⁰³ Scottish Law Commission *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP 128, 2005) [5.1]–[5.6]; Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, 2010) [9.27].

section 3(1)(b) that made those rights real. On this approach, section 3(1)(a) provided for the effect of registration of ownership and leases (i.e. the interests in land which have their own title sheets).²⁰⁴ Section 3(1)(b) provided the effect of the registration of subordinate rights over or in favour of those interests (rights 'relating to' those registered interests). Section 3(1)(c) was concerned with transactions 'affecting' (e.g. varying) those subordinate rights.

2-81. That seems a plausible interpretation of section 3(1). It would mean that section 3(3) did not in fact provide that a term of a lease must be registered in order to be real, because a term of the lease was not a right 'relating to the registered interest in land' (i.e. the lease) in the sense already used by section 3 in subsection (1)(b). The matter can also be approached in a different way, focusing specifically on the application of the statutory language to a lease: when a lease was registered under the 1979 Act, what was the 'registered interest'? Was it the contract of lease? Or was it a narrower property right, to which one would then say that the rights and obligations which are real conditions of the lease are 'related'? In order to say that the terms of a lease are rights and obligations which 'relate to' the tenant's interest in land, one would need to view the tenant's registered interest in land narrowly, as a core real right to possession of the land to which rights and obligations created by the contract of lease relate. That is similar to the Common Law conception of a lease as an estate in land, benefited and burdened by covenants, but it is not the traditional Scottish approach. In Scots law, lease is first and foremost a contract, albeit one which can have real effect in some circumstances. On this approach, the tenant's registered interest was the lease itself. That seems more natural for a Scots lawyer. For example, if the tenant's interest is assigned, a Scots lawyer would say that the contract of lease is assigned, not that the core real right of lease (as an 'interest in land') had been assigned and that the terms of the contract of lease ran with that interest as real conditions. And if the tenant's registered interest was the contract of lease, one would not naturally say that the terms of the contract which are real conditions 'relate to' that contract. Instead, the terms were simply part of the contract. Further, section 3(3) said that registration was the only way of making 'rights and obligations' into 'real rights and obligations': however, a real condition of a lease is *not* a real right; and, from the tenant's perspective, is not a 'real obligation' (whatever that is meant to mean) either.

2-82. Having said that, interpreting 'registered interest' broadly, such that it included the rights and obligations of the lease, also has problems. If the contract of lease was the tenant's interest, the wording of section 3(1)(a) and 3(3) was odd, because it referred to the tenant being vested in a real right 'in and to' the registered interest in land. One would not normally speak of the

²⁰⁴ That is supported by the fact that s 3(1)(a) referred to 'the person registered as entitled to the registered interest in land' (which can be taken as a reference to the proprietorship section of a main title sheet), and also referred to the interest in land having a 'title sheet'.

tenant having a real right ‘in and to’ a contract of lease. Rather, if registration conferred a real right on the tenant, that is a real right that subsisted alongside the contract, to which the tenant was already a party and to which he remained a party even if the lease did not become real.

2-83. This type of semantic argument can take matters only so far, especially when dealing with the 1979 Act given all of the well-known difficulties with its drafting. The Scottish Law Commission expressed no final opinion about whether section 3(3) required a variation to be registered in order to have ‘real’ effect.²⁰⁵ But the stronger argument is that section 3(3) did not do so, both because of the points made by the Scottish Law Commission and because one would not normally describe a term of a lease as something that ‘relates’ to the lease. However, as the Scottish Law Commission concluded, it is difficult to be certain here.

2-84. Section 3(3) was, however, not the only relevant provision when seeking to determine whether only registered terms will bind a successor landlord. It has to be interpreted consistently with other provisions of the 1979 Act and with what can be discerned as the policy underlying the Act. As will now be explained, there is a good argument that section 12(3)(m) indicates that the register was not intended to provide any guarantee to a successor landlord about the terms of leases and that a successor could be affected by an unregistered variation.

(c) Section 12(3)(m) of the 1979 Act

2-85. Section 12(3)(m) of the Land Registration (Scotland) Act 1979 related to the indemnity element of the official guarantee of title. In its form immediately prior to repeal, it stated that:

(3) There shall be no entitlement to indemnity under this section in respect of loss where – . . .

(m) the claimant is a landlord under a long lease and the claim relates to any information –

(i) contained in the lease and

(ii) omitted from the title sheet of the interest of the landlord,

(except insofar as the claim may relate to the constitution or amount of the rent and adequate information has been made available to the Keeper to enable him to make an entry in the register in respect of such constitution or amount or to the description of the land in respect of which the rent is payable).

Prior to feudal abolition, this also applied to claims by superiors relating to any information contained in the feu writ but which was omitted from the title

²⁰⁵ See Scottish Law Commission *Report on Land Registration* [9.26]–[9.28].

sheet of the superiority.²⁰⁶ As discussed above, a successor to a superiority could not rely on the Register of Sasines to disclose all of the obligations which the superior owed to the vassal: the superior required to satisfy himself as to the terms of feu writs granted. It seems likely that this provision was intended to maintain that position in the Land Register and to subject leases to the same principle. In his annotation to section 12(3)(m), Halliday stated:²⁰⁷

The Keeper will not be liable in indemnity where he has omitted to enter in the title sheet of the interest of the superior . . . or landlord in a long lease, information contained in the feu writ . . . or lease. . . themselves. The proprietors of these interests have or ought to have information as to the terms of the constituting deeds and persons acquiring from them should have that information communicated to them. *Moreover, detailed conditions contained, say, in a long lease may have been varied or become unenforceable through the actings of the parties.*

Halliday's reference to variations is of obvious importance.

2-86. To a modern eye, section 12(3)(m) may not appear significant, given that none but a bare minimum of details of leases are given on the landlord's title sheet.²⁰⁸ Indeed, the Scottish Law Commission interprets section 12(3)(m) as concerned with the *way* in which information is entered into the register.²⁰⁹ On that approach, it did nothing more than provide that the Keeper was not liable in indemnity if he did not repeat on the landlord's title sheet the terms of the lease which were detailed on the tenant's. In light of the analysis above about the approach in the Register of Sasines, it is suggested that that view is too narrow. Further, it is not supported by the Henry Report, which was the immediate antecedent of the 1979 Act. The Henry Committee proposed that the register offer no guarantee in respect of the terms of leases other than rent (or of feudal grants, other than feuduties). In passages that were to apply *mutatis mutandis* to the landlord's interest in a registrable lease, the Henry Report recommended that:²¹⁰

The Keeper shall guarantee the constitution and amounts of the feuduties specified, according to the evidence produced to him, but beyond this there shall be no guarantee of the particulars of the feu writs and any further information given to him along with the foresaid particulars, unless the contrary shall be stated in the Title Sheet.

²⁰⁶ And also creditors in grounds annual. A ground annual was a perpetual payment secured on the land.

²⁰⁷ JM Halliday Annotations to *The Land Registration (Scotland) Act 1979* in *Current Law Statutes Annotated* (emphasis added). The *Registration of Title Practice Book* (in respect of the 1979 Act) explained matters in very similar terms at [7.29].

²⁰⁸ See above: only key details are given in a 'schedule of leases'. Full details of the lease appear only on the tenant's title sheet. This is the provision relied upon by the Keeper to justify that approach.

²⁰⁹ *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP 128, 2005) [8.15] and [8.18].

²¹⁰ *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (Cmnd 4137, 1969) 33.

This was the explanation:²¹¹

The detailed information . . . (other than in respect of the constitution and amount of Feuduties which are basically important) should only be guaranteed in the discretion of the Keeper because such information will be of the nature found in a Collection list.²¹² It might be impossible to guarantee it and might in any event impose too formidable a burden of investigation on the Keeper in time and labour.

Section 12(3)(m) does not seem to have been perceived by the architects of the 1979 Act as being about the internal distribution of information in the Land Register, but rather the extent to which information had to be investigated by the Keeper and the extent to which information regarding the terms of leases (and feus) could be relied upon. It is clear that section 12(3)(m) was the provision designed to give effect to this recommendation. It operates by preventing the successor from claiming indemnity for loss suffered as a result of the fact that such information was not on the landlord's title sheet.²¹³

2-87. One should acknowledge some difficulties with the argument that section 12(3)(m) shows that a successor landlord is affected by an unregistered variation. First, the section is not explicit that this is its effect. In its terms it is limited to information omitted from the landlord's title sheet and, further, it is limited to only one aspect of the guarantee provided by the Land Register (i.e. indemnity). It may be that the draftsman did not have fully in mind the different aspects of that guarantee, i.e. that the register, if inaccurate, could not be rectified against a proprietor in possession.²¹⁴ Second, there is an inconsistency, because decisions under the 1979 Act accepted that the terms of a lease did need to be registered against a *tenant's* interest in order to bind a tenant and that the tenant was protected against rectification if the register did not detail particular burdens on the tenant in the lease.²¹⁵ It would be odd for a landlord to have been bound by an off-register variation which operated in the tenant's favour (as, it is submitted, section 12(3)(m) suggests was intended) but the landlord would have been unable to rely upon an off-register variation which operated in the landlord's favour in a question with a successor tenant.²¹⁶

2-88. Despite these difficulties, however, section 12(3)(m) seems a good indication that it was not intended that successor landlords could rely upon the register accurately to disclose the terms of leases. Indeed, the premise of an entitlement to claim an indemnity would often (perhaps always?) have been that

²¹¹ *Scheme for the Introduction* 34. See also the discussion of indemnification at 48–50.

²¹² It is unclear what this is. There is no explanation in the Henry Report.

²¹³ That claim would otherwise lie under Land Registration (Scotland) Act 1979 s 12(1)(d).

²¹⁴ Further, for that guarantee to protect a landlord, it would need to be established that the terms of a lease only bound if disclosed on the register – which is the very issue being discussed.

²¹⁵ *Douglas Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513 (OH); *MRS Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271 (IH).

²¹⁶ Because the tenant, as a proprietor in possession, was protected against rectification.

the incoming landlord *was* bound by a term even though it was not disclosed by the register. Otherwise, there would be nothing to trigger a claim on the indemnity. In light of this indication, and the policy points noted at paragraph 2-71 above, which are equally valid in respect of leases in the Land Register, the doubts about the meaning of section 3(3) should be resolved in favour of the view that a variation did not need to be registered in order to bind a successor landlord. The position is, however, very far from clear.²¹⁷

(d) Landlord's title in Land Register; tenant's title in Sasine Register

2-89. Under the 1979 Act, it was possible for the landlord's title to be in the Land Register and the tenant's title to be in the Register of Sasines. It was suggested above that section 3(1) provides no indication that terms need to be registered in order to bind a successor landlord and that section 12(3)(m) suggests, on balance, that a successor landlord can be bound by variations which are not registered. The argument from section 3(3) applies only to long leases which needed to be registered in the Land Register (i.e. which were created after that register became operational). It does not apply to leases which were registered in the Register of Sasines but where the landlord's title was in the Land Register following a later registration to which the 1979 Act applied. Whether unregistered variations to a Sasine lease bound a successor landlord depended upon, in the language of section 3(1), the 'effect' of a lease registered in the Register of Sasines. As noted above, it is likely that an unregistered variation does have real effect.

(4) Landlord's title in the Land Register: 2012 Act

2-90. We now turn to consider the provisions of the Land Registration etc (Scotland) Act 2012, which replaced the legislation of 1979 with effect from 8 December 2014. The 2012 Act made a number of changes to the general scheme of land registration and also some specific changes in respect of the registration of leases. Do these affect the analysis of whether a successor to the landlord can be bound by a variation that is not registered?

2-91. As part of the project which led to the 2012 Act, the Scottish Law Commission considered various aspects of the treatment of leases in the land registration system, but concluded that the effectiveness of a variation of a registered lease in a question with successors was outside the scope of its project.²¹⁸ In the Commission's view, this was not a situation in which the policy

²¹⁷ If the landlord is not bound, the tenant might obtain some element of protection from the application of principles regarding personal bar/acquiescence discussed at paras 2-42 to 2-51 above.

²¹⁸ See in particular *Report on Land Registration* (SLC No 222, 2010) Ch 9.

underlying the existing legislation was clear but the legislation failed to give it proper effect – a matter which could be addressed by better legislation. Rather, both the existing legislation *and* the policy were unclear, and a decision on policy required consideration of various different areas of law other than land registration. Importantly for present purposes, it was thought to be unsettled whether under the 1979 Act an unregistered variation of a lease could bind a successor.²¹⁹ Thus, the approach of the 2012 Act is for the most part to seek to maintain the existing law in that respect. For drafting reasons, the relevant provisions were relocated in the Registration of Leases (Scotland) Act 1857.²²⁰ Certain limited changes, however, were made to the provisions specific to leases, and the general changes made to the land registration system also need to be considered. The text that follows first analyses the provisions specific to leases and then addresses certain points regarding the general regime of the 2012 Act.

(a) *Provisions specific to leases*

2-92. In respect of the provisions specific to leases, the first point to make is that the 1857 Act now contains a provision allowing a variation to be registered. Section 20A of the 1857 Act provides that a deed ‘extending the duration of the lease’ or ‘otherwise altering the terms of the lease’ which affects a lease registered in the Land Register is registrable.²²¹ That, however, is not the same thing as saying that registration is *necessary* for a variation to affect a successor landlord. The second point is that section 3(3) of the Land Registration (Scotland) Act 1979, discussed at some length above, is re-enacted in section 20B(2) of the 1857 Act, subject to certain deletions. Like section 3(3), section 20B(2) states that ‘registration . . . is the only means whereby rights or obligations relating to a registered lease become real rights or obligations’ or affect ‘such real rights or obligations’. As the Scottish Law Commission accepted,²²² the same arguments about the interpretation of those words arise as previously arose in respect of section 3(3) of the 1979 Act. It was suggested above that section 3(3), properly understood, did not prevent an unregistered term of a lease from binding a singular successor of the landlord. The same appears to be true in respect of section 20B.

²¹⁹ Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, 2010) [9.24]–[9.30].

²²⁰ This was in keeping with the Scottish Law Commission’s general approach that provisions dealing with eligibility for, and the effect of, registration should be removed from the statute concerning the land register. The Commission’s view was that these should be a matter for the general law and statutes dealing with specific rights.

²²¹ Land Registration etc (Scotland) Act 2012 s 52(2), inserting s 20A into the Registration of Leases (Scotland) Act 1857.

²²² Scottish Law Commission *Report on Land Registration* [9.28].

(b) The general statutory context

2-93. The general statutory context must also be considered. Under the 2012 Act the Keeper is to prepare a title sheet for each registered plot of land.²²³ A title sheet may also be, but need not be, prepared in respect of a registered lease.²²⁴ Section 9 specifies what is to be in the burdens section of a title sheet. Two points are of relevance in respect of leases. First, where there is a long lease which has real effect, that fact is to be entered into the title sheet of the plot of land.²²⁵ Second, where the land is encumbered with a 'title condition', details of that condition are likewise to be entered into the title sheet.²²⁶ The definition of 'title condition' includes 'a condition in a registrable lease if it is a condition which relates to the land' other than a condition which relates to rent.²²⁷ There is therefore a statutory obligation to note in the burdens section of the landlord's title sheet certain conditions of leases which have real effect.²²⁸ As a matter of practice, the Keeper responds to this obligation by putting an entry in the burdens section stating that 'the rights of the tenants under the Leases specified in the Schedule of Leases in the Property Section are burdens on the subjects in this title'.²²⁹

2-94. One of the fundamental changes effected by the 2012 Act is to change the effect of registration. The 1979 Act was a 'positive' system, that is to say, the very act of making an entry in the register conferred rights regardless of the entitlement to those rights under the normal rules of property law. Registration conferred the rights entered in the register, subject to the possibility of rectification.²³⁰ The approach under the 2012 Act is fundamentally different: registration does not in and of itself confer or extinguish rights, other than in

²²³ Land Registration etc (Scotland) Act 2012 s 3(1).

²²⁴ 2012 Act s 3(2). If the title sheet is a lease title sheet, the property section is to give 'the particulars of the lease': s 6(1)(e).

²²⁵ 2012 Act s 9(1)(b). 'Long lease' is defined for these purposes only by reference to its length: a lease exceeding 20 years or containing a renewal provision requiring the landlord to renew so that the total duration could exceed 20 years. This provision therefore requires the Keeper to enter the existence of such a real lease on the title sheet even if the lease is not registered. One wonders whether this was intentional. If the burdens section does not contain material that it should, there is at least the theoretical possibility of a claim against the Keeper under the warranty: see para 2-96 below.

²²⁶ 2012 Act s 9(1)(a).

²²⁷ Title Conditions (Scotland) Act 2003 s 122, applied by 2012 Act s 113(1).

²²⁸ The definition of 'title condition' includes certain terms of a 'registrable' lease. The lease does not need to have been registered in order to fall within the definition. Read literally, this requires the entry into the register of the terms of unregistered leases which are nevertheless real. It is doubtful that this was the statutory intention.

²²⁹ Registers of Scotland *Registration Manual* 'Burdens Section Information/Burdens Section Entries for Leases'. Where the title sheet is a lease title sheet, the burdens section is completed by incorporating the lease by reference to the archive record: *Registration Manual* 'Leases/Burdens Section/Incorporating Commercial Lease'.

²³⁰ For example, the transferee became owner upon registration, even if the disposition was void. This is what the Scottish Law Commission referred to as the Keeper's 'Midas touch'.

certain limited circumstances. This means that the model of the legislation is different. There is no general provision equivalent to section 3(1)(a) of the 1979 Act, discussed above.

2-95. In what follows the replacement statutory provisions are analysed to ascertain whether they affect whether a successor is bound by an off-register variation. The position of a party acquiring land already registered in the Land Register is governed by the provisions regarding (i) warranty and (ii) ‘realignment’ of rights in the case of good-faith acquisition.

(c) The Keeper’s warranty

2-96. Considering first the Keeper’s warranty: by accepting an application for registration, the Keeper warrants to the applicant that the title sheet to which the application relates is, at the time of registration, not inaccurate in so far as there is omitted from it any encumbrance which could or should have been included on the title sheet.²³¹ However, there is an express carve-out from the warranty in respect of the variation or termination of a registered lease: the Keeper does not warrant that ‘a registered lease has not been varied or terminated without the variation or termination having been registered’.²³² (Unlike the provision of section 12(3)(m) of the 1979 Act, this provision applies both to landlords and tenants.²³³) The effect is that when the Keeper registers a transfer of ownership, she does not warrant to the new owner that the terms of a registered lease disclosed by the register have not been varied. The Scottish Law Commission’s reasoning was that it is not reasonable for the Keeper to assume liability for such variations and also that the successor would be able to check the position in advance of settlement.²³⁴

²³¹ Land Registration etc (Scotland) Act 2012 s 73(1)(b). As an aside, note that the warranty covers whether the land is subject to a long lease at all. As mentioned above, if applied literally, the definition of ‘long lease’ in s 9 means that the Keeper is obliged to note on the plot’s title sheet any subsisting long lease with real effect i.e. even one made real other than by registration. By s 73, the Keeper warrants that no encumbrance which ought to have been included on the title sheet has been omitted. There is therefore a warranty that there is no long lease with real effect which is not disclosed by the title sheet. However, a claim on the warranty is available only if the register is subsequently rectified to correct the inaccuracy: s 77(2). If that occurs to note the existence of such a long lease, in principle a claim under the warranty would exist; however, such a claim would be challenging, because liability is excluded where the existence of the inaccuracy was, or ought to have been, known to the applicant at the time of registration (s 78(b)), and the existence of a lease made real by possession would likely fall into that category.

²³² 2012 Act s 73(2)(g).

²³³ Note, however, that in respect of the tenant’s interest, s 20B(1)(a) re-enacts s 3(1)(a) of the Land Registration (Scotland) Act 1979: registration vests in the person entitled to the lease ‘a real right in and to the lease . . . subject only to the effect of any matter entered in that register so far as adverse to the entitlement’.

²³⁴ Scottish Law Commission *Report on Land Registration* (SLC No 222, 2010) [9.31].

(d) Realignment

2-97. In place of the approach of the 1979 Act, which conferred ownership via section 3, subject to the ability to correct inaccuracies by way of rectification, the 2012 Act operates a system of ‘realignment’, by which, in certain circumstances, rights are realigned following an acquisition in good faith so that they match the position as stated on the register. This can best be illustrated by example: A is registered as owner, but the disposition to A was actually void; B acquires from A in good faith in reliance on the register; in certain circumstances B becomes owner even though A was not owner (the person who was owner beforehand being compensated for the loss of ownership to B). Part 9 does not address the issue of variations of the terms of registered leases. It is true that section 91 provides that a person acquiring ownership in good faith acquires free of encumbrances which are absent from the register, but ‘encumbrance’ for this purpose does not include a lease.²³⁵ Accordingly, a lease with real effect which, for whatever reason, does not appear on the register will nonetheless bind a person acquiring the land. And if realignment does not affect a subsisting but off-register lease, it seems improbable that the *terms* of a lease can bind successors only if they are disclosed by the register.²³⁶ Thus, an off-register variation will not be extinguished by the operation of the realignment provisions of the 2012 Act.

(e) Summary

2-98. In summary, the question whether an off-register variation binds a successor depends on the proper interpretation of what is now section 20B of the 1857 Act, formerly section 3(3) of the 1979 Act. The view expressed earlier is that, on balance, registration is not necessary before a variation can take effect in a question with a successor of the landlord.²³⁷

2-99. The Scottish Law Commission identified the area as being one in need of further review. No doubt readers of the previous pages will agree.

D. CONCLUSION

2-100. This chapter has analysed the rule in respect of variations to both registered and unregistered leases. It has shown that properly constituted variations to an unregistered lease may transmit and affect successors to the

²³⁵ 2012 Act s 91(4)(d).

²³⁶ There might otherwise have been an argument that real conditions of a lease constitute an encumbrance. However, given that a ‘lease’ itself is not included in the definition, it is suggested that the terms of the lease cannot be an encumbrance.

²³⁷ See paras 2-75 to 2-84 above.

landlord. Such a variation is treated in the same way as a term of the original lease: provided that the content of the term is such that it may be a real condition, and that the parties did not intend it to be personal, it transmits to a successor landlord. The rule is, in principle, the same in respect of back-letters, although the fact that the parties have chosen to document a term in a back-letter (as opposed to in the lease itself) must be taken into account when considering whether they intended it to be personal. The position in respect of registered leases is not clear. However, it is suggested that an unregistered variation to a lease can transmit to a successor landlord, both in the Register of Sasines and in the Land Register.

3 Distinguishing Real and Personal Conditions: Exposition

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A. INTRODUCTION

3-01. Although a successor of the landlord becomes a party to the contract of lease, the successor is not bound by nor takes the benefit of all aspects of the agreement between the original landlord and tenant. The contractual transfer (if that is what it is) consequent upon transfer by the landlord of the subjects of the lease is limited in effect. At least since the early seventeenth century, Scots law has distinguished between those terms which transmit against and in favour of singular successors of the landlord and those which do not. In 1838 this was expressed in terms of a distinction between ‘real conditions’ and ‘personal conditions’,¹ which is the familiar modern language.² In drawing such a distinction, the law exercises a substantive control over the rights and obligations which transmit to and against successor landlords. This is a control based on the content of the term in question, rather than, say, on the intention of the parties involved or on where the particular term is documented.³ Nor does it matter that the term affected the tenant’s economic judgment whether to enter into the lease.⁴ Generally, the cases have considered whether the successor landlord is bound by a particular *obligation* which bound the original landlord, but logically the question may also arise as to whether a particular *right* vests in the successor.

3-02. This chapter considers how the test for distinguishing real from personal conditions can best be formulated, analysing the existing case law in detail. Chapter 4 then considers the justifications for drawing such a distinction and asks whether the distinction should continue to be made. Chapters 5 to 7 give detailed consideration to specific examples of terms, such as options to purchase and agreements relating to the duration of the lease.

B. BACKGROUND TO THE DISTINCTION

(1) Early texts

3-03. Although there are various early cases, duly noted by the institutional writers, the institutional sources contain little general discussion of the contrast between real and personal conditions in leases. Bankton does state that ‘personal’ provisions are ‘binding upon the heritor and his heirs but not

¹ *Ross v Duchess-Countess of Sutherland* (1838) 16 S 1179 (IH) at 1181 (in submission).

² Rankine *Leases* 475–479; Paton and Cameron *Landlord and Tenant* 95; McAllister *Leases* [2.31].

³ In *Ross v Duchess-Countess of Sutherland* (1838) 16 S 1179 (IH) the tenant argued that the term was *in gremio* of the lease and was therefore a real condition. This argument was unsuccessful.

⁴ *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 650J.

effectual against his onerous singular successors',⁵ but he does not explain how it is to be determined when a term is 'personal'. Almost all the case law in this area is post-institutional.⁶ It was not until Rankine wrote towards the close of the nineteenth century that the notion of 'real' and 'personal' conditions was treated in a unified manner.⁷

3-04. Some brief points may nevertheless be made about the treatment by the institutional writers and their later editors. Instead of providing a unified discussion of the basis of the distinction between transmissible and non-transmissible conditions, the institutional writers, where they considered the issue at all, sought to justify specific instances of non-transmission. One common explanation for a successor not being bound by a particular term was that its transmission would be inconsistent with some rule, be it of lease law or of another area of law. So, for example, an obligation to renew the lease at its ish did not transmit⁸ because that was inconsistent with the rule that a lease must have a definite duration.⁹ Another frequent example was the use of a lease as a means of secured payment. A debtor would lease land to a creditor and provide that the creditor/tenant could retain from the rent the amount due under the contract of loan. If such clauses of retention were sustained against singular successors of the debtor/landlord, the creditor/tenant was guaranteed repayment of the debt (albeit by payment in kind). The judicial approach to the transmission of such clauses vacillated, but it was finally held¹⁰ that they did not bind a singular successor of the debtor/landlord, who was instead entitled to the full rent stipulated in the lease. This decision was sometimes justified on the basis that sustaining such clauses would allow parties to circumvent the rules of constitution of wadsets (then the normal form of heritable security), in particular the requirement of registration.¹¹ Another explanation was that the Leases Act 1449 provides that tenants are entitled to remain upon the lands upon their paying 'sic lik male as thai tuk thaim of befor', which was taken to require that the tenant pay the full rent and not some reduced sum.¹² The weakness of this second line of reasoning is clear, for there are many cases in which

⁵ Bankton *Institute* II ix 25.

⁶ Lord Rodger remarked in another context upon the fact that in some areas of law the institutional writers provide little meaningful guidance: A Rodger 'Developing the law today: national and international influences' 2002 Tydskrif vir die Suid-Afrikaanse Reg 1, 2.

⁷ The general distinction between real and personal conditions is discussed in all three editions of Rankine's work on *Leases*: 1st edn, 1887, 407–411; 2nd edn, 1893, 427–431; 3rd edn, 1916, 475–479. Even here the transmission of clauses permitting the retention of rent is still discussed separately. See also the later general treatments in Gloag *Contract* 233–234 and 263–265, and Paton and Cameron *Landlord and Tenant* 95–97.

⁸ *Dabrymple v Hepburn* (1737) Mor 9444.

⁹ E.g. Mackenzie *Observations* 189; JS More's Notes to Stair's *Institutions* vol I (1832) ccxlv.

¹⁰ *Auchinbreck v Maclaughlan* (1748) Mor 15248. See paras 6-20 *et seq* below for more detailed discussion.

¹¹ Erskine *Institute* II vi 29; Hume *Lectures* IV 75–76.

¹² Bankton *Institute* II ix 7–9; Mackenzie *Observations* 189–190.

the tenant is allowed to retain rent in a question with a singular successor of the landlord.¹³ These early attempts at explanation were obviously insufficient. Their spirit, however, is reflected in the rule proposed later in the chapter, that a term cannot be a real condition if it is inconsistent with the nature of a lease.¹⁴

3-05. A final rationalisation attempted in two of the later institutional texts is more promising. Again it arises in discussion of cases permitting the tenant to retain rent. The question facing Erskine and Bell was how to reconcile those decisions which held that a tenant could not retain rent in a question with a successor landlord¹⁵ with those decisions which permitted the tenant to do so.¹⁶ Erskine suggested that retention was only possible against a singular successor when it was claimed *qua* tenant, not when it was claimed in the character of creditor of the landlord.¹⁷ Bell's approach was similar: he stated that a right of retention on account of a debt unconnected with the lease would not transmit.¹⁸ The solution Erskine and Bell advocated was to consider the underlying obligation which provides the basis for the tenant's retention of rent. Only if that obligation is connected to the lease, so that the tenant can be said to be claiming as (i.e. in the capacity of) tenant, is the incoming landlord bound by it. This approach is attractive and will be expanded upon below. It provides at once a convincing doctrinal justification for distinguishing between real and personal conditions, and an indication as to how in practice that distinction is to be drawn.

(2) Doctrinal justification

3-06 The rule that only certain terms of the contract between the original landlord and tenant are 'real' and transmit to successors of the landlord is both an instance of one fundamental tenet of private law doctrine and an exception to another. It is an instance of the *numerus clausus* principle.¹⁹ This provides

¹³ E.g. in satisfaction of the landlord's obligation to compensate the tenant for the value of improvements to the property: see paras 6-30 *et seq* below.

¹⁴ See paras 3-51 to 3-53 below.

¹⁵ Such as where the lease permitted retention because of the landlord's debt to the tenant.

¹⁶ Primarily at that time the cases regarding the tenant's meliorations, as to which see paras 6-30 *et seq* below.

¹⁷ Erskine *Institute* II vi 29.

¹⁸ Bell *Principles* §1202.

¹⁹ It is so characterised in K Reid and CG van der Merwe 'Property Law: Some Themes and Variations' in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 637, 656–657. Four important contributions to the international debate about the justifications for the *numerus clausus* principle are: B Rudden 'Economic Theory v Property Law: The *Numerus Clausus* Problem' in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence: 3rd Series* (1987) 239; W Wiegand 'Numerus clausus der dinglichen Rechte. Zur Entstehung und Bedeutung eines zentralen zivilrechtlichen Dogmas' in G Köbler (ed) *Wege europäischer Rechtsgeschichte* (1987) 623; TW Merrill and HE Smith 'Optimal Standardization in the law of property: the *numerus clausus* principle' (2000) 110 Yale LJ 1;

that there are only a limited number of real rights (hence ‘*numerus clausus*’) and that the characteristics of such rights are pre-determined by the law and may only be varied within prescribed parameters.²⁰ It is that second aspect of the principle which is relevant here. If a legal system recognises the existence of hybrid rights which – although essentially personal in nature – share some of the characteristics of real rights,²¹ then a *numerus clausus* must apply to them as well as to real rights in the full sense of the term.²² Parties who wish to create rights with real effect may only do so if the law so permits, and then only by making use of recognised property rights. There is no ‘freedom of property’ as there is ‘freedom of contract’. As it was put by the draftsmen of the German Civil Code:²³

The principle of freedom of contract, which governs the law of obligations, is not valid for property law. There, the opposite principle applies: parties can only create such rights as are permitted by law. The number of real rights is therefore necessarily a closed one.

3-07. The principle to which real conditions are an exception is the relativity of contracts, i.e. the principle that contracts bind only the parties to them.²⁴

N M Davidson ‘Standardization and pluralism in property law’ (2008) 61 *Vanderbilt LR* 1597. See also more recently M Weir ‘Pushing the envelope of proprietary interests: the nadir of the “*numerus clausus*” principle’ (2015) 39 *Melbourne University LR* 651. This debate need not be entered into here: the idea that there is a closed list of property rights, the features of which are controlled by law, appears to be accepted by virtually every legal system. For discussion of the principle as it applies to real obligations relating to land, see B McFarlane ‘The *numerus clausus* principle and covenants relating to land’ in S Bright (ed) *Modern Studies in Property Law* vol 6 (2011) 311, and C Bevan ‘The doctrine of benefit and burden: reforming the law of covenants and the *numerus clausus* “problem”’ (2018) 77 *CLJ* 72. For discussion from a Scottish perspective, see RRM Paisley ‘Real Rights: Practical Problems and Dogmatic Rigidity’ (2005) 9 *EdinLR* 267; S Farran and D Cabrelli ‘Exploring the interfaces between contract law and property law: a UK comparative approach’ (2006) 13 *Maastricht Journal of European and Comparative Law* 403, 409–410.

²⁰ Some elements of German doctrine distinguish these two elements as *Typenzwang* (limit on the number of real rights) and *Typenfixierung* (limit on their content): e.g. JF Baur and R Stürner *Sachenrecht* (18th edn 2009) I, §1 7. But not all are agreed that this is useful: HH Seiler *J Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Einleitung zum Sachenrecht* (2000) Rn [38]. See also, generally, S Herrier (ed) *Staudinger Einleitung zum BGB* (2018) Rn [94] *et seq.*

²¹ Which is how some might choose to characterise a lease.

²² CW Canaris ‘Die Verdinglichung obligatorischer Rechte’ in HH Jakobs, B Knobbe-Keuk, E Picker and J Wilhelm (eds) *Festschrift für Werner Flume zum 70. Geburtstag* vol I (1978) 371, 376–378. Depending upon one’s analytical preference, the contract of lease may be such a right: see the brief discussion at paras 1-48 to 1-53 above.

²³ *Motive zu dem Entwurf eines Bürgerlichen Gesetzbuchs für das Deutsche Reich* vol III: *Sachenrecht* (1888, 1997 reprint) 3. [Der Grundsatz der Vertragsfreiheit, welcher das Obligationenrecht beherrscht, hat für das Sachenrecht keine Geltung. Hier gilt der umgekehrte Grundsatz: Die Betheiligten können nur solche Rechte begründen, deren Begründung das Gesetz zuläßt. Die Zahl der dinglichen Rechte ist daher notwendig eine geschlossene.]

²⁴ Gloag *Contract* 257; WT Watson ‘Contract’ in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol IV (1927) [1016].

Rights may, of course, be transferred by assignation;²⁵ but a contract imposes obligations only upon the parties to it, and they cannot free themselves of these without the creditor's consent.²⁶ However, there is a category of personal right which is so connected to particular property that, when that property is transferred, the transferee becomes party to the personal rights and obligations relating to it. Being vested in a particular real right of itself makes the holder the creditor and debtor of particular rights and obligations. The focus having been on the latter,²⁷ these have been variously called 'real conditions'²⁸ or 'real obligations'.²⁹ The classic example in Scots law is the real burden, which exists between the owners of two plots of land. In a pioneering study, Kenneth Reid noted that the real burden affecting two plots of land is not the only type of real obligation which Scots law recognises. Initially, Reid labelled a second class of real obligation as 'non-neighbourhood real conditions',³⁰ that is to say conditions 'the dominant and servient properties [of which] are different estates or interests in respect of the same area of land'.³¹ Examples are real conditions in a standard security and servitude conditions.³² Later Reid's terminology changed, as, subtly, did the definition. He came to refer to 'non-autonomous obligations', which exist where 'real obligations are found as a component part of some other right – in practice usually a limited real right'.³³ In distinction to the previous definition, which covered only rights and obligations running between the holders of two real rights in the same land, now the creditor's right need not always be real. As he notes:³⁴

A lease is classified as a real right in Scotland and South Africa but not in most European countries; but however the right is classified, a maintenance obligation on the landlord/owner is a (non-autonomous) real obligation.

²⁵ A contract may also confer a right upon a third party: *jus quaesitum tertio*, as to which see now the Contract (Third Party Rights) (Scotland) Act 2017.

²⁶ *Stair Institutions* III i 2.

²⁷ Cf e.g. Belgian law, where there has been discussion of the automatic transfer of both rights and obligations, using the terms qualitative rights and qualitative obligations: V Sagaert 'Real Rights and Obligations in Belgian and French Law' in S Bartels and M Milo (eds) *Contents of Real Rights* (2004) 47.

²⁸ KGC Reid 'Defining real conditions' 1989 JR 69; Reid *Property* [344].

²⁹ KGC Reid 'Real Rights and Real Obligations' in S Bartels and M Milo *Contents of Real Rights* (2004) 25.

³⁰ To distinguish them from real burdens between nearby plots in separate ownership, which were 'neighbourhood real conditions'.

³¹ Reid 'Defining real conditions' 78. This is similar to what in German law is referred to as a 'Gesetzlicher Vertrag' or 'Legalschuldverhältnis': JF Baur and R Stürner *Sachenrecht* (18th edn, 2009) II §5 26.

³² On the latter, see DJ Cusine and RRM Paisley *Servitudes and Rights of Way* (1998) Ch 13.

³³ Reid 'Real Rights and Real Obligations' 41.

³⁴ Reid 'Real Rights and Real Obligations' 43.

3-08. Some might quarrel with the view that lease is a real right in Scots law.³⁵ For present purposes, this does not matter. The focus here is on the fact that where a contract of lease is ‘real’, it does not behave as an ordinary contract does: the identity of one party to the contract, the landlord, is determined by who owns the subjects of the lease.³⁶ The important point to make is that this type of automatic transfer of rights and obligations is exceptional in terms of contract law. By considering why the law makes this exception to the general principle that contracts bind only the parties to them, one gets closer to grasping the purpose of the real condition/personal condition distinction in leases.

3-09. In the case of real burdens, the justification for the deviation from normal contractual principle is that the rights and obligations are so closely related to the land that it is appropriate that they run with the land. The law grants perpetual effect to the parties’ own regulation of their relationship as landowners. But the law limits the types of agreement between landowners which can become real burdens: in order to create a real burden, the burden must confer praedial benefit and impose praedial burden. Thus, the law limits the exception that is made to the normal rule of relativity of contract.³⁷ As it was put by the Scottish Law Commission: ‘a real burden runs with the land only because it has something to do with the land’.³⁸

3-10. A similar argument may be advanced about leases. The rule that a person who acquires leased property does so subject to the contract of lease, and acquires the rights and obligations to which the lease gives rise, is an exception to general contractual principle. It is justified on the basis that, if the new owner is to be bound by the tenant’s right of possession, it is more practical and efficient that the acquirer may sue and be sued on the contract of lease directly instead of only the original landlord being bound by the contract.³⁹ However, this justification extends only to terms of the contract of lease, not to other agreements between the original landlord and tenant.⁴⁰ If every lease contained only the default rules (i.e. those which the law would in any event imply) the

³⁵ See paras 1-48 to 1-53 above.

³⁶ In a sub-lease the argument applies *mutatis mutandis* to the person who holds the head lease.

³⁷ The praediality test now has a statutory footing: Title Conditions (Scotland) Act 2003 s 3(1)–(4).

³⁸ Scottish Law Commission *Discussion Paper on Real Burdens* (Scot Law Com DP No 106, 1998) [7.42]. The (English) Law Commission accepted the Scottish Law Commission’s arguments: Law Commission *Easements, Covenants and Profits à prendre* (Law Com CP No 186, 2008) [8.73]; Law Commission *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) [5.50] and [5.51].

³⁹ This argument is advanced in South Africa in Cooper *Landlord and Tenant* 296–297. Cf JG Lotz ‘Lease’ in WA Joubert (ed) *The Law of South Africa* vol 14 (1981) [182].

⁴⁰ See also, e.g., in respect of English law, Megarry and Wade *Real Property* [19-005]: ‘covenants which do not relate to the land are not enforceable under this head, for they have nothing to do with the relationship of landlord and tenant on which the right to enforce covenants against third parties is founded’.

position would be straightforward: the acquirer would simply be bound by those. However, parties often prefer to amend the default rules and provide their own terms to regulate their relationship of landlord and tenant. The aim of the distinction between real and personal conditions is to differentiate between that type of term and such other terms as the parties may agree which have no reference to their relationship as landlord and tenant or even are inconsistent with it. There is no reason for the law to make an exception to the normal rule of contractual relativity in respect of that second type of term and hold that it transmits to a successor landlord. In a sense, therefore, what the law is attempting to do is to identify the contract of lease, as modified by the parties to suit their own needs. It is only if a term is sufficiently connected to the parties' relationship as landlord and tenant that there is a justification for departing from the normal rule that contracts bind only the parties to them. This ties in with the explanation offered by Erskine, that the Leases Act 1449 applied only to render the tenant's rights *qua* tenant binding upon the successor.⁴¹ Further, insisting on such a connection complies with the policies underlying the *numerus clausus* principle, as it keeps the type of obligation to which an acquirer of land can be exposed within limits.

3-11. Reichmann's analysis of the early role of real covenants in the United States supports this analysis. He explains that real covenants served to bind successors to variations made to the default rules in proprietary relationships:⁴²

In England, horizontal privity⁴³ of estate was traditionally limited to the landlord-tenant relationship. In the United States, however, the privity concept was extended during the first half of the nineteenth century to other situations where a property interest in the land of another was granted, whether by easement, ground-rent, or mortgage. In those situations, the same piece of land was shared, for use purposes, investment, or security interest, by at least two people, usually for a relatively long period of time. Because the value of each party's property right was affected by the land's exploitation, the conduct of the parties clearly required regulation. Although the common law defined the initial scope of property rights and thus regulated the behaviour of the sharing parties, the parties often consented to modification of these rights due to specific needs, physical conditions of the land, price, and bargaining power. These consensually created rights are similar to the original common law entitlements which they replaced, and thus should 'run with the land'. To hold otherwise would have resulted in overly rigid patterns of property rights, patterns which would have prevented the transacting parties from structuring their relationship as they wished.

⁴¹ Erskine *Institute* II vi 29.

⁴² U Reichmann 'Towards a unified concept of servitudes' (1982) 55 Southern California L Rev 1177 at 1218 (footnotes omitted).

⁴³ This is the requirement that the original promisor and promisee must have been in a particular property law relationship for a promise to 'run with the land'.

This explanation of the doctrinal function of the rule is important, as it makes clear a point which is perhaps not made sufficiently clearly in the Scottish sources: the rule that certain conditions are personal is a mandatory one. Parties to a lease might provide that a term is to transmit to successors, but if the term is one which the law holds to be personal, the parties' provision to the contrary will be of no effect.

3-12. In light of this introduction, this chapter now turns to consider how the distinction between real and personal conditions has been articulated in the Scottish case law. It will be suggested that the cases support the proposition that, in distinguishing between real and personal conditions, the law is attempting to distinguish between those rights and duties which regulate the parties' relationship as landlord and tenant and those which do not and are, in a sense, 'collateral' or 'extrinsic' to that relationship. This analysis gains weight by a consideration of cases addressing the parallel issue of the transmission of feudal conditions. This is, however, not the only test which can be found in the authorities. Indeed, it is not the current orthodoxy, which is instead that only terms which are *inter naturalia* of a real right of lease transmit. This supposed test is examined below and criticised. There has been at best only partial debate in Scotland as to the appropriate test for controlling transmission, despite the issue having been litigated on numerous occasions. Many decisions contain little in the way of reasoning for adopting a particular test and those which are reasoned often proceed with little reference to prior formulations, which has hindered the development of an accepted test. The issue has also not been the subject of detailed academic analysis. This has allowed the *inter naturalia* test to emerge and it is to that we now turn.

C. MISTAKEN ORTHODOXY: *INTER NATURALIA*

3-13. The prevailing approach is that a term transmits to a successor of the landlord when it is *inter naturalia* of the real right of lease.⁴⁴ If that test is taken literally, it is singularly unsuited to the task of distinguishing real from personal conditions. If, on the other hand, it is not to be taken literally, as appears to be the case, the invocation of the Latin phrase *inter naturalia* is superfluous and potentially misleading.

⁴⁴ E.g. *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 650G ('Whether an obligation is binding on singular successors depends on whether it is *inter naturalia* of the lease'); *Allan v Armstrong* 2004 GWD 37-768 (OH); *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142, 2006 GWD 12-235 at [16]; *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [37]–[38]. In respect of textbooks, see Gloag *Contract* 234; Paton and Cameron *Landlord and Tenant* 95; *SME Landlord and Tenant Second Reissue* [142] ('the condition must be *inter naturalia* of the lease', but cf [215] which states that subsidiary obligations will not bind a successor *especially* if they are not *inter naturalia*); WM Gordon *Scottish Land Law* (2nd edn, 1999) [23-22]; McAllister *Leases* [2.39]; Rennie *Leases* Ch 15.

(1) Use in case law

3-14. The *inter naturalia* test seems almost to have been arrived at by accident. *Bisset v Magistrates of Aberdeen*⁴⁵ is the case usually cited as its *fons et origo*, but in fact the phrase ‘*inter naturalia*’ appears in the context of transmission of terms in earlier cases, such as *Mackenzie v Mackenzie*⁴⁶ some fifty years before.⁴⁷ In *Mackenzie* part of Lord Jeffrey’s reasoning in holding an heir of entail not to be bound by the obligation of his author was that the obligation in question was not ‘*inter naturalia* of any ordinary contract of location’.⁴⁸ It is not clear, however, whether Lord Jeffrey was treating this as a general test to regulate transmission of terms, especially given that only one year earlier, in *Montgomerie v Carrick*,⁴⁹ he had asked whether an arbitration clause was referable to the *essentialia* (as opposed to the *naturalia*) of the lease and to the general relation of landlord and tenant in order to determine whether a successor landlord was bound by an obligation to refer a dispute to an arbiter.

3-15. *Inter naturalia* was little mentioned in the context of the transmission of lease terms in the period between *Mackenzie* (1849) and *Bisset* (1898),⁵⁰ although it makes a brief appearance in *Burnfield v Stewart*⁵¹ and *Waterston v Stewart*.⁵² The use in *Bisset* is fairly equivocal in itself. A tenant sought declarator that the current landlord was bound by his predecessor’s obligation to grant a feu charter. The successor landlord advanced two arguments: (i) the phrasing of the lease was such that the obligation to grant the feu charter was personal to the original landlord and did not extend to a singular successor; (ii) in the event of the clause not being interpreted as personal to the original

⁴⁵ (1898) 1 F 87 (IH).

⁴⁶ (1849) 11 D 596 (IH). The case is further discussed below at para 3-29.

⁴⁷ D Haughey ‘Transmissibility of lease conditions in Scots law – a doctrinal-historical analysis’ (2015) 19 EdinLR 333 at 344 notes three earlier cases in which he states that the phrase was used in the context of transmission of terms: (i) *Maule v Maule* (1829) 7 S, Appendix 1 per Lord Balgray at 8; (ii) Shaw’s report of *Todd v Moncrieff* (1823) 2 S 113, in P Shaw, *Digest of Cases decided in the Courts of Session, Teinds, and Justiciary, and in the House of Lords 1821–1833* (1834) 285; and (iii) the *Scottish Jurist* report of *Ross v Duchess-Countess of Sutherland* 1838 SJ 510 at 511. It is not clear from those reports that the question whether the relevant term was one of the ‘*naturalia*’ of the contract of lease was in fact being used as a test for determining whether a term transmitted, but it is possible that it was.

⁴⁸ (1849) 11 D 596 at 601.

⁴⁹ (1848) 10 D 1387 (IH) at 1396, discussed below at paras 3-25 to 3-27.

⁵⁰ It is not mentioned in e.g. *M’Gillivray’s Exrs v Masson* (1857) 19 D 1099 (IH); *Campbell v M’Kinnon* (1867) 5 M 636 (IH) affd (1870) 8 M (HL) 40; *Davie v Stark* (1876) 3 R 1114 (IH); *Harkness v Ratray* (1878) 16 SLR 117 (IH); or *Swan and Sons v Fairholme* (1894) 2 SLT 74 (OH), all of which concerned the extent of the landlord’s successor’s liability.

⁵¹ A sheriff court decision from 1872, reported at (1872) JJ 330.

⁵² (1881) 9 R 155 (IH). The matter was considered only tangentially here, as the case did not concern transmission of terms against a successor landlord. Instead, the issue was whether a discharge by a tenant of claims under the lease was effective only against the current heir of entail in possession (to whom the discharge had been given) or whether it also operated to prevent a claim by the tenant against the original landlord.

landlord, the obligation was, in any event, not *inter essentialia* (*sic*) of the lease and therefore could not bind a successor.⁵³ Despite the terms of the argument, the Lord Ordinary (Kyllachy) justified his conclusion that the obligation did not transmit on the basis that it could not be said to be '*inter naturalia* of a lease, or otherwise than a collateral obligation binding only on the lessors and their representatives'.⁵⁴

3-16. The tenant in *Bisset* appealed, but the Second Division upheld the decision of the Outer House. One of the judges, Lord Trayner, made no mention of the phrase '*inter naturalia*'. Instead he placed weight on the interpretative point and argued that the nature of the obligation (to replace a mere right of use with an absolute right of property) meant that it was personal to the grantor of the obligation.⁵⁵ It is, however, Lord Moncreiff's opinion which is usually cited and there *inter naturalia* is a determinative factor.⁵⁶

It [the option] is an obligation to alter the tenure from one of lease to one of feu. This can scarcely be said to be *inter naturalia* of a lease, and if it is not it will not affect singular successors.

There are three comments to make in respect of this passage. The first is that it only allows one to say that a clause being *inter naturalia* is a necessary condition for it to be a real condition of a lease. It does not support the proposition that it is a sufficient condition: 'if not A, then not B' does not equate to 'if A then B'. Yet the typical view of the current law is that a term being *inter naturalia* of a lease is both a necessary *and* a sufficient condition for transmission. The rule is not seen to be 'if a term is not *inter naturalia* of a lease it will not transmit to a successor' but rather 'if a term is *inter naturalia*, it will bind a successor'.⁵⁷

3-17. A second point is that Lord Moncreiff's opinion proceeds without reference to earlier decisions such as *Montgomerie v Carrick*⁵⁸ and *Stewart v Duke of Montrose*,⁵⁹ despite these having been cited to the court. As we shall see shortly, both of these authorities take a different approach to determining which terms transmit to successors, and the second criticises the use of *inter naturalia* to determine whether a term transmits (albeit in a feudal context).

3-18. The third comment is that it is only since relatively recently that *Bisset* has come to be seen as the leading case in this area. Indeed, it is only in modern times that *inter naturalia* has been treated as the governing test. That seems

⁵³ *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 88.

⁵⁴ (1898) 1 F 87 at 89.

⁵⁵ (1898) 1 F 87 at 89–90. He does, however, state that he 'agrees with the Lord Ordinary' who, of course, argued that the obligation was personal because it was not *inter naturalia*.

⁵⁶ (1898) 1 F 87 at 90. He also relied upon the interpretative point.

⁵⁷ E.g. *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142 at [16]; *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [38].

⁵⁸ (1848) 10 D 1387 (IH).

⁵⁹ (1860) 22 D 755 (IH), affd (1863) 1 M (HL) 25.

not to have been the position in the period immediately following the decision. Within ten years of *Bisset* a dispute concerning the transmission of terms reached the House of Lords in *Gillespie v Riddell*.⁶⁰ The tenant argued in the Outer and Inner Houses, and the House of Lords, that the succeeding heir of entail was bound, as the obligation was *inter naturalia* of the lease.⁶¹ However, the ultimate decision, against transmission of the condition, was not explained by the court using this term. Similarly, the term did not appear in *Purves' Tr v Traill's Tr*⁶² or *Younger v Traill's Tr*,⁶³ two other decisions on the matter dating from the early twentieth century, when *Bisset v Magistrates of Aberdeen* would still have been fresh in the legal consciousness. Nor was it relied upon in the opinions in the Inner House case of *Norval v Abbey*⁶⁴ in 1939. The term *inter naturalia* does appear in two early twentieth-century cases which involved a dispute between a successor to the landlord and the tenant,⁶⁵ namely *John Haig and Co Ltd v Boswall-Preston*⁶⁶ and *Marshall's Trs v Banks*,⁶⁷ however, in neither case was this part of a consideration of whether a term was a real condition and, in any event, there was no detailed consideration of the test nor a reference to *Bisset*. Finally, the 1937 sheriff court decision of *Milne v Darroch*⁶⁸ referred to an *inter naturalia* test as part of a broader formulation of when a term would not bind a successor, as is noted below.

3-19. After these decisions there seems to have been no litigation concerning the transmission of terms in leases until the 1990s. Rankine did not use the phrase in his attempt to provide a general test for distinguishing real and personal conditions, although he did mention it in his discussion of whether specific terms were real or personal.⁶⁹ Gloag⁷⁰ and Paton and Cameron,⁷¹ however, gave the phrase a much more prominent position and treated it as the determinative principle. Thus Gloag:⁷²

While the ordinary obligations in a lease run with the lands, obligations may be undertaken by landlord or tenant in a lease which are purely personal, and by which

⁶⁰ 1908 SC 628 (IH), affd 1909 SC (HL) 3.

⁶¹ 1908 SC 628 at 630, 631, 635. The submissions made in the House of Lords are in the Appeal Cases report – it was argued that, as conditions *inter naturalia* of the lease, the relevant clauses would bind the successor: [1909] AC 130 at 133.

⁶² 1914 2 SLT 425 (OH).

⁶³ 1916 2 SLT 397 (OH).

⁶⁴ 1939 SC 724 (IH).

⁶⁵ As Haughey has noted: (2015) 19 EdinLR 333, 346.

⁶⁶ 1915 SC 339 (IH) at 347.

⁶⁷ 1934 SC 405 (IH) at 413.

⁶⁸ (1937) Sh Ct Rep 3.

⁶⁹ Rankine *Leases* 475–478. That he did not view it as determinative is shown by his reasoning that a break clause was a real condition not on the basis that it was *inter naturalia* but rather because it bore reference to the general relation of landlord and tenant: 528.

⁷⁰ Gloag *Contract* 234.

⁷¹ Paton and Cameron *Landlord and Tenant* 95, but cf the less absolute wording at 104.

⁷² Gloag *Contract* 234.

only the contracting parties and their heirs are affected. The rule is usually stated that those obligations only which are *inter naturalia* of the lease are binding upon singular successors.

Doubtless under the influence of these writers, when the matter did arise again in several cases in the closing decade of the twentieth century and the opening years of the twenty-first, it was *inter naturalia* which was treated as controlling the transmission of lease terms.⁷³

(2) Meaning of *inter naturalia*

3-20. What does the phrase '*inter naturalia* of a lease' actually mean? Its literal meaning is 'among the default rules of the lease'. '*Naturalia*' denotes the default rules of a nominate contract. The concept is part of the Civilian trichotomy of *essentialia*, *naturalia* and *accidentalia*, identified by the medieval jurist Baldus in the Roman texts.⁷⁴ Here Pothier's definition will suffice:⁷⁵

With respect to contracts, Cujas makes no other distinctions than of those things which are of the essence of the contract and those which are accidental to it. The distinction made by many lawyers of the seventeenth century is much more accurate; they distinguish three different things in each contract – Things which are of the

⁷³ *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 650G; *Allan v Armstrong* 2004 GWD 37-768 (OH); *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142 at [16]; *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [37].

⁷⁴ J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 61–65. The subsequent development is noted at 102–105, 158–160 and 208–213. I am grateful to Dr Dot Reid and Professor Paul du Plessis for having referred me to Gordley's work. The philosophical underpinnings of the 'essentialia, naturalia, accidentalia' trichotomy are no longer generally accepted and so the distinction has been criticised: Gordley *Philosophical Origins*; T Naudé 'The preconditions for recognition of a specific type or sub-type of contract – the essentialia-naturalia approach and the typological method' 2003 *Tydskrif vir die Suid-Afrikaanse Reg* 411, 416–421.

⁷⁵ RJ Pothier *A Treatise on the Law of Obligations, or Contracts* vol I (transl DW Evans, 1806) [5]–[8]. The original text, in RJ Pothier *Traité des obligations* (1761–64) in M Bugnet (ed) *Œuvres de Pothier* vol II (1861) Ch 1, Sect 1, Art 1, s III, is: 'Cujas ne distinguait dans les contrats, que les choses qui sont de l'essence du contrat, et celles qui lui sont accidentelles. La distinction qu'ont faite plusieurs jurisconsultes du dix-septième siècle, est beaucoup plus exacte: ils distinguent trois différentes choses dans chaque contrat; celles qui sont de l'essence du contrat; celles qui sont seulement de la nature du contrat; et celles qui sont purement accidentelles au contrat. 1. Les choses qui sont de l'essence du contrat, sont celles sans lesquelles ce contrat ne peut subsister. Faute de l'une de ces choses, ou il n'y a point du tout de contrat, ou c'est une autre espèce de contrat. . . . 2. Les choses qui sont seulement de la nature du contrat, sont celles qui, sans être de l'essence du contrat, font partie du contrat, quoique les parties contractantes ne s'en soient point expliquées, étant de la nature du contrat que ces choses y soient renfermées et sous-entendues. . . . 3. Les choses qui sont accidentelles au contrat, sont celles qui, n'étant pas de la nature du contrat, n'y sont renfermées que par quelque clause particulière ajoutée au contrat.'

essence of the contract, things which are only of the nature of the contract, and things which are merely accidental to it.

1st. Things which are of the essence of a contract are those without which such contract cannot subsist, and for want of which there is either no contract at all, or a contract of a different kind. . . .

2d. Things which are only of the nature of the contract are those which, without being of the essence, form a part of it, though not expressly mentioned; it being of the nature of the contract that they shall be included and understood.^[76] . . .

3d. Those things which are accidental to a contract such as, not being of the nature of the contract, are only included in it by express agreement.

This distinction is recognised by Scots law,⁷⁷ although it seems not to have found the hold in the general part of contract law that it has, say, in South African law.⁷⁸ The concept of ‘default terms’ or those ‘implied at law’ into nominate contracts is, however, clearly recognised in Scots law.⁷⁹ The ‘essential’ terms of a lease (without which there is no lease) are the parties, subjects, rent and duration.⁸⁰ Once a contract with those terms is agreed, the law implies certain default terms (e.g. regarding maintenance obligations and the assignability of the lease). In addition, the parties may choose to make their own provision on particular matters.

3-21. It was suggested above that the aim of a distinction between ‘real’ and ‘personal’ conditions is to determine, where parties vary the default rules of a lease, which of the additional or altered terms are to bind successors.⁸¹ If *inter naturalia* bears its literal meaning, it is singularly unsuited to this task. Furthermore, the focus on *naturalia* detracts from the fact that the incoming landlord must also be bound by and benefit from the *essentialia* of the lease (such as terms regarding its rent and duration). Bankton was clear that the fact that a term was not *inter naturalia* (i.e. in its strict sense, implied by law) did not automatically prevent it from being a real condition (although often it would not be).⁸²

⁷⁶ One characteristic of *naturalia* is that they can be varied without changing the type of contract.

⁷⁷ *Bell's Dictionary and Digest of the Law of Scotland* (7th edn by G Watson, 1890; reprinted by the Edinburgh Legal Education Trust as *Old Studies in Scots Law* vol 2, 2012) 406 sv ‘essentialia’. The trichotomy is not discussed in those sections of the institutional writings which cover the general part of contract law. Rather it is mentioned only when discussing the terms of a feudal grant: Bankton *Institute* II iii 12; Erskine *Institute* II iii 11; H McKechnie ‘Superior and Vassal’ in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol 14 (1933) [630]; WM Gordon *Scottish Land Law* (2nd edn, 1999) [2-27]. See also the definition of *inter naturalia* in Trayner's *Latin Maxims and Phrases* (4th edn 1894, reprinted 1986) 285.

⁷⁸ LF van Hutssteen et al *Contract: General Principles* (6th edn, 2020) 330–331. But see the reference to South African material in McBryde *Contract* [9-08].

⁷⁹ E.g. McBryde *Contract* [9-02] and [9-08].

⁸⁰ Stair *Institutions* II ix 5; Rankine *Leases* 114.

⁸¹ Paras 3-10 and 3-11 above.

⁸² Bankton *Institute* II ix 25.

Besides the natural and implied obligations between heritor and tenant . . . there may be divers others expressly agreed upon, which must accordingly be observed, those being as various as the humours of parties are different. But these are often only personal, binding upon the heritor and his heirs, but not effectual against his onerous singular successors.

(3) A feudal parallel

3-22. As chapter 2 noted, there are parallels between the courts' approach to the transmission of leases and to the transmission of the 'feudal contract' which existed between superior and vassal.⁸³ It is therefore of significance that, in the latter context, the authorities have been notably dismissive of the *inter naturalia* test. So in *Stewart v Duke of Montrose*⁸⁴ in 1860 a superior argued that an obligation to indemnify the vassal against minister's stipend and augmentations thereof did not bind him as a singular successor because it was not *inter naturalia* of the feudal relation. The court's response was clear:⁸⁵

It is said, that the obligation is not *inter naturalia* of the feu. But that is nothing to the present question.

In *Duncan v Church of Scotland General Trustees*,⁸⁶ in response to an argument that only conditions which were *inter naturalia* bound a successor to a superiority, Lord Mackay stated 'To my deferential thinking, that is never a correct way of formulating such a question.' Further, Bell, in the context of obligations which were binding upon successors of the vassal, stated – in respect of obligations not to sub-feu – that:⁸⁷

These, however, if not *inter naturalia*, partake so much of a legitimate stipulation for preserving the rights of the superior, that there has been little difficulty in giving effect to them.

These references show that, relatively shortly after *inter naturalia* first started to be mentioned in the context of the transmission of lease terms, it was criticised in a decision of the Whole Court on the analogous point in feudal law, presumably because it was clear that it was too narrow a test. Despite this, and despite *Stewart* having been cited in *Bisset*, the *inter naturalia* test still formed the basis of Lord Moncreiff's opinion in that case.

⁸³ Para 2-68 above.

⁸⁴ (1860) 22 D 755 (IH) at 773, affd (1863) 1 M (HL) 25.

⁸⁵ (1860) 22 D 755 at 791. See also *Earl of Zetland v Hislop* (1882) 9 R (HL) 40 at 43 (in respect of an obligation on the vassal).

⁸⁶ 1941 SC 145 (IH) at 156.

⁸⁷ Bell *Principles* §861.

(4) Giving other meanings to *inter naturalia*

3-23. The above discussion proceeds upon the assumption that the term *inter naturalia* bears its technical meaning, which is what one would expect if a term of art is being used as a legal test. In fact, that is not how it is always treated. Both Gloag and Paton and Cameron viewed *inter naturalia* simply as expressing an insistence that a condition be ‘of common occurrence in that particular class of lease’ in order to be a real condition.⁸⁸ That might be said to have the merit of guaranteeing to purchasers that they will not be bound by any unexpected obligations, but it is unsuitable as a test for two reasons. First, it is possible for a clause to be commonly incorporated into leases, but for it nevertheless to be collateral to the landlord-tenant relationship. The very first cases in this field, concerning agreements that the tenant could set off rent against a personal debt owed to the tenant by the landlord, showed this. There are various other examples of clauses which are allegedly common being held not to transmit. Secondly, the inverse might be true: a clause which is uncommon may nevertheless be referable to the lease. The approach of Gloag and Paton and Cameron was criticised in *Optical Express* as too narrow, and not even a proper interpretation of Lord Moncreiff’s opinion in *Bisset*.⁸⁹ Lord Moncreiff had stated only that, if it is established that the obligation was customary and usual in leases of such a duration, ‘it would have materially aided the pursuer’s contention’.⁹⁰ He did not state that if this is established it would necessarily result in the successor being bound. In *Optical Express*, Lord Macfadyen’s conclusion was that whether a condition is a real condition is ‘primarily a question of the nature of the obligation’.⁹¹ This is welcome: that is exactly where the focus should be. It does not, however, indicate what it is about their nature which makes some conditions personal and others real.

3-24. *Inter naturalia*, then, is a concept which requires further definition. It has no independent value and merely describes a result which has been reached in accordance with other reasoning. The chain of reasoning which the law currently requires is this:

- (i) a term transmits to a singular successor of the landlord if it is a real condition;

⁸⁸ Gloag *Contract* 234; Paton and Cameron *Landlord and Tenant* 95. Cf *SME Landlord and Tenant Second Reissue* [142], which states that this is only a ‘helpful but not definitive factor’. The fact that the technical meaning of *inter naturalia* was either not understood or at least that the phrase was used without reference to that meaning is also clear in the pleadings in *Gillespie v Riddell* (1908) SC 628 (IH) 635: the respondent argued that the obligation in question ‘was an obligation *inter naturalia* of the lease, and was indeed inserted there *ex necessitate*’.

⁸⁹ *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 650I. Despite this criticism, the same definition was used in *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142 at [16], where Lord Drummond Young stated: ‘If a lease runs with the land, its conditions will be real in nature, and hence binding on singular successors, only if they are *inter naturalia* of the lease, that is to say, of a nature that commonly occurs in the type of lease concerned.’

⁹⁰ *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 90.

⁹¹ *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 650I.

- (ii) it is a real condition if it is *inter naturalia* of the lease;
- (iii) it is *inter naturalia* of the lease if . . .

The invocation of *inter naturalia* is superfluous. As long as this is appreciated, its continued use poses no difficulties, but it is odd to use a legal term inconsistently with its technical meaning. A more logical approach is to miss out the superfluous middle stage and simply to state: 'a term transmits to a successor landlord if the term is a real condition, and it is a real condition if . . .'. This chapter now considers how one may complete the ellipsis. To do so, it reviews the key case law to consider what tests, apart from *inter naturalia*, it contains.

D. 'REFERABLE TO THE GENERAL RELATION OF LANDLORD AND TENANT'

(I) Case law

(a) *Montgomerie v Carrick* (1848)

3-25. Although there are various early cases such as *Arbuthnot*⁹² and *Ross*,⁹³ it was not until 1848 that the first detailed attempt was made to provide a reasoned distinction between real and personal conditions. The case was *Montgomerie v Carrick* (1848)⁹⁴ and the clause in question an arbitration provision. The singular successor of the landlord sought declarator that he was not bound by the decree arbitral which the tenant had obtained, but he was unsuccessful. The decision is a good illustration of the difficulties in this area, for there are as many different formulations of the reasoning as there are opinions. The most promising is that of Lord Jeffrey, who stated '[t]he question is, is the stipulation now in question a matter referable to the general relation of landlord and tenant' as opposed to one which 'bore reference to the private relation of the contracting parties'.⁹⁵ However, Lord Jeffrey also asked whether the stipulation was referable to the *essentialia* of the contract of lease;⁹⁶ these, as previously mentioned,⁹⁷ encompass only the parties, subjects, rent and duration.⁹⁸

⁹² *Arbuthnot v Colquhoun* (1772) Mor 10424, where the Lord Ordinary's reason for refusing to hold a successor bound by an obligation to pay for the tenant's improvements to the subjects of the lease was that 'the clause in question, although contained in the contract of tack, is an obligation distinct from the contract of tack'. This decision was reversed on appeal. See also *Thomson v Reid* (1664) Mor 15239 where Thomson, an appriser, argued that he was not bound by a clause of retention in a tack because it was 'but a personal provision, adjoined in the tack and no part of the tack'.

⁹³ *Ross v Duchess-Countess of Sutherland* (1838) 16 S 1179 (IH).

⁹⁴ (1848) 10 D 1387 (IH).

⁹⁵ (1848) 10 D 1387 at 1396–1397.

⁹⁶ (1848) 10 D 1387 at 1396.

⁹⁷ Para 3-21 above.

⁹⁸ *Stair Institutions* II ix 5; *Rankine Leases* 114.

3-26. This approach moved away from what had been the focus of the parties' arguments, namely whether the arbitration clause was essential for or necessary to the contract.⁹⁹ Those arguments are reflected in the other opinions. Thus, the Lord Ordinary (Ivory) held that the clause bound a successor because it did not have 'reference to any matter merely extrinsic, or which can be regarded as in any proper sense foreign to the proper object of the lease, but, on the contrary, constitut[ed] an express condition of the contract, and [was] necessary to its extrication'.¹⁰⁰ Slightly different again was Lord President Boyle, who stated:¹⁰¹

It is no doubt most plain and obvious . . . that there is a distinction between those stipulations which are extrinsic to the lease, and do not transmit against singular successors, and those other stipulations which are of the essence of the contract, and do therefore of necessity transmit against them.

Later he reasoned simply that the clause 'formed an essential part of this contract, and was therefore transmitted against singular successors'.¹⁰² Lord Fullerton likewise placed weight upon the fact that the clause was a necessary part of the lease, although he did state that he was not deciding any general principle of law.¹⁰³ Finally, Lord Mackenzie stated that '[n]o doubt there may be clauses separable from the contract, and not binding on singular successors; but this clause is not of that description. It is a reference forming a most proper and reasonable condition of the contract.'¹⁰⁴

3-27. What to make of these various tests? Lord Jeffrey's consideration of whether a term is referable to the general relation of landlord and tenant (as opposed to the private relation of the contracting parties) is the most promising. Although general, it coheres with what was suggested above to be the purpose of distinguishing real and personal conditions, and also with the explanations offered by Erskine and Bell for the non-transmission of terms in the 'lease as security' cases.¹⁰⁵ It has since been cited with approval by Hunter and Rankine,¹⁰⁶ and was treated as the governing test by Lord Wark in the Inner House case of

⁹⁹ (1848) 10 D 1387 at 1394.

¹⁰⁰ (1848) 10 D 1387 at 1392. It is unclear why the fact that the arbitration clause was express was thought to be relevant. The purpose of the real condition/personal condition distinction is to distinguish between those express terms which do transmit and those which do not. Further, there is no rule that a term must be express in order to bind a successor: default terms, which need not be set out, surely do affect a successor, as must terms which are implied in fact (although there is an argument that the successor – like any other transferee of a contract – should not be affected by an implied term arising from facts and circumstances of which he, as successor, could not have been aware).

¹⁰¹ (1848) 10 D 1387 at 1395.

¹⁰² (1848) 10 D 1387 at 1395.

¹⁰³ (1848) 10 D 1387 at 1395.

¹⁰⁴ (1848) 10 D 1387 at 1395.

¹⁰⁵ Discussed at para 3-05 above.

¹⁰⁶ Hunter *Landlord and Tenant* vol I 482; Rankine *Leases* 476.

Norval v Abbey.¹⁰⁷ Accepting this test as the best that is available, part E below considers how it might be fleshed out. The various references in *Montgomerie* to a term being 'extrinsic' to the lease may be interpreted as serving the same purpose, i.e. as seeking to identify a term that is not referable to the relationship of landlord and tenant. That notion is frequently encountered in other cases considering the transmission of terms.

3-28. Admittedly, it is difficult to reconcile other passages in *Montgomerie* with this test. However, those other passages are, themselves, problematic and cannot readily be treated as setting down a general test. The focus in some passages on whether a term is 'necessary' is troublesome. It is unclear (i) how it is to be ascertained whether a clause is 'necessary' to a contract, and (ii) why the 'necessity' of a clause should determine its transmission. Were it to be properly applied, a test based on necessity would be restrictive: when can it be said that a clause is actually essential to a contract? Necessity is not a test which has been adopted in other decisions and, indeed, is inconsistent with other decisions.¹⁰⁸ Nor does there appear to be support for a 'severability' test along the lines proposed by Lord Mackenzie. Although that would have the practical attraction that it would prevent a complex contract from being dissected upon transfer, it would not achieve the aims of the real condition/personal condition distinction set out above.

(b) Mackenzie v Mackenzie (1849)

3-29. Shortly after *Montgomerie*, in *Mackenzie v Mackenzie* (1849),¹⁰⁹ the Inner House again had to consider whether a particular obligation incumbent upon a landlord bound a successor owner. It was held that an obligation on the landlord of a farm to improve and enclose adjoining woodland did not bind the successor of the landlord, but it is unclear whether this was because (i) the obligation was a personal condition or (ii) to hold the successor bound would have contravened the fetters of the entail to which the land was subject.¹¹⁰

¹⁰⁷ 1939 SC 724 (IH) 731.

¹⁰⁸ In *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH), for example, it was argued that the clause was an essential part of the lease, but this did not persuade the court that it was a real condition. (Such exclusivity agreements probably are real conditions, but not on the basis that they are essential to the lease: see paras 7-28 to 7-36 below.) Similarly, it had been argued in *Gillespie v Riddell* 1909 SC 628 (IH) at 634 affd 1909 SC (HL) 3 that the clause there was necessary. Again, that did not result in its transferring. The arguments are noted at [1909] AC 133 but not in the Session Cases HL report.

¹⁰⁹ (1849) 11 D 596 (IH).

¹¹⁰ Before one has to consider rules of entail law, a prior question is whether the obligation could transmit under ordinary law against the successor: *Gillespie v Riddell* 1908 SC 628 (IH) at 638, affd 1909 SC (HL) 3. In *Gillespie*, *Mackenzie* was viewed as having been decided on the 'real conditions' and not the 'entail' point: 640. However, the explanation of *Mackenzie* in *Gillespie* is too broad: see para 3-34 below.

The opinions do include statements such as ‘it [the term] does not necessarily become [transmissible] by insertion into the lease’;¹¹¹ and ‘he [the tenant] can only hold the landlord to the lease, so far as it is a lease’, and could not insist that the successor landlord perform ‘an obligation over and above the lease’.¹¹² This could be said to suggest an approach similar to that of Lord Jeffrey in *Montgomerie*, which attempts to distinguish between those elements of the parties’ agreement which are attributable to the lease from those which are collateral to it. However, *Mackenzie* provides no guidance as to how this distinction is to be made.¹¹³ Lord Jeffrey noted that, although the obligation was recorded in the document of lease, it was clearly completely separate from that lease. There was separate consideration given for it, for example.

(c) *M’Gillivray’s Exrs v Masson (1857)*

3-30. The next Inner House case to consider the matter was *M’Gillivray’s Exrs v Masson (1857)*.¹¹⁴ This case is an important one but, although the decision is undoubtedly correct, some of the reasoning is problematic. An incoming tenant undertook to pay the outgoing tenant the sums to which that outgoing tenant was entitled from the landlord as compensation for improvements which the tenant had made to the subjects. In return, the landlord undertook to take the buildings at the end of the lease and to reimburse the incoming tenant their value, up to a specified amount. Later, the property having been transferred, the executors of the original landlord sought declarator that they were free from liability to the incoming tenant under this obligation. This was refused by majority (Lord Curriehill dissenting). Such a decision might be reached on two grounds: (i) the term was a real condition, but nevertheless the original landlord remained liable on it, or (ii) the term was a personal condition and so continued to bind the original landlord. The majority took the second approach. Lord Curriehill’s minority view was that the term was a real condition and that the original landlord retained no subsidiary liability for real conditions. The opinions of all of the judges should, therefore, discuss whether the term was real or personal. And indeed they do, but in different terms.

3-31. The Lord President (M’Neill), with whom Lord Ivory concurred, stated that a singular successor was bound only in regard to ‘the proper matter of the lease’ and ‘proper stipulations as to land’. (This obligation was said not to qualify, as it amounted simply to an obligation on the landlord to repay

¹¹¹ (1849) 11 D 596 at 600 (Lord Fullerton).

¹¹² (1849) 11 D 596 at 599 (Lord Mackenzie).

¹¹³ In his opinion in *Mackenzie* Lord Jeffrey does mention that the obligation in question is not *inter naturalia*: (1849) 11 D 596 at 601. Lord Jeffrey’s opinion also contains a rather strange explanation as to the basis for the succeeding heir being free of the obligation in question: he ‘has a sort of *jus quaesitum*, entitling him to say that he had not only a right to the benefit of the contract, but to refuse fulfilment of the counter obligation’.

¹¹⁴ (1857) 19 D 1099 (IH).

the tenant the sum which he had paid to the outgoing tenant in discharge of a personal liability of the landlord.¹¹⁵) There was, however, no guidance as to how to identify 'the proper matter of the lease'. Both Lords Curriehill and Deas referred to the non-transmission of terms extrinsic to the lease, but there are difficulties with each of their opinions. Lord Curriehill's conception of what was 'extrinsic' was narrow: the only example he gives is a term contained in a separate agreement which is unknown to the purchaser.¹¹⁶

3-32. In a passage surely influenced by *Montgomerie*, Lord Deas stated:¹¹⁷

But obligations may be engrafted upon a lease (as upon any other deed) which are extrinsic to its character as a real right, and not even essential to its objects as a contract. Such obligations are not necessarily to be dealt with in the same manner with the proper and inherent subject matters of the tack.

The reference to a term being 'extrinsic' is familiar, but question-begging. The issues with a test based on a term being 'essential' were noted above.¹¹⁸ Further, Lord Deas' formulation is difficult to square with the existing case law. He insisted that an obligation to pay even for those meliorations executed by the tenant during his lease did not qualify as part of the 'proper and inherent subject matter of the tack' and so did not bind a singular successor of the landlord. Yet by the time of *M'Gillivray's Exrs* it was already clear that an incoming landlord is bound by such obligations,¹¹⁹ and Lord Deas was forced to rationalise those earlier decisions as applications of *caveat emptor*.¹²⁰

Purchasers are bound to ascertain the terms of all current leases; and if they buy with postponed obligations patent on the face of the leases, or notorious by the custom of the country, it is no great stretch to hold that they have taken upon themselves these obligations.

This analysis is problematic. Mere notice does not result in successors being bound, otherwise the rules regarding the transmission of terms would cease to exist.¹²¹ Assuming that had been accepted by Lord Deas, one would then be left, on his analysis, with two classes of term which transmit: (i) those which do so automatically and (ii) those which do so because they are deemed to be adopted by purchasers who are held to have notice of the conditions in question, which in turn would have to be distinguished from (iii) those terms which are not deemed to have been adopted by the purchaser, even although he had notice

¹¹⁵ (1857) 19 D 1099 at 1101.

¹¹⁶ (1857) 19 D 1099 at 1104–1105. But knowledge does not determine transmission: para 4-05 and Ch 9 below.

¹¹⁷ (1857) 19 D 1099 at 1106.

¹¹⁸ Paras 3-26 to 3-28.

¹¹⁹ *Arbuthnot v Colquhoun* (1772) Mor 10 424 established this and has been followed ever since: see paras 6-30 *et seq.*

¹²⁰ (1857) 19 D 1099 at 1106.

¹²¹ See para 4-05 and Ch 9 below.

of them. Given the difficulty of developing one test to distinguish ‘real’ and ‘personal’ conditions, a further distinction seems unhelpful.¹²²

(d) *Gillespie v Riddell* (1908)

3-33. *Gillespie v Riddell* (1908)¹²³ is another case concerning entailed land. An heir of entail who succeeded to lands which were the subject of a lease was held not to be bound by an obligation to take over the outgoing tenant’s sheep stock and to pay the tenant the same amount for the stock which the tenant had paid when he took entry. The tenant argued that this provision was customary in leases of sheep farms: indeed, it was said that no sheep farm could be let without such a clause. He also pled that the condition was *inter naturalia* of the lease.¹²⁴ The tenant’s arguments did not succeed. The question whether the term was *inter naturalia* does not feature in the courts’ reasoning at any stage of the case.

3-34. The First Division emphasised that the case involved both questions of lease law (whether the term could bind a singular successor under ordinary rules of property and lease law) and entail law (whether to hold the successor bound by virtue of those ordinary rules would infringe a fetter of the entail).¹²⁵ The court’s view was that, applying either of these rules, the terms would not bind a successor. It is the analysis of lease law which is of interest here. At one point Lord Kinnear justified the decision on the basis that ‘in its true character [the obligation] is, in my opinion, a *personal contract over and above the lease*, and therefore is ineffectual as against the defender, who does not represent the contracting owner’.¹²⁶ This may support the suggestion above that the key to identifying real conditions is to identify those aspects of the parties’ agreement which are referable to the ‘contract of lease’. But, as with Lord Deas’ opinion in *M’Gillivray*,¹²⁷ there are aspects of the decision which suggest a narrower approach. For example, Lord Kinnear explained the non-transmission of the obligation to improve farmland in *Mackenzie*¹²⁸ as follows:¹²⁹

This was held to be a personal obligation which did not transmit against subsequent heirs of entail. It was not considered as a contravention [of the entail], because it

¹²² Although it may be that a distinction between different real conditions is drawn when determining the scope of the original landlord’s liability after transfer of the subjects: see Gloag *Contract* 264. That was, of course, the main issue in *M’Gillivray’s Exrs.*

¹²³ 1908 SC 628 (IH) affd 1909 SC (HL) 3. In the House of Lords, Lord Robertson gave the only speech, which was short. He commended the Inner House’s analysis as a ‘compendious account of this branch of the law which must hereafter be studied as of the highest authority’: 1909 SC (HL) 3 at 4.

¹²⁴ 1908 SC 628 at 630, 634–635.

¹²⁵ 1908 SC 628 at 638.

¹²⁶ 1908 SC 628 at 643 (emphasis added).

¹²⁷ See para 3-32 above.

¹²⁸ *Mackenzie v Mackenzie* (1849) 11 D 596 (IH), discussed at para 3-29 above.

¹²⁹ *Gillespie v Riddell* 1908 SC 628 (IH) at 640.

neither was nor could have been made a real burden on the land, and it made no difference that it was inserted in a lease, because the real right acquired under a lease is to possession of the land, and stipulations engrafted on the lease by which the landlord undertakes to pay money or perform an obligation are purely personal.

Read strictly, this suggests that a successor is not bound by *any* of the obligations of the lease, for all conditions incumbent on the landlord are either to pay money or to perform an obligation. Although that might have been a tenable (if unlikely) approach to the Leases Act 1449, it is not the approach of Scots law.¹³⁰ In *Gillespie*, Lord Kinnear¹³¹ and Lord President Dunedin¹³² both suggested that the rules about the constitution of real burdens laid down by Lord Corehouse in *Tailors of Aberdeen v Coutts*¹³³ apply also to terms of leases and had the effect of preventing the condition about sheep from being real, for it was an obligation to pay an uncertain amount of money. As is discussed below, the analogy is not a good one: the rules for the constitution of real conditions in leases and real burdens differ,¹³⁴ and an obligation in a lease to pay an uncertain sum of money can be a real condition: an obligation to compensate a tenant for the value of improvements to the property is a clear example.¹³⁵ In other ways, too, Lord Corehouse's rules are inapplicable to leases: there is no need, for example, to use words which clearly express or plainly imply that the term is to be real.¹³⁶ In light of all of these comments, it is hard to derive from *Gillespie* a formulation of a test for distinguishing real and personal conditions.

(e) *Milne v Darroch* (1937)

3-35. As noted above, this sheriff court decision from 1937 referred to *inter naturalia* as part of the test it applied. The sheriff stated that 'it is well settled that where a lease contains conditions or provisions which are not *inter naturalia* of a lease and are private or personal in their character, such conditions or provisions are not binding as [*sic*] singular successors'.¹³⁷ The case concerned an alleged agreement between father (landlord) and daughter (tenant) that the daughter need only pay rent if her father demanded it, and, if he did not, there was no obligation to pay. It was held that this would not have been binding in a question with a singular successor. Although there is reference to *inter naturalia*, the

¹³⁰ See paras 1-33 and 1-34 above.

¹³¹ 1908 SC 628 at 643.

¹³² 1908 SC 628 at 645.

¹³³ (1840) 1 Robin 296 (HL).

¹³⁴ See para 3-58 below.

¹³⁵ See paras 6-30 *et seq* below. The rule that an uncertain amount of money could not be constituted as a real burden applied only to pecuniary real burdens: WM Gordon *Scottish Land Law* (2nd edn, 1999) [21-04] and [22-51].

¹³⁶ See paras 3-58 *et seq* below.

¹³⁷ (1937) 53 Sh Ct Rep 3 at 11.

focus of the reasoning was on the fact that it was a personal arrangement referable to their relationship as father and daughter.

(f) *Norval v Abbey (1939)*

3-36. In this Inner House decision from 1939,¹³⁸ on the other hand, there was no reference to *inter naturalia* in the opinions and instead, as noted above, Lord Wark referred to Lord Jeffrey's test from *Montgomerie v Carrick*.¹³⁹ The case concerned whether an informally documented agreement that the landlord would carry out improvement works, in reliance on which the tenants entered into a lease, bound a successor to the landlord. The incoming landlord argued that the agreement was not binding because it was not recorded in the formal lease and that in any event it did not run with the lands.¹⁴⁰ The analysis of the second question is *obiter*, because the court held unanimously that the tenant could not rely on the terms given the lack of formality. However, Lord Wark said that if the terms could be regarded as having been imported into the lease (despite being in an informal prior writing) 'they would be enforceable against a singular successor, for they bear reference to the general relation of landlord and tenant and not to the private relation of the contracting parties – see *per* Lord Jeffrey in *Montgomerie v Carrick*'.¹⁴¹ That is a helpful affirmation and application of Lord Jeffrey's test.

(g) *Modern decisions*

3-37. After this, there appears to be no case until *Davidson v Zani*¹⁴² in 1992 in which the test for determining which terms of a lease are real and which personal is discussed. In *Davidson*, the question was whether an option bound a successor via the offside goals rule. However, there was some discussion of *Bisset v Magistrates of Aberdeen*. The Sheriff Principal described the question in that case as whether the term was 'incident to the continuing relationship of landlord and tenant', such that it would bind a successor.¹⁴³ That is a useful formulation. Cases since *Davidson* have referred to *inter naturalia* as a test to determine whether a term is real: *Optical Express (Gyle) Ltd v Marks & Spencer plc*¹⁴⁴ and *The Advice Centre for Mortgages v McNicoll*.¹⁴⁵

¹³⁸ 1939 SC 724 (IH).

¹³⁹ (1848) 10 D 1387, discussed at paras 3-25 to 3-28 above.

¹⁴⁰ 1939 SC 724 at 728.

¹⁴¹ 1939 SC 724 at 731. Lord Mackay agreed with Lord Wark. The remainder of the opinions focussed on the question of the informal nature of the lease.

¹⁴² 1992 SCLR 1001 (Sh Ct).

¹⁴³ 1992 SCLR 1001 at 1004–1005. The Sheriff Principal also noted the reference to 'inter naturalia' in *Bisset*.

¹⁴⁴ 2000 SLT 644 (OH) at 650–651. The case concerned an exclusivity agreement in a lease of a unit in a shopping centre.

¹⁴⁵ 2006 SLT 591 (OH) at [37]–[40]. The case concerned an option to purchase in a short commercial let.

(h) Conclusions

3-38. What may be drawn from these cases? The picture is not a harmonious one. It is suggested, however, that they contain support for the proposition that a real condition is a term of the lease which is referable to the relationship of landlord and tenant, whereas a personal condition is one which is not, and which is – in other words – extrinsic or collateral to the lease.¹⁴⁶ As we have seen, this was not the approach adopted by Gloag¹⁴⁷ or by Paton and Cameron,¹⁴⁸ nor has it been the approach of more recent cases which have addressed the issue. They propose that whether a term of a lease is a real condition depends upon whether the term is *inter naturalia* of the lease. But, as argued above, the *inter naturalia* test is, on closer examination, unsuited to the task of identifying real conditions. The approach proposed here, in its place, was adopted by Lord Jeffrey in the Inner House in *Montgomerie v Carrick*¹⁴⁹ and applied by Lord Wark in *Norval v Abbey*.¹⁵⁰ It is similar to Rankine's attempt at a general formulation.¹⁵¹ It is also the approach of the editors of Gloag and Henderson: as noted above, the *inter naturalia* test requires to be glossed, and their gloss is this:¹⁵²

[T]here may be conditions which are not *inter naturalia* of the lease, that is, provisions which have reference to the private relations of the contracting parties, and not to their general relations as landlord and tenant. By such provisions a singular successor of the landlord is not bound.

This approach coheres with the doctrinal explanation for the distinction between real and personal conditions. It is also supported by reference to decisions in feudal cases concerning the transmission of obligations against a successor of the superior,¹⁵³ which, as noted above, rejected as unsuitable an *inter naturalia*

¹⁴⁶ It may be, therefore, that referring to a 'personal condition of the lease' is a taxonomic error. Such a term is not a term of the contract of lease at all, for it is extrinsic to it. But the traditional language has been retained here both because of its familiarity and also because, in practice, even personal conditions will be viewed as terms of 'the lease', using that term to mean the contract created by a document known as 'the lease'.

¹⁴⁷ Gloag *Contract* 233–234.

¹⁴⁸ Paton and Cameron *Landlord and Tenant* 95.

¹⁴⁹ (1848) 10 D 1387 (IH) at 1396–1397.

¹⁵⁰ 1939 SC 724 (IH).

¹⁵¹ Rankine *Leases* 476. He viewed it as determinative of the status of break clauses: 528. Rankine did, however, there cite – without adverse comment – the *dictum* of Lord Ivory in *Montgomerie* which states that a term must be 'necessary' in order to be a real condition: 476.

¹⁵² Lord Eassie and HL MacQueen *Gloag and Henderson: The Law of Scotland* (14th edn, 2017) [35.04]. This formulation has been present since the first edition: WM Gloag and RC Henderson *Introduction to the Law of Scotland* (1927) 141. Despite the fact that this is almost a verbatim quotation of Lord Jeffrey in *Montgomerie v Carrick* (1848) 10 D 1387 (IH), that decision is not cited until slightly later in the text.

¹⁵³ As to which, see WM Gordon *Scottish Land Law* (2nd edn, 1999) [22–51] *et seq*, and H McKechnie 'Superior and Vassal' in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol 14 (1933) 293–294. Cf Reid *Property* [393], which states that the law knew no rules as to the content of feudal conditions which could bind successors. It is, fair to say that the contours of the limitations were not clearly articulated.

test.¹⁵⁴ The leading feudal case is *Stewart v Duke of Montrose*,¹⁵⁵ in which the court considered the transmissibility of an obligation by the superior to indemnify the vassal against minister's stipend and any augmentations of it.¹⁵⁶ The joint opinion of the Lord Justice-Clerk (Inglis), Lord Benholme and Lord Neaves provides a useful summary of the competing submissions:¹⁵⁷

The contention of the pursuers now is, that this obligation of relief is a condition of the feu-right, and is thus *inseparable from the feudal relation of superior and vassal*. The opposite view is, that it is merely a personal and collateral, or extrinsic, stipulation, accruing only to the grantee and his personal representatives or assignees, and operating only against the granter and his personal representatives.

Further support for this approach can be gained from considering the approaches of other jurisdictions, to which this chapter now turns.

(2) The position in other jurisdictions

3-39. Admittedly, just as this issue has proved difficult in Scotland, so it has elsewhere. It therefore cannot be said with confidence – and, in particular, an outsider may not say with confidence – that one particular approach represents the law of another jurisdiction. Also, although there are similarities in the general tests being applied, the results are not uniform in every jurisdiction.¹⁵⁸ These problems notwithstanding, the position in South Africa, England and Germany is now explored.

3-40. In South African law an important case states that ‘the purchaser acquires all the rights which the seller had in terms of the lease, except, of course, collateral rights unconnected with the lease’.¹⁵⁹ Another renders the aim as being to distinguish between the ‘conditions on which the land is let’

¹⁵⁴ See para 3-22 above.

¹⁵⁵ (1860) 22 D 755 affd (1863) 1 M (HL) 25.

¹⁵⁶ The superior concerned was not a singular successor of the original, but rather represented him. The focus of the case was whether the right to the indemnity had passed to the successor vassal without assignation. However, it was clear that the basis of the decision was that the term was referable to the feudal relationship between superior and vassal and would have bound the superior, even had he been a singular successor. See *Hope v Hope* (1864) 2 M 670 (IH) at 677.

¹⁵⁷ *Stewart v Duke of Montrose* (1860) 22 D 755 (IH) at 776 (emphasis added). A similar description can be seen in the speeches in the House of Lords: (1863) 1 M (HL) at 25, 27 and 29. Cf Lord Ivory (IH) 790, who seems to have a different understanding of ‘collateral’, given his statement that even collateral obligations may sometimes transmit against successors.

¹⁵⁸ A prominent example is a term permitting the tenant to set off a debt due by the landlord against rent, which, unlike the position in Scots law, is held to affect a successor in South African and German law, with academic approval. South Africa: Cooper *Landlord and Tenant* 290–292, discussing *De Wet v Union Government* 1934 AD 59; Germany: *Staudingers Kommentar* §566 Rn [40].

¹⁵⁹ *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (AD) at 1051A.

and 'collateral agreements'.¹⁶⁰ The approach adopted by Cooper, a leading commentator, to determining what rights are 'collateral' is more permissive than that of Scots law. His formulation is that:¹⁶¹

[T]he lessor-lessee relationship between a new owner and the lessee is governed *mutatis mutandis* by all the terms of the agreement between the lessor-seller and the lessee –

- (a) except in the case of those terms in respect of which the lessee can be said to have a *delectus personae*;
- (b) except in the case of a composite agreement; and
- (c) unless the lease indicates a contrary intention, viz the term in question shall apply to the original lessor only.

Cooper rejects the suggestion that the new landlord is affected only by those terms which are incident to the relationship of landlord and tenant, for there may be terms of the contract which, though not incident to that relationship, are nevertheless incident to the contract concluded by the original landlord and tenant. This is to adopt a purely contractual approach to determining whether a term transmits. It offers strong protection for the tenant, but it offers none at all to the successor landlord. In *Spearhead Property Holdings Ltd v E and D Motors (Pty) Ltd*¹⁶² the majority did not follow Cooper's test. The question in that case was whether an option to purchase bound a successor landlord. Hurt AJA noted that the effect of holding a term to transmit by application of the rule *huur gaat voor koop* is that a successor landlord becomes bound by a term, even if ignorant of it. That would be inequitable in the case of an option. The judge instead held that:¹⁶³

[T]he problem must be approached from an objective point of view which keeps in focus the basic purpose of *huur gaat voor koop*. On this approach, the question is simply whether the 'collateral right' (or the collateral obligation) relates to the lessee's real right of occupation *as lessee*.

That is similar to the approach proposed here for Scots law. Having said that, in a later case the South African Supreme Court of Appeal accepted that a term (an exclusivity clause) transmitted because it had been a *sine qua non* for the tenant taking the lease and therefore had been integral to the lease and could not be said to be collateral.¹⁶⁴ Further, it should be noted that the South African Constitutional Court has held that a common law rule which distinguished between terms of the lease on the one hand and, on the other hand, terms 'collateral' to that lease could no longer stand as it was incompatible with the

¹⁶⁰ *Shalala v Gelb* 1950 (1) SA 851 at 864. See also Kerr *Sale and Lease* 524–529.

¹⁶¹ Cooper *Landlord and Tenant* 297–298.

¹⁶² [2009] ZASCA 70, 2010 (2) SA 1.

¹⁶³ [2009] ZASCA 70, 2010 (2) SA 1 at [52].

¹⁶⁴ *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* [2015] ZASCA 164, 2016 (2) SA 586 (SCA) at [24].

South African Constitution.¹⁶⁵ That, however, was in the context of an extension of a lease, where the common law rule was that if when extending or renewing a lease the parties are silent on exactly which terms are extended, the parties' agreement does not extend to 'collateral' terms. The Constitutional Court held that there was no justification for this rule, which unduly favoured landlords. Some take the view that this ruling also affects the application of the *huur gaat voor koop* rule¹⁶⁶ but there appears to be room for argument about that, given that the decision was not itself concerned with the *huur gaat voor koop* rule.

3-41. The test proposed here for Scots law is similar to the approach of English common law and that of other systems of the Common Law tradition.¹⁶⁷ It is unclear whether this is the result of English influence¹⁶⁸ or simply an instance of the phenomenon of legal systems adopting similar solutions to identical problems.¹⁶⁹ Until English law was fundamentally changed by the Landlord and Tenant (Covenants) Act 1995,¹⁷⁰ the rule was that leasehold covenants transmitted if their benefit or burden was referable to the subject matter of the lease¹⁷¹ or, in the Common Law terminology, 'touched and concerned' the reversion or the term of years.¹⁷² This has been glossed in various ways. In a passage approved by the Privy Council,¹⁷³ Cheshire and Burn's *Modern Law of Real Property* stated that perhaps the clearest way of describing the test is 'if it [the covenant] affects the landlord in his normal capacity as landlord or the tenant in his normal capacity as tenant, it may be said to touch and concern the land'.¹⁷⁴ Another useful formulation is that of Fancourt, who writes that:¹⁷⁵

¹⁶⁵ *Mokone v Tassos Properties CC* [2017] ZACC 25, 2017 (5) SA 456 (CC).

¹⁶⁶ G Muller et al (eds) *Silberberg & Schoeman's The Law of Property* (6th edn, 2019) 517. In the first instance decision in *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels Moosa NO* [2020] ZAKZDHC 47 the KwaZulu-Natal Local Division of the High Court at [43] took the view that '*Mokone* overrules the majority's holding in *Spearhead* that the *huur gaat voor koop* rule protects only the terms of a lease and not collateral rights unconnected with the lease'.

¹⁶⁷ E.g. Australian law: B Edgeworth *Butt's Land Law* (7th edn, 2017) [7.1290].

¹⁶⁸ The concept of a contract 'running with the lands' seems to have been an English import: Rankine *Leases* 475. The precise date of the import is unclear. The use of the terminology seemed to confuse counsel in *Marquis of Breadalbane v Sinclair* (1846) 5 Bell App 353 at 372.

¹⁶⁹ K Zweigert and H Kötz *Introduction to Comparative Law* (3rd edn, transl T Weir, 1998) 39.

¹⁷⁰ Landlord and Tenant (Covenants) Act 1995 s 3 changed the rule for leases granted on or after 1 January 1996. The touch and concern requirement was replaced by a rule that all leasehold covenants transmit, except those which are expressed to be personal.

¹⁷¹ Law of Property Act 1925 ss 141 and 142.

¹⁷² For general discussion, see Gray and Gray *Elements* [4.5.34]–[4.5.96]; Megarry and Wade *Real Property* Ch 19; Woodfall *Landlord and Tenant* [11.048.1]–[11.063].

¹⁷³ *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] AC 99 (PC) at 107.

¹⁷⁴ EH Burn *Cheshire and Burn's Modern Law of Real Property* (14th edn, 1988) 425; in the current edition, EH Burn and J Cartwright *Cheshire and Burn's Modern Law of Real Property* (18th edn, 2011) 304.

¹⁷⁵ TM Fancourt *Enforceability of Landlord and Tenant Covenants* (3rd edn, 2014) [4.08].

purely personal or collateral covenants between the lessor and the lessee, which have no lasting significance for the continuing landlord and tenant relationship regardless of the identity of landlord or tenant, do not touch and concern . . .

It is suggested that these are also useful formulations for Scots law.

3-42. Experience in Germany illustrates the difficulties in this area and the problems to which too narrow a test may lead. §566 BGB is the provision which gives effect to the principle *Kauf bricht nicht Miete*. The acquirer is said to enter into only the rights and duties which arise from the contract of lease:¹⁷⁶

If the leased land is transferred by the lessor to a third party after delivery to the lessee, the acquirer takes the place of the lessor in *the rights and obligations arising from the lease* during the period when he is owner.

The scope of this provision has been the subject of controversy. As recounted in the *Münchener Kommentar*,¹⁷⁷ in interpreting this provision, one chamber of the *Bundesgerichtshof* had taken the position that the rights and duties had to be set out in the lease contract or a connected agreement. However, the Twelfth Chamber had taken a narrower approach, stating that an acquirer only becomes bound by obligations which refer to the leased land and therefore can only be performed by the owner for the time being of that land. That would cover the obligation to hand over the property for use by the lessee and to maintain it in a condition which complies with the contract.¹⁷⁸ However, that latter approach was criticised as too narrow and appears since to have been departed from. The *Bundesgerichtshof* now requires that the rights and duties either qualify as 'mietrechtlich' (i.e. that they be lease-like) or at least that they have an inseparable connection to the contract of lease. That approach has, however, itself also been criticised as being insufficiently clear.¹⁷⁹

¹⁷⁶ §566 I BGB. [Wird der vermietete Wohnraum nach der Überlassung an den Mieter von dem Vermieter an einem Dritten veräußert, so tritt der Erwerber anstelle des Vermieters in die sich während der Dauer seines Eigentums *aus dem Mietverhältnis ergebenden Rechte und Pflichten* ein.] (emphasis added).

¹⁷⁷ *Münchener Kommentar* §566 Rn [35].

¹⁷⁸ 1999 BGHZ 141, 160 at 166: 'Nach Sinn und Zweck des §571 tritt der Erwerber jedoch nur hinsichtlich solcher Verpflichtungen an die Stelle des Veräußerers, die sich auf das Grundstück beziehen und deshalb regelmäßig auch nur von dessen jeweiligem Eigentümer erfüllt werden können, namentlich hinsichtlich der Pflicht zur Gebrauchsüberlassung und Erhaltung in vertragsgemäßem Zustand.' [According to the meaning and purpose of §571, the acquirer takes the place of the transferor only in respect of those obligations which relate to the land and which can therefore regularly be performed only by the owner for the time being, particularly in respect of the duty to allow the tenant to use the property and the duty to maintain it in a condition which complies with the contract.] The equivalent provision to §571 after the recent reforms of the BGB is §566.

¹⁷⁹ *Staudingers Kommentar* §566 Rn [39]–[40].

E. FLESHING OUT THE PROPOSED TEST

(I) Burdened as landlord and benefited as tenant

3-43. The real conditions in a lease, it was argued above, are those which are referable to the relationship of landlord and tenant, while the personal conditions are those which are ‘extrinsic’ or ‘collateral’ to that relationship. On the basis that that is the appropriate test, the present section attempts to elucidate factors which may be applied in order to determine whether a particular term is referable to the landlord and tenant relationship.

3-44. When Erskine considered whether a successor landlord was bound by an obligation to allow the tenant to retain the rent, he asked whether the tenant was claiming *qua* tenant.¹⁸⁰ This idea remains crucial to the analysis. But how is it to be determined whether a party is benefited or burdened as (i.e. in the capacity of) landlord or as tenant? In *Stewart v Duke of Montrose*,¹⁸¹ when Lord Kinloch considered whether the right to relief against stipend was an inherent condition of the feudal relationship, he relied upon the fact that an assignation of the right to relief against stipend to anyone other than the proprietor of the lands would be ‘little better than an absurdity’. He concluded that this term should run with the lands as part of the relationship between superior and vassal, reasoning as follows:¹⁸²

[O]nly the proprietor of the lands could be subjected to the burden [i.e. of the increase in stipend], and therefore it is only in his favour that a right of relief would have any practical effect. . . . Construed as for the benefit of any other than the existing proprietor, the obligation would be comparatively meaningless.

That is similar to the English approach to determining whether the benefit of a covenant touches and concerns land or a reversion.¹⁸³ To the extent that this is an absolute test – i.e. if the benefit of a term runs with the land if it is *only* of use to the successor – it seems too strict. There are terms which would remain

¹⁸⁰ Erskine *Institute* II vi 29.

¹⁸¹ (1860) 22 D 755 (IH) affd (1863) 1 M (HL) 25.

¹⁸² (1860) 22 D 755 at 784–785. See also (1863) 1 M (HL) 25 at 27: ‘[T]he nature of the obligation is such as was plainly intended to accompany and follow the feu in its transmissions, for it is an engagement which none but the actual vassal can claim the benefit of’. Lord Ivory ((IH) 789–790) described a result which separated the right (i.e. right to claim indemnity) and the ownership of the teinds as ‘a solecism in law’. He noted that, by separating the ownership of the teinds from the entitlement to indemnity, the right would be refused to the only person with any interest in the matter. Of course, there were other formulations, such as Lord Deas’ well-known statement that, in order to transmit, obligations must have the ‘qualities of permanency, immediate connection with the estate, natural relation to the objects of the grant, and so on, which indicate their character as inherent conditions of the right’: (IH) 803–804.

¹⁸³ *Kumar v Dunning* [1989] 1 QB 193 (CA) at 204C (‘is the covenant beneficial to the owner for the time being of the covenantee’s land, and to no one else?’). See also *Vernon v Smith* 5 B and Ald 1 at 10, 106 ER 1094 at 1097; *P and A Swift Investments v Combined English Stores Group plc* [1989] AC 632 (HL) at 641–642 which contains an important statement of English law’s approach.

of benefit to an original party after transfer and which would remain capable of performance by the original obligor after transfer, but which are rightly regarded as real. Such a test would be particularly problematic for terms requiring the payment of the money: the original landlord can pay money even after it has transferred the leased property and, conversely, does not need to be a landlord to stand to benefit from the payment of money. Also, such a test is too narrow to account for terms of the lease which are real but which relate to other property (as discussed in chapter 7). Such terms are not solely capable of performance by a successor landlord: the owner of the other land would be able to perform; in fact, such an owner might be able to perform more easily. However, in some such circumstances, Scots law treats the term as a real condition.

3-45. The test, therefore, is better phrased in less demanding, relative terms. For example, the *Restatement of the Law Third: Property: Servitudes* in the United States distinguishes between ‘servitudes’ which are ‘appurtenant’ to land and those which are ‘in gross’. The benefit of a servitude is appurtenant to an interest in property ‘if it serves a purpose that would be more useful to a successor to a property interest held by the original beneficiary of the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of that interest to a successor’.¹⁸⁴ Similarly, the burden is appurtenant if ‘it could more reasonably be performed by a successor to a property interest held by the original obligor at the time the servitude was created than by the original obligor after having transferred that interest to a successor’.¹⁸⁵ In the leases context, the question would be whether a term would be of more (not sole) benefit to a successor landlord or tenant than to the original party. If so, it benefits that person as landlord or as tenant. Similarly, if an obligation is more readily or reasonably performable by the successor landlord or tenant than by the original landlord or tenant, then it binds that person as landlord or as tenant. When considering an obligation to pay money, a distinction may be drawn according to what the payment is for. So an obligation to reimburse the cost of repairs carried out by the tenant will burden the landlord as landlord, and a right to rent will benefit him as landlord, whereas an undertaking simply to repay a loan which the tenant has made to the landlord will burden him only in a personal capacity.

3-46. A common objection to formulations which ask whether a party is bound or benefited in a particular capacity is that they are circular: a landlord is burdened as landlord if the obligation is a real condition, and it is a real condition if he is burdened as landlord.¹⁸⁶ Unsatisfactory as it may be, a certain level

¹⁸⁴ American Law Institute *Restatement (Third) of Property: Servitudes* (2000) §4.5(1)(a).

¹⁸⁵ *Restatement (Third) of Property: Servitudes* §4.5(3)(a).

¹⁸⁶ Provided that the tenant is benefited as tenant. For criticisms of the circularity of such tests, see e.g. *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] AC 99 (PC) at 112F; HA Bigelow ‘The contents of covenants in leases’ (1914) 30 LQR 319, 319; L Berger ‘A policy analysis of promises respecting the use of land’ (1970) 50 Minnesota L Rev 167, 210; JE Stake ‘Towards an economic understanding of touch and concern’ [1988] Duke LJ 925, 929.

of circularity is inevitable. The approach proposed is not as circular as some variants¹⁸⁷ and seems sufficiently certain as to be workable.¹⁸⁸ The discussion in the chapters which follow will indicate how such a test functions in respect of particular terms.

(2) An independent analysis of benefit and burden?

3-47. Are benefit and burden to be analysed separately,¹⁸⁹ that is to say, if an obligation binds the landlord *as* landlord, but the correlative right does not benefit the tenant *as* tenant, does the term nevertheless bind a successor landlord, even although, upon transfer by the tenant, it may be that the assignee does not acquire the right?¹⁹⁰ A term might affect the landlord as landlord but not the tenant as tenant (or vice versa) for one of two reasons. It might be because of the nature of the term or, alternatively, it might be that the benefit or burden of a term which would otherwise be a real condition has been expressed to be personal to a particular party. Each possibility is addressed in turn.

(a) *The substance of the term*

3-48. So far as can be discerned, there is no Scottish consideration in a lease case of the question whether benefit and burden can be analysed, and can transmit, separately. The American commentator Berger argues that there is no policy reason why benefit and burden should not be analysed separately.¹⁹¹ It is suggested, however, that in order for a term to be a real condition in Scots law, both the benefit and the burden of the term must affect the landlord as landlord and the tenant as tenant. The point was considered in the feudal context by Lord Deas in *Hope v Hope*.¹⁹² In his explanation of the rationale behind *Stewart v*

¹⁸⁷ E.g. ones which determine whether a party is benefited as proprietor if the right increases the value of the land: any right attached to land will increase its value.

¹⁸⁸ The House of Lords contented itself with providing a 'satisfactory working test', albeit one which was not exhaustive, in *P and A Swift Investments v Combined English Stores Group plc* [1989] 1 AC 632 (HL) at 642E.

¹⁸⁹ The transmission of the benefit and burden of leasehold covenants is analysed separately in respect of pre-1995 Act leases in English law: *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA) at 50L ('the transmission of the benefit does not depend on the transmissibility of the burden'); Megarry and Wade *Real Property* [19-036].

¹⁹⁰ This book does not consider the rules which apply to transfers of the tenant's right. Gloag, Paton and Cameron, and Gordon all state that the same distinction between real and personal conditions is drawn upon transmission of the tenant's right as upon transfer by the landlord, but there is no readily available case law which considers the issue: see Gloag *Contract* 233; Paton and Cameron *Landlord and Tenant* 95; Gordon *Scottish Land Law* (2nd edn, 1999) [23-22].

¹⁹¹ Berger (1970) 50 *Minnesota L Rev* 167, 213. Bigelow (1914) 30 *LQR* 319, 331 discussed the Common Law authorities.

¹⁹² (1864) 2 M 670 (IH).

Duke of Montrose,¹⁹³ he made clear that, when considering whether a feudal condition had transmitted as part of the relationship of superior and vassal, benefit and burden were inter-dependent.¹⁹⁴

The liability, on the one hand, and the right to enforce it upon the other, depended upon the same principle, – namely that the obligation related directly to the subject of the grant and the permanent enjoyment of it by the vassal, and that thus it formed an inherent part of the feu-contract, transmissible on both sides by the mere continuance of the relation of superior and vassal. . . . There would be no consistency in holding that the vassal could enforce the obligation because it was a condition inherent in the feudal relation constituted by the grant, and yet that the superior was not liable to implement it *qua* superior, on the same ground.

The reasoning applies equally to leases. In order to be referable to the relationship of landlord and tenant, a term must both burden the landlord as landlord and benefit the tenant as tenant, or vice versa.

(b) Terms expressed to be personal

3-49. It will be suggested below that, although parties to a lease cannot make a personal condition real merely by stating it to be so, they can, within limits, make what would otherwise be a real condition personal.¹⁹⁵ It seems, however, that very precise language is required to achieve this. Does this freedom extend to making a term personal at one end only, so that – for example – the benefit of a break clause (which is a real condition) could be made personal to the original tenant but the burden would affect a successor landlord? There seems to be no reason in principle why not. On the contrary, it seems desirable that this should be possible. The point is of considerable commercial importance, as the benefit or burden of particular terms of leases, such as options or provisions relating to a reduction in rent, are often stated to be personal to one party. An example clarifies the issue. In the English case of *System Floors Ltd v Ruralpride Ltd*¹⁹⁶ the landlord covenanted *inter alia* that he would accept surrender of the leases within three months of a rent review, but stated that this privilege was to be personal to the original tenant. An assignee of the reversion was held bound by the covenant in a question with the original tenant, but he would not have been bound to an assignee of the lease.

¹⁹³ (1860) 22 D 755 (IH) affd (1863) 1 M (HL) 25, discussed at para 3-22 above.

¹⁹⁴ *Hope v Hope* (1864) 2 M 670 (IH) at 677. See also in *Stewart v Duke of Montrose* itself: ‘In an ordinary disposition the obligation must be of a purely personal nature, for there is no room for anything else; and, being thus purely personal on the one side, the inference of the House of Lords deduced, in the cases of *Maitland* and *Sinclair*, naturally arises – that the right to enforce the obligation is also personal on the other side . . . it does not pass *ipso jure*, with the lands, but requires to be transmitted like any other personal and collateral right’: (1860) 22 D 755 (IH) 798.

¹⁹⁵ Paras 3-58 *et seq.*

¹⁹⁶ [1995] 1 EGLR 48 (CA).

3-50. The question whether Scots law would recognise that a successor of the landlord could be burdened by an obligation, the benefit of which is expressly stated to be personal to a particular tenant, has not been authoritatively addressed. The practical response is to bind the landlord to procure his successors bound by the obligation. However, not every tenant will be able to obtain such a promise and, in any event, such chain clauses are only as good as the landlord. They expose the tenant to the risk of breach by the landlord or his insolvency. The question whether the burden of such a term transmits automatically is therefore important. The point was raised in argument in *Optical Express*, where the benefit of an exclusivity clause was stated to be personal to the tenant. Lord Macfadyen opined that this was irrelevant to whether the burden of the obligation could transmit.¹⁹⁷ This appears sound. It is suggested that Scots law, like English, allows the parties to a lease to agree that the benefit or burden of a real condition is to be personal to one party only, or to a defined class of parties. This is not inconsistent with the rule that benefit and burden are analysed as a unity, such that the term in question must be referable to the relationship of landlord and tenant. It is merely one of the means by which the parties are permitted to regulate their relationship of landlord and tenant. A useful way to approach the matter is to consider whether the term would have been a real condition had it not been expressed to be personal: if so, the fact that it is expressed to be personal to one party does not prevent it from being a real condition. If parties provide that, for example, a break clause is available for the first five years of the lease, the temporal restriction does not prevent the term from being real. The fact that they choose another restriction (namely, that the term is to subsist only as long as a particular person is tenant) should not result in a different analysis.

(3) Policy concerns: terms not contrary to the nature of the lease or to another rule of law

3-51. There are some terms which, although they bind only the landlord for the time being and benefit only the tenant for the time being, and so satisfy the first element of the general test proposed here, are nevertheless not real conditions. There must, therefore, be a further element to the analysis. It is suggested that for a term to be referable to the relation of landlord and tenant it cannot be incompatible with that relationship. Nor may it be incompatible with the right which the transferee acquires (ownership in the case of transfer by the landlord) or with some other rule of law or public policy.

3-52. This rule finds its roots in the tendency, noted above, to explain decisions in the early cases on the basis of incompatibility with some rule of

¹⁹⁷ *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 650B.

lease law.¹⁹⁸ Furthermore, rules preventing the transmission of conditions which are incompatible with the nature of the right burdened are well-established in other areas of law. Lord Young's 'repugnancy with ownership'¹⁹⁹ ground is a well-known objection to the validity of a real burden.²⁰⁰ Similarly, a servitude cannot detract excessively from the burdened proprietor's ownership.²⁰¹ One would expect these rules to have analogues in lease law.

3-53. Because of the diversity of uses to which leases may be put, it is difficult to maintain that they have a single 'nature'.²⁰² On the contrary, they are protean. In the discussion of specific terms in the following chapters, this element of the general test finds application in respect of terms relating to the duration of leases and options to purchase. So whilst an obligation on a landlord to renew the lease in perpetuity can more readily be performed by the owner of the property for the time being and is of more benefit to the tenant for the time being, such a term is said not to be a real condition because it is inconsistent with the nature of a real right of lease which, as matters currently stand, must have a definite duration.²⁰³ A term preventing the termination of a periodic tenancy would also, presumably, fall foul of this rule.²⁰⁴ An obligation or an option to renew a lease is also, as the law stands, a personal condition: to hold otherwise would be inconsistent with the rule that a lease to begin at some point in the future does not bind a successor until the tenant possesses by virtue of the lease.²⁰⁵ Similarly, there are particular policy reasons which justify the rule that options to purchase do not bind singular successors of the landlord, namely the potential for an innocent purchaser, ignorant of the option, to be deprived of the property.²⁰⁶

(4) 'Customary and usual' terms: an automatic exception?

3-54. It was said in *Bisset v Magistrates of Aberdeen* that it would have 'materially aided' the tenant's contention that the successor was bound by the obligation to grant a feu charter had he shown that the obligation was 'customary and usual in

¹⁹⁸ See para 3-04 above.

¹⁹⁹ E.g. *Earl of Zetland v Hislop* (1881) 8 R 675 (IH) at 681 revd (1882) 9 R (HL) 40.

²⁰⁰ Now codified in Title Conditions (Scotland) Act 2003 s 3(6). Equally, under s 3(6), a burden must not be illegal or contrary to public policy.

²⁰¹ DJ Cusine and RRM Paisley *Servitudes and Rights of Way* (1998) [1.71]; *Moncrieff v Jamieson* [2007] UKHL 42, 2008 SC (HL) 1 [24] (Lord Hope), [47], [54]–[61] (Lord Scott), [134]–[144] (Lord Neuberger), cf [76] (Lord Rodger); Title Conditions (Scotland) Act 2003 s 76(2).

²⁰² A point made by I Quigley 'On the wrong track' (2007) 52 JLSS Feb/48, 49.

²⁰³ See paras 5-23 *et seq* below.

²⁰⁴ Discussed in the English case of *Mexfield Housing Ltd v Berrisford* [2011] UKSC 52, [2012] 1 AC 955.

²⁰⁵ See paras 5-23 *et seq* below. It is suggested in ch 5 that the rule in respect of options to renew could safely be changed to allow them to transmit.

²⁰⁶ See paras 6-07 *et seq* below.

leases of such duration'.²⁰⁷ Indeed, Gloag, and Paton and Cameron, went so far as to say that terms which were customary and usual were to be automatically classified as real conditions.²⁰⁸ That, however, is not the law.²⁰⁹ In *The Advice Centre for Mortgages v McNicoll*, Lord Drummond Young stated the normal rule as being that options to purchase are not real conditions, but that exceptions may exist, one of which is 'where it is established by evidence that custom and practice in leases of a particular nature is to insert a particular form of clause'.²¹⁰ That appears to go further than Lord Moncreiff in *Bisset* and to suggest that, whenever a term can be shown to be customary and usual in the class of leases concerned, it will be held to be a real condition. In fact, there is no necessary correlation between a term being customary in a class of leases and its being referable to the relationship of landlord and tenant.²¹¹ It would be illogical for proof that a term is customary and usual in a class of leases to operate as an automatic 'override' of the general rule. Further, it is inconsistent with the case law: in many cases, terms have been held not to transmit, even though the term was apparently common. In *Ross v Duchess-Countess of Sutherland*²¹² and *Gillespie v Riddell*,²¹³ terms which were said to be common were held not to bind a successor landlord, and the 'lease as security' cases likewise concerned an arrangement that seems to have been common. Nevertheless, evidence of practice is plainly useful. The possibility of leading such evidence is welcomed by Quigley as a means of keeping decisions in this field in line with commercial reality.²¹⁴ One would certainly think hard before holding that a term which has been shown to be customary and usual in leases is not a real condition, given the practical difficulties which such a conclusion causes. In those circumstances, one should consider whether the reasons for holding the term to be personal are cogent. Nevertheless, the possibility of such terms being personal must remain open.

(5) Registered leases

3-55. The rules outlined above apply regardless of whether the lease is registered or unregistered, but there seems to be only one case concerning the distinction between real and personal conditions which considered registered leases: *Bisset v Magistrates of Aberdeen*.²¹⁵ The tenants argued that the lease had been registered and that the case was therefore not one of a latent or indefinite

²⁰⁷ (1898) 1 F 87 (IH) 90.

²⁰⁸ See para 3-23 above.

²⁰⁹ *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) at 650H.

²¹⁰ [2006] CSOH 58, 2006 SLT 591 at [39].

²¹¹ See para 3-23 above.

²¹² (1838) 16 S 1179 (IH) at 1182.

²¹³ 1908 SC 628 (IH) affd 1909 SC (HL) 3.

²¹⁴ Quigley (2007) 52 JLSS Feb/48. He cites, in particular, the examples of exclusivity clauses and options to purchase, both of which are common in particular classes of lease.

²¹⁵ *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 88.

burden, so the term should transmit.²¹⁶ The fact that the lease was registered was not noted in any of the judgments, so it cannot have been regarded as material by the judges. This case is clear authority that the real condition/personal condition distinction is also drawn in respect of registered leases.

3-56. The opposite argument is sometimes advanced.²¹⁷ However, quite apart from the fact that this is inconsistent with *Bisset*, the approach in *Bisset* can be justified by reference to the terms of the Registration of Leases (Scotland) Act 1857. It is sometimes argued that section 2 of the 1857 Act is unqualified when it states that, when a lease which is valid and binding against the grantor of it is registered, it ‘shall, by virtue of such registration, be effectual against any singular successor in the lands and heritages thereby let’. However, section 2 applies only to render *the lease* binding on a successor. Further, section 16 provides that registration completes the tenant’s right as effectually as if he had entered into possession at the date of registration, which can be treated (if need be) as importing the rules that apply to unregistered leases in this respect. Further, the provisions in respect of registration in the Land Register, now included as section 20B of the 1857 Act, provide that registration makes the lease real *insofar as the right is capable, under any enactment or rule of law, of being made real*. The doctrinal reasons above for distinguishing between real and personal conditions apply as much to registered as to unregistered leases.²¹⁸

3-57. Nevertheless, there are policy arguments that unregistered and registered leases should be treated differently. In particular, it is sometimes said that the purpose of the rule that some conditions affect only the original landlord is to protect purchasers and that they are in no need of protection when registration alerts them to any obligations which the lease would impose upon them. Notice, it is said, cures all. This policy argument is considered and rejected in chapter 4.²¹⁹ Just as notice does not cure all in respect of real burdens, so, as the law currently stands, it does not cure all in respect of terms of leases.

F. INTENTION AND INTERPRETATION

(I) General approach

3-58. In contrast to the law of real burdens, where the use of words to indicate that a burden is real is a formal requirement,²²⁰ there is no similar requirement in

²¹⁶ (1898) 1 F 87 at 90.

²¹⁷ S Brymer ‘Enforcing commercial lease terms against singular successor landlords’ (2000) 49 Property Law Bulletin 4 and (2001) 50 Property Law Bulletin 3; Quigley (2007) 52 JLSS Feb/48, 49.

²¹⁸ See paras 3-06 to 3-12 above.

²¹⁹ See paras 4-13 *et seq* below.

²²⁰ Title Conditions (Scotland) Act 2003 s 4(2)(a), (3).

lease law. Nor is there discussion of the relevance of intention and interpretation in the sections of lease texts dealing with real and personal conditions. Yet these concepts must have a role in the analytical framework of real and personal conditions. This section considers that role.

3-59. The rule that only certain terms of a lease are real conditions is mandatory, so parties cannot make a term real when it would not otherwise be so. This is also the position in English law.²²¹ Parties can, however, make personal a term which would otherwise be real, and in that sense the role of intention is a negative one. The power to do so is, however, limited: for example, a provision that the right to rent is personal to the original landlord would not affect a successor, because a successor acquires the right to rent as a civil fruit of the property.²²² This section considers how to determine whether a term is intended by the parties to be real or personal.

3-60. A term is a real condition without the need for a statement that the parties intend the term to be real. In *Warren James (Jewellers) Ltd v Overgate GP Ltd*,²²³ Lord Drummond Young correctly rejected an argument that the common law rules regarding the precision required to create a real burden (i.e. that the burden must be clear and unambiguous and that there may be no reliance on extrinsic evidence as an interpretative aid) applied to leases. Rankine notes that the English rules which insisted upon the use of the word ‘assigns’ in a lease in order for an assignee to be bound by covenants *in posse* ‘have no analogue in our law’.²²⁴ There is no need to use any particular expression in order to create a real condition in a lease. This is appropriate, given that the vast majority of lease terms are real conditions. Instead there is a presumption that if the content of a term is such that it is referable to the relationship of landlord and tenant, the parties intend it to be real. A well-drafted lease will indicate which, if any, of its provisions are intended to affect only the original parties. The unresolved question is just how clear the

²²¹ Woodfall *Landlord and Tenant* [11-051]. Cf in the United States: American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977) §16.1 Reporter’s Note 5: traditionally intent could prevent the burden of a promise which touched and concerned land from running with the land, but could not overcome a failure to touch and concern; ‘today, intent might be viewed as the controlling factor’. That statement is difficult to reconcile with the approach of the Restatement, which retains ‘touch and concern’ and ‘intention’ as separate requirements for the burden of a promise to transmit to a successor.

²²² Erskine *Institute* II vi 20. See also P Gane (transl) *The Selective Voet* (1956) XIX ii 19; Bankton *Institute* II iii 169.

²²³ [2005] CSOH 142, 2006 GWD 12-235 at [16]–[19], affd [2007] CSIH 14, 2007 GWD 6-94.

²²⁴ Rankine *Leases* 475 n 8. He is referring to the rule that covenants relating to things *in posse* (not in existence) had to mention ‘assigns’ in order to bind assignees to the lease. This does not apply to leases concluded after 1926, so modern English law also contains no rules on how a covenant must be phrased in order to transmit to assignees: Megarry and Wade *Real Property* [19-052]. That is also the position of the *Restatement of the Law Second: Landlord and Tenant* §16.1.

parties must be in order to show that this is their intention. The case law is not consistent.

3-61. *Murray v Brodie*²²⁵ and *Ross v McFinlay*²²⁶ both concerned break clauses. Despite being expressed in a way which might have been thought to restrict the benefit to the original landlord, the options were said to be available to the landlords' successors in title. In *Murray* the lease allowed for the landlord to resume possession 'personally and by herself only'.²²⁷ In *Ross* there was an 11-year lease with a break 'at the end of five years in favour of Mr Ross [the landlord], in case he chooses to take the whole or part for himself or his brother'. In *Ross* the court stated that:²²⁸

... the faculty reserved in the tack was not personal, but an ordinary power, transmissible to a purchaser. The texture of a clause of resumption might be such as to make it otherwise; but there would be need of a precise limitation for that purpose ...

Hunter criticised the decisions for ignoring the terms of the lease,²²⁹ and that criticism has force, especially in respect of *Murray*, where the term was expressly said to apply to the landlord personally. Rankine, however, viewed the criticism as unfounded, noting the decisions simply as illustrations of the strength of the presumption that a term which is referable to the relation of landlord and tenant runs with the lands.²³⁰

3-62. Doubt about the weight to be given to the wording of a term can also be seen in *Bisset v Magistrates of Aberdeen*.²³¹ Lord Trayner required rather less than *Murray* and *Ross* might suggest when he concluded that the wording of an option to purchase meant that it bound only the original landlord. He noted simply that the option was expressed to be binding on the landlord alone, distinguishing it from the position in *Wight v Earl of Hopetoun*,²³² where an option had been stated to bind the landlord and his heirs and successors.²³³ The phrasing of the option should, in any event, have been compared with the phrasing of other provisions of the lease.²³⁴ The case report in *Bisset* does not disclose the entire terms of the lease. If none of the other terms was stated

²²⁵ (1806) Hume 825 (IH).

²²⁶ (1807) Hume 832 (IH).

²²⁷ (1806) Hume 825 (IH) 825.

²²⁸ (1807) Hume 832 (IH) 834.

²²⁹ Hunter *Landlord and Tenant* vol II 118.

²³⁰ Rankine *Leases* 528.

²³¹ (1898) 1 F 87 (IH).

²³² (1763) Mor 10461.

²³³ (1898) 1 F 87 (IH) 89.

²³⁴ Cf *Montgomerie v Carrick* (1848) 10 D 1387 (IH) at 1392, where the successor argued that the failure to mention successors in the arbitration clause of the lease, in contrast to their being mentioned in other clauses, meant that the arbitration clause was not a real condition. This was rejected by the Lord Ordinary as being 'too hypercritical to be listened to'. See the similar leniency in the feudal case of *Holburn v Buchanan* (1915) 31 Sh Ct Rep 178.

to bind successors, the fact that the option was also not does little to indicate that the parties intended it, unlike the other terms of the lease, to bind only the original landlord. It seems difficult to reconcile Lord Trayner's position in *Bisset* with the decisions in *Murray* and *Ross*, to which no reference was made. *Bruce v McLeod*²³⁵ and *Turner v Nicolson*²³⁶ – which, it was suggested in chapter 2,²³⁷ are best analysed as cases where a term was held not to transmit because it was intended only to bind the grantor and not his successors – are also difficult to reconcile with the idea of a strong presumption in favour of transmission, because the parties' intention that the obligation should bind only the grantor was far from clear in those cases. The best that can be said is that the presumption in favour of transmission has not, in the past, been consistently applied. This is a consequence – perhaps – of the fact that the relevance of intention has not previously been highlighted as a separate aspect of the analysis, and also of the fact that questions of interpretation are highly fact-dependent and particularly susceptible to differences of opinion.

(2) Back-letters

3-63. Within the framework of ascertaining the parties' intention as to transmission, the approach taken to back-letters might differ from the approach taken to terms included in the main document of lease. By use of a back-letter, parties make a deliberate choice to record some terms separately from the main provisions of a lease.²³⁸ This might be argued to demonstrate an intention that the terms should not affect a successor. In *Optical Express*, Lord Macfadyen approached the question whether a successor was bound by a back-letter by asking whether the back-letter amounted to a 'variation' of the main lease document. It was suggested in chapter 2 that it would have been better to ask whether the parties' decision to detail certain terms of their agreement in an unrecorded back-letter expressed the intention that these terms should not bind successors of the landlord.²³⁹ Lord Macfadyen's discussion in *Optical Express* indicates that this is not a black-and-white issue. There can be a number of reasons for expressing terms in a back-letter other than an intention that the terms should not transmit to successors. A desire for privacy is a prime example.²⁴⁰ In addition, a back-letter is sometimes used precisely because the parties want a successor landlord to be bound by a particular term, but it is unclear that the term would be classified as a real condition. The parties might then record

²³⁵ (1822) 1 Sh App 213.

²³⁶ (1835) 13 S 633 (IH).

²³⁷ See paras 2-05 to 2-10 above.

²³⁸ This is not the case with variations. Although they appear in a separate document, the parties have no realistic choice but to do this.

²³⁹ See paras 2-52 to 2-57 above.

²⁴⁰ It may be that the lease is registered in the Books of Council and Session, but the back-letter is very unlikely to be.

the term in a back-letter, but at the same time include a requirement to take any successor bound in the event that the landlord transfers the subjects. Rent-phasing clauses and exclusivity agreements are two commercially significant examples where this might be done.

3-64. When the transmission of the provisions of a side-letter was considered by the English Court of Appeal in *System Floors*, little weight was placed on the parties' choice of medium for recording the term.²⁴¹ The benefit of the side-letter was expressly stated to be personal to the tenant. It did not refer to the landlord's assignees in the reversion, but only to 'we', 'us' and 'our'. This was held to be a reference to the landlord for the time being, especially when contrasted with an express statement that the benefit of the side-letter was personal to the tenant. Particular weight was placed on the need for a commercial interpretation of the document. The tenant would not, it was said, have been content for the landlord to be able to defeat the covenant created by the side-letter by disposing of the reversion.²⁴² The trial judge had refused to be swayed by this point, reasoning that a personal obligation may have been all that the tenant was able to extract in negotiations. It is suggested that the English Court of Appeal's approach was more commercial and appropriate.

(3) Conclusion

3-65. Again, therefore, we see an area which is under-developed, and indeed rarely addressed at all as a distinct issue in the Scottish analysis of the transmission of terms.²⁴³ What is clear, however, is that there is no need for an express statement that a term is to bind a successor in order for it to do so. Rather the presumption is that if the content of a term is such that it is referable to the relationship of landlord and tenant, such that it can qualify as a real condition, then the parties intend it to transmit to successors. It would be logical if the clarity of expression required to indicate an intention to depart from that presumption were proportionate to the strength of the conclusion that the condition belongs to the relationship of landlord and tenant, but this might require too fine an analysis. Ascertaining the parties' objectively expressed intention is not an exact science. This serves to highlight the importance of clarity of expression. If the parties intend that a term is not to transmit to a successor, clear language should be used to indicate that the term is personal. Similarly, draftsmen should be careful that differences in expression between

²⁴¹ *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA). There are other English decisions which take the same approach: e.g. *Lotteryking Ltd v AMEC Properties Ltd* [1995] 2 EGLR 13 (Ch).

²⁴² [1995] 1 EGLR 48 (CA) at 49J and 51C.

²⁴³ In Lord Moncreiff's opinion in *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 90, the two points (i.e. the substantive objection to an option to purchase transmitting and the question of the parties' intention) were not really analysed separately.

clauses (e.g. some clauses referring expressly to the landlord and its successors, while other clauses simply refer to the landlord) do not give rise to an unintended suggestion that some clauses are intended to be personal.

G. CONCLUSION

3-66. This chapter has sought to outline the rationale behind the distinction between real and personal conditions and to propose a test for how that distinction may be drawn. Key conclusions are as follows. The distinction between real and personal conditions is a mandatory rule of law. That rule is justifiable by key principles of both property and contract law doctrine. It applies equally to unregistered and registered leases and it cannot be overcome by the parties to the lease declaring a term ‘real’ when otherwise it would not be. In general, the distinction is between terms which are attributable to the relationship of landlord and tenant (which do transmit) and those which are collateral or extrinsic to that relationship (which do not).²⁴⁴ Although it has become common to say that the test is whether a term is *inter naturalia* of the lease, when that is properly analysed, it can be seen not to be a helpful test:²⁴⁵ if the phrase is being used in a technical sense i.e. to refer to the default rules of a contract of lease, it is unsuitable for distinguishing between real and personal conditions; if it is being used with some other meaning which needs to be spelled out, using the phrase *inter naturalia* does not assist.

3-67. In assessing whether a term is referable to the relationship of landlord and tenant so as to be a real condition, it is useful to consider:

- (i) whether the term burdens the landlord as landlord and benefits the tenant as tenant, or vice versa: if an obligation on the landlord is more readily performable by a successor landlord than by the original (and now ex-) landlord, and the correlative right in favour of the tenant is of more use to a successor tenant than to the original (and now ex-) tenant, it will satisfy this limb of the test; and
- (ii) whether to allow the term to transmit would be inconsistent with the nature of a lease, or with another rule of law, or would be contrary to broader legal policy.

On the other hand, it is not, as is sometimes suggested, sufficient to make a term a real condition that the term is ‘commonplace’: instead, the analysis is a qualitative one, based on the nature of the term.

²⁴⁴ This approach is adopted, in particular, by Lord Jeffrey in *Montgomerie v Carrick* (1848) 10 D 1387 (IH), Lord Wark in *Norval v Abbey* 1939 SC 724 (IH), and in *Davidson v Zani* 1992 SCLR 1001 (Sh Ct).

²⁴⁵ A view shared by D Haughey ‘Transmissibility of lease conditions in Scots law – a doctrinal-historical analysis’ (2015) 19 EdinLR 333.

3-68. There is no need for particular words to be used to render a term a real condition; however, if the parties to the lease have clearly expressed an intention that a term be personal to particular parties, that can render personal a term that would otherwise have been real.

3-69. Chapter 4 analyses this approach from the perspective of legal policy. Chapters 5 to 7 consider in more detail how specific terms have been treated. In anticipation, and for ease of reference, the results of that analysis are summarised here, along with the classification of some terms which are not considered in those chapters.

3-70. The following conditions are likely to be real:

- a break option;²⁴⁶
- an obligation to compensate the tenant for the value of improvements made to the property;²⁴⁷
- an obligation to allow the tenant to make use of other land as a pertinent or accessory to the lease, such as a right of way over adjoining property;²⁴⁸
- a prohibition upon using adjoining land in a particular way, provided that the prohibition is of benefit to the tenant as tenant; examples include an exclusivity clause or a prohibition on building on adjoining land;²⁴⁹
- an agreement to submit disputes relating to those conditions of the lease which are real conditions to arbitration;²⁵⁰
- an obligation to give a tenant of minerals permission to sink new pits;²⁵¹
- possibly, a partial discharge of rent;²⁵²
- a term requiring a tenant to pay a larger share of public burdens than usual in relief of the landlord, and entitling the tenant to deduct that amount from the rent;²⁵³ and
- a provision entitling the tenant to remove or sever improvements that the tenant has made to the subjects.²⁵⁴

3-71. The following conditions are likely to be personal:

- an obligation on the landlord to renew the lease at its ish;²⁵⁵

²⁴⁶ See paras 5-39 to 5-41 and para 5-59.

²⁴⁷ See paras 6-30 to 6-34.

²⁴⁸ See paras 7-04 to 7-23.

²⁴⁹ See paras 7-27 to 7-38.

²⁵⁰ See paras 6-39 to 6-41.

²⁵¹ *Montgomerie v Carrick* (1848) 10 D 1387 (IH).

²⁵² See paras 6-27 to 6-29.

²⁵³ Hunter *Landlord and Tenant* vol I 477; Rankine *Leases* 145, citing *Oliphant v Currie* (1677) Mor 15245.

²⁵⁴ *Van Lynden v Gilchrist* – this was the decision of the Lord Ordinary, [2015] CSOH 147, 2015 SLT 864 at [28]; a challenge to that aspect of the reasoning was abandoned on appeal, [2016] CSIH 72, 2017 SC 134.

²⁵⁵ See paras 5-19 to 5-37.

- a term giving the tenant the option to renew the lease at its ish;²⁵⁶
- a term giving the tenant the option to purchase the subjects of the lease;²⁵⁷
- a clause providing for rent to be set-off against a personal debt due by the landlord to the tenant;²⁵⁸
- an absolute discharge of rent;²⁵⁹
- an obligation on the landlord to pay the tenant at the expiry of the lease a sum of money, that obligation having been assumed by the landlord in the following circumstances: at the start of the lease, the tenant paid that sum to a previous tenant in discharge of the landlord's liability to that previous tenant;²⁶⁰
- a term allowing the tenant a reduction of rent in consideration of services rendered to the landlord;²⁶¹ and
- an obligation on the landlord to pay the tenant the value of sheep stock which the tenant was bound to deliver either to the landlord or to the incoming tenant.²⁶²

3-72. The status of an obligation on the landlord to carry out certain works to the subjects is unclear,²⁶³ as is that of a landlord's obligation to reimburse the tenant for the tenant's outlay on repairs (as distinct from outlay on improvements).²⁶⁴ It is suggested that both should be viewed as real conditions. The status of some terms, such as 'solus agreements' (i.e. that a business acquire its stock only from a particular supplier) or provisions relating to repayment of a deposit, have not been considered by the Scottish courts.²⁶⁵

²⁵⁶ See paras 5-19 to 5-37. But it is suggested in ch 5 that such an option is a real condition of a registered lease (paras 5-58), and also that the law should be reformed so that such an option is also a real condition of an unregistered lease.

²⁵⁷ See paras 6-02 to 6-18.

²⁵⁸ See paras 6-20 to 6-25.

²⁵⁹ See paras 6-27 to 6-29.

²⁶⁰ See para 6-33.

²⁶¹ *Ross v Duchess-Countess of Sutherland* (1838) 16 S 1179 (IH).

²⁶² *Gillespie v Riddell* 1908 SC 628 (IH) affd 1909 SC (HL) 3. Paton and Cameron *Landlord and Tenant* 96 and *SME Landlord and Tenant Second Reissue* [143] both assert that this obligation was a real condition, but did not bind the successor in this case because she was an heir of entail. That is inconsistent with the reasoning of both Lord Kinnear (643) and Lord President Dunedin (645), as analysed above at para 3-33 *et seq.* In the two-page House of Lords judgment the case was treated as raising a point of entail law, but no doubt was cast upon the Inner House opinions. Those opinions on this point did, however, depend on applying the strict rules about constituting real burdens to the question whether a term could be made binding on a successor landlord and, in particular, took the approach that an obligation to pay an unascertained sum of money could not be a real condition. It is suggested that that is not the law.

²⁶³ See paras 6-35 to 6-38.

²⁶⁴ See para 6-34.

²⁶⁵ In English law, the first would and the second would not have run with the land: *Caerns Motor Services v Texaco* [1994] 1 WLR 1249 (Ch D); *Hua Chiao Commercial Bank v Chiaphua Industries* [1987] AC 99 (PC).

4 Distinguishing Real and Personal Conditions: Policy Analysis

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A. INTRODUCTION

4-01. Holding transferees to be bound by their transferors' obligations, and vested in their personal rights, is anomalous in terms of contract and property law doctrine. The general test proposed in chapter 3 controls the scope of this anomaly in a doctrinally satisfying way: successors become party to the lease, but not to obligations which are 'collateral' or 'extrinsic' to that contract. The exception to the general rule is no wider than it need be. It allows the parties to change the terms of their lease relationship – to create, it might be said, a lease on their own terms, instead of on the law's default terms – and for those changes to have effect in a question with successors. However, it does not allow them to use a lease to make other personal obligations run with the land.

4-02. We must not, however, be ruled by doctrine. In other legal systems, parallel distinctions to that which Scots law draws between real and personal conditions have been criticised, and sometimes abandoned. The *numerus clausus* doctrine – of which the rule about real and personal conditions is a manifestation – does not demand that every legal system recognise the same property rights, and impose the same restrictions upon their creation. Rather, it requires that within one legal system only certain property rights may be

created. Different legal systems will recognise different rights, and will afford parties varying degrees of freedom in tailoring those rights to suit their own preferences. Re-adjusting the balance between real and personal conditions in leases would not mean that there ceased to be a *numerus clausus* of property rights. It would mean simply that, in one respect, Scots law had decided to afford parties more freedom when creating property rights than it had previously done.

4-03. This chapter considers whether the distinction between real and personal conditions is justified on a policy level or whether it would be better to adopt another approach, such as allowing all terms of leases to transmit to successors or some intermediate position. The scheme of the chapter is as follows. First, standard arguments about protecting purchasers and keeping land free from burdens are considered. American academic comment, which has been influenced by legal realism and the law and economics movement, is then canvassed. It is generally critical of rules which distinguish between obligations which transmit and those which do not. This section pays particular attention to whether there is any justification for distinguishing real and personal conditions where successors have guaranteed notice of the terms of leases (as could be provided by registration). A final section notes statutory reform in England and reform proposals in Ireland. The overall conclusion is that some limit on the type of term that can be made to run with the lands by inclusion in a lease continues to be appropriate.

B. SOME TRADITIONAL POINTS

4-04. There has been little discussion in Scotland of the justification for the rule that only certain conditions transmit to successor landlords. As was noted in chapter 3, a common explanation for early applications of the rule was that a particular term was personal because its transmission would be inconsistent with some rule of lease law or a rule about the constitution of another real right (notably wadset).¹ A wadset had to be constituted in a particular way (by registration)² and to allow a functionally equivalent right to be created via a lease would have undermined that rule. This concern with the protection of purchasers is explicit in *Oliphant v Currie*.³ The landlord's singular successor argued that if a clause permitting the tenant to retain rent in satisfaction of a debt owed to him by the original landlord were to be sustained against him as a successor, there would need to be a register of leases in order to secure the protection of purchasers. The tenant's response was that there was no such need as purchasers could simply enquire as to the terms of the lease. The successor's argument did not convince the court in that case. But it eventually prevailed.

¹ See para 3-04 above.

² Bell *Commentaries* I 712.

³ (1677) Mor 15245 at 15246.

In *Auchinbreck v Maclaughlan*⁴ a clause permitting the tenant to retain rent in satisfaction of a debt owed to him by the original landlord was held to be personal. Erskine justified the rule adopted in *Auchinbreck* on the basis that, were such clauses to bind singular successors, ‘the security intended for singular successors by the records would dwindle to a mere name, as tacks need not be registered’.⁵ It will be suggested in chapter 6 that the same logic underlies the general rule that an option to purchase does not bind a successor landlord: to allow an option to run with the land as a real condition of a lease would be inconsistent with the policy of the law, expressed particularly clearly in respect of real burdens, that it should not be possible to constitute an option to purchase as a real condition which burdens land.⁶

4-05. This type of policy-based objection to a term’s being real is only one element in the general test, however, so such arguments are only a partial explanation of the distinction the law draws between real and personal conditions. The central feature of the general test proposed in chapter 3 is that a term must relate to the lease in order to transmit. Here, too, the concern can be said to be with protecting those acquiring land, and also the transmissibility of land in general. There is a well-documented hostility to allowing obligations to run with land. That is true of positive obligations in particular (although Scots law is more open to this than many other systems).⁷ The fear is that such obligations act as a clog on title and render land, an important and finite asset, less marketable. In particular, lenders are more reluctant to lend, or will do so only on less favourable terms, if the property against which the loan is to be secured is subject to onerous, and unusual, burdens. The rule that a successor becomes party to the lease exposes the successor to positive as well as negative obligations. If they then fall due, the liability of the successor is personal: it cannot be got rid of by transferring ownership of the subjects.⁸ The test proposed in chapter 3 limits the types of obligation by which a successor can be bound to those which are referable to the relationship of landlord and tenant and therefore provides a degree of protection for those acquiring land. However, leases are diverse and many terms can therefore qualify as real conditions, so it might be said that the protection provided by the rule is rather limited. Also, the rule gives no guarantee as to the *extent* of the obligation by which the successor could be bound.⁹ The guarantee which the rule offers is merely that an obligation which is unrelated to the lease, or which it would be contrary to public policy or other rules of property law to allow to run with the land, cannot be made into a real condition.

⁴ (1748) Mor 15248; see paras 6-26 to 6-29 below.

⁵ Erskine *Institute* II vi 29.

⁶ See paras 6-08 to 6-11 below.

⁷ See the various contributions to S Bartels and M Milo (eds) *Contents of Real Rights* (2004).

⁸ *Barr v Cochrane* (1878) 5 R 877 (IH) at 883; Hume *Lectures* IV 83–84.

⁹ Bankton makes a similar comment in the analogous context of the transmission of the rights and obligations of a feudal superior to and against a successor: Bankton *Institute* II iii 11.

4-06. A tempting argument in justification of restrictions on the transmission of terms is that they protect purchasers from being bound by obligations of which they are unaware. Rudden notes that ‘one of the main reasons given in common and civil law for the *numerus clausus* of real rights is the problem a purchaser would face in finding out about fancies’.¹⁰ In the English decision of *Keppel v Bailey*,¹¹ a successor of a tenant of an iron works was held not to be bound by the original tenant’s promise to purchase all limestone used in the works from a particular quarry. Lord Chancellor Brougham concluded, in a famous passage:¹²

[I]t must not . . . be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. . . . There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and *it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.*

Although this argument is common, it is flawed as a justification for the distinction drawn between real and personal conditions, because that distinction is based upon the *nature* of the obligation, not upon whether the successor was aware of the term in question. If the purpose of the distinction between real and personal conditions were to protect the purchaser from unknown obligations, the purchaser should be bound by all those obligations of which the purchaser was aware. Yet, in Rudden’s words:¹³

Notice is not sufficient, because no system holds a fancy binding just because the acquirer of land knows all about it. Indeed, were this not so, common-lawyers would be spared all that dreary learning on ‘touch and concern’.

In fact, a person acquiring property subject to a lease will typically be aware of its terms, for, having been alerted to the existence of the lease by possession or registration, the purchaser will have carried out the necessary investigations. The arguments in favour of notice acting as a cure-all are considered below.¹⁴ However, the distinction between real and personal conditions is hard to explain as a response to the difficulty which successors have finding out about terms.

¹⁰ B Rudden ‘Economic Theory v Property Law: The *Numerus Clausus* Problem’ in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence: 3rd Series* (1987) 239, 246.

¹¹ (1834) 2 My and K 517, 39 ER 1042.

¹² (1834) 2 My and K 517 at 535–6, 39 ER 1042 at 1049 (emphasis added).

¹³ Rudden ‘The *Numerus Clausus* Problem’ 246.

¹⁴ Paras 4-13 and 4-14 below.

At most what can be said is that a side-effect of the rule is that it protects a successor who, for whatever reason, is not aware of a term, by limiting the types of obligation by which the successor is bound. As we have seen, it also protects purchasers against being bound by obligations which do not relate to the lease, or in respect of which there is a policy objection to the term burdening land.

C. ARGUMENTS FROM AMERICA

(1) The Restatement of Servitudes

4-07. There has been significant debate about analogous issues in the USA. The American Law Institute's *Restatement of the Law Third: Property: Servitudes* (2000)¹⁵ encompasses what a Scots lawyer would call servitudes and real burdens. While it does not cover landlord and tenant covenants,¹⁶ the approach adopted by the Restatement and the debates which preceded its adoption should be considered because the issues discussed are similar. In Common Law systems, the test for determining whether leasehold covenants run with the land or the reversion is the same as that for determining whether freehold covenants run with the land: does the benefit or burden of the covenant in question 'touch and concern' the land or the reversion? This is equivalent to the Scots rule that a servitude or real burden must be praedial and to the rule of lease law that only certain types of condition are real. The Restatement, and the debates surrounding it, are noteworthy because the Restatement purports to abandon the 'touch and concern' rule. Do the arguments that influenced the US approach mean that a similar approach should be taken in respect of leases in Scots law?¹⁷

4-08. There was significant debate about the merits of this proposal. The Reporter for the project, Susan French, took the view that the touch and concern rule served no independent function but was instead used by courts for other ends. Better, it was said, that the Restatement identify those ends and address

¹⁵ Some important articles preceding the drafting of the Restatement are: L Berger 'A policy analysis of promises respecting the use of land' (1970) 55 Minnesota L Rev 167; RA Epstein 'Notice and freedom of contract in the law of servitudes' (1981–82) 55 Southern California L Rev 1353; SF French 'Towards a modern law of servitudes: reweaving the ancient strands' (1981–82) 55 Southern California L Rev 1261; U Reichmann 'Towards a unified concept of servitudes' (1982) 55 Southern California L Rev 1177. There also is a retrospective work: SF French 'The touch and concern doctrine and the restatement (third) of servitudes: a tribute to Lawrence E Berger' (1998) 77 Nebraska L Rev 653. *A Restatement of the Law Fourth: Property* is currently under preparation by the American Law Institute.

¹⁶ They are the subject of a different Restatement: American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977).

¹⁷ Its approach was considered by the Scottish Law Commission during its reform of the law of real burdens: Scottish Law Commission *Discussion Paper on Real Burdens* (Scot Law Com DP 106, 1998) and *Report on Real Burdens* (Scot Law Com No 181, 2000).

them directly. This would promote clarity of reasoning and would enable the abandonment of a requirement which had in any event proved difficult to define.¹⁸ The following functions were identified as being those which courts actually performed under the guise of applying the ‘touch and concern’ test: (i) ascertaining intent; (ii) protecting purchasers; (iii) preventing covenants from running with the land where this was viewed as objectionable on policy grounds; and (iv) tackling covenants which had become obsolete.¹⁹

4-09. The first and second points appear to be linked. In respect of the first, French argued that where parties had not made clear their intent as to whether a covenant should run with the land, courts, when determining the parties’ intent, would consider the nature of the arrangement and whether it could more easily be performed by or was of particular benefit to the owner of land for the time being. An affirmative answer to either of these questions suggested that the covenant ‘touched and concerned’ land, in which case it was said to indicate an intention on the part of the original parties that it should bind successors. A negative answer indicated the contrary. The ‘touch and concern’ test was used to make up for the parties’ silence on the matter. The conclusion that a condition did not touch and concern the land could even be used to disregard apparent statements of intent where these were ‘boilerplate’ and were thought not to represent the parties’ true intention.

4-10. The second function which French identified the ‘touch and concern’ test as performing was protecting purchasers. One might expect this to mean that, in the absence of a system of land registration, the law limited the types of obligation which could bind a successor.²⁰ But this is not the sense in which French perceived purchasers as being protected. Rather, her argument was that the test protects them even where they *do* have notice of the obligation in question. Despite such notice, they may not expect to be bound by a particular term.²¹ In formulating this argument, French relied upon a much-cited article by Berger, where he stated that:²²

The real policy, then, is to give effect to the intent that most people would probably have if they thought about the issue and thereby protect subsequent parties against unexpected or unexpectable liability. Touch and concern is a device for intent effectuation, through which the law conforms itself to the normal, usual or probable understandings of the community.

¹⁸ One of the reasons for which it was said that the test has escaped accurate definition was that it was being used for this variety of different purposes.

¹⁹ French (1981–82) 55 Southern California L Rev 1261, 1289–1292; French (1998) 77 Nebraska L Rev 653, 661–663.

²⁰ This is the argument advanced above at paras 4-04 *et seq.*

²¹ French (1981–82) 55 Southern California L Rev 1261, 1290; French (1998) 77 Nebraska L Rev 653, 662.

²² Berger (1970) 55 Minnesota L Rev 167, 208.

There are, however, difficulties internal to this approach²³ and also with the doctrinal understandings which underlie it.²⁴

4-11. The ‘touch and concern’ requirement was said to perform the third and fourth functions identified by French (respectively, policy objections and obsolete covenants) in the following way: if it was felt that a covenant was unreasonable or obsolete, and if the ownership of the burdened property had transferred since the covenant was constituted, the property could be freed from the covenant by declaring that it did not touch and concern the land. Given that the ‘touch and concern’ doctrine operates only when the land comes to be transferred, it does not seem particularly suited to either of these roles.²⁵ French’s response to this was to propose that the ‘touch and concern’ requirement be dropped and the concerns of unreasonableness and obsolescence be addressed directly. Others doubted whether, given its unsuitability for those functions, the ‘touch and concern’ doctrine actually performed other functions which French did not consider.²⁶

4-12. French asserted that the third and fourth functions could be better performed by specific doctrines. Also, if one accepts Berger’s argument that the ‘touch and concern’ doctrine served only to give effect to the parties’ intentions about which terms should run with the land, the doctrine could be treated simply as an interpretative aid, to be used in the absence of a clear expression of intent on the part of the original parties. French therefore proposed that there be specific policy-based objections to the creation of a servitude and also a mechanism to allow for the termination of servitudes which had become obsolete. However, she argued that the law did not need to go beyond that. In the fashionable phrase,

²³ Such a test provides no guidance where the obligation is unusual (as Berger admits at 224). Further, looking at things realistically it is unlikely that the community will have expectations about whether the benefit or burden of a covenant runs with land which are independent of those created by the law. Rather, expectations as to which terms transmit and which do not are likely to be conditioned by what the law provides, so it seems illogical to use community expectations to provide content for the law, as Berger seeks to do.

²⁴ The underlying assumption appears to be that the *intent* of the original grantor controls whether a successor is bound by an obligation. The theory explains a finding that a covenant does not touch and concern land in the following way: if the covenant does not touch and concern the land, the successor would not have thought that the original party intended the successor to be bound because this is not the type of obligation which binds successors; because of this deemed negative intent on the part of the original owner, the term does not transmit and so the successor is not bound. A logical difficulty is that this does not explain why the ‘touch and concern’ test could not be overcome by a clear statement of intent. (This logical difficulty is removed by the Restatement’s use of ‘touch and concern’ to determine intention in the event that it cannot be established by other means: see para 4-12 below.) More seriously, the premise is wrong: whether a successor is bound is not dependent upon the grantor’s intent.

²⁵ J Stake ‘Towards an economic understanding of touch and concern’ [1988] Duke LJ 925, 943.

²⁶ Ibid. See also paras 4-16 *et seq* below.

there should be a shift from *ex ante* to *ex post* controls.²⁷ Provided that there is notice, and the term does not fall foul of the policy objections, parties should be able to make any covenant they wish run with the land by a clear expression of intent. Where the intention is not clear, the ‘touch and concern’ doctrine, despite its vaunted disappearance, is in fact still used to determine whether the parties intended the covenant to be attached to land (appurtenant to it) or not (in gross).²⁸ It has ceased, however, to be a mandatory rule.

(2) Economic arguments: externalities and information costs

4-13. In the debate preceding the adoption of the Restatement, various economic arguments were also rehearsed. Epstein argued that the original owners’ intent should govern the transmission of covenants. His may be characterised as a ‘notice cures all’ approach: he viewed notice, presumably provided by registration, as the only constitutive requirement of a servitude and insisted that there was no normative justification for any other rule, such as that the servitude must touch and concern land.²⁹ Much of his analysis, indeed much of the American debate, relies upon a law and economics analysis. Epstein’s argument is that any negative economic effects of granting a servitude will be taken into account by the original owner when making a decision whether to grant the right, as they will affect the value of the land. If the owner is prepared to accept a reduction in value, the argument runs, there is no justification for the law refusing to recognise the servitude as binding future owners who bought with their eyes open and could therefore pay a lesser price for the property. The ‘touch and concern’ doctrine simply increases transaction costs, both at the time of creation and upon subsequent transactions. There may also be adverse ‘incentive effects’: doubt about whether crucial covenants touch and concern may be enough to prevent some parties from proceeding with a transaction. This is an argument for saying that the ‘touch and concern’ doctrine is unjustified when applied to obligations of which the successor has notice by means of registration.

4-14. However, even leaving aside the fact that in respect of a good such as land, the law might not be content to allow one owner to strip value from it by entering into esoteric arrangements with real effect, the premise of Epstein’s argument has been disputed. His argument presupposes that the conclusion of

²⁷ S French ‘The American Restatement of Servitudes Law: Reforming Doctrine by Shifting from Ex Ante to Ex Post Controls on the Risks Posed by Servitudes’ in S van Erp and B Akkermans (eds) *Towards a Unified System of Land Burdens?* (2006) 109.

²⁸ American Law Institute *Restatement of the Law Third: Property: Servitudes* (2000) §4.5. For discussion of the new role for ‘touch and concern’, see French (1998) 77 *Nebraska L Rev* 653, 662–663.

²⁹ RA Epstein ‘Notice and freedom of contract in the law of servitudes’ (1981–82) 55 *Southern California L Rev* 1353.

a servitude imposes costs only on the original parties and on successors to their interests. On that basis, he argued that any costs imposed on successors will be capitalised into a reduction in value of the interest at the time of grant. Merrill and Smith have, however, convincingly argued that this is not the case.³⁰ On their view, the recognition of real rights imposes costs not only on successors to the grantor's interest in land but also upon *all other* participants in the land market. All acquirers of property incur increased information costs when the law increases the number of rights which it recognises as binding successors in title, as they must investigate whether the land which they are acquiring is subject to the type of right in question. They would not incur this cost if they knew that the law simply prohibited the creation of such rights as real rights or real obligations. Such information costs are an externality to the grantor of the right – they will not be taken into account when considering whether to grant the right in question. This provides a justification for the law's intervention to limit the number of rights which may bind successors in title. Abstract as the point may sound, it is readily appreciable: as matters stand, a person acquiring land knows that the land could be affected by a particular number of rights, the effects of which on a successor are, broadly, also known: servitude, real burden, standard security, public rights of way, liferents, leases, and so on. The conscientious purchaser will take care to ascertain what the effect of the rights burdening the land are, but the enquiry is much easier, and cheaper, when it takes place within a framework of established property rights with known characteristics. To allow *any* form of right to be made real would make the purchaser's task more difficult. An obvious objection to this argument in respect of registered rights is that land registration systems reduce information costs.³¹ But, as Merrill and Smith retort, although it reduces information costs, land registration does not eliminate them completely and so a land register simply enables a legal system to recognise a larger number of property rights: it does not enable total freedom of property.³² Notice is not a 'cure-all'.

4-15. There were dissentient voices in the debate surrounding the Restatement's abandonment of the 'touch and concern' doctrine. Stake, reviewing the existing

³⁰ TW Merrill and HE Smith 'Optimal standardization in the law of property: the *numerus clausus* principle' (2000) 110 Yale LJ 1, especially 26 *et seq.* As the title suggests, this article is not a specific discussion of the transmission of covenants, but rather seeks to advance an economic justification for the closed system of property rights present in most (all?) legal systems. See also SE Sterk 'Freedom from freedom of contract: the enduring value of servitude restrictions' (1985) 70 Iowa L Rev 615, 621–624.

³¹ E.g. BWF Depoorter and F Parisi 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' (2003) 3 Global Jurist Frontiers, Issue 1 Article 2 n 56 (available at e.g. <https://core.ac.uk/download/pdf/72834349.pdf>); B Edgworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 Monash University LR 387.

³² Merrill and Smith (2000) 110 Yale LJ 1, 43–45. See also M Wolff and L Raiser *Sachenrecht: Ein Lehrbuch* (10th edn 1957) §2 II 1, where it is argued that a land register can only function if there is a limited number of registrable rights.

American law, concluded that the ‘touch and concern’ doctrine provided for the efficient allocation of the benefit and burden of covenants after transfer of an interest in land.³³ It ensured that an obligation bound the party who, following transfer, could perform it the more efficiently, and, equally, that a right was allocated to the party who stood to gain most from it.³⁴ This has particular resonance in Scots law, given the suggestion in chapter 3 that the test for distinguishing between real and personal conditions asks whether, taking the case of an obligation on the landlord as an example, the obligation is more readily performable by a successor landlord and the correlative right is of more benefit to a successor tenant. On Stake’s analysis, such a rule promotes economic efficiency.

4-16. Reichmann advanced two additional arguments in support of ‘touch and concern’.³⁵ First, agreements which do not relate to land so as to touch and concern it are highly individualised and likely to become inefficient after transfer. The best way to ensure the efficient termination of such arrangements is to place the burden of re-negotiation upon the beneficiaries: should they wish to continue to benefit from the covenant, they will have to negotiate with the new owner for its reconstitution. In an appealing phrase, he states: ‘Personal contracts remain the subject of personal bargains’.³⁶ However, there are difficulties with this analysis.³⁷ Reichmann’s second reason – and one also sees this point made in Civilian explanations of the *numerus clausus* principle³⁸ – was that, to have no limits on the types of obligation to which owners could be subject, would subvert individual freedom and could potentially create modern variations of feudal serfdom.³⁹

³³ Stake [1988] Duke LJ 925.

³⁴ He noted, however, that this did not necessarily provide an economic justification for the doctrine, as these benefits could be offset by other costs which it created, such as transaction costs: Stake [1988] Duke LJ 925, 971.

³⁵ U Reichmann ‘Towards a unified concept of servitudes’ (1982) 55 Southern California L Rev 1177, 1233.

³⁶ Reichmann 1982) 55 Southern California L Rev 1177, 1233.

³⁷ It fails to take account of the obvious point that personal covenants do not terminate upon transfer. Instead, they remain contractually binding upon the original owner, who should take the new owner bound by them if they require performance related to land. So, in fact, the burden of negotiation with the successor falls on the original landlord, not the tenant. See para 8-43 below. Rudden noted this: B Rudden ‘Economic Theory v Property Law: The *Numerus Clausus* Problem’ in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence: 3rd Series* (1987) 239, 256. This is actually one of the strongest arguments against continuing to distinguish between real and personal conditions: see para 4-23 below.

³⁸ E.g. V Sagaert ‘Les interférences entre le droit des biens et le droit des obligations: une analyse de l’évolution depuis le Code civil’ in P Wéry (ed) *Le droit des obligations contractuelles et le bicentenaire du Code civil* (2004) 353, 362.

³⁹ Although this argument might appear fanciful, one can think of illustrations. In *Bradford Properties Ltd v BT plc* 1992 SC 12 (IH), the landlord undertook to provide secretarial services and a telephone answering service for the tenant. Is such an obligation a real condition of the lease, so as to bind a successor to the landlord? It is thought not.

(3) Relevance for Scots law

4-17. When considering the rules of Scots lease law, how much weight should be given to these arguments and to the ultimate position adopted in the American Restatement? There are various points which detract from their weight. First, and most obviously, the debate in the United States was concerned with the law applicable there governing what we would call servitudes and real burdens. The result of that analysis cannot simply be accepted as equally compelling in Scotland, especially not in the distinct field of leases. It is of significance that in its reform of the law of real burdens, the Scottish Law Commission considered, but chose not to follow, the American Law Institute's lead: it maintained the rule that a real burden must be praedial.⁴⁰ Consistency in the law would suggest that a similar approach should be adopted in respect of proprietary aspects of lease law. Further, the distinction which Scots law draws between real and personal conditions in leases does not perform the functions which French suggested that the 'touch and concern' rule performed in the United States. In particular, it is not a device for 'intent effectuation'.⁴¹ On the contrary, it is a mandatory rule. In addition, there is an independent, statutory basis in Scotland on which terms can be adjusted by the Lands Tribunal,⁴² so it seems unlikely that the distinction between real and personal conditions performs the fourth function which French identified, i.e. dealing with terms which had become obsolete.

4-18. Secondly, particularly for those not schooled in law and economics, much of the debate is difficult to evaluate. Finally the arguments pay too little regard to the doctrinal starting-points of contract and property law. It is more of a free-ranging policy discussion, set free from any moorings in contract or property doctrine.⁴³ Were it to have been accepted as a starting-point that contracts only bind parties to them and that parties cannot create whatever real rights they wish, and then to have been argued that an exception needed to be made here for particular reasons, then the debate's conclusion that 'touch and concern' should

⁴⁰ The Law Commission of England and Wales has proposed that analogous rules be retained for easements, and also created for its new proposed category of 'land obligations': Law Commission *Easements, Covenants and Profits à Prendre: A Consultation Paper* (Law Com CP No 186, 2008) [3.20]–[3.25] (easements) and [8-71]–[8-80]; Law Commission *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) [5.54]. The Scottish Law Commission's work on real burdens is cited.

⁴¹ If, indeed, the 'touch and concern' rule served such a function in the US jurisdictions considered by the Restatement.

⁴² Title Conditions (Scotland) Act 2003 Pt 9. This power does not, however, extend to all real conditions, but only to those conditions of a registrable lease which 'relate to the land' (with the exception of terms relating to rent). In *George T Fraser Ltd v Aberdeen Harbour Board* 1985 SC 127 (IH) at 134 it was held that the Tribunal had jurisdiction only in respect of matters which affect the land and not (as in that case) matters which affect the relationship between the respective proprietors of interests in the land or the identity of these proprietors. See too *Propinvest Paisley LP v Co-operative Group Ltd* [2011] CSIH 41, 2012 SC 51.

⁴³ For critical comments about such an approach to law, see DM Johnston 'The renewal of the old' (1997) 56 CLJ 80, 89 *et seq* and esp 92.

be abandoned would be more easily applied to a system, such as Scots law, which does adhere to those doctrines. That is not, however, the approach taken. Rather, when reading works such as Epstein's, with its emphasis upon 'freedom of contract', one gets the impression that the opposite principle was taken as a starting-point:⁴⁴ the assumption is that covenants should benefit and burden successors unless there is a reason to the contrary and that the original parties' intent should be determinative. That was also the case with Berger's explanation of 'touch and concern' as merely a device for intent effectuation. The starting-point of Scots law is very different.

4-19. Despite these critical observations, there are some useful insights to be taken from this material. Stake's view that a doctrine such as 'touch and concern' allocates rights and obligations to those to whom they are most efficiently allocated is a good place to begin. But that points in favour of continuing to distinguish real and personal conditions. Epstein's 'notice cures all' argument is also worthy of consideration, especially in respect of registered leases. It pits the compellingly concrete 'why should this purchaser who knew of this obligation not be bound by it?' against the more abstract dangers of increased complexity and costs for all those involved in property transactions, a general reduction in the marketability of land if it can too readily be burdened by obligations, and a paternalistic concern against preventing landowners from attaching burdens to land which (perhaps unintentionally) seriously affect its value. That type of argument is always difficult to assess, and views about the appropriate balance can differ.

D. HOME-GROWN POINTS

4-20. A key difficulty with drawing a distinction between real and personal conditions is the impossibility of providing a precise test. Scottish attempts to distinguish between conditions of a lease which transmit to successors and those which do not have not resulted in a clear rule. This is not, though, a problem unique to Scots law. The German experience, for example, is the same, one commentator remarking that 'the distinction gives rise to frequent difficulties'.⁴⁵ Similar criticisms have been made in England,⁴⁶ and it does not seem that the South African position is much more certain.⁴⁷ On the other hand, the difficulties of a general test can be overplayed. Despite a view that property law is a particularly certain branch of the law, there are many areas where

⁴⁴ Stake [1988] Duke LJ 925, 932 noticed this.

⁴⁵ *Staudingers Kommentar* §566 Rn [39]: 'Die Abgrenzung bereitet häufig Schwierigkeiten'.

⁴⁶ E.g. HA Bigelow 'The contents of covenants in leases' (1914) 30 LQR 319, 319. One of the best-known critical judicial passages is *Grant v Edmondson* [1931] 1 Ch 1 (CA) at 28–29 (Romer LJ).

⁴⁷ *Cooper Landlord and Tenant* 297–303; *Kerr Sale and Lease* 440–442.

property law relies upon fluid tests,⁴⁸ just as there are in private law generally.⁴⁹ Few tests can be said to produce absolute certainty and yet they continue to function.⁵⁰ Such problems as result from the current *inter naturalia* formulation of the test could be avoided by working to produce a better formulation.

4-21. A particular problem for Scots law is that, as a small jurisdiction, the problems of an uncertain general test have not been alleviated by a sufficient volume of litigation or commentary to allow the treatment of individual instances to be predicted with certainty.⁵¹ It cannot therefore be said with confidence how terms which have given rise to litigation in other legal systems would be treated here. The problem is compounded by the fact that the experience of those larger jurisdictions may be of limited value to Scotland. Rankine warned that English cases on this point ‘do not afford a safe guide to a Scots lawyer’.⁵² They are useful to consider, indeed this book has considered them and those of other jurisdictions, but – as we have seen – the reasoning used, and results reached, vary. Another objection voiced in the commentary to the *inter naturalia* test is that the current rules are out of touch with commercial reality.⁵³

4-22. A further difficulty is the effect on the contract of lease of holding some conditions to be real and some personal. Although the point is not always appreciated, the conclusion that a term is a personal condition of a lease does not lead to its extinction.⁵⁴ The rule which distinguishes between real and personal conditions has no impact upon the existence of contractual rights and obligations, but merely controls who is bound by or entitled to them. It is a rule about allocation of rights and obligations, not their existence. In respect of an obligation on a landlord, the tenant’s rights remain unaltered; the difference is that, after transfer by the landlord, in place of one counterparty, the tenant is faced with two: the new landlord in respect of real conditions and the original landlord in respect of personal conditions. One can readily conceive that this may cause difficulties. One French commentator has referred to ‘a veritable

⁴⁸ E.g. the rules to determine whether accession has taken place, or that a real burden or a servitude be praedial, or that a servitude must be exercised *civiliter*, or that prescriptive possession be as of right, or that a trustee in sequestration takes property *tantum et tale*. The list could go on.

⁴⁹ J Dietrich ‘Giving content to general concepts’ (2005) 29 Melbourne University L Rev 218.

⁵⁰ In Tarlock’s view, ‘open-ended standards are more troublesome to law professors than to lawyers and judges’: AD Tarlock ‘Touch and concern is dead, long live the doctrine’ (1998) 77 Nebraska L Rev 804, 818.

⁵¹ Fancourt says of English law that, despite the uncertainty of the ‘touch and concern’ test, there is an established body of decisions and, because there is not an inexhaustible supply of lease covenants, unlitigated ones do not arise very often: TM Fancourt *Enforceability of Landlord and Tenant Covenants* (3rd edn, 2014) [4.08].

⁵² Rankine *Leases* 478.

⁵³ I Quigley ‘On the wrong track’ (2007) 52 JLSS Feb/48.

⁵⁴ See paras 8-44 and 8-45 below. It is possible to create a term which binds the original parties only so long as they remain parties to the lease, but that is not the default rule.

carving up of the contract, the criteria for which are not known'.⁵⁵ Take, for instance, the facts of *Bradford Properties Ltd v BT plc*,⁵⁶ where a landlord undertook to provide secretarial services to the tenant. It was suggested above⁵⁷ that this would constitute a personal condition. If after transfer of the land the original landlord remained bound, what consideration would this now ex-landlord receive for providing these services? He would no longer be entitled to rent, but equally he could not be expected to provide these services for free. Is the 'rent' due under the lease to be apportioned between the sum due for these services and the sum due for the occupation of the land, and these sums allocated to the original landlord and his successor respectively? There is no clear answer to this question. If this were to happen in respect of a particularly important provision, it could be problematic. Options to purchase the subjects or to renew the lease are also awkward, but in a different way. Although they are personal conditions, the person bound by them requires a right in the property concerned in order to be able to perform. It follows that the original landlord should take steps to remain in a position to perform after transfer, most likely by taking the successor bound by the obligation concerned. This appears not to be common practice in Scotland, but it should be.

E. LAW REFORM IN ENGLAND AND IRELAND

4-23. Because of similar criticisms to those which have just been made, in 1988 the Law Commission of England and Wales recommended abolition of the distinction between leasehold covenants which touched and concerned leased land or its reversion and those which did not. Responses to its consultation had not indicated that the 'touch and concern' test gave rise to significant practical problems,⁵⁸ but the Law Commission suspected that this was because of the use of indemnity covenants and not because the 'touch and concern' test was in itself satisfactory. An indemnity covenant is an undertaking by, say, an assignee of the tenant's interest by which the assignee undertakes to perform *all* of the obligations of the lease.⁵⁹ The result was that the 'touch and concern' rule was circumvented by contract.⁶⁰ Such indemnity covenants were implied by statute into transfers by the tenant. There was no statutory implied covenant in respect

⁵⁵ Civ 3e 17 nov 1998, JCP 1999 II 10 227 obs F Auque at 2310: 'un véritable dépeçage du contrat dont on ne comprend pas le critère'.

⁵⁶ 1992 SC 12 (IH).

⁵⁷ At n 39.

⁵⁸ Law Commission *Landlord and Tenant Law: Privity of Contract and Estate* (Law Com No 174, 1988) [3.29].

⁵⁹ Law Commission *Landlord and Tenant Law: Privity of Contract and Estate* [3.30]; TM Fancourt *Enforceability of Landlord and Tenant Covenants* (3rd edn, 2014) [7.17]–[7.20]. Such covenants are implied by statute into transfers by the tenant of pre-1996 leases: Land Registration Act 2002 s 134(2) and Sch 12 para 20(2).

⁶⁰ Law Commission *Privity of Contract and Estate* [3.30].

of transfer of the reversion, but apparently they were common nevertheless.⁶¹ The Law Commission proposed the following governing principle as a ‘simple and easy to understand’ rule:⁶²

[A]ll the terms of the lease should be regarded as a single bargain for letting the property. When the interest of one of the parties changes hands the successor should fully take his predecessor’s place as landlord or tenant, without distinguishing between different categories of covenant.

The resulting legislation was section 3(1) of the Landlord and Tenant (Covenants) Act 1995, which applies to all leases created on or after 1 January 1996. It provides that the benefit and burden of all landlord and tenant covenants⁶³ of a tenancy shall pass on assignment of the tenancy or the reversion. Section 3(6), however, inserts a limitation:

Nothing in this section shall operate –

- (a) in the case of a covenant which (in whatever terms) is expressed to be personal to any person, to make the covenant enforceable by or (as the case may be) against any other person; or
- (b) to make a covenant enforceable against any person if, apart from this section, it would not be enforceable against him by reason of its not having been registered under the Land Registration Act 2002 or the Land Charges Act 1972.

The second exception is required to ensure the new rule of lease law does not circumvent other rules of law which require particular types of right (including options to acquire a reversion or to renew a lease) to be constituted by registration.⁶⁴ The concern with leases not being used to undermine other rules of law, which in part motivates Scots law, is therefore still present.

4-24. The Irish Law Reform Commission has proposed a similar rule to the English: all leasehold covenants would transmit, apart from those expressed to be personal either to the original holder or to another holder of the landlord’s or tenant’s interest, but so far at least this proposal has not been implemented.⁶⁵

⁶¹ Law Commission *Privity of Contract and Estate* [2.15].

⁶² Law Commission *Privity of Contract and Estate* [4.1].

⁶³ Inadvertently, the ‘touch and concern’ test may have been re-introduced by the back door via the definition of ‘landlord’ and ‘tenant’ in ‘landlord covenant’ and ‘tenant covenant’. See Landlord and Tenant (Covenants) Act 1995 s 28(1), and TM Fancourt *Enforceability of Landlord and Tenant Covenants* (3rd edn, 2014) [11.03].

⁶⁴ Fancourt *Enforceability of Landlord and Tenant Covenants* [12.05]. Under the Land Registration Act 2002, however, options will bind someone who acquires the reversion of registered land if the option-holder is in ‘actual occupation’ of the property, as is a tenant; see para 9-28 below.

⁶⁵ Irish Law Reform Commission *Report on the Law of Landlord and Tenant* (LRC 85, 2007), draft Landlord and Tenant Bill cl 16. As noted in para 2-41 above, the proposal is that this rule would not apply to an obligation in an agreement separate from the lease, unless the acquirer had actual knowledge of such an obligation at the time of transfer.

F. CONCLUSION

4-25. What conclusions can be drawn in respect of Scots law? Should it be amended to follow the approach taken in England and proposed in Ireland? Should other less radical changes be made? These are questions on which views will legitimately differ. It may be that they will be considered as part of the Scottish Law Commission's ongoing law reform project in respect of leases.⁶⁶

4-26. The English approach has the virtue of simplicity. It would reduce transaction costs. It could also address some concerns that the law is out of touch with the commercial realities when it prevents certain types of term from binding successors. However, some of those concerns can be addressed by less radical changes than abolishing the rule completely, for example (i) by there being greater clarity as to the applicable test and the treatment of different types of term and the reasons for that – to which, it is hoped, this book contributes, and (ii) by courts being more aware of the commercial background to decisions and explaining clearly the reasons why a term is being held not to transmit, if indeed that is the conclusion. The real condition/personal condition divide is not to be viewed in isolation when considering whether it is a satisfactory rule: the impact of the offside goals rule (discussed in chapter 9) is also to be taken into account. Further, the English rule that any term can be made into a real condition (unless it is personal or is the type of obligation that needs to be registered to affect a successor) does have some odd consequences. It is odd, for example, that if a lease were to contain a provision obliging the landlord to sing once a week for the tenant, such a provision would bind a successor. Taking a less frivolous example, it means that if a lease contains a term that the landlord is to make periodic payments to the tenant, entirely unrelated to the lease, that too will bind a successor. Perhaps the (presumably low) risk of such terms being included in a lease is to be viewed as worth running for the benefit of certainty and simplicity, and the associated savings in transaction costs which a 'bright-line' rule provides. However, the question remains: if a term has nothing to do with the relation of landlord and tenant, why should it bind a successor? If it is appropriate in the context of real burdens to limit the types of obligation that can be made to run with the land, why should there not be a functionally equivalent rule in respect of leases? Indeed, if there were no such rule in respect of leases, would there be a risk of leases being used to circumvent restrictions in another area of law? Are the difficulties of having a distinction between real and personal conditions really so great that the law should be amended to allow any type of term whatsoever to transfer? If that approach were to be adopted, would the law need to be amended to enable terms which had become obsolete or were

⁶⁶ Aspects of lease law are currently being considered by the Scottish Law Commission: *Tenth Programme of Law Reform* (Scot Law Com No 250, 2018) [2.10] *et seq.*

acting oppressively to be addressed (as was the approach of the US *Restatement of the Law Third: Property: Servitudes*)?⁶⁷

4-27. If reform is being considered, decisions on this point should be informed by a proper analysis of the experience of those whom the current law affects (e.g. transactional property lawyers and their clients) and also by such information as can be obtained about the English experience. This writer therefore hesitates to express a concluded view, as so much depends on its effects in practice. The rule distinguishing real from personal conditions is, at heart, a logical one, and its reform would interact with various other areas of law, so should not be undertaken lightly. An argument in favour of reform can more easily be made in respect of registered leases than in respect of leases that are not registered, given that the law could provide that registration would guarantee that the acquirer would be bound only by terms which the acquirer had had the ability to discover.⁶⁸ Were legislation to be contemplated, specific provision could be made for terms where there were thought to be particular policy reasons against transmission.

⁶⁷ As noted above, the Title Conditions (Scotland) Act 2003 confers limited powers in this respect regarding only certain terms of registrable leases: see n 42.

⁶⁸ I.e. assuming that the law were changed to make clear that unregistered terms would not bind a successor. As discussed in chapter 2, that could create difficulties given that a lease might be varied and the parties have acted on that basis for some time.

5 Renewals and Break Options

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A. INTRODUCTION

5-01. Either when agreeing the original lease or subsequently, parties might provide for a lease to be renewed. This could take the form of an agreement

to extend the lease in some way or of an option in favour of the tenant to renew the lease.¹ Conversely, a lease might contain a break option, allowing the landlord or tenant or both to bring the lease to an end before the ish. This chapter considers the extent to which successor landlords are affected by these types of agreement. It discusses the rules of lease law which apply regardless of the successor landlord's knowledge. This is an area where the offside goals rule might apply to produce a different result from the rules of lease law discussed in this chapter, and that subject is discussed in chapter 9.

5-02. The scheme of this chapter is as follows. The first section sets out the rules in respect of unregistered leases. It begins by considering agreements between parties to a subsisting lease for the grant of a new lease, referred to in standard textbooks as 'prorogations' and 'renewals'. Although these are not technically terms of a lease (rather they are separate agreements), the treatment of these agreements has such an influence on the analysis of terms of the lease relating to its duration that the relevant rules must be set out. The chapter then considers the treatment of options to renew the lease and break options, before critically assessing the rules in respect of unregistered leases. The second section of the chapter considers the corresponding rules in respect of registered leases.

B. UNREGISTERED LEASES

(I) Agreeing to extend the lease

(a) Terminology: 'prorogations' and 'renewals'

5-03. Logically there are three ways in which parties to a subsisting lease might provide for it to be 'extended' so as to allow the tenant to remain in the property after the ish. They might:

- conclude a new lease to commence at the ish of the subsisting one;
- conclude a new lease to commence immediately, its duration being the sum of the unexpired period of the subsisting lease and the desired period of extension; or
- vary the duration of the subsisting lease.

Although the third possibility might seem the most obvious way to extend a lease, and indeed it appears to be common in practice today,² previous discussion in Scotland has focused mainly upon the first two possibilities. Most textbooks

¹ More exotically, but rarely, the landlord might have the option to require the tenant to take a new lease.

² E.g. KS Gerber *Commercial Leases in Scotland: A Practitioner's Guide* (3rd edn, 2016) [25-01].

on leases contain chapters entitled ‘Prorogations and Renewals’.³ What is the meaning of these terms? First: ‘prorogation’. According to Ross, a prorogation was a lengthening out or extension of the same thing, so a lease was said to be ‘prorogued’ when the transaction amounted to an extension of the period of the old lease, leaving all its other conditions unaltered.⁴ That suggests that a prorogation amounted to a continuation of the same contract: the *ish* was simply varied. This impression is heightened by Ross’s use of the term ‘new lease’ to describe other means of extending the tenant’s right and it would cohere with the dictionary definition of prorogation, which is ‘the action of causing something to last longer or to continue in effect’.⁵ But this seems not to be the way in which the term ‘prorogation’ is used in most of the Scottish discussion. Rankine stated that a prorogation was ‘a new term to run after the lapse of the old’⁶ and the word is used in that way in various cases.⁷ On the other hand, when Bankton discussed the treatment of consecutive leases, he noted that they were initially treated as being ‘in effect’ prorogations of the subsisting tacks.⁸ That presupposes that ‘prorogation’ existed as a distinct concept, meaning, presumably, the continuation of a subsisting lease. It seems, therefore, that there was no unanimity as to the exact meaning of ‘prorogation’. In particular, it was unclear whether the grant of a second lease on identical terms to the first was a ‘prorogation’, or whether a ‘prorogation’ was an extension of the original lease and the grant of a second lease on identical terms to the first was, for some time, simply treated analogously to this. The point is of some importance when discussing whether the duration of a lease may be extended simply by varying the *ish*.⁹ The dominant use of the word ‘prorogation’ was to mean an extension effected by means of a second lease which was on identical terms to the original one and which was to commence at its *ish*.

³ Hunter *Landlord and Tenant* vol I 442–444 and 488–492; Rankine *Leases* 148–151; Paton and Cameron *Landlord and Tenant* 41–42. Although there is not a chapter devoted to the issue, there is discussion in Bell *Leases* vol I 46 *et seq.*

⁴ Ross *Lectures* vol II 500.

⁵ *Oxford English Dictionary* (available at www.oed.com). The word’s origins are in Old French and Latin. The term ‘prorogation’ is used in French texts: eg P Malaurie, L Aynès and P-Y Gautier *Droit des contrats spéciaux* (11th edn, 2020) [466]. In French law, that term seems to mean a continuation of the subsisting lease, as opposed to the conclusion of another; however, it is also possible for the parties to effect a renewal of a lease by means of a new, and separate, lease.

⁶ Rankine *Leases* 148. See also Paton and Cameron *Landlord and Tenant* 41 and 113, who use ‘prorogation’ and ‘renewal’ synonymously to cover any form of ‘extending’ the tenant’s right.

⁷ In *Richard v Lindsay* (1725) Mor 15217, *Creditors of Lord Cranston v Scot* (1757) Mor 15218, and *Scot v Graham* (1769) Mor 15220, ‘prorogation’ was used to refer to a lease granted to an existing tenant to commence at the *ish* of the current lease.

⁸ Bankton *Institute* II ix 39.

⁹ See paras 5-13 to 5-17 below.

5-04. Distinct from a prorogation was what Ross called ‘a new lease’,¹⁰ which later writers described as a ‘renewal’.¹¹ This occurred if the terms of a lease were altered *and* the new lease began before the ish of the original. These definitions of ‘prorogation’ and ‘renewal’ were not, however, adhered to by later writers. Approaching the matter logically, one can see that, even if considering only extensions effected by means of a new lease, these are not the only possibilities. When the possibility of extending a lease by varying its ish is included, there are in fact five possible types of transaction:

1. a lease on identical terms to the subsisting lease, to commence at its ish;
2. a lease on different terms to the subsisting lease, to commence at its ish;
3. a lease on identical terms to the subsisting lease, to commence immediately;
4. a lease on different terms to the subsisting lease, to commence immediately; and
5. a variation of the duration of the subsisting lease.

Ross’s definition classified types 1 and 4: 1 was a prorogation and 4 a ‘new lease’. At some point, a ‘new lease’ became known as a ‘renewal’. Ross’s definition was repeated by Hunter,¹² but Rankine,¹³ and Paton and Cameron,¹⁴ whilst maintaining Ross’s definition of ‘prorogation’, altered his definition of ‘renewal’. It became: a transaction where the new lease begins before the lapse of the old *or* where alterations are made to the rent or other conditions.¹⁵ This definition of renewal encompasses types 2 to 4.

5-05. This traditional terminology is unhelpful. As will be shown below, when ascertaining whether a transaction binds a successor landlord, the crucial distinction is now between transactions of types 1 and 2 on the one hand and types 3 and 4 on the other. Types 1 and 2 commence at the ish of the subsisting lease and so do not bind a successor landlord who acquires ownership prior to its termination, which is also the date when the ‘extension’ is to commence. It is thought¹⁶ that types 3 and 4 become immediately real because they commence immediately. They therefore do bind a successor landlord who acquires before

¹⁰ Ross *Lectures* vol II 501.

¹¹ Hunter *Landlord and Tenant* vol I 442; Rankine *Leases* 148; Paton and Cameron *Landlord and Tenant* 41.

¹² Hunter *Landlord and Tenant* vol I 442. Bell *Leases* 51 uses the terms ‘prorogation’ and ‘renewal’ but does not appear to define them.

¹³ Rankine *Leases* 148.

¹⁴ Paton and Cameron *Landlord and Tenant* 41.

¹⁵ In the case of Paton and Cameron, the alteration appears not to be deliberate: they cite Ross as authority for the definition which they propose.

¹⁶ The reason to be tentative is that some texts maintain that unless the new lease innovates on the terms of the existing lease in some manner which results in a change in the parties’ behaviour, the tenant’s possession will not be attributed to the new lease absent express renunciation or special circumstances. Paras 5-11 and 5-12 below suggest that that is not the law.

the original lease would have expired. The prorogation/renewal distinction as drawn by Paton and Cameron sits in the wrong place if the question being asked is whether a transaction is effective in a question with a successor landlord. This may explain why they stated that there is ‘no important distinction between prorogation and renewal, and the word “renewal” is commonly used for either transaction’.¹⁷ Modern texts assume that leases are extended by means of separate contracts of lease, whether they begin at the ish of the subsisting lease or immediately, but those texts pay little attention to the fifth possibility, that the parties may agree to vary the ish.

(b) *New lease to commence at ish: protection postponed*

5-06. In order for a successor of the landlord to be bound by an unregistered lease, the tenant must possess by virtue of that lease. The rule is well expressed by Hume: ‘the possession which shall serve to validate a tack must be possession upon the particular title, or very tack which is in question between the parties’.¹⁸ Such possession can only occur *after* the lease’s date of entry. Thus Erskine: ‘a tenant can have no possession upon his tack till the term of his entry’.¹⁹ So if parties conclude a contract of lease which is to commence at some point in the future, and before the date of entry the landlord transfers ownership of the subjects, the tenant’s right in respect of that future lease will not be enforceable against the successor even if the tenant possesses the subjects in the meantime by virtue of some other right.²⁰ A commonly encountered phrase is that the subsequent lease was conferred *in tempus indebitum*.²¹ Following transfer, the tenant will be left with a contractual claim against the original landlord for non-performance.²² As George Joseph Bell says, the tenant remains a personal creditor until he begins to possess upon the lease.²³

¹⁷ Paton and Cameron *Landlord and Tenant* 41. Indeed, that text uses the terms synonymously to refer to an extension, however effected. ‘Prorogation’ is used in this way in *Birkbeck v Ross* (1865) 4 M 272 (OH) at 276.

¹⁸ Hume *Lectures* IV 81.

¹⁹ Erskine *Institute* II vi 25.

²⁰ *Wallace v Harvey* (1627) Mor 67; *Hamilton v Tenants* (1632) Mor 15230; *Maxwell v Tenants* (1630) Mor 15215; *Johnston v Cullen* (1676) Mor 15231; *Kerr v Redhead* (1794) 3 Pat 309 (HL); *Millar v McRobbie* 1949 SC 1 (IH) at 8. Cf German law, which protects the tenant’s future right against a successor in these circumstances: *Staudingers Kommentar* §566 [29] and *Münchener Kommentar* §566 [13].

²¹ This phrase is used in *Drum v Jamieson* (1602) Mor 15209 at 15210; *Preston v Tenants of Duddingston* (1604) Mor 15210, and *Maxwell v Tenants* (1630) Mor 15215. In *Drum* this is translated: ‘to begin in such a year when the setter had no right’. Trayner’s rendition is ‘at an undue time’: J Trayner *Latin Maxims and Phrases* (4th edn, 1894) 277.

²² *Creditors of Lord Cranston v Scot* (1757) Mor 15218.

²³ Bell *Commentaries* I 65, citing *Creditors of Lord Cranston v Scot* (1757) Mor 15218. See also Hunter *Landlord and Tenant* vol I 443–444.

5-07. Bankton is a good place to start when considering how this rule applies to transactions to extend leases:²⁴

If an heritor grant a tack to a tenant already possessed of one, to commence after expiration of the first tack, and thereafter sell the lands, and the disponee is infeft before commencement of the second tack, the question is, if it can defend the tenant against such singular successor. It may seem, that the possession, being only upon the first, and not on the second tack, the purchaser is not concerned with it; but the court found the second tack good against him, as being in effect but a prorogation of the first tack^[25]; but if the second tack varied from the first, to the prejudice of the proprietor,^[26] this could not hold; for then it could not be deemed a prorogation of the first, and would ensnare purchasers. And, with submission, even the first case may still be doubted, since purchasers are bound only to enquire as to the tacks, by virtue whereof the tenants are in the possession, and the old statute only secures such leases, till the issue or termination of the same.

Bankton makes three points. (I) The conclusion of a second contract of lease to commence at the ish of the existing lease and on the same terms (a type 1 case) was, at that time, viewed as being ‘in effect’ a prorogation of the original contract of lease, and not as a separate lease to commence at the ish of the original. The difficulty in determining exactly what earlier writers meant by ‘prorogation’ was noted above.²⁷ Here Bankton uses the word in its literal sense: an extension of the same thing. This is a key point. The two leases were fused. The second lease was to be viewed as simply extending the duration of the first, and so the tenant was protected against alienation by the landlord even before the period of the extension began, for he was already in possession under the lease as extended. (II) When the terms of the second contract varied from those of the original lease (a type 2 case), it could not be viewed as simply an extension of the original lease, but was instead to be seen as a separate contract of lease with a future date of entry. As there could be no possession upon this lease prior to that date, a successor acquiring the subjects in the meantime would take free of it. Bankton thought that this was justified by the protection of purchasers. (III) Bankton thought the rule which plainly applied to type 2 cases might also apply to type 1 cases. At the time Bankton wrote, there was already some authority to this effect,²⁸ although subsequent cases had taken a different approach.

5-08. In the cases cited by Bankton it is possible to see debate about how type 1 cases should be characterised: are they extensions to, or distinct from, the

²⁴ Bankton *Institute* II ix 39.

²⁵ He cites *Edgar*, July 7 1725 and *Richard*. I have not been able to trace the former reference; the latter may be to *Richard v Lindsay* (1725) Mor 15217.

²⁶ In doctrinal terms, it should not matter whether the variation is to the prejudice of the proprietor. If there is any variation to the terms, the renewal must be viewed as a separate contract of lease.

²⁷ Para 5-03 above.

²⁸ *Drum v Jamieson* (1602) Mor 15209.

existing contract of lease?²⁹ In *Mackarro*,³⁰ for instance, the landlord's successor argued that the second tack was 'a several and distinct right from the first . . . to which [the tenant] could not ascribe his possession'. This argument was rejected and the successor was held bound by the subsequent lease. Likewise in *Preston v Tenants of Duddingston*,³¹ current and future leases were viewed as 'a conjunct tack'. These early cases simply considered whether a lease to commence at the ish of a subsisting lease would bind a successor who acquired before that lease commenced; however, subsequent decisions actually considered transactions described as 'prorogations'.³² The law fluctuated³³ and finally reached the position that leases to begin after the ish of a current lease were viewed as separate from the current lease and, like other leases with future dates of entry, did not become real until the tenant began to possess by virtue of them.³⁴ That is clearly the rule today. There are various cases to support this position³⁵ and it is recognised as the law by many writers.³⁶ The rule is most pithily expressed in *Johnston v Monzie*,³⁷ in which it was unanimously found that 'a prorogation of a tack, upon which no possession had followed, the old tack not being expired, is not a real right, and, consequently, not valid against a singular successor'. The cases in which the opposite rule was adopted, and the contracts fused, are

²⁹ (i) Future lease not binding upon successor as it is separate from the original lease: *Drum v Jamieson* (1602) Mor 15209; (ii) second lease binding upon successor as it is an extension of the original lease: *Preston v Tenants of Duddingston* (1604) Mor 15210, and *Mackarro* (1662) Mor 15213. An obligation to renew a lease contained in the original lease was held not to bind a successor in *Dalrymple v Hepburn* (1737) 5 Br Sup 190 (on which, see para 5-24 below).

³⁰ (1662) Mor 15213.

³¹ (1604) Mor 15210.

³² *Richard v Lindsay* (1725) Mor 15217; *Creditors of Lord Cranston v Scot* (1757) Mor 15218; *Scot v Graham* (1769) Mor 15220. In *Richard* the description as a prorogation may have been inaccurate, as the rent was increased.

³³ Cf e.g. *Drum v Jamieson* (1602) Mor 15209 (not binding); *Preston v Tenants of Duddingston* (1604) Mor 15210 and *Richard v Lindsay* (1725) Mor 15217 (binding); *Creditors of Lord Cranston v Scot* (1757) Mor 15218 and *Scot v Graham* (1769) Mor 15220 (not binding). The chronological development is documented by Hunter *Landlord and Tenant* vol I 489–491.

³⁴ German law also recognises that the treatment of extensions of a lease and future leases are linked. It was noted above (n 20) that in German law leases bind successors where the tenant had been admitted to possession *before* the date of entry. From this it follows that an extension binds successors who acquire after the conclusion of the contract to extend the lease, but before the extended period commences: see *Staudingers Kommentar* §566 [29].

³⁵ *Creditors of Lord Cranston v Scot* (1757) Mor 15218; *Creditors of Douglas v Carlyles* (1757) Mor 15219; *Scot v Graham* (1769) Mor 15 220; *Johnston v Monzie* (1760) 5 Br Sup 877. See also *Campbeltown Coal Company v Duke of Argyll* 1926 SC 126 (IH), in respect of an obligation to accept a renunciation of an existing lease and to grant a new one.

³⁶ *Erskine Institute* II vi 25 (the note first appeared in the 4th edn by J Gillon, 1805); JS More *Notes to Stair's Institutions* (1832) ccxlv; JS More *Lectures on the Law of Scotland* (J McLaren ed, 1864) vol II 3; Hume *Lectures* IV 81–82; Bell *Principles* §1210; Bell *Commentaries* I 65; Hunter *Landlord and Tenant* vol I 492; Rankine *Leases* 149; Paton and Cameron *Landlord and Tenant* 112.

³⁷ (1760) 5 Br Sup 877.

no longer good law.³⁸ It is said to make no difference whether the two (or more) leases are recorded in a single deed,³⁹ or the subsequent contract is endorsed upon the existing lease.⁴⁰

5-09. As a matter of logical inference, future contracts of lease which are upon different terms from the original lease (type 2) are subject to the same treatment: these are separate contracts from the subsisting lease and so the ‘renewal’ does not bind a successor of the landlord until the tenant begins to possess by virtue of it.⁴¹ Obviously, if the new lease is a long lease, it must be registered in order to become real.⁴²

(c) *New lease to commence at once: immediate protection*

5-10. The rule just discussed defers protection of the tenant against a singular successor until the end of the subsisting lease. To avoid this, parties may structure their transaction differently. Instead of agreeing, say, in year 10 of a 15-year lease that there will be a further lease for 10 years at the end of the original lease, a new lease may be concluded to start immediately, aggregating the period remaining on the original lease with that of the desired new lease. In the example given the parties would conclude a 15-year lease. Possession may be ascribed right away to the new lease so as to render it immediately binding in a question with a successor.⁴³ In the classification given earlier,⁴⁴ this is a type 3

³⁸ *Preston v Tenants of Duddingston* (1604) Mor 15210; *Mackarro* (1662) Mor 15213; *Richard v Lindsay* (1725) Mor 15217. Two later cases did hold that a provision for the renewal of a lease bound a successor landlord: *Wight v Earl of Hopeton* (1763) Mor 10461; *Scott v Straiton* (1771) Mor 15200, affd (1772) 3 Pat 666. However, both turned on specialities. *Wight* depended on the terms of the transfer to the successor; *Straiton* turned on the successor having homologated the obligation. See, e.g., *Bell Leases* vol I 47–49; *Rankine Leases* 151. *Wight* and *Scott* are discussed in more detail at para 5-28 below. In *Jacobs v Anderson* (1898) 6 SLT 234 (OH) it was said that if a contract been made between a landlord and tenant to renew a lease at its expiry and, in reliance upon it, the tenant incurred expenditure, it might have been arguable that a new lease was constituted from the date of the letter. This is not thought to be the law.

³⁹ Cf the reasoning in an early case, where it was the fact that consecutive leases were in separate deeds which appears to have been conclusive: *Drum v Jamieson* (1602) Mor 15209.

⁴⁰ Bell, Hunter and Rankine are unanimous upon this point, although there appears to be no relevant case authority: *Bell Leases* vol I 57; Hunter *Landlord and Tenant* vol I 475; *Rankine Leases* 149.

⁴¹ *Richard v Lindsay* (1725) Mor 15217 is *contra*, but is now viewed as wrong, for it is inconsistent with the general rule: *Rankine Leases* 150–151.

⁴² See discussion of the effect of prospective registration at para 5-49 below.

⁴³ *Neilson v Menzies* (1671) Mor 15231 is often cited. The note in Morison is ‘one possessing by a tack, getting a new tack for a lesser tack-duty presently to commence, it was found, That he might ascribe his possession to the new tack, so as to prefer him to a successor’. This is Stair’s report. Gosford’s differed: he reports that the second tack did not commence until the expiry of the first, making it a type 2 transaction (as there was a variation of rent). If that is so, the result is inconsistent with the current rule in respect of future leases. For this reason, Bell describes the decision as ‘very doubtful’: *Principles* §1210.

⁴⁴ At para 5-04 above.

or 4 transaction, and this is how a lease would normally be extended in modern practice.

5-11. In order to remove any doubt as to the basis for the continuing possession, it is best for the original lease to be renounced. If there is no express renunciation, it must be clear that possession is upon the new lease.⁴⁵ The general view is that this requires a change in rent (or presumably of any other term which results in an immediate change in the parties' conduct). Some commentators maintain that only in special circumstances will possession be ascribed to the new lease where there is neither express renunciation nor such a change;⁴⁶ the mere fact that the second lease has a different ish is insufficient. There must, in the ordinary course of things, be some alteration to the terms which is immediately observable and therefore serves as evidence that the tenant is now possessing by virtue of the new lease. The acceptance of a lease on such altered terms is regarded as an implied renunciation of the original lease.⁴⁷ The requirements of a particular change to the terms of the lease, or alternatively 'special circumstances', will often, albeit not necessarily,⁴⁸ be satisfied by a type 4 transaction, as that involves a second lease on different terms from the first. If, however, the rule as to when there is an implied renunciation is as just stated, a type 3 transaction (a new lease on identical terms) will not bind a successor until the original lease has expired, absent an express renunciation or special circumstances, because it is a lease on the same terms as the original (except, of course, for the ish).

5-12. There is a good argument that this distinction is illogical. If the parties to a subsisting lease conclude a further lease with a different ish which is to commence immediately, that must surely amount to an implied renunciation of the subsisting lease, regardless of whether terms other than the ish are different or the same. From that point on, their plain intention is, surely, that the new lease provides the basis for possession. Erskine may be cited in support of this position. He viewed the conclusion of a contract with a different ish as sufficient to amount to implied renunciation.⁴⁹

⁴⁵ *Birkbeck v Ross* (1865) 4 M 272 (OH) at 276.

⁴⁶ Bell *Principles* §1210; Rankine *Leases* 149; Paton and Cameron *Landlord and Tenant* 113; *SME Landlord and Tenant Second Reissue* [232]. See also *Birkbeck v Ross* (1865) 4 M 272 (OH) at 276.

⁴⁷ Ross *Lectures* vol II 501. On implied renunciation, see Hunter *Landlord and Tenant* vol II 110–112; Rankine *Leases* 524; Paton and Cameron *Landlord and Tenant* 239.

⁴⁸ The alteration might be to a term which does not result in an immediate alteration to the parties' behaviour.

⁴⁹ Erskine *Institute* II vi 44 (emphasis added). See also Bankton *Institute* II ix 48 ('There is an implied renunciation of a tack unexpired, by taking a posterior lease, innovating the terms of the first'); *Campbeltown Coal Co v Duke of Argyll* 1926 SC 126 (IH) 131. The parallel English doctrine of implied surrender would operate in these circumstances: see the unqualified statement in *Jenkin R Lewis & Son Ltd v Kerman* [1971] 1 Ch 477 (CA) at 496B–C.

The consent of parties to give up a current tack is presumed when the tenant accepts of and uses a posterior tack, in which *any* variation is made from the first, either as to the tack duty, *term of endurance*, or other provisions relating to it.

Hunter writes in similar terms,⁵⁰ as does Gloag.⁵¹ However, Rankine, and Paton and Cameron, relying on *Montgomerie v Vernon*,⁵² suggest that only in ‘special circumstances’ may possession be attributed to the new lease if there is no change of rent. This seems not to be correct. The opinions in *Montgomerie* do not formulate the law in such a way. Furthermore, this was not a case where the second lease was granted at the same rent as the first. Instead, the second lease was at a higher rent, but the tenant had continued to pay, and the previous landlord had continued to accept, the original rent.⁵³ The successor argued that she was not bound by the lease on the basis that there had been no possession on the second lease. This argument was rejected. According to Lord McLaren, ‘from the time the lease was granted, the defender [the tenant] necessarily possessed upon the lease, and on no other title’.⁵⁴ That formulation supports the approach taken by Erskine, Hunter and Gloag. Hence suggestions⁵⁵ that there must be ‘special circumstances’ to indicate that possession is on the new lease, where there is no change of rent or something similar between the original and new leases, are misplaced. If parties conclude a new lease to commence at once, that necessarily amounts to a renunciation of the existing lease.⁵⁶ That being the case, extensions of a lease effected by concluding a new lease to commence immediately can immediately become real. If the new lease cannot be registered, and the tenant is in possession, the new lease will become real immediately; if registrable, the lease will need to be registered in order to do so.

⁵⁰ Hunter *Landlord and Tenant* vol II 110.

⁵¹ Gloag *Contract* 392.

⁵² (1895) 22 R 465 (IH).

⁵³ The lease had, however, been granted in the expectation that the tenant would carry out certain work on the subjects, which he had done.

⁵⁴ (1895) 22 R 465 at 475 (emphasis added). On the facts there had been other conduct which could have been attributed to the new lease, such as carrying out improvements. However, those did not feature in Lord McLaren’s Opinion.

⁵⁵ Rankine *Leases* 149; Paton and Cameron *Landlord and Tenant* 113; *SME Landlord and Tenant Second Reissue* [232].

⁵⁶ Because of this, thought should be given to preserving any subsisting claims arising from the original lease: there is some authority that unless such claims are specifically reserved, they will be impliedly relinquished: *Lyon v Anderson* (1886) 13 R 1020 (IH) at 1024 and 1025. See Ross *Lectures* vol II 501; Rankine *Leases* 524; Gloag *Contract* 706; McBryde *Contract* [25–28]. It must be doubtful whether this is the law. Normally, a party will not lightly be taken to have given up legal rights: see, generally, *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) at 717H; *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691, [2010] 1 CLC 934 at [29], where Moore Bick LJ said that the presumption that a party does not intend to abandon any remedies for breach was ‘essentially one of common sense’. This must apply *a fortiori* in respect of *accrued* rights.

(d) Varying the ish

5-13. A third way by which parties might attempt to extend a subsisting lease is to vary its duration (type 5).⁵⁷ This appears to be common in practice. For example, a style minute of extension in *Green's Practice Styles* provides: 'With effect from [], the period of the Lease will be extended for a further period of [] years from and after [], (notwithstanding the date or dates hereof) so that the Lease will now terminate on [date], and Clause [] of the Lease shall be deemed to be varied accordingly.'⁵⁸ What effect is given to such an agreement and, in particular, how does it affect singular successors of the landlord?

5-14. Various arguments may be marshalled in favour of the view that the parties to a lease may extend it simply by varying its ish, and that such an extension is immediately binding on successors. The first is that there is no reason why such a transaction should not receive effect in line with the parties' intentions. A lease is a contract and, like any other, its terms may be varied. As was discussed in chapter 2, variations generally bind successors.⁵⁹ If no effect were to be given to an agreement to vary, what would happen to it?⁶⁰ Secondly, though the issue is not much considered, the authorities give some support to the proposition that a lease may be extended by varying its ish. When Bankton discussed whether extending a lease by means of a consecutive lease can be treated as in effect a prorogation, he presupposed the existence of a concept of prorogation distinct from a second lease to commence at the ish of the existing lease. Presumably he had in mind an extension to the existing lease. Thirdly, just such a transaction was given effect in a question with a successor landlord in *Thomson v Terney*.⁶¹ The landlord granted to the tenant a missive providing that, instead of being obliged to quit the farm at Michaelmas,⁶² he could remain until the following Martinmas. This was held to bind a successor of the landlord who acquired before Michaelmas. It is highly significant that, in what seems to be the only case to consider whether a successor landlord was bound where a lease was extended simply by varying the ish, the variation *was* held to bind the

⁵⁷ For the five types of transaction, see para 5-04 above.

⁵⁸ *Green's Practice Styles* C1016/16 (Feb 2011 version). See, too, KS Gerber *Commercial Leases in Scotland: A Practitioner's Guide* (3rd edn, 2016) [25-01]. The Scottish Law Commission's draft Leases (Automatic Continuation) etc (Scotland) Bill is drafted on the basis that variation of the duration of a lease is possible: see s 24(2)(b).

⁵⁹ As the duration of a lease determines how it may be made real, variation of the ish may impact upon this: see para 5-17 below.

⁶⁰ It might, by virtue of a mandatory rule of law, be treated as an agreement to extend the lease by means either of a new lease to commence at the ish of the current lease (i.e. type 1, in the characterisation at para 5-04 above) or a new lease to commence immediately (i.e. type 3). English law takes the second of these approaches: *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477 (CA) at 496E. If Scots law were to follow the English rule and characterise a variation of the ish as a deemed renunciation of the existing lease and grant of a new one, this would mean that the extension bound a successor.

⁶¹ (1791) Hume 780, discussed in para 2-03 above.

⁶² One of the English quarter days, falling on 29 September.

successor landlord. Hume approved of the decision in *Thomson v Terney* when he reported it⁶³ and cited it favourably at one point in his lectures.⁶⁴ Finally, the *Registration Manual* produced by the Registers of Scotland assumes the competence of such transactions and allows for registration of a lease which is extended by variation of the ish, such that it becomes, after extension, a registrable lease.⁶⁵

5-15. However, the decision in *Terney* has been doubted as difficult to reconcile with the general rule that a second contract of lease, which ‘extends’ the original lease, binds a successor landlord only once the tenant possesses upon it. George Joseph Bell doubted it.⁶⁶ Rankine thought that it could be justified only on the basis that the missive was ‘a mere readjustment’ of the original lease.⁶⁷ The leading texts on lease law do not mention varying the ish as a possible method of extending the duration of a lease, even although it is arguably the most obvious way of doing so.⁶⁸ That may suggest that it was not thought to be competent. Such a view might be the result of the influence of rules relating to feudal rights, which could not be varied. Instead there had to be a re-grant by a charter of *novodamus*,⁶⁹ or a minute of waiver had to be used. English law recognises that parties can vary the duration of a lease, but does so indirectly by treating an attempt at such a variation as a type 3 transaction, that is, as involving the deemed renunciation of the subsisting lease and the grant of a new lease on the same terms as the subsisting lease for the aggregate of the unexpired period of the subsisting lease and the period of extension.⁷⁰

It is not possible simply to convert the existing estate in the land into a different estate by adding more years to it, and even if the parties use words which indicate that this is what they wished to achieve the law will achieve the result at which they are aiming in the only way in which it can, namely by implying a fresh lease for the longer period and a surrender of the old lease.

There is, however, no suggestion in the sources that this is Scots law.

5-16. The better view is that an agreement to vary the ish of a subsisting lease does bind a successor landlord. This is not inconsistent with the rules which apply to extensions effected in other ways. On the contrary, it is a principled position. If the parties agree to extend a lease, that contract is immediately

⁶³ (1791) Hume 780.

⁶⁴ Hume *Lectures* IV 99.

⁶⁵ Registers of Scotland *Registration Manual* Leases/What is a registrable lease? The approach was similar under the Land Registration (Scotland) Act 1979: see *Legal Manual* [19.4.2.(a)].

⁶⁶ Bell *Principles* §1210, cited with apparent approval by the Lord Ordinary in *Birkbeck v Ross* (1865) 4 M 272 (OH) at 276.

⁶⁷ Rankine *Leases* 149.

⁶⁸ Hume *Lectures* IV 81–82.

⁶⁹ WM Gordon *Scottish Land Law* (2nd edn, 1999) [12-84]; Reid *Property* (Gretton) [95].

⁷⁰ *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477 (CA) at 496E.

varied, and the varied contract binds a successor (subject to the points made below about a variation which converts a short lease into a registrable one). On the other hand, if the parties agree to a second, separate lease to commence at the ish of the first lease, that will not become binding upon a successor until the tenant begins to possess by virtue of it. Finally, if they agree to conclude a new lease to commence immediately, and that lease is made real in the appropriate way, the tenant will immediately be protected against transfer by the landlord. The appropriate analysis depends upon the appropriate interpretation of the parties' agreement. The fact that it may occasionally be difficult to distinguish between the types of transaction⁷¹ does not mean that the concepts are not distinct.

5-17. If a straightforward variation of the ish is possible (as is suggested here), it gives rise to other issues. In particular, variation may affect whether the lease must be registered in order to be made real. If, for example, the parties to a 15-year lease agree to vary the ish with effect from the start of year 7 and to add a further 10 years to the duration, must the lease as amended be registered? Two models are possible. Registrability might depend upon the total duration of the lease as varied (in this example, 25 years: registrable); or it might turn upon the unexpired duration of the lease as varied (in this example, 19 years: not registrable).⁷² The *Registration Manual* produced by Registers of Scotland takes the first approach.⁷³ In favour of that approach, one may say the following. Consider a 25-year lease which the parties neglect to register. The tenant then has no real right. In year 6, when the lease has fewer than 20 years to run, the lease does not become real by possession. It is a registrable lease and remains such notwithstanding the running down of duration. So if the tenant realises the error in year 6, the tenant must register the lease in order to render the right real.

⁷¹ Which, for example, is the 'Minute of Extension' in the *Scots Style Book* vol V (1905) 329? It is in the following terms: 'We, the parties to the foregoing lease, hereby agree that the duration of the said lease shall be extended for the period of [] years from and after the term of [], on the same terms and conditions in all respects as are expressed in the said lease, which it is hereby agreed and declared shall be operative and binding for the said extended period, and shall form the contract between us, as if the whole clauses and stipulations thereof so far as not already implemented were herein inserted at length with reference to said period of extension'. Although the initial clause refers to the duration of the lease being extended, which might suggest a variation of the subsisting lease, the later clauses, which incorporate the provisions of the original lease into the extension, point towards the extension being a distinct contract of lease. Fortunately, modern styles are clearer: that in *Green's Practice Styles* (February 2011) C1016/16 is clearly a variation of the existing lease.

⁷² There is a third possibility: that it turns on the duration of the period of extension itself. This is unlikely. It would be appropriate if an agreement to vary the ish were to be interpreted as an agreement that the subsisting lease will be followed by another. That is not thought to be the rule.

⁷³ Registers of Scotland *Registration Manual* Leases/What is a registrable lease? For the corresponding position under the Land Registration (Scotland) Act 1979, see *Legal Manual* [19.4.2(a)].

The position adopted in the *Registration Manual* in respect of a variation of the ish is consistent with that. Similarly, if the ish of a registered lease is varied, the lease does not cease to be registrable if the remaining duration of the lease, taken together with the period of the extension, is 20 years or less. The Keeper's approach is also consistent with the legal analysis that the existing lease is being varied, not that a new lease is being granted (i.e. the English analysis where parties attempt to agree to vary the term of a lease). However, the opposite approach – amalgamating the unexpired duration and the period of extension – would have the merit that registration was only required where the landlord (and any successor) stood to be bound by the lease for more than 20 years. That might be said to sit better with the aims of land registration. Further, the Keeper's approach might be thought to produce harsh, or at least impractical, results if a lease is extended close to its expiry. Take the example of a 19-year lease approaching its ish, which is extended for a short period, say two years. It might be thought harsh that, unless the lease is registered, the tenant's right will not be protected against a successor in these final two years; and it might be thought impractical to have to register to protect the tenant for such a short period. The arguments are finely balanced but, in the absence of any authority to the contrary, and the lack of any suggestion that a variation of an ish is to be analysed in the same way as it would be in English law, the Keeper's approach appears to be acceptable. Tenants must therefore be alert to the possibility that variations can make registration essential to protect their rights in respect of previously unregistrable leases.

(2) Consecutive leases

5-18. The conclusion of consecutive leases now appears unlikely, but there are older cases in which parties agreed at the outset that an initial lease was to be followed by a second (and perhaps a third, and a fourth . . .) lease. The consecutive leases might be individually documented⁷⁴ or could be in one document. It is unclear what advantage such an arrangement would confer over a lease for the whole period.⁷⁵ But if the advantage is not clear, the law is. Consecutive leases are separate contracts; the successor is unaffected by the future lease(s), as he is bound only by the lease by virtue of which the tenant possesses at the time of acquisition. Here the argument against viewing the leases as one, and binding the successor by both, is strong: had the parties wished to conclude a single lease, they could have done so.⁷⁶

⁷⁴ As in *Drum v Jamieson* (1602) Mor 15209, and *Birkbeck v Ross* (1865) 4 M 272 (OH).

⁷⁵ This structure may have been used because of rules of entail law. At one point, leases of agricultural land or of mines and minerals could be granted, notwithstanding the terms of any entail, but not for a period exceeding 21 years: A Duff *A Treatise on the Deed of Entail* (1848) [31].

⁷⁶ *Birkbeck v Ross* (1865) 4 M 272 (OH) at 275–276.

(3) Options to renew (I): some preliminary points*(a) Setting the scene*

5-19. A lease might contain an option in favour of the tenant to renew or extend the lease.⁷⁷ Alternatively, the parties might agree during the lease that the tenant is to have such an option or the landlord might unilaterally grant the tenant such an option.⁷⁸ Another possible term is one which imposes on the landlord an unconditional obligation to renew the lease.⁷⁹ (A further possibility, discussed later in the chapter,⁸⁰ is a break option, which gives either party, or both, the power to terminate the lease before its ish.) There are many instances when such a term might be used. For example, it could be used as a response to uncertain economic conditions, or the tenant might be an overseas company which wishes a long period of occupation, but whose domestic laws or customs necessitate the use of short leases. In some cases the suitability of a site can only be assessed after a trial period of operation.⁸¹

5-20. This section and the next consider whether terms such as these bind a successor landlord.⁸² The focus is on options. The present section considers how an option may be analysed; the next⁸³ reviews the case law about whether options bind a successor landlord and considers how that coheres with the rules outlined at the start of the chapter.⁸⁴ The predominant view as the law currently stands is that just as a contract of lease to begin in the future does not bind a successor, so an option to enter into such a lease does not do so. It will be suggested that, from a policy perspective, this rule should be reconsidered.⁸⁵

⁷⁷ An option in favour of the landlord to require the tenant to take a new lease is also conceivable, but likely to be rare. In the terms used in financial markets, that would be a ‘put’ option held by the landlord.

⁷⁸ No doubt that would follow on from negotiations, but the form of the option could be unilateral. Unilateral options were considered in *Arbuthnot v Campbell* (1793) Hume 785; *Mackenzie v Mackenzie* (1799) Hume 801; and *Jacobs v Anderson* (1898) 6 SLT 234.

⁷⁹ This may be difficult to classify as either an option or a binding contract of lease because of the rule that an agreement to grant a lease is equivalent to a lease: see Rankine *Leases* 100–101; Craig *Jus Feudale* II x 10; Stair *Institutions* II ix 6; Erskine *Institute* II vi 21; Bell *Principles* §1190. The rule is sometimes expressed using the maxim *pactum de assedatione facienda et ipsa aequiparantur*. An unconditional obligation to renew and an option to renew were treated differently by the Long Leases (Scotland) Act 1954 s18.

⁸⁰ See paras 5-39 to 5-41 below.

⁸¹ D Neuberger and J Bassett ‘Options: are they worth the paper they are written on?’ in *The Blundell Memorial Lectures: Current Problems in Property Law* (1988) 1, 30.

⁸² Break options are considered at paras 5-39 to 5-41 below.

⁸³ Paras 5-23 to 5-37 below.

⁸⁴ See paras 5-03 *et seq* above.

⁸⁵ See paras 5-44 *et seq*.

(b) An analysis of options

5-21. Whereas some jurisdictions have committed themselves to a particular theoretical analysis of options to enter into contracts,⁸⁶ Scots law has not yet reached that position. There has been some debate about how best to analyse an option to purchase property,⁸⁷ which has favoured the view that an option is a promise by the grantor to enter into a contract on certain terms if the option-holder so desires within a particular period of time.⁸⁸ It is too early to say whether this will become the accepted position. Space does not permit the issue to be considered in full here: it does not affect whether an option will bind a successor landlord. Obviously, a promissory analysis will be suitable where the option is granted unilaterally. However, three other approaches which deserve more consideration in the case of options which result from bilateral deeds should be mentioned. The first is to view the option simply as the substantive contract (e.g. of sale or lease) subject to a suspensive condition, namely the exercise of the option.⁸⁹ The second is to view the option as ‘a contract between two parties, the option grantor and the option holder, which binds the former to keep open an offer to conclude some other contract (the substantive contract) for possible acceptance by the latter’.⁹⁰ The option contract is distinct from the substantive contract which results from the exercise of the option. A third, important, approach is that of Hoffmann J in *Spiro v Glencrown Properties Ltd*.⁹¹ He viewed an option as *sui generis* and used notions of ‘conditional contract’ and ‘irrevocable offer’ as metaphors to describe the various aspects of this *sui generis* concept. On that approach, it is not essential that an option display all of the characteristics of an offer or a conditional contract or a unilateral promise. That approach has much to recommend it, although it seems not to have been considered at all in the Scottish debate so far.

5-22. These are thought to be the possible analyses of an option to the tenant to renew the lease; or, on Lord Hoffmann’s approach, these are the metaphors

⁸⁶ See e.g. (i) England: M Dray et al *Barnsley’s Land Options* (7th edn, 2021); (ii) France: F C Dutilleul *Les contrats préparatoires à la vente d’immeuble* (1988); B Gross and P Bihr *Contrats: ventes civiles et commerciales, baux d’habitation, baux commerciaux* (2002) [87]; P Malaurie, L Aynès and P-Y Gautier *Droit des Contrats Spéciaux* (11th edn, 2020) [96] *et seq*; (iii) Germany: D Medicus *Schuldrecht II: Besonderer Teil* (12th edn, 2004) [156]–[164]; (iv) South Africa: LF van Huyssteen et al *Contract: General Principles* (6th edn, 2020) 82 *et seq*.

⁸⁷ Note this fundamental difference: whereas the exercise of an option to purchase need not result in a contract, but could simply trigger a unilateral obligation to convey property, an option to conclude a lease must result in a contract.

⁸⁸ HL MacQueen ‘Offers, promises and options’ 1985 SLT (News) 187. There is a general discussion of options in M Hogg *Obligations* (2nd edn 2006) [2.52]–[2.71], which expresses a preference for constituting an option as a promise: [2.64]. See, too, M Hogg *Promises and Contract Law* (2011) 230–235.

⁸⁹ This view prevailed in South Africa for some time, but was then abandoned: see Van Huyssteen et al *Contract* 83.

⁹⁰ This is the predominant South African approach: Van Huyssteen et al *Contract* 82–83.

⁹¹ [1991] Ch 537 (Ch D)

which may be used to describe aspects of the situation which arises upon the grant of an option:

1. unilateral promise by the landlord to renew the lease at its ish (i.e. to grant the tenant a further lease on the terms provided for in the option);⁹²
2. firm offer by the landlord to the tenant to renew the lease at its ish; the usual analysis in Scots law of a firm offer is that it consists of an offer accompanied by a promise that the offer will not be revoked before a particular time;⁹³ the same result could also be achieved by a subsidiary contract that the offer will be kept open for a particular time;⁹⁴ and
3. a lease to commence at the ish of the current lease, but subject to a suspensive condition, for example that it is only to take effect if the tenant so requests, or upon the tenant's paying a premium for the renewal.⁹⁵

As one would expect, each of the above possible analyses has different attributes.⁹⁶ Not all options need be analysed in the same way. As Lord Hodge

⁹² E.g. *Jacobs v Anderson* (1898) 6 SLT 234 (OH) (the promise here was not to renew an existing lease but rather from a landlord to a sub-tenant to grant a lease on the expiry of the head-lease, if the sub-tenant so required.) The notion of a unilateral obligation to grant a lease seems to be accepted, but it is unclear that it is any different from possibility 2, namely a firm offer of a lease. It is a promise that, at a particular time, the landlord will be willing to contract on particular terms. What is this but an offer? There are differences, such as assignability, between promises and offers which may make the distinction between a promise-based and an offer-based analysis important: McBryde *Contract* [2-20].

⁹³ E.g. TB Smith *A Short Commentary on the Law of Scotland* (1962) 747; R Black 'Obligations' in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) [617].

⁹⁴ This is the South African analysis of an option contract: Van Huyssteen et al *Contract* 82–83.

⁹⁵ E.g. (it is thought) *Campbell v M'Kinnon* (1867) 5 M 636 (IH), affd *sub nom Campbell v M'Lean* (1870) 8 M (HL) 40. There a 99-year lease was stated to be 'renewable for ever . . . at [the tenants'] cost and expense, upon payment to [the landlord] of [a grassum]'. There may be cases where it is difficult to determine whether a condition is suspensive of the landlord's obligation to renew, or is an obligation imposed on the tenant once the landlord grants the renewal.

⁹⁶ Again, this is not the place for detailed exploration of the various different issues arising from these approaches. However, the following points, in particular, arise. (i) Does the Requirements of Writing (Scotland) Act 1995 require the exercise of the option to be in writing? Exercise must be in writing if it is either an offer or an acceptance, but not, it seems, if it is simply the purification of a condition of an existing contract: *Stone v Macdonald* 1979 SC 363 (IH) at 368 (re purification of a condition of a unilateral obligation); *Hamilton v Lochrane* (1898) 1 F 478 (IH) at 480 (tenant's initial argument, abandoned on appeal); PJ Hamilton (ed) WG Dickson *A Treatise on the Law of Evidence* vol II (1887) § 1036 (oral evidence of non-fulfilment of condition admissible). (ii) Does the option require explicit exercise or does the tenant's remaining upon the property after the ish suffice? *Commercial Union Assurance Co Ltd v Watt and Cumine* 1964 SC 84 (IH) held that, where a lease expressly gave the tenant an option to renew and it did not exercise the option before the ish, possession after that date was attributable to tacit relocation and the option lapsed. Similarly, *Marquess of Linlithgow's Trs v Gifford* 1969 SLT 288 (IH). The Scottish Law Commission's understanding was that 'a renewal requires action on the part of the tenant': *Report on Conversion of Long Leases* (Scot Law Com No 204, 2006) [2.24]. The predicament of the inattentive tenant who failed to exercise

has stated, '[d]ifferent forms of option agreement may lend themselves more readily to one or other characterisation'.⁹⁷ In the context of leases, although an option granted by the landlord to the tenant during the lease could be viewed as a promise to grant a lease if required to do so, it is thought that a promissory analysis would be artificial if the option is a term of the lease itself.

(4) Options to renew (II): binding on successor landlords?

(a) Case law and commentary

5-23. There are various relevant cases which consider whether an obligation or an option to renew a lease binds a successor. They reach conflicting results. The predominant view, however, is that such terms are personal conditions and that those cases which held a successor bound by obligation to renew turned on their own facts.⁹⁸ The case law is now reviewed before proposals are made for reform.

5-24. In *Dalrymple v Hepburn*⁹⁹ a landlord was held not to be bound by an unconditional obligation in the lease to renew the lease at its ish. The Lord Ordinary held that this did not bind a successor who acquired before the ish. The court initially reversed, on the basis that they 'considered the obligation in the tack as a continuation of the same tack, being *in eodem corpore juris*, and not a new tack, to which the only reasoning upon that topic^[100] . . . did apply'. After subsequent argument, however, the Lord Ordinary's view was restored, on the basis that 'a bond to renew a tack, contained in the end of a tack, makes no part of the tack, but is a separate obligation', which was not effectual against a singular successor.¹⁰¹

5-25. *Clerk v Farquharson*¹⁰² supports this approach, although consideration of this precise point may be *obiter*. An agreement was interpreted as being a lease for one year, with an obligation upon the landlord to give the tenant a lease for

the option before the end of the lease was alleviated in the leasehold conversion scheme by the Long Leases (Scotland) Act 2012 s 72, which deems a renewal provision to have been complied with where a lease is continuing by tacit relocation. Cf two earlier cases involving unilateral, unconditional undertakings by the landlord to renew the lease at its ish, where the tenant's continued possession after the expiry of the initial lease was attributed to a lease in terms of that undertaking and not to tacit relocation: *Arbuthnot v Campbell* (1793) Hume 785 and *Mackenzie v Mackenzie* (1799) Hume 801.

⁹⁷ *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139, 2008 GWD 33-494 at [15], where the issue was whether the postal acceptance rule applied to the exercise of an option. Lord Hodge held that it did not. It would have done so if the exercise was to be viewed as the acceptance of an offer.

⁹⁸ *Bell Leases* vol I 48-49; *Rankine Leases* 150; *Paton and Cameron Landlord and Tenant* 112. (1737) 5 Br Sup 190.

¹⁰⁰ I.e. the cases discussed at paras 5-03 *et seq* above regarding prorogations and renewals.

¹⁰¹ Citing *Corsehill v Wilson and Hamilton v Tenants*, both reported at (1626) Mor 15188.

¹⁰² (1799) Mor 15225.

seven years if required. The year passed; the tenant remained on the property but did not exercise the option. Subsequently, the landlord sold the subjects and his successor sought to remove the tenant on the expiry of that year. The successor successfully argued that the only agreement between the original landlord and tenant had been a lease for one year, which had then been tacitly renewed. 'He [the tenant] had farther a personal obligation on the landlord, giving an option to obtain a lease for seven years; but as [the tenant] had not made the requisition before sale, his right to do so is ineffectual against a singular successor.'¹⁰³ The case may actually raise no question about whether an obligation to renew binds a singular successor. Once the one-year lease had expired without the option having been exercised, the option would have lapsed,¹⁰⁴ meaning that the tenant could not have exercised it even in a question with the original landlord. If that is correct, the case is not authority as to whether an option to renew binds a successor. However, the court's view on this point certainly seems to have been that it did not.

5-26. In the *Case of the Queensberry Leases*,¹⁰⁵ heard by the House of Lords in 1819 and described by the Lord Chancellor as 'unquestionably the most weighty and important cause, which, in the course of my professional life . . . I have ever had occasion to consider',¹⁰⁶ it was held that where the parties had agreed a lease for 19 years, with an obligation on the landlord to renew the lease for a further 19 years each year so long as the grantor lived, the tenant possessed only on the 19-year lease which existed at the time: the provision for renewal was 'a mere personal contract, upon which . . . there could be no possession'¹⁰⁷ and therefore would not have bound a successor.

5-27. A further case which held that an option did not bind a successor landlord is *Jacobs v Anderson*.¹⁰⁸ A landlord undertook to a sub-tenant to grant him a lease on expiry of the head-lease, provided that he was still in occupation. Lord Kyllachy held that such an obligation did not bind a successor to the landlord. Of course, the case did not involve an option granted by a landlord to a tenant. However, one reason which Lord Kyllachy gave for the result was that the obligation was unilateral and did not require the option-holder to accept the lease from the landlord. Such an obligation was not, he reasoned, one to which the Leases Act 1449 applied. This case is strong, albeit only Outer House, authority that a freestanding option does not bind a successor.

5-28. Some cases support the opposite position. In particular, in two well-known cases a successor was held bound by a lease which was renewable in

¹⁰³ (1799) Mor 15225 at 15226, citing *Dalrymple v Hepburn* (1737) 5 Br Sup 190.

¹⁰⁴ As in *Commercial Union Assurance Co Ltd v Watt and Cumine* 1964 SC 84 (IH).

¹⁰⁵ (1819) 1 Bligh 339.

¹⁰⁶ (1819) 1 Bligh 339 at 340.

¹⁰⁷ (1819) 1 Bligh 339 at 404; see, too, 522.

¹⁰⁸ (1898) 6 SLT 234.

perpetuity. These are *Wight v Earl of Hopeton*¹⁰⁹ and *Scott v Straiton*,¹¹⁰ the latter a decision of the House of Lords. In *Campbell v M'Kinnon*¹¹¹ both the Inner House and the House of Lords refused to express an opinion upon whether a successor would be bound by an obligation in a 99-year lease to renew it in perpetuity.¹¹² Both courts held that the lease by virtue of which the tenant was currently in possession bound a successor and left undecided the question whether the successor was bound by the obligation to renew. The decisions in *Wight* and *Straiton* are now typically explained upon other grounds: in the case of *Wight*, as depending upon the particular terms of the transfer involved, which bound the successor to abide by the leases;¹¹³ and, in the case of *Straiton*, as depending upon the successor's homologation of the obligation.¹¹⁴ They are not now seen as establishing any general rule that a successor is bound by an obligation to renew.¹¹⁵ John Shank More summarised the current position accurately when he stated that 'no obligation to grant or renew a lease is of any avail against purchasers or other singular successors'.¹¹⁶

¹⁰⁹ (1763) Mor 10461.

¹¹⁰ (1771) Mor 15200 affd (1772) 3 Pat 666.

¹¹¹ (1867) 5 M 636 (IH) at 649 and 652, affd *sub nom Campbell v M'Lean* (1870) 8 M (HL) 40 at 43 and 48.

¹¹² Such an obligation faces the further problem that it is contrary to the nature of a lease, which is a temporary real right. Mackenzie insisted that an obligation on the landlord not to remove a tenant would not bind a successor as it was both *contra naturam Domini* and not of the nature of a tack, which must have a definite ish: Mackenzie *Observations* 189. And yet such obligations were commonplace in a particular class of leases, called 'Blairgowrie Leases': Scottish Law Commission *Report on the Conversion of Long Leases* (Scot Law Com No 204, 2006) [2.23].

¹¹³ The lease was excluded from warrandice and assigned to the successor. The exclusion provided that the successor was not to challenge the lease on any ground which would infer warrandice against the seller: *Wight v Earl of Hopeton* (1763) Mor 10461 at 10463 and argument at 10464–10465. See also Rankine *Leases* 140 and the footnote to Erskine *Institute* II vi 24 (the relevant part of the footnote first appeared in the 4th edn by J Gillon, 1805).

¹¹⁴ See (1771) Mor 15200 at 15207.

¹¹⁵ Rankine *Leases* 140 and Paton and Cameron *Landlord and Tenant* 112 both state that a successor is not bound by such an obligation. Cf Gloag *Contract* 234 where the point was said to be 'doubtful'. For specific discussion of *Wight* and *Straiton*, see e.g. *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 89 ('it may be doubtful whether it [*Wight*] would now be followed'); *Mann v Houston* 1957 SLT 89 (IH) at 95 (Lord Sorn), although Lord President Clyde did not feel able to doubt *Wight* and Lord Carmont preferred to express no opinion (94); Paton and Cameron *Landlord and Tenant* 97. Cf *Wilson v Mann* (1876) 3 R 527 (IH) at 534, where Lord Gifford cited *Wight* approvingly. Hume also viewed these cases as being decided upon specialities. He noted that there is a third similar, but unreported, case (*Skene v Bryce* 20 May 1790): Hume *Lectures* IV 78; cf 82, where Hume suggests that an obligation to renew a 19-year lease every Whitsunday to ensure that there are always 19 years to run would bind a successor. This is probably incorrect, for that would be a perpetual lease.

¹¹⁶ More *Lectures* vol II 3.

(b) Reasoning from rules regarding future leases and renewals

5-29. The explanation for the rule that an option to renew is a personal condition is that this flows from the rules, detailed at the beginning of the chapter, about when contracts of lease, and extensions to them, bind successors.¹¹⁷ Regardless of how an option to renew is characterised – be it as a further lease subject to a suspensive condition, as a unilateral obligation to enter into a further lease, or as a firm offer to grant the tenant such a lease – it is a preliminary step to entering into another lease. A successor is only bound by an unregistered lease by virtue of which the tenant is in possession. The law is unwilling to amalgamate a lease which has a future date of entry and the lease by virtue of which the tenant is currently possessing so as to make the future lease a real right prior to its date of entry. This rule logically also applies to options to enter into such a second lease. It would be odd for a successor landlord not to be bound by an unconditional contract of lease with a future date of entry (which might itself be the result of the exercise of an option), but for the option itself to bind a successor. This result also flows from a consideration of each of the possible analyses of an option.¹¹⁸ Just as successive contracts of lease are viewed as separate from the subsisting one, so if a conditional contract analysis of an option is adopted, that conditional contract will be viewed as separate from the original contract of lease. As for the other possible analyses (i.e. firm offer or promise), these cannot bind successors because the Leases Act 1449 applies only to contracts of lease and not to offers or unilateral obligations to conclude such contracts.¹¹⁹

(c) Arguments based on the registration statutes

5-30. In the South African case of *Shalala v Gelb*,¹²⁰ the decision as to whether the tenant's right of renewal could be exercised against a successor landlord was influenced by the fact that such rights are there taken into account when determining whether a lease is short or long. Ogilvie Thomson J reasoned that, as the renewal period is included in computing the duration of a lease, so the renewal period falls to be included in the protection accorded to the tenant by the maxim *huur gaat voor koop*.¹²¹ Similar arguments could be advanced on the basis of Scottish legislation. This section considers arguments that statutory provisions relating to long leases assume (and therefore require) that obligations to renew do bind successor landlords.

5-31. Both the Registration of Leases (Scotland) Act 1857 and, when it was in force, the Land Registration (Scotland) Act 1979 state, in varying terms, that

¹¹⁷ See paras 5-03 *et seq* above.

¹¹⁸ For these (three) analyses, see para 5-22 above.

¹¹⁹ *Jacobs v Anderson* (1898) 6 SLT 234 (OH).

¹²⁰ 1950 (1) SA 851 (CPD).

¹²¹ 1950 (1) SA 851 at 862.

provisions relating to renewal are to be taken into account when calculating the length of a lease and determining whether it is registrable. Thus, section 17 of the 1857 Act (which now determines the ability to register a lease) provides that:

Leases containing an obligation upon the grantor to renew the same from time to time at fixed periods, or upon the termination of a life or lives, or otherwise, shall be deemed leases within the meaning of this Act, and registerable as such, provided such leases shall by the terms of such obligation be renewable from time to time so as to endure for a period exceeding twenty years.

Under the 1979 Act only 'long leases' could be registered. Section 28(1) of the 1979 Act provided the following definition of 'long lease':¹²²

'long lease' means a probative lease –

- (a) exceeding 20 years; or
- (b) which is subject to any provision whereby any person holding the interest of the grantor is under a future obligation, if so requested by the grantee, to renew the lease so that the total duration could (in terms of the lease, as renewed, and without any subsequent agreement, express or implied, between the persons holding the interests of the grantor and the grantee) extend for more than 20 years.¹²³

5-32. A variety of arguments may be advanced on the basis of these provisions. The first is that the purpose of the system of land registration is to provide information to potential acquirers about the real rights and real conditions which affect that land, subject to the possibility of off-register rights which nevertheless bind successors.¹²⁴ The latter are an elite group. They include those unregistered leases which may be made real by possession.¹²⁵ So far as leases are concerned, the system of land registration allows those acquiring property to do so on the basis that, if no lease is disclosed on the Land Register, the maximum duration of lease by which they may be bound (i.e. a lease not

¹²² The second limb of the definition was not present in the original Bill. It was introduced at the Report stage, after the status of leases containing such options was raised in the House of Lords: Hansard HL vol 397 col 926.

¹²³ Note the differences between the two provisions. The definition of long lease in the 1979 Act took into account only those terms which impose upon the grantor 'a future obligation, *if so requested by the grantee*, to renew the lease'. What if the obligation is unconditional and simply requires the landlord to renew the lease at its ish? Section 28(1) of the 1979 Act appears not to have covered this, meaning that a 19-year lease which simply obliges the landlord to renew it for a further 19 years would not have qualified as a long lease under the Act. That lease would have been registrable under the 1857 Act.

¹²⁴ These were called 'overriding interests' under the 1979 Act regime, but that defined term has been abandoned under the Land Registration etc (Scotland) Act 2012.

¹²⁵ I.e. short leases, long leases made real by possession prior to the Land Register becoming operational, and (possibly) leases for more than 20 years which are not probative and therefore not registrable: as to the latter possibility, see paras 1-20 and 1-21 above.

eligible for registration) is likely to be 20 years.¹²⁶ By providing that a lease must be registered where, though granted for a period shorter than 20 years, it has a renewal option which, if exercised, would extend its duration to more than 20 years, the law assumes that such a renewal obligation would bind a successor. Otherwise, why would it insist upon registration? Were the renewal option not binding upon a successor, the successor could simply ignore it, and there would be no breach of the principle that the Land Register will inform potential acquirers of leases exceeding 20 years in duration.

5-33. This argument, however, rests on too narrow a view of the purposes of registration. Although the protection of acquirers is certainly a key aim of registration of title, it is not the only aim. Registration also benefits tenants. In particular, a tenant will benefit from the guarantee of title offered by registration. It may be thought entirely appropriate that a tenant with an option to renew which, if exercised, would make the lease a long lease, should be able to participate in the advantages of land registration, even if the option is not a real condition. In many cases, there will be no change of landlord. Even where there is such a change, and the liability correlative to the option to renew does not automatically bind a successor, the original landlord should take the successor bound to respect the option and the tenant should therefore remain able to exercise it.¹²⁷ Further, registration of rights in land benefits the public more generally. The presence of a similar provision in the Registration of Leases (Scotland) Act 1857 is also important. For as long as leases were registrable in the Register of Sasines, registration was not compulsory in order to obtain a real right of lease. One cannot therefore use the argument which has just been made in respect of registration as it was originally introduced by the 1857 Act. An acquirer who found no mention of a lease in the Register of Sasines was offered no guarantee that the property was free from leases in excess of 20 years' duration.¹²⁸ Yet the 1857 Act contained a materially identical provision requiring options to renew to be taken into account when determining whether a lease was registrable. The 1857 Act also substantiates the point that registration serves broader purposes than solely the protection of acquirers of

¹²⁶ This cannot be said to be an absolute proposition, because of (i) the possibility of a longer lease that was made real before the Land Register became operational, and (ii) if this is law – which is doubtful – the possibility of a lease for more than 20 years which is not probative and so cannot be registered: as to the latter, see paras 1-20 and 1-21 above.

¹²⁷ See, generally, ch 8 below.

¹²⁸ The continuing effectiveness of long leases made real by possession prior to the Land Register becoming operational means that, for some time yet, the Land Register can also offer no guarantee that the maximum duration of an off-register lease by which a successor may be bound is 20 years. The number of such leases will decrease as the leases in question expire or become registered. There is also the possibility (albeit that it is thought that this is probably not the law) of there being a lease which is longer than 20 years but which is not probative and therefore not registrable but which might bind a successor without being registered: see para 1-21 above.

ownership of property: it was introduced in order to facilitate the use of leases as security.¹²⁹

5-34. The second argument is a broader one. It is simply that by aggregating the durations of the lease and the option, the statute treats the two as one, and that the same approach might be expected to prevail when it comes to binding successors. It is not only registration statutes which so aggregate the duration of leases.¹³⁰ The approach of section 17 of the 1857 Act (and the definition of ‘long lease’ in the now-repealed section 28 of the Land Registration (Scotland) Act 1979) is, for example, similar to that of the Land Tenure Reform (Scotland) Act 1974. Again, however, this does not allow one to say that Parliament assumed (or required) that options to renew bind successors. These definitions come from Acts pursuing social policy objectives, such as the conversion of the tenant’s right under a long lease into ownership, or the prohibition of the letting of residential property on long leases. The inclusion of renewal obligations or options in the calculation of likely duration is to be expected in such a context. It is either an anti-avoidance measure (as in the 1974 and 2000 Acts)¹³¹ or recognition that such renewals are typically exercised and that not to include them would underestimate the likely duration of the lease and undermine the policy objectives of the legislation (as in the case of the leasehold conversion scheme created by the Long Leases (Scotland) Act 2012).¹³² These definitions carry no implication that renewal obligations bind successor landlords.

5-35. In respect of both arguments, a further point may be made. They read a lot into statutory provisions which are not explicit upon the question being considered here and which may have other objectives in view. Case law is fairly clear, and commentary more so, that options or obligations to renew do not transmit. The argument based on the registration statutes is not specific to registered leases. It is that these statutes presuppose (and therefore require?) that options to renew bind successor landlords. It is suggested that such a change from the well-established position at common law would be too radical to be achieved by legislation which is not explicit upon the matter. As the contributing editors of Bennion put it in a previous edition:¹³³

¹²⁹ See W Guy ‘Registration of leases’ (1908–09) 20 JR 234.

¹³⁰ The following statutory provisions also do so: Long Leases (Scotland) Act 1954 s 18; Land Tenure Reform (Scotland) Act 1974 s 8(4); Abolition of Feudal Tenure etc (Scotland) Act 2000 s 67(2); Leasehold Casualties (Scotland) Act 2001 s 10(2)(b); Long Leases (Scotland) Act 2012 s 71(1)(b).

¹³¹ Land Tenure Reform (Scotland) Act 1974 s 8(4); Abolition of Feudal Tenure etc (Scotland) Act 2000 s 67(2).

¹³² Scottish Law Commission *Report on Conversion of Long Leases* (Scot Law Com No 204, 2006) [2.25].

¹³³ D Bailey and L Norbury *Bennion on Statutory Interpretation* (7th edn, 2017) §26.8. This formulation was approved in *R (Maughan) v Oxfordshire Senior Coroner* [2020] UKSC 46, [2021] AC 454 at [54]. The current, 8th, edition of Bennion (2020) §26.7 contains slightly

It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. . . . The court, when considering . . . which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

These statutory provisions do not require the conclusion that an obligation or option to renew binds a successor of the landlord. The provisions in respect of registration, however, do give cause to reflect on whether the current rule is a sensible one, a matter to which we must return.¹³⁴

(d) Explaining the rules in terms of the general test

5-36. Finally, the application to options of the general test proposed in chapter 3 to determine whether a term is real or personal may now be discussed. The first element of the test is to consider whether the term in question burdens the landlord *qua* landlord and benefits the tenant *qua* tenant. An obligation to grant a lease can be viewed as more readily performable by a successor than by the original landlord after transfer.¹³⁵ Such a term will be of particular benefit to the tenant for the time being, as it allows the tenant to use the property secure in the knowledge that another lease can be obtained if required. That is sufficient to satisfy the first stage of the test.

5-37. The second stage of the general test encompasses broader issues: a term is not referable to the relationship of landlord and tenant if it is inconsistent with the nature of a lease or with rules of law or legal policy. It is at this stage that the current classification of options to renew can be explained. Given that a second contract of lease is viewed as separate from the original lease, the same analysis is necessarily adopted in respect of an option to conclude such a second contract of lease. To do otherwise would be inconsistent with these more general rules of law. An option or obligation to renew is therefore said to be collateral or extrinsic to the existing lease.

different wording. See also *Kirkness v John Hudson & Co Ltd* [1955] AC 696 (HL) at 714: 'the beliefs or assumptions of those who frame Acts of Parliament cannot make the law'. This is cited in *Pritchard v Briggs* [1980] Ch 338 (CA) at 398D, where Goff LJ distinguishes between 'an Act which is passed under a misapprehension as to the law and an amending Act'.

¹³⁴ See paras 5-42 to 5-47 below.

¹³⁵ One might argue to the contrary, as is argued at para 6-07 below in respect of the obligations created by an option to purchase. It could be argued that the obligation does not bind the landlord *qua* landlord but rather *qua* owner, relying on the position if the landlord grants an interposed lease. However, the situation is not as clear as in respect of an option to purchase. A sub-lease could easily contain an option to renew (cf an option to purchase).

(5) Options to extend

5-38. The question how an option to extend (as opposed to an option to renew) would be treated has not been litigated in Scotland. The English case of *Baker v Merckel*¹³⁶ provides an example of possible drafting. It concerned an option to convert a 7-year lease into an 11-year lease: ‘if the tenant shall give notice in writing to the landlord before [date] of such his desire, the lease shall thereupon be read, construed and take effect as though the term thereby granted was for a period of 11 years from [date of entry of subsisting lease]’. It is arguable that this would bind a successor landlord. The term appears to satisfy the general test proposed in chapter 3, namely that it be referable to the relationship of landlord and tenant. It binds the landlord in the capacity as landlord and benefits the tenant in the capacity as tenant. The exercise of the option would not give rise to a separate contract of lease, but would result in the duration of the subsisting lease being extended, so the argument that the option should be treated as a second lease is not as strong. Just as it is thought that a variation of the lease may bind a successor, so should this: in effect, it is an option to vary the lease. It cannot, however, be stated with any certainty how such an option would be dealt with. The functional parallels with an option to renew are such that, for the sake of consistency, it may well be that this would be treated in the same way as an option to renew which, on current analysis, is not a real condition if the lease is unregistered.

(6) Break options

5-39. A break option permits either or both parties to the lease to terminate the lease before the term. In Hohfeldian terminology, it confers upon the holder of the option a ‘power’ to terminate, and therefore upon the other party to the lease a ‘liability’ to have the party’s legal position altered.¹³⁷ Such options are common. They are thought to be real conditions. The transmissibility of a break clause

¹³⁶ [1960] 1 QB 657 (CA) at 658. German law also recognises the concept of an option to extend the existing contract of lease: H Roquette *Mietrecht* (5th edn, 1961) 82 *et seq.*

¹³⁷ WN Hohfeld ‘Some fundamental legal conceptions as applied in judicial reasoning’ (1913) 23 Yale LJ 16, 44 *et seq.* There is a second article at (1917) 26 Yale LJ 710. This is what in German law is called a *Gestaltungsrecht*: K Larenz and M Wolf *Allgemeiner Teil des Bürgerlichen Rechts* (9th edn, 2004) §15 Rn 65. The parallel concept in French law, apparently developed under German and Italian influence, is the *droit potestatif*. Not all French commentators agree that this is a useful concept: cf FC Dutilleul *Les contrats préparatoires à la vente d’immeuble* (1988) [254]; C Larroumet *Droit civil vol III les obligations, le contrat* (7th edn, 2014) [11]. The appropriate classification may be significant. In *Harbour Estates Ltd v HSBC Bank plc* [2004] EWHC 1714, [2005] Ch 194, the parties proceeded on the assumption that the benefit of a break option could be assigned. One wonders whether ‘assignment’ is the appropriate term if what is involved is a ‘power’ and not a ‘right’. Larenz states that in German law *Gestaltungsrechte* are, as a rule, not freely transferable, but are instead linked to the person or legal relationship to which they refer: Larenz *Allgemeiner Teil* §15 Rn 78. That supports a break option being a real condition.

was considered most recently in *Allan v Armstrong*.¹³⁸ This was a professional negligence claim which tenants raised against their solicitors when a successor landlord refused to allow them to exercise a break clause contained in missives of let but not in the subsequently executed lease. The question whether in principle a break option is a real condition was not independently focused in the judgment, as it also considered the relevance of the fact that the option was documented only in the missives, and of the successor's alleged knowledge of the option.¹³⁹ However, in two early nineteenth-century cases – neither of which is free of idiosyncrasies – the view was expressed that a break clause, albeit here in favour of the landlord, would transmit to a successor.¹⁴⁰ This may be accepted as the correct position. As Reid and Gretton comment, 'it is difficult to think of anything more central to the lease than this'.¹⁴¹ In terms of chapter 3's general test, this is a term which is referable to the relationship of landlord and tenant: a break option in favour of a tenant clearly benefits the tenant as tenant and burdens the landlord as landlord. Such an option transmits in English law.¹⁴² Logically, this rule should extend to equivalent terms, such as one obliging the landlord to accept a renunciation of the lease at a particular time.¹⁴³

5-40. Often break options will be expressed to be personal to a particular landlord or tenant. How a term may be made personal to a particular party was discussed in detail in chapter 3.¹⁴⁴ Very clear language is required. Taking an option in favour of a tenant as an example, the rule is that if such an option is expressed to be personal to the original tenant, that tenant remains able to exercise it in a question with a successor landlord. The fact that it is personal to a tenant does not prevent it from binding a successor landlord. After parting with the lease, however, the original tenant is no longer able to exercise the break; nor is the ex-tenant's assignee.

¹³⁸ 2004 GWD 37-768 (OH).

¹³⁹ On the relevance of these two points, see paras 2-03 *et seq*, paras 2-52 to 2-57, and ch 9.

¹⁴⁰ *Murray v Brodie* (1806) Hume 825; *Ross v McFinlay* (1807) Hume 832. These cases are controversial because they held the clauses to be transmissible even although it was fairly clear from the language used that the parties intended them to be personal to the grantor of the lease. This aspect of the decisions was discussed at para 3-61 above.

¹⁴¹ KGC Reid and GL Gretton *Conveyancing 2004* (2005) 106. They state that there are no cases which consider whether a break clause is *inter naturalia*. They are correct that there are no cases which use that language. However, as the text shows, there are cases which consider whether a break clause will continue to have effect between successors to the original parties.

¹⁴² In respect of both old and new tenancies (i.e. tenancies before and after the Landlord and Tenant (Covenants) Act 1995): *Roe v Hayley* (1810) 12 East 464, 104 ER 181; Landlord and Tenant (Covenants) Act 1995 s 3; Woodfall *Landlord and Tenant* [17.288].

¹⁴³ As was the phrasing of the term in the English decision of *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA).

¹⁴⁴ See paras 3-66 to 3-72 above.

5-41. A modern English case raises some interesting issues.¹⁴⁵ A lease contained a break option in favour of the tenant. It was provided that the benefit of the clause which contained the break option was personal to the original tenant and not capable of assignment to or exercise by any other person, except that the benefit of the clause could be assigned to a defined class of assignees. First the reversion was transferred and then the lease was assigned to a group company but without making any mention of the break option. When the assignee sought to exercise the option, the question arose whether it had passed automatically with the lease. One aspect of the decision considered whether this was a covenant which ‘touched and concerned’ the land: if it was, the benefit of it had passed despite its not being mentioned in the assignment. The landlord argued that, although a break clause would usually touch and concern the land, the overriding characteristic of this clause was that it was personal and therefore it did not do so. It would therefore have required to have been separately assigned. Lindsay J rejected this argument. The benefit of the clause was not personal to one specific tenant; in fact, the clause which contained the option expressly contemplated that it would benefit two classes of assignee (namely, a group company or a permitted assignee). It was a hybrid: it was not wholly personal and therefore could be viewed as having reference to the subject matter of the lease. The break option could therefore be exercised by an assignee, despite the fact that no mention of it had been made in the assignment. None was required: it was a term which ‘touched and concerned’ the lease and therefore transferred automatically. This seems a sensible result and it is thought that the same result would be reached in Scotland.

(7) Assessment of the rules for unregistered leases

(a) Extending the lease

5-42. Are the rules outlined above sound? Consider first those rules which apply to the various ways to extend a subsisting lease. If parties choose to extend a lease by agreeing to a second lease to commence at the end of the first, this will not bind a successor landlord who acquires ownership of the subjects before the first lease has expired, whereas if the parties agree on a second lease to commence immediately, such a successor will be bound. This rule may be objected to on the basis that it leads to functionally equivalent transactions being treated differently. Rankine felt this. He stated:¹⁴⁶

Without venturing to impugn what seems to be a settled rule of law, it may be allowable to suggest that where both parties are thus bound there is nothing more than a formal distinction between the tenant’s position and that which he would have occupied if he had taken the precaution to renounce the old lease and take a new one

¹⁴⁵ *Harbour Estates Ltd v HSBC Bank plc* [2004] EWHC 1714, [2005] Ch 194.

¹⁴⁶ Rankine *Leases* 151.

for the space of the aggregate number of years of the old lease still to run and of the new lease.

5-43. Until the introduction of the Land Register, the law was willing to allow successors to be bound by unregistered leases of any duration.¹⁴⁷ Against that background, it is difficult to see that there was a strong policy objection to a successor being bound by a renewal effected by a lease to commence in the future, as the successor could have been bound by a lease for the complete period. The introduction of land registration – and the limit to the length of leases that can take effect without registration – means that Rankine’s point has lost some of its force. Further, the current rule has various virtues. From a doctrinal perspective, it maintains consistency with the broader treatment of leases to begin in the future. Further, rules of law often involve different results following from different structures of transactions. Finally, and most importantly, if parties wish to render an agreement to extend a lease immediately binding upon a successor landlord, the means are available for them to do so: they may conclude a new lease to commence immediately and then renounce the subsisting lease.¹⁴⁸ Or they may vary the lease of the current lease. The law in this respect does not appear to be in need of change.

(b) *Options*

5-44. The same cannot be said of the rules relating to options. Options are a useful, and frequently encountered, device, and yet the current law is that it is not possible, in terms of lease law, for parties to make an option to renew bind a successor landlord.¹⁴⁹ The rule results in functionally equivalent transactions being treated differently: a 15-year lease with a break option after 10 years is functionally equivalent to a 10-year lease with an option to renew on identical

¹⁴⁷ For a long time there was no limit to the length of leases to which the Leases Act 1449 applied: JS More *Notes to Stair’s Institutions* (1832) ccxlvii. There are now statutory inroads into this position. One is that since 9 June 2000 it has not been possible to create a lease which exceeds 175 years in duration: Abolition of Feudal Tenure etc (Scotland) Act 2000 s 67. In areas in which the Land Register is operational (since 1 April 2003 it has been operational in all counties), registration is compulsory for, broadly, leases over 20 years in length: Land Registration (Scotland) Act 1979 ss 3(3) and 28(1) (for the former law) and Registration of Leases (Scotland) Act 1857 s 20C (for the current law).

¹⁴⁸ As noted at paras 5-11 and 5-12 above, express renunciation, although desirable, is probably unnecessary. Also, an agreement simply to extend the lease would arguably take immediate effect: see paras 5-13 to 5-17 above. A further possibility would be to secure the landlord’s obligations under the future lease with a standard security.

¹⁴⁹ If it is developed as some academics suggest, the offside goals rule may render an option binding upon a knowing successor: see paras 9-36 to 9-40 below for discussion. Further, the parties could secure the obligations on the landlord by means of a standard security, but this is cumbersome.

terms for a further five years,¹⁵⁰ yet, as the law stands, the successor is bound by the break option but not by the option to renew. There appears to be no policy justification for this different treatment. Admittedly, it maintains doctrinal consistency with other rules of law (namely, the rules that future contracts of lease do not bind a successor in advance of the date of entry). However, there is a good argument that this doctrinal consistency comes at too high a price, and it prioritises that consistency over the inconsistency with the rule about break options. Successor landlords would not be particularly prejudiced by being bound by an option to renew. A successor, after all, may be bound by an unregistered lease (typically with a duration of up to 20 years, in some circumstances longer). As was remarked in the South African case of *Shalala v Gelb* (in which a renewal option in an unregistered lease was held to bind a successor landlord):¹⁵¹

it is . . . hardly more inequitable to bind the innocent purchaser with a right of renewal for four years contained in a lease whose original term is five years than it is to bind him with an existing lease whose original term happens to be nine years and of which he is equally ignorant.

Because the existence of an option is taken into account when determining whether a lease requires to be registered in order to bind a successor,¹⁵² holding a successor bound by an option would not create the risk of being bound by an unregistered lease for more than 20 years.

5-45. One might attempt to justify the rule that an option is a personal condition by arguing that it protects purchasers, by minimising the period of time for which they can be bound by a lease. The argument would be that the Leases Act 1449 is an exception to the more general principle that contracts do not bind successors, and, as such, it should be applied narrowly.¹⁵³ Holding successors bound by such obligations might be thought to reduce the marketability of land in general (there is the possibility, say, that the rent will be below the market rent) and every opportunity should be taken to limit the extent of obligations by which a successor can be bound. Although the parties could have concluded a longer lease subject to the same rent, the fact remains that they did not do so, and

¹⁵⁰ The point is made in the English case of *Roe v Hayley* (1810) 12 East 463, 104 ER 181, in support of an argument that a break option should touch and concern, given that an obligation to renew does in English law. See also *Clerk v Farquharson* (1799) Mor 15225 at 15226. The two types of option will be completely equivalent only if both options are unconditional (or subject to the same conditions), which is rare.

¹⁵¹ *Shalala v Gelb* 1950 (1) SA 851 (CPD) 862. An option to renew also runs with the land in English law, although this does not circumvent the rules which require such options to be registered in order to bind a successor. In the case of registered land, however, the option will bind a successor even without registration if the option-holder is in actual occupation. See Gray and Gray *Elements* [4.5.69]; *Woodall v Clifton* [1905] 2 Ch 257 at 279.

¹⁵² See paras 5-30 to 5-35 above.

¹⁵³ This point was made in argument in *Scott v Straiton* (1771) Mor 15200 at 15202.

the law should take the opportunity to free the land from a potentially oppressive burden. The 1449 Act is not, however, usually restrictively interpreted. Instead the focus is generally upon protecting the tenant¹⁵⁴ and so this reasoning does not readily convince.

5-46. It is suggested, therefore, that if the opportunity arises, the law should be reformed to recognise that an option to renew which is a term of the original lease may be a real condition. Although there are court decisions which take the opposite approach,¹⁵⁵ none contains a full analysis of the arguments canvassed above. On a full consideration of the applicable test for distinguishing real and personal conditions and a full consideration of arguments, a court could now appropriately decide that an option to renew is a real condition. Realistically, however, it may be that this type of change would require legislation.

5-47. If the law is developed, thought would need to be given to whether an option which is a term of the original lease should be treated in the same way as one which is granted or agreed upon at a later stage. The position in respect of what might be called a ‘supervening’ option demands separate consideration because the existence of an option is taken into account when determining whether a lease needs to be registered to become real. If a supervening option is granted by the landlord of a subsisting lease, does the existence of that option need to be taken into account (in the same way as variation of the *ish* would be taken into account) such that the question whether the lease is registrable needs to be re-assessed? If the option is to bind a successor, it would seem appropriate for it to be taken into account, and for the grant of the option to renew to be treated in the same way as the variation of the *ish*.¹⁵⁶ Consider the following example. L grants T a 19-year lease and in year 10 L grants T an option to renew for a further 15 years. It seems unlikely that, in the normal case at least, the parties envisaged affecting the status of the current lease (so that it would cease to be real unless the new lease combined with the option were registered). If it did cease to be real, a rule intended to operate in favour of tenants could actually operate against them (by depriving them of their real right). However, if such an option binds a successor without registration the successor would potentially be bound by a lease for 24 years without that having been disclosed by the register. That would not be acceptable. Thus, it is suggested that if an option to renew or take a further lease is granted by a landlord to an existing

¹⁵⁴ Its protection is not, for example, limited to the ‘pure pupil that laubouris the grunde’, as a strict application of its terms might entail: *Waddell v Brown* (1794) Mor 10309; Rankine *Leases* 135. But cf *Millar v McRobbie* 1949 SC 1 (IH), where it was held that possession prior to the date of entry did not protect the tenant. Of course, it is the rule which that case embodies which is the source of the rule about when renewals bind successors to the landlord. On the general approach to interpreting Acts of the Parliament of Scotland, see *Governors of George Heriot’s Trust v Paton’s Trs* 1912 SC 1123 (IH) at 1134–1135.

¹⁵⁵ Noted at paras 5-23 to 5-27 above.

¹⁵⁶ Discussed at para 5-17 above.

tenant, absent indicators to the contrary, such an option should continue to be treated as separate from the existing lease and treated in line with the established rules about when future contracts of lease bind successors. That separate option should not affect a successor until the option has been exercised and the tenant has begun to possess by virtue of the new lease. If the parties wish to have the option bind a successor, they should make clear that they are varying the existing lease to include such an option and, if the potential duration of the lease, as varied, exceeds 20 years, the lease would need to be registered to continue as a real right.

C. REGISTERED LEASES

(1) Two overarching issues

5-48. Many points regarding registered leases are unclear and little considered, and the issues which this chapter considers are no exception. As with unregistered leases, two preliminary issues seem to be key to determining the proper analysis of the types of term considered in this chapter: (i) when does a contract of lease become a real right? and (ii) what is the appropriate contractual analysis of the transaction to renew or extend, or to give the option of renewing or extending, the lease?

5-49. Unlike unregistered leases, registered leases can be made real before their date of entry. This was not always the case. At first, the Registration of Leases (Scotland) Act 1857 adhered to the position under the Leases Act 1449. As originally enacted, section 2 provided for leases to be effectual against a singular successor of the landlord if they had been registered ‘at or subsequent to the date of entry therein stipulated’.¹⁵⁷ These words were removed, with retrospective effect, by the Land Tenure Reform (Scotland) Act 1974.¹⁵⁸ The purpose of the amendment was to allow leases to be made real prior to their date of entry so that they could immediately be used as security.¹⁵⁹ The

¹⁵⁷ I am grateful to Martin Corbett for bringing this to my attention.

¹⁵⁸ Land Tenure Reform (Scotland) Act 1974 Sch 6 para 2.

¹⁵⁹ JM Halliday *Annotations to the Land Tenure Reform (Scotland) Act 1974* in *Current Law Statutes Annotated*. The effect of registration is detailed in s 16(1) of the 1857 Act, which provides that ‘registration . . . shall complete the right . . . to the effect of establishing a preference in virtue thereof, as effectually as if the grantee . . . had entered into the actual possession of the subjects leased under such writs respectively at the date of registration thereof’. This provision was enacted when the Act applied only to leases recorded on or after the date of entry. It might be objected that deeming the tenant to be in possession prior to the date of entry does not render the lease binding upon a successor prior to the date of entry. Given the clear objectives of the amendments in the 1974 Act, however, this argument would not succeed. In any event, the provision deems the tenant to be in possession *under* the lease. That this is impossible prior to the date of entry is irrelevant: the purpose of a deeming provision is to treat something as being the case when it is not.

Legal Manual prepared by the Registers of Scotland in respect of the Land Registration (Scotland) Act 1979 stated that the fact that a lease had a future date of entry was no bar to registration, provided that it met the other criteria for registration.¹⁶⁰ The equivalent manual for the Land Registration etc (Scotland) Act 2012 does not repeat this wording but it is not thought that the law has changed. Thus a lease becomes real upon registration, even although its date of entry is not until a later date. Unlike in English law, there is no control over how far in advance the lease may commence.¹⁶¹ This different basic rule means that some renewal transactions are treated differently in registered leases than in unregistered leases.

5-50. The second issue is whether the contractual analysis applied to renewals of registered leases is the same as that which applies to unregistered leases. It is thought that it must be: a lease is a lease, whether unregistered or registered. The point is best made by recalling that, prior to the advent of registration of title, the recording of leases in the Register of Sasines was optional. Thus the situation could have arisen in which two neighbouring plots were held on identical 25-year leases, only one of the leases being recorded but both being real. If the parties to both leases agreed in year 24 to the grant of a second 25-year lease, there should not be a difference in contractual analysis. In both it was the conclusion of a separate contract of lease, and not the extension of the existing lease. It is also thought that terms of existing leases relating to renewal should be analysed in the same way in registered and unregistered leases.

(2) Extending the lease

(a) New lease to commence at ish

5-51. As noted below,¹⁶² it has been made clear by statute that parties can vary the duration of a registered lease. Given that, it may be that recourse to the grant of a new lease, whether to commence immediately or at some point in the future, will be rare. However, for completeness, these possibilities are considered first.

¹⁶⁰ Registers of Scotland *Legal Manual* (1979 Act) [19.4.2(a)].

¹⁶¹ At English common law, the grant of a lease to begin on a future day did not create an estate in land, but rather conferred upon the tenant what was called an *interesse termini*. The lessee's title was completed only by entry. This was changed by Law of Property Act 1925 s 149, which abolished the doctrine of *interesse termini* but provided that a lease to commence more than 21 years from the date of the instrument purporting to create it is void, as is any contract to create such a lease. Since the Land Registration Act 2002 came into force, registration of a lease of any length has become compulsory where possession is to be given more than three months after the date of the grant: s 4(1)(d). See Woodfall *Landlord and Tenant* [5.065]–[5.066].

¹⁶² Para 5-55.

5-52. In respect of unregistered leases the rule is that where parties agree during one lease that it shall be followed by a second, the latter is viewed as a separate contract from the original lease.¹⁶³ There is no reason to suppose that the rule for registered leases is different. One result of this is that the duration of the ‘renewal’ effected by a new and separate lease is assessed independently of the original lease: the renewal must itself meet the definition of long lease in order to be registrable and, if it does so, then registration is compulsory in order for the lease to become real. If the second lease is a short lease and not registrable, it will not become real until the tenant begins to possess by virtue of it.

5-53. Because of the rule that a lease becomes real on registration, even if the date of entry is in the future,¹⁶⁴ a renewal effected by means of a further registrable lease becomes real immediately if it is registered. This is a fundamental difference to the rule which applies to unregistered leases. It means that there is no strong need from the perspective of property law for parties who wish to extend an existing registered lease by concluding a new lease to conclude a lease that commences at once. There may, however, be practical reasons which mean that concluding a new lease to commence immediately or varying the term of the existing lease is preferable (e.g. a desire to have the entirety of the tenant’s occupation regulated by one contract, for instance, so that any dilapidations are not addressed until the end of the entire term).

(b) New lease to commence at once

5-54. If this device is used, its effects seem straightforward. A new lease to commence at once will be effective to confer an immediate real right upon the tenant, provided that it is made real in the appropriate way (i.e. registration, if registrable; possession, if not). It was suggested above that the conclusion of a new lease to commence immediately amounts to the implied renunciation of the existing lease. Renunciation of a lease itself needs to be registered. If parties to an existing lease are concluding a new lease, it would be preferable for the renunciation of the former lease to be dealt with expressly.

(c) Varying the term

5-55. In the discussion above of unregistered leases, it was suggested that parties might extend an existing lease simply by varying its duration and that, although the law is unclear, such a variation should bind a successor.¹⁶⁵ Such a transaction is also possible for registered leases. The Land Registration etc

¹⁶³ See paras 5-06 to 5-09 above.

¹⁶⁴ See para 5-49 above.

¹⁶⁵ See paras 5-13 to 5-17 above. Indeed, the Registers of Scotland *Legal Manual* [19.4.2(a)] recognises the validity of such a transaction in respect of a short lease.

(Scotland) Act 2012 amended the 1857 Act to provide expressly that a deed varying the duration of a lease is registrable in the Land Register.¹⁶⁶ If registered, there seems no doubt that a variation of the lease will bind a successor landlord. As the Scottish Law Commission noted, however, that does not imply that a variation will not bind a successor if it is not registered.¹⁶⁷ The question whether an off-register variation binds a successor landlord was discussed in chapter 2, which concluded that the position was unclear but that the stronger view was that an off-register variation could bind a successor to the landlord.¹⁶⁸ An argument might, however, be made that the lease – which along with the subjects defines the very extent of the tenant's right – should be treated in a particular way. The safest course is for the tenant to register.

(3) Terms of the original lease relating to duration

5-56. Discussion of unregistered leases suggested the following as possible terms of leases: (a) provision for consecutive leases; (b) some form of option for the tenant to have the lease renewed; and (c) a break option.

(a) Consecutive leases

5-57. There is nothing to suggest that the analysis of consecutive leases which is applied under the Leases Act 1449 would differ were the leases to be registered: they are separate contracts of lease and the point at which they become real is determined by the general rule as to when registered contracts of lease bind successors. This means that such a lease will be real on registration, even if this is prior to its date of entry.

(b) Options to renew

5-58. It is suggested above that the current law in respect of unregistered leases is that an option to renew does not bind a successor landlord but that the law might sensibly be developed so as to view such an option as a real condition, provided that it is a term of the lease (and not a 'supervening' option granted by the landlord to the tenant at some point during the lease).¹⁶⁹ In distinction to the current rule about unregistered leases, the rule for registered leases appears to be that an option to renew binds a successor. This is for two reasons. First,

¹⁶⁶ Registration of Leases (Scotland) Act 1857 s 20A, inserted by Land Registration (Scotland) Act 2012 s 52.

¹⁶⁷ Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, 2010) [9.24]–[9.27].

¹⁶⁸ See paras 2-59 *et seq* above.

¹⁶⁹ See above, paras 5-19 to 5-37 and paras 5-44 to 5-47.

the underlying rules about when a lease becomes real are distinct in registered leases. The logic for saying that an option to renew is not a real condition of an unregistered lease is that, although such a term binds the landlord as landlord and benefits the tenant as tenant, and so satisfies the first stage of chapter 3's general test, it fails the second stage of that test: to allow such a term to transmit would be inconsistent with the broader rule of law that an unregistered lease cannot become real until the tenant begins to possess by virtue of it. In registered leases, there is no such inconsistency: a long lease *can* be made real by registration prior to its date of entry. There is, therefore, no reason to hold that the option does not transmit as a term of the existing lease.¹⁷⁰ Secondly, there is no policy reason for not holding a successor landlord bound by an option to renew, provided it is disclosed by the register. The new landlord acquired with knowledge, actual or constructive, of the option. Once the option is exercised, a new and separate contract of lease will arise, and the tenant will require to register that in order for it to be protected against a successor of the landlord.

(c) Break options

5-59. Just as a break option in an unregistered lease is a real condition because it satisfies the general test suggested in chapter 3,¹⁷¹ so also such a term is a real condition if the lease is registered.

D. CONCLUSION

5-60. This chapter has considered whether a successor landlord is bound by various types of transaction by which a lease may be renewed (using that term in a neutral way) or by which a tenant is given an option to renew a lease or to terminate it prematurely. Its principal conclusions are these. Whether a successor is bound by an agreement to renew an existing lease depends upon the exact nature of the transaction. It may be (i) a new contract of lease to commence on the expiry of the existing one, (ii) a new contract of lease to commence immediately, or (iii) a variation of the lease of the existing lease. The question how the resulting contract may be made real depends on this classification. Short leases require possession in order to become real and that possession must be by virtue of the very lease which is said to bind a successor. So, a short lease to commence in the future cannot bind a successor until its date of entry, whereas a lease to commence immediately becomes immediately binding upon successors (even – it is thought – without express renunciation of the original lease). If the second lease is a long one, it must be registered. Registration can, though, take place before the date of entry, so here the distinction between a lease to

¹⁷⁰ Rennie *Leases* [15-07] supports this view.

¹⁷¹ See paras 5-39 to 5-41 above.

commence immediately and one to commence in the future is not as important. Whether the effect of an unregistered lease can simply be varied with binding effect on successors is open to some doubt: the view taken here is that (a) where the lease is unregistered, this is possible, but that if the variation converts what was previously a short lease into a long lease, it should be registered; and (b) where the lease is registered in the Land Register, such a variation is possible and will have real effect.

5-61. The status of an option to renew was also considered. An option granted independently from a lease clearly does not bind a successor (although the offside goals rule may provide a different result). The predominant view of the current law is that an option to renew which is a term of an unregistered lease is treated in the same way and is a personal condition. It is an option to enter into a second, distinct contract of lease and, as such, is collateral to the existing lease. In particular, such an option is said to be personal because of the conflict which would otherwise arise with the rule that a short lease does not bind a successor prior to the tenant beginning to possess by virtue of that lease. However, it was suggested that the law would be improved if this rule were changed, and that an option to renew which is a term of an unregistered lease should be capable of being a real condition. It was also suggested that, where the lease is registered, it is already the law that an option to renew contained in a registered lease is a real condition. Finally, a break option may confidently be said – even in the absence of modern authority – to be real.

6 Further Particular Terms

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6-01. This chapter continues the consideration of whether particular lease terms are real or personal. It both considers existing case law and also how such terms would be analysed within the framework of the general test proposed in chapter 3.

A. OPTIONS TO PURCHASE

(1) Introduction

6-02 The question whether an option to purchase is a real or a personal condition has generated some controversy. Such as it is, the case law is clear: such a term is a personal condition, unless – perhaps – it can be shown that the term is customary and usual in the class of lease concerned. This rule has been criticised as out of touch with commercial realities, especially when the option is in a registered lease and would therefore have been obvious to the successor landlord. However, this section demonstrates that the rule that an option is not a real condition is in line with the policy of property law generally, which does

not allow an option to purchase to be constituted as a title condition. Further, the rule can be defended on its merits: if an option to purchase is a real condition, it binds a successor landlord, and could require a forced sale, regardless of whether the successor knew of its existence. That would be a considerable interference with ownership. A separate question is whether the offside goals rule can be applied to render the option binding on a successor where the successor landlord knew of the existence of the option. This is discussed in chapter 9. There are doubts whether the offside goals rule applies to options, but chapter 9 argues that it does. If that is accepted as the law, any practical difficulties created by the rule of lease law that an option to acquire ownership does not automatically bind a successor as a real condition would be addressed by the application of the offside goals rule. Criticism of the law would therefore be misplaced.

(2) Case law

6-03. *Bisset v Magistrates of Aberdeen*¹ and *The Advice Centre for Mortgages v McNicoll*² set out the law in respect of an option to purchase in favour of the tenant. *Bisset* establishes, and *Advice Centre* follows, a general rule that such an option does not bind a successor landlord. In *Bisset* the grantors of a lease for 999 years were bound in terms of the lease to subscribe and deliver to the tenant, and his heirs, executors and successors, at any time they shall desire, a feu charter of the subjects of the lease. This was therefore not an option to purchase but rather an option simply to demand, in modern terms, the transfer of ownership; in feudal terms, it was an option to substitute a feu for the lease. The lease was recorded. By a series of transfers the landlord's and tenant's interests came into the hands of the defenders and pursuer respectively, both as singular successors of the original parties. *Bisset* sought declarator that the Magistrates were bound by the obligation to grant a feu charter. The Magistrates had two arguments to the contrary: first, the wording of the option was such that no obligation was imposed upon successors of the landlord and, secondly, in any event the obligation was not of a type that could bind singular successors of the landlord. They were successful. Lords Trayner and Moncreiff each relied upon both arguments.³ *Bisset* is therefore authority for the proposition that there is a substantive objection to a successor landlord being bound by an option to purchase.

¹ (1898) 1 F 87 (IH).

² [2006] CSH 58, 2006 SLT 591.

³ The Lord Ordinary (Kyllachy) focused on the substantive objection to the term and not on the construction of the lease. Cf *Davidson v Zani* 1992 SCLR 1001 (Sh Ct), where it is suggested (at 1004) that *Bisset* 'was concerned solely with the construction of the terms of the lease under which the obligation in question was assumed only by the original lessor, without reference to successors'.

6-04. Subsequently, in *The Advice Centre for Mortgages v McNicoll*,⁴ *Bisset* was accepted as ‘clear authority’ for the proposition that ‘an option to purchase is not normally *inter naturalia* of a lease’. The case concerned a 10-year lease of commercial premises. Lord Drummond Young rejected submissions that there might be scope for developing the law on the basis of judicial knowledge in favour of a rule that a successor is bound by such an option.⁵ The relevant part of the decision was, however, *obiter*, as the court held that the lease had not been constituted in compliance with the Requirements of Writing (Scotland) Act 1995 and so could not transmit against a successor.⁶

6-05. This general rule may be subject to an exception, albeit one which has never been applied. In *Bisset*, Lord Moncreiff said that it would have ‘materially aided’ the tenant’s contention had it been established that such an obligation was ‘customary and usual in leases of such duration’,⁷ although he stopped short of stating that this would definitely result in the term being treated differently.⁸ In *Advice Centre*, Lord Drummond Young’s formulation was different. He appeared to hold that if it is established that the term is customary in the type of lease concerned, it *automatically* binds a successor. So, after stating the general rule, he continued:⁹

That is the normal rule, and exceptions may exist. One such exception has been identified; that is where it is established by evidence that the custom and practice in leases of a particular nature is to insert a particular form of clause. . . . Other exceptions may exist, but none was suggested in relation to the present lease.

Options to purchase, Lord Drummond Young noted, are likely to be rare in investment leases. There are, however, categories of lease in which options are common. One is capital allowances leases, namely those granted by owners of industrial property which cannot be sold immediately without triggering a clawback of industrial building allowances. Instead of the property being sold, it is leased for a considerable premium but at a nominal rent. The tenant enjoys

⁴ [2006] CSOH 58, 2006 SLT 591 at [39].

⁵ [2006] CSOH 58, 2006 SLT 591 at [40].

⁶ [2006] CSOH 58, 2006 SLT 591 at [19] and [20]. This aspect of the decision is considered by A McAllister ‘Leases and the Requirements of Writing’ 2006 SLT (News) 254; EC Reid ‘Personal bar: three cases’ (2006) 10 EdinLR 437; KGC Reid and GL Gretton *Conveyancing* 2006 (2007) 106–109; and by the present writer in ‘Leases and the Requirements of Writing’ (2022) 26 EdinLR 51. There is also some discussion at paras 2–23 *et seq* above.

⁷ *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 94.

⁸ In *Bisset* it would have been unlikely to do so given the wording of the lease: it imposed an obligation upon the two named original landlords in favour of the tenant, and his heirs, executors and successors. The contrast suggests that it was intended that the obligation bind only the original landlords. See paras 3–58 to 3–65 above on the approach to interpretation.

⁹ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [39]. Establishing the exception would require appropriate averments and evidence, of which there had been none. The supposed prevalence of options to purchase was not a fact which was within judicial knowledge: [40].

an option to purchase at a particular point in the future when the clawback period for the relevant tax allowances has expired.¹⁰ A second category of lease in which a purchase option is common is a ground lease granted to a developer with an option to purchase when the tenant has completed the development to a particular stage.¹¹ Further, some tenants benefit from a statutory option to purchase.¹²

6-06. The relevance of a term being customary and usual in a particular class of lease was discussed in chapter 3.¹³ The view taken there was that, although this is a factor to be taken into account in considering whether a term is a real condition, it is not conclusive, particularly if there are policy reasons why a term should not bind a successor. As the next section discusses, there are policy factors which justify the general rule that an option is a personal condition. Any argument that an option should transmit because it is customary and usual in the particular class of lease would require to overcome these.

(3) Justifications

(a) *In general*

6-07. This section considers how options to purchase fit within the general test set out in chapter 3 for determining whether a term is real or personal. The first element of that test is to consider whether the term binds the landlord in the capacity of landlord and benefits the tenant in the capacity of tenant. Once the property is transferred, an obligation to transfer ownership can – obviously – more readily be performed by the successor landlord. Yet this is because the successor owns the property rather than because he is a party to the lease, and the test is that the term must bind the landlord as landlord, not simply as owner.¹⁴ To focus that distinction, consider the situation in which the original landlord granted an interposed lease of the premises: the interposed tenant would become party to the existing contract of lease, but the burden of the option which it contained would remain more readily performable by the original landlord, who remained owner. That suggests that the burden is not referable to the contract of lease but is in fact distinct from it.¹⁵ As for benefiting the tenant as tenant, one

¹⁰ D Bell and R Rennie 'Purchase options in leases' (2006) 51 JLSS May/49.

¹¹ I Quigley 'On the wrong track' (2007) 52 JLSS Feb/ 48, 50.

¹² In respect of crofters, see Crofters (Scotland) Act 1993 ss 12–19. Further, the tenant of a '1991 Act tenancy' in respect of agricultural land may enjoy a statutory right of pre-emption: Agricultural Holdings (Scotland) Act 2003 Pt 2. Certain categories of residential tenant previously enjoyed a 'right to buy' under the now repealed Housing (Scotland) Act 1987 ss 61–84 and Housing (Scotland) Act 2001 ss 42–52.

¹³ See para 3-54 above.

¹⁴ See paras 3-43 to 3-46 above.

¹⁵ This book does not consider in detail whether the distinction between real and personal conditions is drawn in respect of the terms of a subsisting lease when an interposed lease is

might argue that the benefit is not particular to the holder of the lease for the time being, for any party would benefit from an option to purchase land.¹⁶ It will, however, be of *particular* benefit to the tenant for the time being, as it allows investment in the property secure in the knowledge that the tenant will be able to acquire a permanent right to it in the future.¹⁷ Overall, however, the test produces a result consistent with the authorities: an option to purchase does not transmit, for it is collateral to the lease and does not burden the landlord *as* landlord.

6-08. Even if a different result were reached applying the first stage of the test, the second stage of the general test also supports the rule that an option to purchase is a personal condition. The second stage encompasses broader policy issues, looking at the content of the obligation and asking whether it is compatible with the nature of the real right of lease and with the right (ownership subject to a lease) which the successor acquires.¹⁸ There are two objections which would arise to transmission of the obligation.

6-09. The first, expressed in *Bisset*¹⁹ and reiterated in *Advice Centre*,²⁰ is that it is inconsistent with the nature of a lease to provide the tenant with the right to put an end to the relationship of landlord and tenant, and substitute for the rights as tenant those of an absolute proprietor. Admittedly, leases are protean: it is difficult, therefore, to identify their 'nature'.²¹ However, one thing which all real rights of lease have in common is that they are temporary.²² This is reinforced by recent legislative caps on the length of leases²³ and the conversion

granted. See Land Tenure Reform (Scotland) Act 1974 s 17(2). There is no authority on the point. Logically, it seems that it should be.

¹⁶ HA Bigelow 'The contents of covenants in leases' (1914) 30 LQR 319, 334. He views the benefit (and therefore the covenant) as 'clearly personal'.

¹⁷ American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977) §16.2 illustration 3.

¹⁸ See paras 3-51 to 3-53 above.

¹⁹ *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 91.

²⁰ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [39].

²¹ Para 3-53 above.

²² A perpetual lease is contractually valid, but does not bind a successor of the landlord: *Carruthers v Irvine* (1717) Mor 15195. There was initially argument about whether leases of exceptionally long endurance benefited from the protection of the Leases Act 1449, but the view developed that they did. The point was rendered less important when the Registration of Leases (Scotland) Act 1857 introduced the possibility of registration: see the discussion in JS More's *Notes to Stair Institutions* ccxlvii.

²³ There is now a maximum duration of 175 years: Abolition of Feudal Tenure etc (Scotland) Act 2000 s 67. This period was chosen after consultation with commercial actors. Leases of such length are required in order to obtain finance for property development. See e.g. Memorandum by the Royal Institute of Chartered Surveyors, Pt 6, which is reproduced in Scottish Parliament Justice and Home Affairs Committee, *3rd Report 1999* Annexe B. Since 1974 the maximum length of a lease of a private dwelling house has been 20 years: s 8 Land Tenure Reform (Scotland) Act 1974. The restriction has since been removed in respect of a private residential tenancy granted under the Private Housing (Tenancies) (Scotland) Act 2016, and also in respect of leases granted to certain types of landlord, such as a social landlord: see 1974 Act s 8, as amended.

of existing ultra-long leases into ownership.²⁴ It might be objected that, in some leases, the tenant's right is already virtually equivalent to ownership. But, as was noted by the tenant in argument,²⁵ *Bisset* concerned just such a lease: a 999-year lease. In that sense, the decision in *Bisset* is a strong one. And even if its reasoning were thought challengeable in respect of a 999-year lease (a view which has force), the logic does apply to shorter leases, in which the tenant's position is not functionally equivalent to ownership. Having said all of this, there are various statutory instances of tenants being given an option to acquire ownership of the subjects of their leases,²⁶ which makes it hard to maintain that an option is always inconsistent with the nature of a lease.

6-10. Arguments about the 'nature' of a lease may be viewed as aridly legalistic, especially when leases are so varied. There is, however, a second, policy-based, justification for the rule against transmission, which is more persuasive. This is that it is contrary to the policy of property law that those acquiring land may find themselves affected by a pre-existing option, and liable to have to transfer ownership to someone else at a time and price outside their control. The policy issues relevant to whether the burden of an option should be capable of running with land were aired in the reform of the law of real burdens. Prior to the coming into force of the Title Conditions (Scotland) Act 2003, a variety of types of option could be created as real burdens, namely rights of pre-emption, redemption, and reversion. A right of pre-emption is a right of first refusal in the event of sale by the owner. Rights of redemption and reversion are rights to reacquire property independently of some trigger act by the owner; their exercise is outside the owner's control and can occur at any time. The Scottish Law Commission considered whether it should be possible to constitute such rights as real burdens.²⁷ It viewed reversions and redemptions as potentially oppressive: owners had no control over when,²⁸ or whether, the option was to be exercised; on exercise, they might lose the property without consent and, potentially, without adequate compensation.²⁹

²⁴ Long Leases (Scotland) Act 2012, which converted a tenant's right in certain ultra-long leases into ownership on the appointed day, 28 November 2015: Long Leases (Scotland) Act 2012 (Commencement No 1) Order 2013, SSI 2013/322, read together with s 70 of the Act. In order to be eligible for conversion, a lease needed to have an unexpired duration of more than 175 years (or 100 years if the subjects wholly or mainly comprise a private dwelling house).

²⁵ *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) at 90.

²⁶ E.g. (i) in respect of crofters: Crofters (Scotland) Act 1993 ss 12–19; (ii) the statutory pre-emption right which the tenant of a '1991 Act tenancy' in respect of agricultural land may enjoy: Agricultural Holdings (Scotland) Act 2003 Pt 2. There was also the now abolished 'right to buy' of certain residential tenants.

²⁷ Scottish Law Commission *Discussion Paper on Real Burdens* (Scot Law Com DP 106, 1998) Pt 8; Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181, 2000) Pt 10.

²⁸ This will not always be the case: an option may be exercisable only at particular points in time. The main objection to options is that owners are liable to be divested without their consent.

²⁹ Note the doubt about whether, at common law, successors could be bound if the purchase price was 'elusive': *McElroy v Duke of Argyll* (1902) 4 F 885 (IH) at 889. A pre-emption

The possibility was mooted that this type of condition might be repugnant with ownership,³⁰ but that argument encounters the difficulty that courts did enforce them.³¹ In the Scottish Law Commission's view, these objections amounted to a convincing case for prohibiting the creation of such options as real burdens. This was despite the fact that an acquirer should have known of the existence of the burden because registration against the burdened property is, and has always been,³² a constitutive requirement of real burdens. The Commission accepted that the offside goals rule might lead to a different result, and that an option could be made to bind a successor by virtue of a standard security. Its position was that an option should not be able automatically to run with the land as a real burden. Consultees agreed with this assessment. A different approach was taken in respect of rights of pre-emption. They do not create the danger of forced sale, for the holder has a right to purchase only in the event of the owner deciding to sell. In the Commission's view, such rights retain considerable utility. The result is section 3(5) of the Title Conditions (Scotland) Act 2003, which only allows options in the form of rights of pre-emption to be constituted as real burdens.

6-11. At a general level, these policy concerns apply equally to lease law. The point of departure is the general property law rule that the burden of an option to purchase does not run with the land and that a person acquiring ownership should not be liable to compulsory expropriation.³³ On a doctrinal level, it would be odd for a legal system which insists upon registration in order to transfer ownership³⁴ to permit an *obligation* to transfer ownership to burden land without the need for registration. If an option to purchase were a real condition of a lease, it would bind a successor landlord to an unregistered lease, even if the successor were unaware of it. Clearly, that would be unacceptable.³⁵ Where the option is a registered term of a registered lease, the argument is less strong, as the successor will be aware (or, at least, have had ready means of becoming aware) of the option. However, as chapter 3 noted, Scots law does distinguish between real and personal conditions in respect of registered leases. Further, as chapter 4 discusses, on a policy level it is not self-evident that every term of a

was unsuccessfully challenged as resulting in a deprivation of property without adequate compensation, contrary to Article 1 of the First Protocol to the ECHR, in *Macdonald-Haig v Gerlings*, Inverness Sheriff Court, 3 Dec 2001, unreported but noted in KGC Reid and GL Gretton *Conveyancing* 2002 (2003) 63.

³⁰ Scottish Law Commission *Report on Real Burdens* [10.20].

³¹ Acknowledged in the Scottish Law Commission's Report, where *Strathallan v Grantley* (1843) 5 D 1318 and *McElroy v Duke of Argyll* (1902) 4 F 885 (IH) are cited.

³² WM Gordon *Scottish Land Law* (2nd edn, 1999) [22-33] and [23-05].

³³ Subject, of course, to statutory rules of compulsory purchase.

³⁴ *Sharp v Thomson* 1995 SC 455 (IH) revd 1997 SC (HL) 66; *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19.

³⁵ The situation is likely to be different in respect of a lease where an option or pre-emption is conferred by statute on the tenant, though – insofar as I am aware – this has not been considered in any authority.

registered lease should bind a successor.³⁶ As it stands, the law does distinguish between real and personal conditions even in registered leases, and an option to purchase fails the first stage of the proposed test for determining whether a term is a real condition.

6-12. There is scope for different views as to what the law should be here. The current rule has been criticised as out of touch with commercial realities. Options to purchase are common in particular classes of registered lease.³⁷ The law could well develop so as to allow an option in a registered lease to transmit, provided that it is shown to be customary in that class of lease. Some, however, may prefer the certainty provided by a clear rule that an option to purchase is always personal. Parties can negotiate around that rule if they desire more protection. It avoids any doubts about (and associated costs involved in determining) whether a lease falls within a particular class of lease, which is likely to require expert evidence from conveyancers. The weight of argument thus supports a uniform rule – that options to purchase are personal conditions – but subject to the override of the offside goals rule which, on a proper analysis, applies to render options to purchase binding on successors who knew of the option (whether the option is in a registered or unregistered lease). That promotes coherence in lease law while achieving a practical, and principled, solution to the need to keep the law in tune with the realities of practice. It makes knowledge of the option, and not the length or class of lease, the controlling factor. However, as chapter 9 discusses, others take the view that the offside goals rule does not apply to options to purchase.

(b) *Pre-emptions*

6-13. The approach adopted in respect of real burdens prompts the question whether lease law too should distinguish between an option which the tenant may trigger at any time, and one (a pre-emption) which affords a right to purchase only should the landlord choose to sell.³⁸ As we have seen, the policy objections to an owner being bound by the second type of term are not as strong as in respect of the first: although there remains a limitation on one of the main aspects of ownership, namely freedom of transfer, there is no question of being compelled to sell the property when one does not wish to do so. Nevertheless, even this limitation might prove problematic for the incoming owner in certain circumstances: the owner might, for instance, wish to transfer the property as part of a corporate restructuring, or as one of a group of properties, or wish to

³⁶ Para 4-14 above.

³⁷ I Quigley 'On the wrong track?' (2007) 52 JLSS Feb/48.

³⁸ Cooper distinguishes between options to purchase and rights of pre-emption in South African law, although he treats both identically when considering whether they bind a successor to the landlord: Cooper *Landlord and Tenant* 139–140 and 147–148.

donate it to a particular person.³⁹ Not all transfers of title are simply to realise the market value of the property. Furthermore, the transmission of such an obligation would still face the objection, noted above, that it would subvert the temporary nature of the burden constituted by the lease, which was the main objection raised in *Bisset* and reiterated in *Advice Centre*. And it would also fall foul of the first stage of the test proposed in chapter 3 for distinguishing between real and personal conditions. For all of these reasons, it seems unlikely that a court would carve out an exception to the general rule and hold a successor bound by an option to purchase in the form of a pre-emption.

6-14. Whether a pre-emption is a real condition is, in any event, unlikely to be of great practical significance in respect of registrable leases because of the statutory rule that the holder of a right of pre-emption in such a lease has only one bite at the cherry. Such pre-emption rights are subject to the general rule that where O(wner) offers the property to H(older) following an event which triggers the pre-emption, and H fails to intimate an intention to exercise the pre-emption within 21 days⁴⁰ of the sending of the offer, the right of pre-emption expires and so H cannot demand that H be offered the property when a trigger event next occurs.⁴¹ In other words, if the tenant does not exercise the right and the landlord transfers ownership, the right is extinguished, so no question of it affecting a successor arises. This rule only applies, however, where an offer to sell is made.⁴²

³⁹ Whether a right of pre-emption is triggered by gift may be expressly regulated by the constitutive agreement. As to the position where it has not been, cf Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181, 2000) [10.22] (pre-emptions not usually triggered by gifts); *Gardner v Coutts* [1968] 1 WLR 173 (Ch D) at 179B ('To my mind the notion of a first refusal is inconsistent with the idea that the person who has to give the first refusal should be entitled to give the property away without offering it to the other party.'). The rule in *Gardner* seems preferable: to hold that a pre-emption is not triggered by a gratuitous disposition would facilitate avoidance. In an unreported Sheriff Court decision, *Howatson v Whyte*, Forfar Sheriff Court, 14 July 1992, the grantor of a pre-emption was ordered to pay damages to the holder of the right where the grantor had colluded with a potential purchaser in order to frustrate the exercise of the pre-emption. The land subject to the pre-emption was only part of that being sold. Seller and buyer agreed to split the sale in two and to inflate the price to be paid for the land subject to the pre-emption, so as to make it difficult for the holder of the pre-emption to exercise the right. The basis of the court's decision was that the grantor owed the holder a contractual obligation to act in good faith. Not all would accept that. Were the case to be followed, it could well apply to gifts made to circumvent pre-emption rights. See KGC Reid and GL Gretton *Conveyancing 2010* (2011) 166–168.

⁴⁰ Or such shorter period as is mentioned in the document constituting the pre-emption.

⁴¹ Title Conditions (Scotland) Act 2003 ss 82–84. The general rule was first introduced by Conveyancing Amendment (Scotland) Act 1938 s 9 which applied to rights of pre-emption in feudal grants. Land Tenure Reform (Scotland) Act 1974 s 13 amended this and extended its application to 'any right of pre-emption, created in a deed or other writing executed after the 1st September 1974 . . . of an interest in land in the event of the sale thereof or of any part thereof by the proprietor for the time being'. This new provision covered rights of pre-emption in leases.

⁴² There is also provision for extinction following a 'pre-sale undertaking', which is where the holder gives an undertaking not to exercise the option and the property is transferred while that undertaking subsists.

There may be instances where transfer does not trigger such an offer or where there is a transfer without an offer being made, although one should have been. In such cases, the right of pre-emption persists and can be exercised when a trigger event does take place.

6-15. The matter may be of more significance in respect of short leases, because the reforms of the Title Conditions (Scotland) Act 2003 have a perhaps unforeseen consequence. Sections 83 and 84 are more restrictive in their terms than their predecessor provision, section 9 of the Conveyancing Amendment (Scotland) Act 1938:⁴³ they apply only to a subsisting right of pre-emption which is constituted *as a title condition*,⁴⁴ meaning, on the definition in section 122, that only conditions of *registrable* leases are covered.⁴⁵ This limitation was not present in section 9 of the 1938 Act, as it was amended to apply to leases. So, since 28 November 2004, the ‘single opportunity to purchase’ rule has ceased to apply to rights of pre-emption contained in leases which are not registrable. Such a pre-emption is therefore not extinguished by statute if there is a transfer by the landlord which triggers the pre-emption but the pre-emption is not exercised. For the reasons given above, the better view of the existing law is that a pre-emption will not automatically bind a successor landlord in such a lease. If the pre-emption has not been extinguished by statute, one can see an argument that the pre-emption continues to exist, albeit only binding on the grantor i.e. the original landlord:⁴⁶ much would depend on the wording of the pre-emption. The safest course is, of course, for parties drafting a pre-emption in a short lease to provide expressly for when the pre-emption right is to cease to exist. If no such express provision has been made, a landlord of property let under a short lease which contains a right of pre-emption should consider taking his successor bound by the tenant’s right of pre-emption, even if the tenant refuses the opportunity to purchase when the subjects are offered to him: the statutory provision which extinguishes the right of pre-emption does not apply, so there is a risk that the original landlord would be exposed to a claim on the pre-emption in the future, unless it can be said that the pre-emption was, even in the absence of sections 83 and 84 of the Title Conditions (Scotland) Act 2003, only to arise once.

(4) Other legal systems

6-16. The position in other legal systems is now considered. In South Africa, there was debate about whether a successor landlord was automatically bound

⁴³ Repealed by Title Conditions (Scotland) Act 2003 Sch 15.

⁴⁴ Title Conditions (Scotland) Act 2003 s 82.

⁴⁵ Title Conditions (Scotland) Act 2003 s 122. Note there is no requirement that the lease be registered, only that it be registrable in order for the condition to qualify as a title condition and for ss 83 and 84 to apply.

⁴⁶ See paras 8-44 and 8-45 below for discussion of the circumstances in which an obligation will continue to bind the original landlord even after transfer.

by an option. The Supreme Court of Appeal's 2009 judgment in *Spearhead Property Holdings Ltd v E & D Motors (Pty) Ltd*⁴⁷ held that the *huur gaat voor koop* rule did not result in a successor landlord being bound by an option to purchase granted by a previous landlord. The majority was concerned in particular by the thought that to hold that an option transmitted as part of the lease would operate unfairly against an innocent purchaser who was unaware of the existence of the option. Until the decision in *Spearhead*, South African law on this point had been unclear. In *Shalala v Gelb*⁴⁸ the Cape Provincial Division had stated, *obiter*, that 'the maxim *huur gaat voor koop* has no application as between competitors for dominium'.⁴⁹ This had been accepted by the authors of a previous edition of a leading property law text.⁵⁰ However, that approach had been rejected by two prominent commentators, Cooper and Kerr, both of whom favoured the position that a successor was bound by an option to purchase contained in a lease provided that it was an integral part of the lease.⁵¹ That test would be satisfied if, for example, the option had been an inducement to enter into the contract of lease or had been a factor in setting the rent. In *Spearhead* the Supreme Court of Appeal rejected such a test as unlikely to assist. The question was not whether the right was 'integral' to the contract (as that would not serve to protect innocent purchasers) but rather whether the right 'relates to the lessee's real right of occupation *as lessee*'.⁵² However, even although the option did not bind the successor landlord by virtue of the *huur gaat voor koop* rule, the position of the tenant with an option was protected by the operation of the doctrine of notice (the South African equivalent of the offside goals rule), which would render the option effective against a purchaser who acquired with notice of it. The application of the *huur gaat voor koop* rule to an option or pre-emption right might, however, now have changed following the Constitutional Court's decision in *Makone v Tassos Properties*,⁵³ the position is not clear as that case did not actually determine, as part of its *ratio*, the scope of the *huur gaat voor koop* rule. In *Makone* the Constitutional Court considered a challenge to the pre-existing common law rule that if parties agreed to *extend* a lease, that agreement did not include terms which were 'collateral' to the

⁴⁷ [2009] ZASCA 70, 2010 (2) SA 1 at [51]–[58]. The decision was by a majority of 4:1; Maya JA dissented.

⁴⁸ 1950 (1) SA 851 (CPD).

⁴⁹ 1950 (1) SA 851 at 865. This is one of four cases on this point discussed by Cooper *Landlord and Tenant* 300–303. The other three are *Ginsberg v Nefdt* (1908) 25 SC 680; *Archibald and Co v Strachan and Co* 1944 NPD 40, and *Van der Pol v Symington* 1971 (4) SA 472 (T). These concern knowing or gratuitous successors and so do not provide authority on the *huur gaat voor koop* rule. *Shalala v Gelb* is the only case Cooper cites which considers whether an option binds a successor by virtue of that rule.

⁵⁰ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5th edn 2006) 433.

⁵¹ Cooper *Landlord and Tenant* 300–303; Kerr *Sale and Lease* 441–442; LAWSA vol 14 [46].

⁵² [2009] ZASCA 70, 2010 (2) SA 1 at [52].

⁵³ [2017] ZACC 25, 2017 (5) SA 456 (CC). The decision has been criticised: (2019) 136 SALJ 1.

lease – rather, unless the parties said otherwise, they were to be taken only to have extended the lease itself. The Constitutional Court considered that such a rule was unjustifiable, in particular because it was said that it was likely to prejudice tenants. It therefore held that if parties extended a lease, the scope of that agreement was not to be determined by an *a priori* assumption that they were only extending *the lease*, as opposed also to terms *collateral* to that lease. One textbook proceeds on the basis that this ruling also affects the distinction that the law draws via the *huur gaat voor koop* rule between lease terms and collateral terms.⁵⁴ At least one first-instance decision has stated that *Makone* overrules the decision in *Spearhead* that the *huur gaat voor koop* rule does not apply to collateral rights unconnected with the lease,⁵⁵ though the reasoning in that case is not very full and this conclusion may not have been essential for the outcome of the decision. Whether that approach becomes accepted in South African law remains to be seen. There are different policy considerations at play when (i) deciding whether two parties should, by the simple act of having agreed to extend their contract, be treated as having agreed that a collateral term has (or has not) been renewed – which was the issue in *Makone*, and (ii) deciding whether a term such as an option automatically binds a successor to the landlord or only remains binding on the previous landlord.

6-17. Common Law systems also hold that an option to purchase is collateral to the relationship of landlord and tenant, so the liability to perform does not run with the reversion. The authority commonly cited for this is the English case of *Woodall v Clifton*,⁵⁶ where a tenant sought to compel an assignee of the reversion to grant a conveyance in line with an option agreement. The tenant was unsuccessful. The defendant answered that ‘the statute⁵⁷ is confined to contracts dealing with the leasehold relation, and does not apply to contracts which are collateral or personal’. This argument was successful. Romer LJ stated:⁵⁸

The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. . . . It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run

⁵⁴ G Muller et al *Silberberg and Schoeman's The Law of Property* (6th edn, 2019) 571, stating that ‘the removal of the common-law rule has important implications for the law of lease generally, including for the operation of the *huur gaat voor koop* rule’ and suggesting that ‘the Constitutional Court had unintentionally extended the application of the *huur gaat voor koop* rule beyond the scope of the law of lease’.

⁵⁵ *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels Moosa NO* [2020] ZAKZDHC 47 at [43].

⁵⁶ [1905] 2 Ch 257 (CA).

⁵⁷ I.e. the Grantees of Reversions Act 1540 (32 Hen 8, c 34). When monastic lands were seized and distributed, it was necessary to enable grantees to enforce the terms of existing leases. The effect of this Act, as interpreted, was that the benefit and burden of covenants, provisions and conditions contained in a lease which touched and concerned the land passed with the reversion: Megarry and Wade *Real Property* [19-061].

⁵⁸ *Woodall v Clifton* [1905] 2 Ch 257 (CA) at 279.

with the reversion An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing.

This expresses well the objection to the transmission of the obligation: the contract to which the transferee becomes party upon transfer is that of lease; a term relating to a contract of sale is separate from the lease and so does not automatically bind a successor landlord. *Woodall v Clifton* has been followed in Australia and New Zealand.⁵⁹ English law, however, is now different. By statute, all landlord and tenant covenants in a lease concluded after 1 January 1996 transmit, provided that they are not expressed to be personal.⁶⁰ Quite apart from the rules of lease law, in England, Australia and New Zealand an option creates an equitable interest in land, so can bind a successor landlord by virtue of those rules but not as a term of the lease.⁶¹ The American Restatement, however, adopts a different position: the Reporter's Notes state that an option to purchase would run with the land.⁶² In German law, the *Münchener Kommentar* states that an option to purchase does not transmit under §566 BGB.⁶³

(5) Conclusion

6-18. Existing Scottish authorities take the view that an option to purchase is not a real condition of a lease. That is consistent with the result of the general test proposed in chapter 3 for distinguishing between real and personal conditions. Although the law has been criticised by some as out of keeping with commercial realities and leading to impractical results, the strength of those criticisms depends upon whether the offside goals rule applies so as to render an option binding on a successor with knowledge of the option. If, as some authority suggests, the offside goals rule does not apply, these criticisms have some force. If, however, the offside goals rule does apply (the approach which this writer prefers), then the rule of lease law is limited and provides desirable protection for successor landlords against being bound by an option of which they were unaware.

⁵⁹ *Davenport Central Service Station Ltd v O'Connell* [1975] 1 NZLR 755 (Supreme Court) at 757; *Denham Bros Ltd v W Freestone Leasing Pty Ltd* [2003] QCA 376 at [6], [22] and [66]. In *Sandhurst Trs Ltd v Australian Country Cinemas Pty Ltd* [2006] QSC 165, the Supreme Court of Queensland applied *Woodall* to a right of pre-emption.

⁶⁰ This statutory rule does not, however, circumvent rules about when an option requires to be registered in order to bind a successor, on which, see ch 9 n 64.

⁶¹ See para 9-28 below. In England, for example, options require to be registered in order to bind a successor, but there is an exception in respect of registered land if the holder of the right is in 'occupation', as a tenant will be.

⁶² American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977) §16.1, illustration 8.

⁶³ *Münchener Kommentar* §566 Rn [36].

B. TERMS REGARDING RENT

6-19. Obviously, a term of a lease providing for the payment of rent to the landlord is a real condition. Parties may, however, include more esoteric provisions, such as that the tenant is entitled to set off against the rent a debt owed to the tenant by the landlord, or that the tenant need not pay rent in consideration of works which the tenant has carried out, or simply that the tenant is relieved of the obligation to pay rent for a particular period. This section considers those types of term.

(1) Provision allowing set-off of landlord's debts against the rent

6-20. At one time it seems to have been common for leases to provide that the tenant was to be entitled to set off against the rent a sum which the (original) landlord owed to the tenant. This was an attempt to use the real qualities of leases to secure debt.⁶⁴ After initial uncertainty, it was established that such a term does not bind a successor landlord, although the tenant may continue to set off the amount until properly 'interpelled' by the successor.⁶⁵ This is a good illustration of the general test set out in chapter 3. One of the structures used was this: a debtor would lease land to a creditor and allow the creditor to retain rent in satisfaction of the sum the creditor was owed, be it the interest (annual-rent) or the principal. Alternatively, the debtor/creditor relationship might arise after the parties were already landlord and tenant: the landlord of a wealthy tenant, Ross recounts, would naturally have recourse to the tenant to borrow money and would equally naturally arrange for the loan to be paid off by retention of the rent.⁶⁶

6-21. The effectiveness of these transactions as 'securities' depended upon the clause permitting the tenant to retain rent remaining effective in a question with the landlord's successors. The extent to which such clauses did so was controversial.⁶⁷ This was one of the earliest types of case in which it had to be determined which aspects of an agreement between landlord and tenant regulated the relationship between a successor landlord and the tenant. The law fluctuated. The initial view was that a clause permitting the tenant to retain rent 'would not liberate [a] tacksman at the hands of a singular successor, albeit it

⁶⁴ See, generally, *Morison's Dictionary* 15234–15249; *Stair Institutions* II ix 28–29; *Bankton Institute* II ix 7–9; *Erskine Institute* II vi 29; *Ross Lectures* vol II 502–503. According to Bell, this was common from the sixteenth to the eighteenth centuries, at which point other ways of taking security took over: *Bell Commentaries* I 69. Stair mentioned 'wadset tacks': *Stair Institutions* II ix 28. He was referring to leases granted which were to endure until the sum borrowed had been repaid. These did not bind successors as they lacked a definite ish.

⁶⁵ For discussion of what amounts to 'interpellation', see para 6-24 below.

⁶⁶ *Ross Lectures* vol II 502.

⁶⁷ In light of the controversy, it is odd that parties did not simply agree to leases at a low rent for a suitable duration to amortise the debt: *Ross Lectures* vol II 503; *Bell Commentaries* I 69; *Bell Principles* §1201.

might militate against the setter and his heirs'.⁶⁸ For a period, an intermediate position was adopted: successors were bound to allow the tenant to set off the debt due by the original landlord, but only where there remained a surplus of rent which could be paid to the successor.⁶⁹ The reasoning was that the lease could have been granted for that surplus rent in any event, and would still have bound the successor. So, one reads of leases where, in addition to a money rent, the tenant also had to provide the landlord with '2 stones butter, 4 wedders and 1 dozen poultry'.⁷⁰

6-22. In *M'Tavish v M'Laughlan*,⁷¹ however, the court held that the distinction between cases which involved a surplus duty and those which did not was unsound. Hume summarises the resulting rule: 'the purchaser's interest shall . . . prevail over all these provisions of the tack, which are destined to intercept the rent, – and turn it into other pockets than his own'.⁷² The successor's argument, that tenants were entitled to the protection of the Leases Act 1449 only upon paying to the successor 'sic lik male as thai tuk thaim [the lands] of befor', was successful. Yet that argument, although also appearing elsewhere,⁷³ proves too much. It would amount to a blanket rule that a tenant may not retain rent in a question with a singular successor, which is not the law. For example, clauses permitting the retention of rent as compensation for expenditure improving the subjects are real conditions, as we will see.⁷⁴ The 1449 Act's statement that the tenant must continue to pay 'sic lik male as thai tuk thaim of befor' is therefore not absolute. Erskine's explanation of decisions such as *M'Tavish* is better:⁷⁵

[T]he retention was . . . claimed by the tenant not *qua* tenant, but in the character of a creditor to the landlord, with which last character it is obvious that the statute hath no concern, since the only view of it was to secure tenants in the possession of their farms, but not the landlord's creditors in the payment of their debts.

The logic is that the basis of the tenant's ability to retain rent is that the tenant is the landlord's creditor. In truth, despite the terminology used in the cases

⁶⁸ *Ross v Blair* (1627) Mor 15167.

⁶⁹ *Thomson v Reid* (1664) Mor 15239, followed in *Peacock v Lauder* (1674) Mor 15244; *Oliphant v Currie* (1697) Mor 15245 contains the same rule, and was itself followed in *Creditors of Duncie v Simpson* (1698) Mor 15247. *Seton v White* (1679) Mor 15245, on the other hand, held the tenant entitled to retain the *whole* rent in a question with a successor landlord. In *Oliphant* reference is made to decisions in cases which raised the parallel feudal issue: in *Blackbarony v Borrowmains* (1679) Mor 10272 a clause in a feu right discharging the feu duties in all time coming was found not to be effective against a successor in the superiority. In *Pringle v Earl of Home* (1699) Mor 10274 the same decision was reached in respect of a discharge which was not in the original feu charter, but was instead subsequent to it.

⁷⁰ *M'Tavish v M'Laughlan* (1748) Mor 1736 and 15248.

⁷¹ *M'Tavish v M'Laughlan* (1748) Mor 1736 and 15248.

⁷² Hume *Lectures* IV 76.

⁷³ Bankton *Institute* II ix 9.

⁷⁴ See paras 6-35 to 6-38 below.

⁷⁵ Erskine *Institute* II vi 29.

and texts, this is not an example of ‘retention’, for that is the withholding of performance by one party to a contract to spur the other party to perform counterpart obligations. Instead it is an instance of compensation, or set-off.⁷⁶ Although this does not operate *ipso jure* and usually must be pleaded and sustained by judgment before it has effect,⁷⁷ it can also operate earlier by agreement.⁷⁸ The clauses under discussion amounted to agreements that the tenant could set off the claim to repayment under a contract of loan against the landlord’s claim to rent. In order for a successor landlord to be bound to allow a tenant to ‘retain’ the rent by virtue of such a clause, the successor would have to have been the tenant’s debtor in the contract of loan. Otherwise, one of the prerequisites of set-off/compensation, that there be *concursum debiti et crediti*, would have been lacking. The successor was, however, not a debtor of the tenant, because upon transfer by the landlord the successor becomes party only to the contract of lease and not to the contract of loan.

6-23. Identifying the proper basis for these decisions is important. It makes clear that there is no absolute rule that a successor landlord must be paid the rent stipulated in the lease. That would have meant that there was no scope at all for a tenant to retain rent in a question with a successor landlord.⁷⁹ The question, rather, is whether the successor landlord is bound by the obligation which the tenant wishes to set off against the rent. As it was put by More in his notes to Stair’s *Institutions*, the tenant may not retain rent against a successor landlord in respect of debts not arising out of the lease.⁸⁰ This is a good illustration of the general test proposed in chapter 3: the term does not bind the successor landlord because it does not affect the landlord as landlord. Instead, it affects the landlord as debtor of the tenant.

6-24. The tenant may, however, continue to set off the rent against the sum outstanding until he is interpellated by the successor landlord.⁸¹ This rule is an instance of the principle of good faith payment, which protects a debtor who pays a former creditor in good faith after the creditor’s right to receive payment

⁷⁶ On the distinction between retention and compensation, see McBryde *Contract* [20-62]–[20-65] and [25-34]; Erskine *Institute* III iv 20.

⁷⁷ McBryde *Contract* [25-54]. Institutional passages are: Erskine *Institute* III iv 12; Bell *Commentaries* II 124; Bell *Principles* §575; cf Stair *Institutions* I xviii 6, which has not been followed.

⁷⁸ McBryde *Contract* [25-53]; WA Wilson *The Scottish Law of Debt* (2nd edn, 1991) [13-6]. This rule is not unique to Scots law: R Zimmermann *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) 20.

⁷⁹ Erskine *Principles* II vi 12 makes this point.

⁸⁰ JS More *Notes to Stair’s Institutions* vol I (1832) ccxlv.

⁸¹ Erskine *Institute* II vi 29; Hume *Lectures* IV 77; *M’Tavish v M’Laughlan* (1748) Mor 1736 and 15248. That case held that a baron decree obtained by a judicial factor on the landlord’s sequestrated estate amounted to sufficient interpellation. Hunter *Landlord and Tenant* vol I 482 and Rankine *Leases* 146 repeat the rule.

has transferred to another.⁸² *Bona fide* payment by a tenant to a former landlord after transfer to a singular successor who has used no diligence to put the tenant in *mala fide* is said by Stair to be the most ordinary example of the principle of *bona fide* payment.⁸³ It is not clear exactly what the law requires by way of ‘interpellation’.⁸⁴ In his *Principles* Erskine referred to ‘litiscontestation or other legal interpellation’.⁸⁵ Hume states that:⁸⁶

as a *bona fide* possessor and consumer, the tenant may have the advantage of such a clause of retention, until the purchaser shall put an end to that *bona fides* by some reasonable course of interpellation on his part.

In the absence of authority to the contrary, it would appear to be sufficient for the successor to notify the tenant in writing that the landlord has changed and that the full rent should in future be paid to the new landlord.

6-25. German⁸⁷ and South African law, in distinction to Scots, hold a successor bound by a clause permitting the tenant to retain rent. In the South African case of *De Wet v Union Government*,⁸⁸ A borrowed money from B in order to erect a house on A’s land and then let the house and part of a farm to B. The lease provided that the rent was to be paid by a *pro tanto* diminution in the amount which A had borrowed from B. A could terminate the lease when the debt had been repaid. A transferred ownership of the farm before the sum had been repaid. Although the Scottish rule was quoted in argument,⁸⁹ it did not find favour with the court, which held that the term bound the new owner, who could therefore not recover rent from B. Stratford ACJ stated:⁹⁰

The term as to how the obligation to pay rent month by month as it accrues is to be extinguished is a material and integral part of the lease, and not . . . merely collateral It was because the learned Judge in the Provincial Division failed to appreciate the difference between an express term of the lease . . . and the operation of the law of set-off apart from agreement, that led him to an erroneous conclusion.

Modern South African commentators approve of this result,⁹¹ although the case

⁸² Stair *Institutions* I xviii 3, III i 13 and IV xl 33; Bell *Principles* §561.

⁸³ Stair *Institutions* I xviii 3.

⁸⁴ There is a parallel with the debate about what counts as sufficient intimation of an assignation of a moveable claim, on which, see Anderson *Assignation* [6-34]–[6-35] and [7-11]–[7-23].

⁸⁵ Erskine *Principles* II vi 12.

⁸⁶ Hume *Lectures* IV 77.

⁸⁷ *Staudingers Kommentar* §566 Rn [40].

⁸⁸ 1934 AD 59.

⁸⁹ 1934 AD 59 at 61.

⁹⁰ 1934 AD 59 at 63–64.

⁹¹ Cooper *Landlord and Tenant* 291–292; G Muller et al *Silberberg and Schoeman’s The Law of Property* (6th edn 2019) 517, arguing that ‘whenever a lessee agrees with his or her landlord to pay rent in advance or to lend him or her money which is to be set off against the rent, the rule *huur gaat voor koop* must apply, for it is either an original term or a subsequent variation of the lease’.

was apparently subject to trenchant criticism.⁹² From a Scottish perspective, it appears to be overly influenced by viewing the successor landlord as an assignee of the right to rent (so that the *assignatus utitur* rule applies) and to take insufficient account of the fact that the lease is a contract which runs with the land and that the rent is a fruit of the land, to which the owner for the time being is entitled. The reasoning in *De Wet* should not cast doubt on the well-established Scottish rule, not least because the test which the South African court applied to determine whether the successor is bound (namely, whether the term is a ‘material and integral’ part of the lease) is not the test which is applied by Scots law to determine whether a term is real or personal.

(2) Assignment of rents

6-26. The rule on set-off just discussed is occasionally justified by drawing an analogy with an assignment of rents by the landlord to a third party.⁹³ Although it is not a term of the lease, the (in)effectiveness of an assignment of rent in a question with a successor is noted here for completeness. Such an assignment is effective only so long as the assignor (the original landlord) remains owner.⁹⁴ As it was put by Bell:⁹⁵

[P]ersonal assignment of rents, although effectual while the feudal right continues in the cedent . . . lose their force when the real right is transferred to another. The purchaser of lands, therefore, or an heritable creditor, completing a real right to the lands, carries the rents in competition with assignments, however completed.

So, if L grants T a lease and assigns the rents of that lease to A, and L later transfers ownership of the leased subjects to S, the assignment by L to A ceases to take effect when the transfer to S is completed. An assignee of the landlord’s right to rent would take no higher right than the landlord enjoyed and would therefore be affected by the tenant’s right to retain rent in compensation of sums owed to the tenant by the landlord.⁹⁶

(3) Rent-free periods and rent-phasing

6-27. A common provision relating to rent in modern leases is one which provides that no rent will be payable for a particular period (a ‘rent-free period’)

⁹² JC de Wet ‘Huur Gaat Voor Koop’ (1944) 8 THRHR 241.

⁹³ E.g. *Thomson v Reid* (1664) Mor 15239; *Oliphant v Currie* (1697) Mor 15245; Bankton *Institute* II ix 9; Hume *Lectures* IV 76. Bankton states that such clauses are ‘truly, in effect’ assignments; Hume, on the other hand, uses an assignment of rent as a metaphor with which clauses can be compared.

⁹⁴ *Erskine Institute* III v 5; Bell *Commentaries* I 793; Rankine *Leases* 318.

⁹⁵ Bell *Commentaries* I 793.

⁹⁶ Bankton *Institute* II ix 10.

or that rent for that period will be at a lower level than otherwise provided in the lease. These provisions are of the utmost commercial importance and feature frequently in commercial leases. A rent-free period is often provided to allow the tenant to fit out the subjects. Or there may be 'rent-phasing' provisions by which a tenant will only pay a proportion of the full rent until, say, an anchor tenant begins to trade from the development. It may be that these appear in back-letters instead of in the body of the lease, in which case not only must parties consider whether the content of the term is such that it will remain effective in a question with a successor, they must also consider whether the manner of documenting the term reveals an intention that it not transmit.⁹⁷

6-28. The question whether the content of such terms allows them to bind a successor landlord has not been litigated. As they concern the rent payable, a core term of the lease, it might be thought that they are clearly referable to the relationship of landlord and tenant and therefore do transmit. However, there are suggestions to the contrary in the texts. When discussing cases where a tenant sought to retain rent on the basis of a personal debt owed to the tenant by the original landlord,⁹⁸ Rankine stated:⁹⁹

[I]f a fixed rent has been stipulated for in the lease, and then, either *unico contextu*, or later, the obligation to pay it is discharged, the discharge is regarded as a purely personal contract, not transmissible against singular successors; and the fixed rent is still due in a question with them.

There is a very similar passage in Stair.¹⁰⁰ Both Rankine and Stair refer to *Ross v Blair*,¹⁰¹ one of the decisions discussed above, where the entire rent due under a lease had been discharged in satisfaction of a debt owed to the tenant. The passages are, however, in general terms. What if, however, the discharge was granted for reasons other than repaying a debt owed by the landlord to the tenant: perhaps to encourage a prospective tenant to take a lease or in return for the tenant undertaking some form of expenditure which otherwise the landlord would have to bear? Further, it is possible to distinguish different degrees of discharge: (i) a total discharge of all rent due under the lease; and a partial discharge, whether it be (ii) only of part of the rent, or (iii) of the entire rent, but for only part of the lease, or (iv) of part of the rent for part of the lease. The discussion by Stair and Rankine is of the first of these possibilities, and their conclusion seems correct, regardless of the reason for which the tenant is allowed to retain the rent. The ground for concluding that successors are not to be bound by a total discharge is clear: it would undermine the rule that a successor is not bound by a lease unless it provides for a rent. Although the rent

⁹⁷ On which see paras 2-52 to 2-57 above.

⁹⁸ These cases are considered in paras 6-20 to 6-25 above.

⁹⁹ Rankine *Leases* 145–146.

¹⁰⁰ Stair *Institutions* II ix 29.

¹⁰¹ (1627) Mor 15167.

need not be fair or adequate, nevertheless there must be *some* rent payable (and not only an elusory amount).¹⁰² Less extreme provisions discharging the tenant's obligation to pay rent (for example, giving a reduced rent for a few months) need not be treated in the same way.

6-29. The validity in a question with a successor of a discharge of rent could have been, but in the event was not, explored in *Ashford and Thistle Securities LLP v Kerr*,¹⁰³ where a tenant argued that a 25-year lease had been varied so that no rent would be payable for the first five years in return for her carrying out repairs and refurbishment work to the subjects. In cases like this it will be important to establish why the discharge is being given. If it is in return for an obligation which itself is referable to the lease (such as to repair or improve the subjects) then it is thought that the provision allowing the tenant to retain rents should bind a successor. The same should be true of a discharge which is offered simply as an inducement to the tenant to take the lease (e.g. a rent-free or reduced-rent period). A term concerning payment of rent is clearly referable to the relationship of landlord and tenant, and there is no policy reason why a reduction of rent – as opposed to a complete discharge – should not bind a successor. It is difficult to distinguish between a partial discharge of rent and a variation of the lease, which, it was suggested in chapter 2, can bind successors. There will, however, be questions of degree. While there seems to be little objectionable with, for example, a three-month rent-free period in a 15-year lease, if the lease or a variation provided for a nine-year rent-free period in a 10-year lease, that would be likely to fall foul of the rule that a lease requires a rent in order to bind successors. A cautious approach is to provide for there always to be some rent payable during 'rent-free' periods, even if at a much reduced rate.

C. COMPENSATION FOR IMPROVEMENTS

6-30. At common law a tenant has no right to be compensated for improvements,¹⁰⁴ but parties often derogate from this default position. 'It has been decided that a *bona fide* and fair stipulation for meliorations is just as effectual against a purchaser as any other stipulation in a lease.'¹⁰⁵ This has been

¹⁰² See e.g. Rankine *Leases* 144; Paton and Cameron *Landlord and Tenant* 109; *Mann v Houston* 1957 SLT 89 (IH).

¹⁰³ Unreported decision of Sheriff Poole, Edinburgh Sheriff Court, 19 December 2005; reversed on appeal 2007 SLT (Sh Ct) 60. The appeal turned on a different point. At first instance, it was argued – successfully – that the agreement did not bind the successor landlord because it was an oral variation of the lease: see para 2-37 n 103 above.

¹⁰⁴ *Stair Institutions* II i 40; *Bankton Institute* II ix 68; *Erskine Institute* III i 11; *Bell Principles* §538; *Scott's Exrs v Hepburn* (1876) 3 R 816 (IH) at 827; *Earl of Galloway v McClelland* 1915 SC 1062 (IH: Whole Ct) at 1099.

¹⁰⁵ *Purves' Trs v Traill's Tr* 1914 2 SLT 425 (OH).

clear since *Arbuthnot v Colquhoun* in 1772¹⁰⁶ and was reaffirmed by the House of Lords in *Fraser v Maitland* in 1824.¹⁰⁷ It also follows from the general test set down in chapter 3. It was noted there that a test which asks whether a person is benefited or burdened in a particular capacity does not produce especially clear results in respect of an obligation to pay money, for everyone is benefited by receiving money and, similarly, such an obligation can be performed by anyone.¹⁰⁸ It is therefore necessary to look at the purpose of the payment and ask, in light of that, who may more reasonably be required to perform the obligation after transfer. An obligation to compensate the tenant for the cost of improvements may more reasonably be performed by the successor landlord because it is the successor who will take the benefit of improvements at the end of the lease. If the term permits the tenant to retain rent by way of compensation for the cost of improvements made, that will also be effective in a question with a singular successor.¹⁰⁹

6-31. Although the general proposition that conditions of this type are real was established early, there was a fairly substantial volume of litigation concerning them. The issue in these cases was not, however, whether there was a substantive objection to a successor landlord being bound. Rather, the focus was upon whether the term bound an heir of entail or upon the question when liability under such an obligation crystallised, which is important for determining whether the original or the successor landlord is bound.¹¹⁰ This book does not consider that point, so these cases are not discussed here.¹¹¹

¹⁰⁶ (1772) Mor 10424. Cf *Rae v Finlayson* (1680) Mor 10211, where such a clause was thought to be personal. From Fountainhall's report it becomes clear that the lease in this case would not in any event have bound a successor for the tenant was not in possession by virtue of the lease when the successor took infestment. Bankton *Institute* II ix 7 reflected the law of his time when he stated that such a clause did not bind a successor.

¹⁰⁷ (1824) 2 Sh App 37. See also *Stewart v M'Ra* (1834) 13 S 4 (IH).

¹⁰⁸ See para 3-44 above.

¹⁰⁹ Rankine *Leases* 267.

¹¹⁰ The most likely rule is that a successor landlord does not acquire liability for one-off obligations which had already become due before the successor acquired the property: *Barr v Cochrane* (1878) 5 R 877 (IH) at 883.

¹¹¹ The cases which have been traced on this point in the course of the research for this book are: *Rae v Finlayson* (1680) Mor 10211; *Macdoul v Macdoul* (1760) Mor 15259; *Arbuthnot v Colquhoun* (1772) Mor 10424; *Dillon v Campbell* (1780) Mor 15432; *Webster v Farquhar* (1791) Bell's Octavo Cases 207; *Taylor v Bethune* (1791) Bell's Octavo Cases 214; *M'Neil v Sinclair* (1807) Hume 834; *Bell v Lamont* 14 June 1814 FC (IH); *Bruce v McLeod* (1822) 1 Sh App 213; *Todd v Skene* (1823) 2 S 113 (IH); *Fraser v Maitland* (1824) 2 Sh App 37; *Moncrieff v Tod and Skene* (1825) 1 W and S 217; *Fraser v Fraser* (1827) 5 S 673 (IH), (1831) 5 W and S 69; *Macra v M'Kenzie* (1828) 6 S 935 (IH); *Barclay v Earl of Fife* (1829) 7 S 708 (IH); *Fraser v Mackay* (1833) 11 S 391 (IH); *Stewart v M'Ra* (1834) 13 S 4 (IH); *Stewart v Campbell* (1834) 13 S 7 (IH); *Turner v Nicolson* (1835) 13 S 633 (IH); *Stewart v Earl of Dunmore's Tr* (1837) 15 S 1059 (IH); *Cumine v Bailey* (1856) 19 D 97 (IH); *McGillivray's Exrs v Masson* (1857) 19 D 1099 (IH); *Runcie v Lumsden's Exrs* (1857) 19 D 965 (IH); *Purves' Tr v Traill's Tr* 1914 2 SLT 425 (OH); *Younger v Traill's Tr* 1916 1 SLT 397 (OH). Many consider whether an agreement

6-32. One case which does deserve mention is *Macdoul v Macdoul*.¹¹² There a lease provided that the landlord was to compensate the tenant for improvements at the termination of the lease. During the subsistence of the lease, the tenant acquired the lands. The original landlord was held bound to reimburse the tenant on the date at which the lease would have terminated. Rankine's view was that the opposite result would have been reached at the time when he wrote, and it is thought that that remains the case today: the lease would be held to have been extinguished by confusion and the parties deemed to have taken the obligation into account in settling the price.¹¹³ The decision dates from 1760. At that time the general rule was that such an obligation did not bind successors¹¹⁴ and the decision may have been influenced by that consideration: after transfer, the original landlord would have remained bound, so it made no difference who acquired the lease. Now, however, that such a condition is real, it would be extinguished, along with the rest of the real conditions of the lease, when the tenant acquired the landlord's interest.

6-33. As can be seen from the discussion in Part B above, a successor is not bound by a merely personal debt of the original landlord. That is one of the clearest examples of an obligation which is extrinsic to a lease. If, therefore, the tenant undertakes to discharge a liability of the landlord's in return for an undertaking to repay the debt at the end of the lease, that undertaking is a personal condition. This was the view of the majority of the Inner House in *M'Gillivray's Exrs v Masson*.¹¹⁵ The landlord was bound to pay the outgoing tenant a sum in respect of meliorations. Instead of doing so, he reached an agreement with the incoming tenant whereby the incoming tenant would pay the outgoing tenant the sum which the outgoing tenant was entitled to be paid by the landlord. In return, the landlord undertook that he would pay the incoming tenant the valuation of the buildings on the land at the end of the lease. That obligation did not bind a successor.¹¹⁶

6-34. It is unclear whether the rule which applies to compensation for improvements also applies to a term which provides for the tenant to be paid a sum of money at the end of the lease in the event that the subjects are left in good repair. Repair and improvement are different. The one case in which the status of such a term arose does not provide clear guidance. The question raised in the

which is not documented in the actual lease can bind a successor (e.g. *Bruce v McLeod* and *M'Neil v Sinclair*, which reach opposite conclusions). Such decisions are discussed in Ch 2 above. Many concern leases of entailed land.

¹¹² (1760) Mor 15259. Paton and Cameron *Landlord and Tenant* 96 cite this case as authority for the proposition that a successor is bound by such an obligation. That, however, is not correct.

¹¹³ Rankine *Leases* 265, citing *Lord Blantyre v Dunn* 1858 20 D 1188 (IH).

¹¹⁴ It is viewed in that light, for example, by G Brodie (ed) *Stair Institutions* (4th edn, 1826) 371.

¹¹⁵ (1857) 19 D 1099 (IH) 1101.

¹¹⁶ See, similarly, *Purves' Trs v Traill's Tr* 1914 2 SLT 425 (OH) at 426, *Younger v Traill's Tr* 1916 1 SLT 397 (OH) at 399, and the entail case of *Fraser v Fraser* (1831) 5 W and S 69. Cf *Stewart v Campbell* (1834) 13 S 7 (IH).

case in question, *Swan and Sons*,¹¹⁷ was whether, where the tenants carried out repairs and the landlord subsequently transferred the subjects of the lease, the original landlord remained bound by the obligation to refund the tenant's outlay. The claim against the original landlord was sent to proof before answer and it is not known how it was finally resolved. The obligation could have remained binding upon the original landlord because (i) the term was not a real condition of the lease, (ii) it was a real condition, but the original landlord remained liable in addition to the successor landlord, or (iii) it was a real condition but liability under it had already crystallised prior to transfer. It cannot be determined from the report which of these possibilities was the basis of the decision. It is thought that this type of term is capable of being a real condition as it is referable to the relationship of landlord and tenant.

D. OBLIGATION TO REPAIR OR IMPROVE THE SUBJECTS

6-35. An obligation to repair is a real condition.¹¹⁸ There is, however, a distinction between repair and improvement and there is mixed case law on the question whether an obligation to improve the subjects is a real condition. By far the better view is that it can be, a view which is supported by passages from two Inner House decisions discussed below. A landlord might agree to carry out improvements, for example, to make alterations to a shop so as to equip it for the business which the tenant is to run, or even to construct new premises from scratch.¹¹⁹ The tenant might also enter into such obligations. In commercial retail developments, for example, tenants often undertake to fit out the premises. In practice, these types of obligation will typically be in an agreement for lease and not in the lease which is subsequently executed. Indeed, the grant of the lease will often be contingent on the landlord having discharged the construction obligations in the agreement for lease. The issue of enforceability against successors may, therefore, be unlikely to arise much in modern practice. It has, however, been the subject of some case law, which is discussed here.

6-36. In terms of the general test proposed in chapter 3, whether such a term is a real condition will depend upon the circumstances of the individual case. However, an undertaking by the landlord to improve the subjects benefits the tenant as tenant; and as, on the lease subjects being transferred, it is likely to be more readily performable by the successor than by the original landlord, it also

¹¹⁷ *Swan and Sons v Fairholme* (1894) 2 SLT 74 (OH).

¹¹⁸ The texts are unanimous: Rankine *Leases* 256; Paton and Cameron *Landlord and Tenant* 96; *SME Landlord and Tenant Second Reissue* [143]. See also *Burnfield v Stewart* (1872) 16 JJ 330.

¹¹⁹ Cockburn *Commercial Leases* [2.6].

binds the landlord as landlord. The same applies, vice versa, to an obligation on the tenant to improve the subjects. The obligation, after all, relates to the condition of the subjects of the lease. The argument that such a term is real is bolstered by the fact that an obligation to compensate the tenant for improvements is a real condition:¹²⁰ and if a successor landlord is bound to pay for improvements, why can the successor not also be bound to carry them out? It is thought, therefore, that, in the general course of things, an undertaking to improve should be held to be a real condition. On the other hand, it might be said that an obligation to carry out improvements is more onerous than an obligation to repair or to pay for improvements carried out by another, and that the law should be more cautious in holding a successor bound by such a condition. In other contexts, it has been said that if an obligation is immediately performable, it is more likely to be personal than real.¹²¹ Further, if the consideration for the improvements was a capital sum paid at the start of the lease, as opposed to rent, this may indicate that the term was intended to be separate from the lease. Having said all that, the tenant would be placed in an invidious position if, after taking a lease on the basis of a promise to carry out certain improvements, the landlord then transferred, and the new landlord was able to insist on performance by the tenant without the improvements having been carried out.

6-37. A key case is *Barr v Cochrane*.¹²² Cochrane, the landlord, undertook to put the buildings and fences of a leased farm into good condition, while the tenants agreed to maintain and leave them in such condition at the end of the lease. Cochrane sold and transferred the subjects to Barr without having fulfilled this obligation, but undertook to Barr to execute the work which he was bound by the lease to perform and to relieve Barr of all claims at the tenants' instance. In a question between Barr and Cochrane, the issue was whether this undertaking to Barr bound Cochrane to execute the works or whether Cochrane had fulfilled his obligation by paying the tenants the value of the performance and obtaining a discharge from them. It was held, by a majority, that Barr had no right to insist that Cochrane actually carry out the work, either from the undertaking given by Cochrane, or by *jus quaesitum tertio* from the lease. All that was intended was that Cochrane discharge his obligation to the tenants so as to relieve Barr of potential liability.¹²³ A relevant point was: what liability would Barr have come under in respect of the obligation to the tenants? Lord Justice-Clerk Moncreiff stated that, 'in taking up the estate he [Barr] was exposed to a claim on behalf of the tenant as he came into the place of the person by whom the lease was granted'.¹²⁴ This indicates that he viewed the obligation as being a real condition of the lease. In contrast, Lord Gifford described the obligation

¹²⁰ See paras 6-30 to 6-34 above.

¹²¹ *Tailors of Aberdeen v Coutts* (1840) 1 Robin 296 at 311.

¹²² (1878) 5 R 877 (IH).

¹²³ (1878) 5 R 877 at 881.

¹²⁴ (1878) 5 R 877 at 881.

as a 'personal obligation' and envisaged the tenants looking to Cochrane for performance even after the subjects had been transferred to Barr.¹²⁵ A dissent by Lord Ormidale appears to have been predicated upon the assumption that the obligation was real. He would have held that Cochrane was actually to carry out the works, on the basis that he was landlord at the time when the obligation became prestatable. Were the obligation personal and not real, this line of reasoning would be superfluous. Further, Lord Ormidale stated that Cochrane was unable to agree with the tenant that the repairing obligation would be discharged by payment because, after transfer to a new landlord, he could not vary a term of a lease to which he was no longer party. A majority of the Inner House therefore viewed an obligation on the landlord to carry out improvements as a real condition. Similarly, in *Norval v Abbey*,¹²⁶ another Inner House case, Lord Wark expressed the view, *obiter*, that an undertaking to carry out improvement works would have been a real condition.¹²⁷

6-38. There is, however, some case law which points in the other direction. In *Mackenzie v Mackenzie*¹²⁸ a succeeding heir of entail was held not to be bound by an obligation in a lease of a farm granted by his predecessor to trench, drain, lime and enclose adjoining woodland from time to time. It is unclear whether the basis of the decision was (i) that the term was not a real condition of the lease or (ii) that the term could be a real condition but did not bind a successor landlord because of the entail. Passages in the opinions of Lords Jeffrey and Fullerton suggest the former,¹²⁹ and this is how the case has subsequently been interpreted,¹³⁰ but the position is not beyond doubt.¹³¹ The same point arose again

¹²⁵ (1878) 5 R 877 at 885. Although the successor landlord was not bound by the obligation, nevertheless Lord Gifford held that he would be affected by its non-performance, for the doctrine of mutuality meant that the tenant could retain rent in a question with the successor.

¹²⁶ 1939 SC 724 (IH).

¹²⁷ 1939 SC 724 at 731. Lord Mackay agreed with Lord Wark. The remainder of the opinions focused on the question of the informal nature of the lease.

¹²⁸ (1849) 11 D 596 (IH).

¹²⁹ (1849) 11 D 596 at 600–601. Another two cases consider whether the landlord's trustee in sequestration is personally bound by such obligations, but that is a different issue and the cases provide no guidance for the question under consideration here: *Harvie v Haldane* (1833) 11 S 872 (IH) and *Harkness v Ratray* (1878) 16 SLR 117 (IH). In *Harvie* Lord Cringletie stated that all singular successors would be bound by an obligation to erect a steading on a farm, but this was because he viewed such an obligation as implied into any lease of a farm. This provides little guidance as to whether other obligations which are not default rules of a lease would amount to real conditions.

¹³⁰ *Gillespie v Riddell* 1908 SC 628 (IH) at 640. The reasoning in *Gillespie* on this point is, however, too broad: see para 3-32 above. Also, the Lord Ordinary in *Gillespie* thought (at 634) that 'an obligation by the lessor to put the fences and gates in a proper state of repair, and to re-roof the old farm buildings with corrugated iron' would have bound a successor heir of entail, which means that he must also have thought such a term would transmit as a real condition of the lease.

¹³¹ The Lord Ordinary decided the case on the entail point: (1849) 11 D 596 at 598.

in respect of entailed land in *Waterson v Stewart*¹³² but did not require to be decided because the tenant had discharged the landlord's obligation. The court in *Waterson* did not view the point as settled. That may well be true. However, when all the cases are considered, and the applicable test and policy considered, the better approach is that such a term can be a real condition.

E. ARBITRATION CLAUSES

6-39. It is thought that an arbitration clause will be effective in a question with a successor landlord, provided the dispute between the parties which it is sought to refer to arbitration itself relates to a real condition.

6-40. A clause referring to an arbiter all disputes between parties to a lease was held to bind a successor landlord in *Montgomerie v Carrick*.¹³³ However, the authority of this case alone does not allow one to state that an arbitration clause will always bind a successor. The gloss put upon the case by some texts is that the clause transmitted because it was essential to the contract.¹³⁴ That is based upon the Lord President's opinion.¹³⁵ It will not always be possible to state that an arbitration clause is essential to the contract. Indeed, it might be thought that, more often than not, and indeed perhaps in *Montgomerie* itself, an arbitration clause will be inessential as a court could adjudicate in the dispute equally well. In any event, as discussed above, it is not the general law that a term requires to be 'essential' to the contract of lease in order to be a real condition.¹³⁶

6-41. There is a contrast in the opinions in *Montgomerie* between on the one hand Lord President Boyle and Lord Mackenzie, who were content to hold a clause referring all disputes between the parties to an arbiter as binding upon the successor, and Lords Fullerton and Jeffrey on the other, who took the view that such a broad clause would not always bind a successor. Lord Fullerton specifically declined to decide that a general obligation to refer disputes to arbitration is transmissible against singular successors.¹³⁷ Lords Fullerton and Jeffrey were only willing to hold the successor bound because of the nature of the parties' dispute: the question at issue was whether the landlord's power to refuse the tenant permission to sink another pit had to be exercised reasonably. They viewed this question as requiring the expertise of an arbiter to resolve. Had the issue related simply to the construction of the lease, for example, it is less clear that on their reasoning they would have held a successor bound. In

¹³² (1881) 9 R 155 (IH).

¹³³ (1848) 10 D 1387 (IH).

¹³⁴ Paton and Cameron *Landlord and Tenant* 96; *SME Landlord and Tenant Second Reissue* [143].

¹³⁵ (1848) 10 D 1387 (IH) at 1395.

¹³⁶ See paras 3-26 to 3-28 above.

¹³⁷ (1848) 10 D 1387 (IH) at 1395.

terms of the general test proposed in chapter 3, this distinction seems suspect. Provided that the dispute which would be referred to arbitration concerns a term which is referable to the relation of landlord and tenant, an arbitration clause affects the landlord as landlord and the tenant as tenant. Davidson notes that the doubts raised by Lords Fullerton and Jeffrey in *Montgomerie* have not been echoed since and proposes, as a general principle, that 'where one party succeeds to another's rights and obligations under a contract, then should that contract contain an arbitration clause, he will be bound by it'.¹³⁸ He notes that this principle has been applied to feu contracts, a parallel which is particularly instructive in the context of leases.¹³⁹ For these reasons, it is thought that Rankine's view that 'a singular successor is bound by a reference clause only in so far as it is ancillary to a real condition' is sound.¹⁴⁰

F. GUARANTEE OF TENANT'S OBLIGATIONS

6-42. A guarantee provided by a third party of some or all of the tenant's obligations under a lease is not itself a term of that lease. Strictly, therefore, it falls outside the scope of this book. However, the question whether the rights under such a guarantee transfer automatically to a successor landlord has arisen, in Scotland and elsewhere, and is of practical importance. It is therefore addressed briefly here.

6-43. In *Waydale Ltd v DHL Holdings (UK) Ltd (No 1)*¹⁴¹ Lord Penrose expressed the view, *obiter*, that the benefit of a guarantee of the tenant's obligations (or, at least, of a guarantee which was not contained in the lease itself and which did not expressly state that it was in favour of the landlord for the time being) would not transfer automatically to a successor landlord. The approach he adopted was to ask whether the rights under the guarantee were intended to run with the lands. He concluded that in the absence of express language conferring the benefit of the guarantee on singular successors, there was nothing to indicate that the right was seen as being inherent in the owner of the subjects for the time being. He reasoned that it would be conceivable

¹³⁸ FP Davidson *Arbitration* (2nd edn, 2012) [5.45]. The case is also discussed in Anderson *Assignment* [9-10].

¹³⁹ *Holburn v Buchanan* (1915) 31 Sh Ct Rep 178: a reference clause was held to be effective between successor superior and vassal, despite wording which might have suggested it was to benefit only the original vassal.

¹⁴⁰ Rankine *Leases* 477. The Supreme Court of Oregon adopted the same approach in *Abbott v Bob's U-Drive* 222 Or 147, 352 P 2d 598 (1960). It held that a covenant to arbitrate disputes arising from a lease did touch and concern the land so as to bind the tenant's assignees where the dispute itself related to a term which touched and concerned the land. In German law, too, an arbitration clause has been held to remain effective in a question with a successor to the landlord: 2000 *Neue Juristische Wochenschrift* 2346.

¹⁴¹ 1996 SCLR 391 (OH).

that the ownership of the subjects should pass with an interposed lease which preserved an existing lease in favour of a tenant, without the benefit of the guarantee obligation being passed on to the new owner.

6-44. The analysis in *Waydale* on this point is short and *obiter*. Other aspects of the decision's reasoning are flawed. The case concerned an attempt by a successor landlord to enforce the guarantee following the tenant's liquidation. Lord Penrose held that the benefit of the guarantee had been personal to the original landlord (i.e. there was *delectus personae*) and that, in any event, there had been no assignation to the successor and the benefit of the guarantee would not automatically have transferred. The landlord then obtained an assignation and brought a new claim, which succeeded. In that second case Lord Hamilton held, contrary to the first decision, that the benefit of the guarantee had *not* been personal to the original landlord and therefore *could* be assigned without the guarantor's consent.¹⁴² It is suggested that the brief reasons given by Lord Penrose for his *obiter* conclusion that the benefit of the guarantee would not automatically transfer to a successor landlord should not stand in the way of the opposite conclusion being reached after fuller consideration.

6-45. Lord Penrose's approach was to ask whether the guarantee itself had been intended to run with the lands. That leaves open the possibility that, if the guarantee had been worded differently, the benefit could have been held to transmit to the successor even on the approach taken by Lord Penrose. However, it seems doubtful that transmission of the benefit of a guarantee depends on showing that the benefit was intended to run with the land.¹⁴³ Such an analysis leaves out of account (i) what happens to the lease upon transfer of the leased subjects by the landlord, and (ii) the relation between the landlord's rights under the lease and the guarantee. As noted in chapter 1 above, upon transfer by the landlord the new landlord steps into the shoes of the old landlord *in the contract of lease*. The successor becomes a party to that contract. The guarantee is an accessory right and, upon established principles, should follow the primary right: *accessorium sequitur principale*.¹⁴⁴ Accordingly, the new landlord should automatically take the benefit of a guarantee of the tenant's rights, because the successor becomes a party to the contract of lease and the guarantee is a guarantee of performance of the obligations under that contract and is accessory to it. Of course, if the parties have used wording which demonstrates

¹⁴² *Waydale Ltd v DHL Holdings (UK) Ltd (No 2)* 2001 SLT 224 (OH).

¹⁴³ Indeed, generally one cannot simply make the benefit of a contract run with the lands just by one or both parties to it so intending. See the discussion at paras 3-06 to 3-11 of the creation of 'real conditions', and also KGC Reid 'Defining real conditions' 1989 JR 69.

¹⁴⁴ As to this, see AJM Steven *Pledge and Lien* (Studies in Scots Law vol 2, 2018) [4-18] (noting that 'where a debt is secured by a bond of caution, the cautioner remains liable where the debt is assigned'); Anderson *Assignation* [2-04]. The principle is illustrated by e.g. *Lyell v Christie* (1823) 2 S 288 (IH), in which an assignation of a claim carried with it rights under a guarantee. See also previously *Cultie and Hunter v Earl of Airly* (1676) 2 Br Supp 197.

an intention that the guarantee is not to benefit a successor, that will result in a different outcome.

6-46. Treating successors as entitled to the benefit of the guarantee of a tenant's obligations would be consistent with the approach of various other legal systems. That is the approach in England,¹⁴⁵ South Africa,¹⁴⁶ the Netherlands¹⁴⁷ and France. The French *Cour de cassation*, in a much discussed decision in 2004, held that the benefit of a guarantee of payment of rent transmits as a matter of law to the new landlord as an accessory of the right to claim the rent (which is transferred to the successor by Article 1743 *Code civil*).¹⁴⁸ That is also the appropriate approach in Scots law, which, as noted above, equally recognises the principle that a guarantee is accessory to the right guaranteed.

¹⁴⁵ *Kumar v Denning* [1989] QB 193 (CA), followed in *P & A Swift Investments v Combined English Store Groups* [1989] AC 632 (HL). The reasoning is that the benefit of a covenant of guarantee of an obligation which touches and concerns the land itself touches and concerns the land. Cf the obligation to repay a deposit provided by the tenant, which does not transmit: *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] AC 99 (JCPC). This has been the subject of debate in Australia, but there are various cases which follow the English approach: see *Bresimark Nominees Pty Ltd v Smart World Enterprises Pty Ltd* [2008] SADC 14.

¹⁴⁶ *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042. The reasoning is that the new owner is substituted into the place of the seller in the lease and, as a concomitant of that, acquires all rights which the lessor enjoyed in the capacity of lessor, which was held to include the right to claim moneys from the tenant's surety in the event of the tenant failing to pay.

¹⁴⁷ S van Erp "A sale does not break lease" and suretyship under Dutch law' (2006) 14 European Review of Private Law 64. Van Erp argues that Dutch law would treat the security as an accessory to the lease.

¹⁴⁸ Cass, ass plén, 6 déc 2004 (03-10-713, arrêt no 520). See commentary at L Aynes 2005 Recueil Dalloz 227 and FC Dutilleul and P Delebecque *Contrats civils et commerciaux* (10th edn, 2015) [494]. There is commentary on the French decision from the perspective of a variety of European legal systems at (2006) 14 European Review of Private Law 63.

7 Terms which relate to Other Property

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A. INTRODUCTION

7-01. This chapter considers whether terms of a lease which relate to property other than the subjects of the lease may be real conditions. Chapter 3 proposed as a test that, in order for a term to be a real condition of a lease, it must relate to the relationship of landlord and tenant. If a standard gloss on that test is that the term must benefit the tenant as tenant and burden the landlord as landlord,¹ it might be thought that a term which relates to property other than the subjects of the lease cannot qualify as a real condition. It might be difficult to say that an obligation which relates to other property burdens the landlord as landlord: if a landlord who is subject to such an obligation transfers the subjects of the lease but retains the other property, the contractual right against the original landlord continues to be of use to the tenant, even although the original landlord no longer owns the subjects of the lease. Does this mean that such obligations do not bind successor landlords?² The point is especially worth considering

¹ Or vice versa: see paras 3-43 to 3-46 above.

² The same point arises in respect of terms of the lease which benefit the landlord as owner of the other land, but that has not arisen in any Scottish case of which I am aware.

because of the practical importance of some of the terms which would be caught by such a rule. Examples are rights of access, rights over common areas (such as parking), and exclusivity agreements.

7-02. *Gyle Shopping Centre General Partners Ltd v Marks & Spencer plc*³ holds that rights in shared areas, such as access rights and parking rights, form part of the grant to the tenant and so bind a successor. However, in the earlier case of *Optical Express (Gyle) Ltd v Marks & Spencer plc*,⁴ one of the reasons for Lord Macfadyen's conclusion that a successor landlord was not bound by an exclusivity agreement in respect of a leased unit in a shopping centre was that that term did not control the landlord's behaviour in respect of the subjects of the lease but instead regulated the landlord's conduct in respect of *other* property which the landlord also owned, namely the other units in the centre. Lord Macfadyen stated that 'such an obligation is prima facie not inter naturalia of a lease'.⁵ The exact weight which Lord Macfadyen intended this consideration to bear is not clear. There are similar general statements in other legal systems. In England, for example, Woodfall states that 'covenants in respect of lands not parcel to the demise' do not touch and concern the land or the reversion.⁶ Some German cases took the position that an acquirer was only bound by such obligations as referred to the leased land and which could therefore only be performed by the owner of that land for the time being, but this approach has been criticised in academic commentary as unduly restrictive.⁷

7-03. There would be a certain neatness in holding that only obligations in respect of the subjects of the lease can be real conditions, as the successor landlord would be guaranteed to own the property which was needed in order to fulfil the obligation.⁸ However, neatness would come at considerable practical cost if it meant that transfer rendered important rights held by the tenant difficult

³ [2014] CSOH 59, 2014 GWD 18-352.

⁴ 2000 SLT 644 (OH).

⁵ 2000 SLT 644 at 650J. See also DJ Cusine (ed) *The Conveyancing Opinions of Professor JM Halliday* (1992) Opinion 86, which discusses whether an option to work minerals discovered on other land owned by the landlord was a real condition and concludes that it was not, as it related to other land.

⁶ Woodfall *Landlord and Tenant* [11.063]. Examples given include (i) to pay rates and taxes in respect of premises not part of the subjects; (ii) to build on or do repairs to land which is not part of the subjects – but there is an exception if this will 'directly benefit' the subjects. The American Restatement states that if the performance of a promise is related to other property, it will not touch and concern the landlord's reversion: American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977) §16.1 p 116. In Common Law systems, however, the tenant has an estate in land which can support easements and restrictive covenants. In respect of English law, see Gray and Gray *Elements* [3.4.23] (re restrictive covenants) and [5.1.43] (re easements). That provides another solution to the issues addressed in this chapter, which some might consider a more attractive analytical approach.

⁷ Discussed at para 3-42 above.

⁸ Bigelow was concerned by this: HA Bigelow 'The contents of covenants in leases' (1914) 30 LQR 319, 337.

to enforce. This chapter demonstrates that there is no rule in Scots law that a term which imposes obligations in relation to property other than the subjects of the lease cannot be a real condition. In fact, successor landlords are often bound by such terms. The chapter is structured as follows. Section B considers conditions which are analogous to servitudes and confer upon the tenant a right to make use of some other property of the landlord – this is the type of term considered by Lord Tyre in *Gyle Shopping Centre v Marks & Spencer*.⁹ Section C considers conditions which are akin to real burdens, in that they impose a prohibition or an affirmative obligation upon the landlord in respect of other land.

B. LEASEHOLD PERTINENTS

(1) Introduction

7-04. A lease will often grant a tenant rights to use property other than the main subjects of the lease.¹⁰ An obvious example is a right of access. Indeed, if such a right is not granted, it will be implied.¹¹ The law in respect of these rights can be summarised in this way: provided that the right is sufficiently connected to the lease, it will qualify as a ‘pertinent’ of the lease. Such a right can be created either by express grant by the landlord, by necessity, or by use over a long number of years. It will bind a successor owner of the main subjects of the lease. There is some conflict in the case law about whether the pertinent is directly enforceable by the tenant against an acquirer of the other land in circumstances where the property over which the pertinent is exercised and the main subjects of the lease come to be owned by different parties. Probably the pertinent is directly enforceable, provided that the nature and manner of use of the right are such as to alert the new owner to its existence.¹² If the pertinent is over land which is held by another tenant from the same landlord, it is enforceable by the tenant directly against the other tenant. In *Gyle Shopping Centre v Marks & Spencer* such a pertinent was classified as a real right.¹³

7-05. The leading case is *Campbell v McKinnon*,¹⁴ the history of which lies in the foundation by the British Fisheries Society of the village of Tobermory on Mull in the late eighteenth century. All inhabitants of the newly created village were to have the right to dig peat for their own uses in any of the Society’s mosses,

⁹ [2014] CSOH 59, 2014 GWD 18-352.

¹⁰ See, generally, MJ Ross, DJ McKichan, AH Primrose and MF Fleming *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn, 1993) ch 4.

¹¹ E.g. *Munro v Forbes* (1933) 21 SLCR 31 at 38; *Little v Trustees of Countess of Sutherland’s No 3 Settlement* 1979 SLCR App 18 at 20.

¹² Subject to the possibility of a residual claim by the tenant against the previous landlord, which this book does not explore.

¹³ [2014] CSOH 59, 2014 GWD 18-352 at [32].

¹⁴ (1867) 5 M 637 (IH) affd *sub nom Campbell v M’Lean* (1870) 8 M 40 (HL).

to take stone or limestone from any of its quarries, and to a summer's grazing on the Society's muir lawn. Subsequently, the Society sold Tobermory. By a series of conveyances, ownership passed to Campbell, who sought declarator that he had the sole and exclusive right of property in the lands and, specifically, that they were free from any servitude or other right to allow the defenders to graze their cows or horses on the muir lawn. Much of the argument was about whether the rights of those occupying plots in Tobermory had been properly constituted at all. There were various classes of defender: some held on feus, some on leases, whilst others were rentallers. For the purposes of the present discussion, it is the decision in respect of tenants that is important. The Lord Ordinary (Kinloch) held that, although the tenants' leases did bind a singular successor, their rights of pasturage did not. The only way in which such a right could have bound a successor was as a right of servitude and it had not been constituted as such. The effect of the Leases Act 1449 did not extend to a right of pasturage given separately by the lease and for a separate consideration.¹⁵ Reversing, the Inner House and then the House of Lords held that the right of pasturage granted to the tenants did bind a singular successor of the Society, not as a servitude but as a 'pertinent' or 'accessory' of the lease.¹⁶ The fact that the right might not, as a freestanding right, have bound the successor, did not prevent it from doing so as a pertinent of the lease.¹⁷ Both courts dismissed the argument of construction that, because there was mention of a separate consideration for the right of pasturage, it could not be viewed as a pertinent of the lease.¹⁸ The terminology of 'pertinent' or 'accessory' has been used in subsequent cases.¹⁹

7-06. More recently, this type of right was considered in *Gyle Shopping Centre v Marks & Spencer*.²⁰ The lease to one of the anchor tenants of a shopping centre granted it various rights in shared areas. A successor landlord sought to construct a new unit, which would have infringed on those rights. It sought declarator that the rights in the shared areas did not bind it as a successor. Lord Tyre rejected this argument.

¹⁵ *Campbell v McKinnon* (1867) 5 M 637 (OH) at 644–645.

¹⁶ *Campbell v McKinnon* (1867) 5 M 637 (IH) at 649, 651 and 656, *sub nom Campbell v M'Lean* (1870) 8 M 40 (HL) at 46. The decisions were based on the Leases Act 1449. Whether the terms of the warrandice clause in some of the transfers which preceded the pursuer's acquisition would have produced the same result was also debated: (IH) 653 and 654–655. The leases were excluded from warrandice, which, it was argued, prevented the successor from challenging the leases. The 'exclusion from warrandice' argument might not succeed today (*Mann v Houston* 1957 SLT 89 (IH)) so it is important to recognise that the decision in *Campbell* did not depend upon it.

¹⁷ (1867) 5 M 637 at 651 (Lord Deas).

¹⁸ Indeed, the House of Lords endorsed the Inner House's statement of the law and focused upon the point of construction: see e.g. (1870) 8 M 40 (HL) at 46 (Lord Westbury).

¹⁹ E.g. *Galloway v Cowden* (1885) 12 R 578 (IH) at 581 ('accessory' right); *Adamson v Sharp's Trs* (1917) 5 SLCR 76 at 78 ('accessory' or 'pertinental' right); *Munro v Forbes* (1933) 21 SLCR 31 at 34 ('pertinental' right).

²⁰ [2014] CSOH 59, 2014 GWD 18-352 at [32].

7-07. Two questions arise: when will a right qualify as a ‘pertinent’ of or as ‘accessory’ to a lease?; and against whom is such a right enforceable? Each of these points is now considered.

(2) Criteria

7-08. There appears to be no definitive statement of how it is to be determined whether a right is a pertinent or accessory of a lease. The Lord Chancellor in *Campbell*, Lord Hatherley, thought that a right which had ‘a considerable connection . . . with the actual enjoyment of the property leased’ would bind a singular successor, but he was not sure how exactly the ‘considerable connection’ should be defined.²¹ In the Inner House, Lord Deas had said that ‘where the privilege is . . . purely of a pertinental nature, the privilege must remain effectual against the singular successor, if the lease be effectual against him as respects the principal subjects let’.²² In *Campbell* separate consideration was given for the ‘pertinental right’,²³ a factor which might have been thought to count against it transmitting as part of the lease, but which – on the courts’ analysis – did not do so.

7-09. It is clear from the various opinions and speeches in *Campbell* that the following would qualify as pertinents: the right to draw water from a well; the right to cut peat for fuel; the right to take stone from quarries for building purposes; and rights of access.²⁴ In *Gyle Shopping Centre* the Court accepted that rights of access and rights to use parking facilities would do so.²⁵ On the other hand, a ‘mere right of privilege’, such as that of killing game upon the land, would not qualify.²⁶ The unifying feature of all of these rights is that they allow the tenant to make some use of other property, that the use is of benefit to the subjects of the lease, and that it does not amount to an exclusive right in the other land. This mirrors the definition of a servitude. Indeed, it seems plausible to say that if the right granted to the tenant is such that it would amount to a servitude were it to be constituted between two plots of land in separate ownership, it will qualify as a pertinent of the lease. The category of pertinents may, however, be broader than rights which would be recognised as a servitude. In its proposals for conversion of long leases into ownership, the Scottish Law Commission recommended that, upon conversion into ownership,

²¹ *Campbell v M’Lean* (1870) 8 M 40 (HL) at 44.

²² *Campbell v M’Kinnon* (1867) 5 M 637 (IH) at 651.

²³ (1867) 5 M 637 at 651.

²⁴ *Campbell v M’Kinnon* (1867) 5 M 637 (IH) at 651 and *Campbell v M’Lean* (1870) 8 M 40 (HL) at 44.

²⁵ *Gyle Shopping Centre General Partners Ltd v Marks & Spencer plc* [2014] CSOH 59, 2014 GWD 18-352 at [29].

²⁶ *Campbell v M’Lean* (1870) 8 M 40 (HL) at 44.

pertinents of the lease would be converted into servitudes.²⁷ The Commission stated, however, that occasionally one might encounter a right which could be a pertinent of a lease but not of land. Such a right would simply lapse upon conversion.²⁸

7-10. Despite the occasional case in which a right may be a pertinent of a lease even although it could not be recognised as a servitude, it is thought that the tests for whether a right may be constituted as a servitude are a useful point of reference for establishing whether a right may be recognised as a pertinent. For example, just as in order to be a servitude a right must confer praedial benefit on the benefited property, it is thought that a right must usually benefit the tenant as tenant in order to be a leasehold pertinent. Similarly, just as a servitude must not be repugnant with ownership, a right must not be repugnant with ownership in order to be a leasehold pertinent. In particular, it must not be so extensive as to amount to an exclusive right in the land over which it is exercised: such a right should be constituted as a lease in its own right and not as a pertinent to a lease. Issues and examples which give rise to debate in respect of servitudes will also be debateable in respect of leasehold pertinents. For instance, is it sufficient that the right confers only an economic benefit upon the subjects leased?²⁹ If the right fails as a leasehold pertinent because it is too extensive an interference with ownership, it might amount to a lease in its own right, in which case the owner of the land affected will be bound in that way. Previously there was some debate about whether a right to car parking could be constituted as a servitude. However, recent authority accepts that Scots law recognises a freestanding servitude of car parking,³⁰ and *Gyle Shopping Centre* accepted that the right to use car-parking facilities was a pertinent of a lease.³¹ Another debateable instance in the context of servitudes is a right to place advertisements or signage on other property, which could be important for tenants of commercial premises.³²

²⁷ Scottish Law Commission *Report on Conversion of Long Leases* (Scot Law Com No 204, 2006) paras [3.31]–[3.35]. See Long Leases (Scotland) Act 2012 s 6.

²⁸ The Commission did not, however, give any examples of such a right.

²⁹ See discussion at paras 7-31 to 7-33 below, where it is suggested that it should be.

³⁰ See *Johnson, Thomas and Thomas v Smith* [2016] SC GLA 50, 2016 GWD 25-456 and, previously, *Moncrieff v Jamieson* [2007] UKHL 42, 2008 SC (HL) 1. Note that in English law the Law Commission has proposed abolition of the ‘ouster principle’, i.e. the English rule equivalent to the Scottish rule that a servitude must not be repugnant with ownership. See Law Commission *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) [3.199]–[3.211]. The main aim seems to be to remove doubts about the enforceability of easements of parking.

³¹ *Gyle Shopping Centre General Partners Ltd v Marks & Spencer plc* [2014] CSOH 59, 2014 GWD 18-352 at [29].

³² It has been held that Scots law recognises no servitude of ‘shop sign’: *Romano v Standard Commercial Property Securities Ltd* [2008] CSOH 105, 2008 SLT 859, approving *Mendelssohn v The Wee Pub Co* 1991 GWD 26-1518. These decisions are open to criticism for taking too strict an approach to the ‘fixed list’ of servitudes: WM Gordon ‘The struggle for recognition

(3) Classification and enforceability

7-11. To say that a right is a pertinent is, adopting Reid's definition, simply to say that it is 'a right which pertains to the land and which stands in a subordinate and ancillary relationship to that land'.³³ That particular classification, therefore, does not much help to elucidate the right's juridical nature or assist with answering the question with which this text is primarily concerned: namely, against whom the right is enforceable when ownership of the subjects of lease is transferred? In particular, what happens if the ownership of the subjects of lease and the land over which the pertinent is exercised come to be separated?³⁴ If the pertinent falls within one of the recognised categories of real right the question would be easy to answer. However, as this section demonstrates, leasehold pertinents do not do so. This section considers possible classifications, before concluding that they are best classified as *sui generis*.

(a) Not a lease or a servitude

7-12. A pertinent right is not itself a lease. The protection of the Leases Act 1449 is limited to 'land' and that term, according to Lord Deas, includes only 'heritable subjects capable of such open and continuous possession as may naturally suggest to a singular successor the existence of a lease'.³⁵ In *Campbell*, a right of pasturage was held not to meet this requirement.³⁶ *Gyle Shopping Centre* also considered that the pertinent did not satisfying the criteria needed for the right to be a lease by itself.³⁷

7-13. Nor is a tenant's pertinent right a servitude. The decision in *Campbell* made that clear and there is a considerable volume of further authority to this

of new servitudes' (2009) 13 EdinLR 139; KGC Reid and GL Gretton *Conveyancing* 2008 (2009) 110. In *Re No 1 Albemarle Street* [1959] Ch 531 (Ch D) at 539 Upjohn J expressed the opinion that the benefit of such a covenant would not touch and concern the land as a matter of English law. That seems inconsistent with *Moody v Steggles* (1879) 12 Ch D 261 (Ch D), in which an easement to maintain a sign on another's property was recognised (in respect of a sign advertising a public house accessed via an alleyway). The better view is that such a right could constitute a leasehold pertinent, though this would require the court to take a less rigid and formalistic approach to lease pertinents than was taken in *Romano* in respect of servitudes.

³³ Reid *Property* [200], citing among other authorities Bankton *Institute* II iii 170.

³⁴ The law about what happens when ownership of land subject to a lease is split is undeveloped but the issue has arisen in at least two relatively recent cases. In *Crewpace Ltd v French* [2011] CSOH 133, 2012 SLT 126 it was held that, at least where the tenant has agreed to an apportionment of rent between the two owners, one landlord cannot object to transactions between the other landlord and the tenant in respect of the land which that other landlord owns, at least where the transactions have no impact on the first landlord.

³⁵ *Campbell v McKinnon* (1867) 5 M 637 (IH) at 651.

³⁶ *Campbell v McKinnon* (1867) 5 M 637 (IH).

³⁷ [2014] CSOH 59, 2014 GWD 18-352.

effect.³⁸ This approach again was adopted in *Gyle Shopping Centre*.³⁹ Admittedly there are some cases in which accessory rights held by tenants have been referred to as ‘servitudes’,⁴⁰ but, given the bulk of authority to the contrary, these should be seen as erroneous. This conclusion is consistent with the broader law. Apart from the ‘personal’ servitude of proper liferent, Scots law recognises only ‘praedial’ servitudes.⁴¹ Unlike Common Law systems, where a lease is viewed as an estate in land capable itself of benefiting from and being burdened by easements, in Scots law the prevailing view is that, however long the lease, the tenant’s right cannot benefit from or be burdened by a servitude. Gordon and Wortley argue that the point has never been authoritatively determined (as all considerations are *obiter*) and that the law should permit a real right of lease to benefit from or be burdened by a servitude.⁴² However, Cusine and Paisley, who consider more of the case law, conclude that, ‘[d]espite some speculation to the contrary, and a number of loosely-worded judgments, the interest of a tenant is not a feudal *praedium* and cannot form a dominant or servient tenement in its own right’.⁴³ This view is shared by other writers⁴⁴ and is thought to be correct.⁴⁵

³⁸ The cases consider either the status of a right granted to one tenant over land held by another tenant from the same landlord or over land owned by the landlord. Unless indicated, the following cases state that such a right is not a servitude: *McDonald v Dempster* (1871) 10 M 94 (IH) at 98 (Lord Neaves doubting the possibility of creating a servitude over one tenancy in favour of another); *Galloway v Cowden* (1885) 12 R 578 (IH) at 581; *Reid v Anderson* (1900) 8 SLT 80 (OH) at 81; *Metcalfe v Purdon* (1902) 4 F 507 (IH) at 511 (Lord President Balfour doubting whether a servitude could exist between tenants of the same proprietor, but reserving his opinion); *Adamson v Sharp’s Trs* (1917) 5 SLCR 76 at 78; *Campbell v The Lochnell Estate Trs* 1918 SLCR App 41 at 42; *M’Kechie v M’Diarmid* 1919 SLCR App 49 at 50; *Kuckron Landholders v Stromfirth and Gillaburn Landholders* (1920) 8 SLCR 21 at 23; *Munro v Forbes* (1933) 21 SLCR 31 at 38; *Morrison v GR Husband and Bocket Estates Ltd* 1950 SLCR App 84 at 86; *McIntyre v Ballantyne* 1958 SLCR App 102 at 104; *MacLean v Stornoway Trust* 1962 SLCR App 39 at 41; *Little v Trustees of Countess of Sutherland’s No 3 Settlement* 1979 SLCR App 18.

³⁹ [2014] CSOH 59, 2014 GWD 18-352 at [29].

⁴⁰ *Stewart v Caithness and Smart* (1788) Hume 731; *Simpson v Mackenzie* (1884) 21 SLR 564 (IH) at 566. In *Campbell v M’Lean* (1870) 8 M 40 (HL) at 47 Lord Westbury used the term ‘servitude’, but it is clear from the reasoning of the other judges in both the Inner House and House of Lords that the right was not being treated as a servitude.

⁴¹ *Erskine Institute* II ix 39.

⁴² Gordon and Wortley *Scottish Land Law* vol II [25-13] and [25-14].

⁴³ DJ Cusine and RRM Paisley *Servitudes and Rights of Way* (1998) [2.12].

⁴⁴ AGM Duncan in *Reid Property* [449]; J Rankine *The Law of Land-Ownership in Scotland* (4th edn, 1909) 414; Rankine *Leases* 721.

⁴⁵ Most of the case law listed in n 38, some of which is cited by Gordon and Wortley and by Cusine and Paisley, concerns whether a right constituted between tenants of the same landlord is a servitude. The clear view of the courts is that such a right is not a servitude. Particularly clear statements are to be found in *Galloway v Cowden* (1885) 12 R 578 (IH) at 581, *Reid v Anderson* (1900) 8 SLT 80 (OH) at 81, and *Adamson v Sharp’s Trs* (1917) 5 SLCR 76 at 78. There appears to be only one case which considers whether a lease may be the benefited property of a servitude over property in separate ownership from the subjects of the lease: *Safeway Food Stores Ltd v Wellington Motor Co (Ayr) Ltd* 1976 SLT 53 (OH) at 56–57. It

It is a separate question whether, given the importance of property held via leases, this rule is a good one. There are strong practical arguments that the law should be reformed so as to allow at least a registered tenant's right to act as a benefited and burdened property for servitudes and real burdens. Such a development, however, would require legislation, and could be a topic for the Scottish Law Commission to consider in its review of lease law.

(b) *A right sui generis*

7-14. Leasehold pertinents seem, therefore, to be best classified as *sui generis*. They have their own constitutive requirements.⁴⁶ Like servitudes, they must be exercised *civiliter*.⁴⁷ Against whom can they be enforced?

7-15. If the land over which a pertinent exists is leased from the same landlord, it is directly enforceable against the tenants of that land.⁴⁸ The exact juridical basis for such inter-tenant enforcement is undebated and unclear, although it is of obvious practical use.

held that it could not. Lord Maxwell rejected the argument that the matter should be treated differently from the case of two tenants holding from a single landlord. He was right to do so. If the tenant's right was capable of supporting servitudes, that should be true regardless of whether the property over which the 'servitude' right existed was owned by the landlord. Cf A Todd and R Wishart 'Can servitudes be granted in favour of tenants under long leases' (2010) 105 Green's Property Law Bulletin 1, who suggest that the definition of 'benefited property' in Title Conditions (Scotland) Act 2003 s 122 indicates that servitudes can be created in favour of and over leases. That, however, is not so. The definition of 'benefited property' can readily be explained in other ways and the argument would, in any event, ascribe a remarkable amount of weight to an interpretation provision, when the substantive provisions of the Act (and the materials preceding it) reveal no intention to change the common law.

⁴⁶ It is commonly said that these rights can be created by express grant by the landlord, by necessity, or by use over a long number of years/implied grant: *Tait v Abernethy* 1984 SLCR 19 at 26; *Ross v Graesser* 1962 SC 66 (IH) at 76 ('custom, prescription or grant'); D Flynn and K Graham *Crofting Law* (2017) 52. Some Land Court cases state the requirements more strictly and insist upon grant from the landlord or necessity: e.g., *Campbell v Lochnell Estate Trs* 1918 SLCR App 41 at 42; *MacLean v Stornoway Trust* 1962 SLCR App 39 at 41. The requirement that any express grant be by the landlord might explain *Reid v Anderson* (1900) 8 SLT 80 (OH), where the court refused to recognise that an agreement between two adjacent tenants akin to a servitude could bind successors to their interests.

⁴⁷ *MacInnes v Hamilton and Kinneil Estates Ltd* 1960 SLCR App 79 at 81.

⁴⁸ There are numerous cases to this effect: *Stewart v Caithness and Smart* (1788) Hume 731 (right incorrectly characterised as a servitude); *M'Donald v Dempster* (1871) 10 M 94 (IH) at 98; *Simpson v Mackenzie* (1884) 21 SLR 564 (IH) (right incorrectly characterised as a servitude: 566); *Galloway v Cowden* (1885) 12 R 578 (IH); *Adamson v Sharp's Trs* (1917) 5 SLCR 76 at 78; *Munro v Forbes* (1933) 21 SLCR 31 at 38. Many are decisions about whether a possessory judgment could be granted to protect a party who had exercised a right for a period of seven years or more. A person seeking a possessory judgment requires to show *prima facie* title (ie a title which would, if established, confer the right which it is alleged has been disturbed): *Reid Property* [146]; Gordon and Wortley *Scottish Land Law* vol I [14-18]. See also discussion of the enforcement between tenants of other terms of leases at n 79 below.

7-16. If the subjects of the lease and the land over which the pertinent is exercised come into separate ownership, do the pertinents of the lease remain enforceable either against tenants of the other land (if it is tenanted) or against its new owner (if it is not)?⁴⁹ This issue has arisen in at least three decisions which are not entirely consistent.

7-17. In *Findlay v Stuart*,⁵⁰ land over which a pertinent existed was transferred but the disposition contained a clause seeking to protect the tenant's pertinent rights. It was held that the acquirer of the lands could not interdict the tenant from exercising these rights, chiefly because of the clause in the disposition. There are conflicting Inner House decisions on whether a pertinent affects a successor in the absence of such a clause. The first is *Duncan v Brooks*,⁵¹ in which an agricultural tenant was entitled to take peats from a moss on another part of the landlord's estate. The moss was transferred to a new owner, who prevented the tenant from exercising the pertinent right. In response, the tenant began to retain a portion of the rent. Later, ownership of the farm itself was transferred. The tenant continued to retain a portion of rent and successfully sought declarator against the successor landlord that he was entitled to do so. One of the successor landlord's arguments was that the pertinent right was good against the owner of the moss and that there were therefore no grounds to retain rent. Lord Young stated that it was not necessary to determine this point, presumably on the basis that, regardless of whether the right bound the new owner of the moss, the successor landlord remained under a contractual obligation to maintain the tenant in possession of the pertinent, or, at least, was unable to claim full rent if it could not do so.⁵² Lord Young inclined to the view that the 1449 Act did not make the pertinent binding on the successor owner of the moss.⁵³

7-18. In *Macdonald v Macdougall*,⁵⁴ by contrast, the Second Division held that an accessory right did bind the successor owner of the land over which it was exercised when that land was transferred separately from the subjects of the lease.⁵⁵ The reasoning was, however, scant and heavily influenced by the fact that the tenants were crofters. Certain cottars⁵⁶ and crofters were accustomed to

⁴⁹ In many cases, the law will imply a servitude into the transfer, which would serve to protect the tenant's position, but that cannot be relied upon: see para 7-17 below.

⁵⁰ (1890) 29 SLR 15 (OH) at 19.

⁵¹ (1894) 21 R 760 (IH) at 764 and 765.

⁵² The court also reasoned that the successor to the lease could have no better right to claim rent than had the original landlord. At the time of transfer, the tenant was validly withholding rent.

⁵³ (1894) 21 R 760 at 764.

⁵⁴ (1896) 23 R 941 (IH).

⁵⁵ This is presented as settled common law by DJ Cusine and RRM Paisley *Servitudes and Rights of Way* (1998) [3.88]. See also DJ MacCuish and D Flynn *Crofting Law* (1990) [8.08].

⁵⁶ A cottar is an occupier of a dwelling house in a crofting county who pays either no or very little rent. A cottar may, therefore, not be a tenant or, even if a tenant, the Leases Act 1449 may not apply. The full definition is in Crofters (Scotland) Act 1993 s 12(5), which is in very similar terms to s 34 Crofters Holdings (Scotland) Act 1886 which applied when *Macdonald* was decided.

gather sea-ware from the shore adjoining certain land. Their landlord transferred this land to Macdonald, who sought to interdict them from continuing to take sea-ware, arguing that (i) the right to take sea-ware was not part of their holdings, and (ii) in any event, that such a right was not binding on singular successors. Interdict was granted against those defenders who were cottars but refused, pending proof, against the crofters. The reasoning was simply that the right to take sea-ware had been determined by the Crofters Commission to be part of the crofts and that the crofters had been given statutory security of tenure on this basis, *ergo* the right bound the current owner of the land.⁵⁷ There is no consideration of the juridical basis on which it did so and, although the case was cited by the pursuer, the court does not discuss *Duncan v Brooks*. The differing treatment of those defenders who were cottars and those who were crofters supports the view that the decision depended upon the particularities of the crofting legislation and this is how the case has been subsequently interpreted.⁵⁸ The proposition that the pertinents of a croft are enforceable against a successor in the land over which they are exercised was reiterated by the Land Court in a subsequent case⁵⁹ and appears to have underlain its decision about jurisdiction in another.⁶⁰

7-19. The question arises whether the same result as in *Macdonald* would be reached in respect of a lease where the tenant does not benefit from statutory provisions similar to those which applied to the crofter in that case. Given the absence of authority, and Lord Young's doubts in *Duncan v Brooks*, the law cannot be stated with certainty. However, the better view of the law is that a lease pertinent does bind a successor owner of the other land. Although the reasoning in *Macdonald* depended on statutory provisions regarding security of tenure, there seems to be no strong reason to treat a tenant who does not benefit from such a statutory regime differently. First, the fact that the length of a lease is controlled by statute in one case and the agreement of landlord and tenant in the other does not seem to be a strong reason for distinguishing whether a pertinent of the lease should have real effect. The right may be equally important in each type of lease. For example, tenants need to be able to access the subjects regardless of whether they benefit from statutory security of tenure. Second, rules regarding security of tenure generally control the length of a lease and not

⁵⁷ The same result might have been reached by implying into the transfer to Macdonald a reservation of a servitude of wrack and ware. This was not, however, the basis on which the case was argued or decided.

⁵⁸ *Fraser v British Aluminium Co Ltd* 1924 SLCR App 86 at 87; *Macdonald v Macdonald* 1959 SLCR App 66 at 69; *MacInnes v Hamilton and Kinneil Estates Ltd* 1960 SLCR App 79 at 81; *Little v Trustees of Countess of Sutherland's No 3 Settlement* 1979 SLCR App 18 at 19.

⁵⁹ *Smith v Bruce* (1925) 13 SLCR 8 at 17: 'if the part of the estate over which the right is exercised be sold the right continues unimpaired notwithstanding the sale'.

⁶⁰ *Maclean v Fletcher* 1965 SLT (Land Ct) 5.

its proprietary consequences. They operate against the general background of property law.⁶¹ As Lord President Cooper said in another context:⁶²

Primarily, if not exclusively, the protection thus afforded to [crofting] tenants by the amendments of the common law of leases is protection against their landlord, and not protection against the world at large or the State.

7-20. It would be inconsistent with that general approach for the proprietary consequences of leases subject to a statutory security of tenure to differ from those of leases which are not.⁶³ Cusine and Paisley state in general terms on the basis of *Macdonald* that ‘the right to collect wrack and ware can exist as a leasehold right enforceable against third parties’.⁶⁴ They are right to do so, and the same would be true of other pertinents. For a pertinent to be enforceable by a tenant against a successor in the other land, the law is likely to require that the pertinent is, by reason of its nature and its exercise, obvious to anyone acquiring the land. Further, the law may well be more willing to hold that a pertinent binds a successor landlord who acquires both the subjects of the lease and the land subject to the pertinent than it will be to accept that the pertinent binds a successor who only acquires the land over which the pertinent is exercised. Only in the second type of case does the difficulty arise that the owner will not be a party to the lease and so will not be alerted by its terms to the existence of the right.

7-21. Separately from whether pertinent rights bind a successor owner of the land over which they are exercised, what of the relationship between the tenant and the successor landlord? It is clear that such a successor is bound by the rights. For authority it is necessary to look no further than the decision in *Gyle Shopping Centre*.⁶⁵ Support is also given by *Campbell v McKinnon*,⁶⁶ in which the successor landlord was bound by the pertinents when he acquired ownership of both the subjects of the lease and the other land over which the pertinents were to be exercised.⁶⁷ Further, *Duncan v Brooks*⁶⁸ makes clear that successor landlords are affected by the obligation to make the pertinents available to the

⁶¹ See analogously the English case of *Kay v Lambeth Borough Council* [2006] UKHL 10, [2006] 2 AC 465 at [138]–[148]. A granted a licence to B, which granted a lease to C. C’s lease amounted to a secure tenancy, but it did not bind A because B had no title as a matter of property law to grant it.

⁶² *M’Lean v Inverness County Council* 1949 SC 69 (IH) at 75. Crofters (Scotland) Act 1993 s 3 is the provision which defines croft. Section 3(4) *deems* any right in pasture or grazing land held by the tenant of a croft to be a part of the croft but only ‘for the purposes of this Act’.

⁶³ On the permissibility of reasoning by analogy with statute in order to develop the common law, see J Beatson ‘Has the Common Law a future?’ (1997) 56 CLJ 291; A Burrows ‘The relationship between common law and statute in the law of obligations’ (2012) 128 LQR 232.

⁶⁴ DJ Cusine and RRM Paisley *Servitudes and Rights of Way* (1998) [3.88].

⁶⁵ [2014] CSOH 59, 2014 GWD 18-352.

⁶⁶ (1867) 5 M 637 (IH) *affd sub nom Campbell v M’Lean* (1870) 8 M (HL) 40.

⁶⁷ Certainly Lord Deas noted this point: (1867) 5 M 637 at 652.

⁶⁸ (1894) 21 R 760 (IH).

tenant even if they do not acquire ownership of the land subject to the pertinent. There a tenant was entitled, in a question with the successor landlord, to a rent abatement commensurate with the value of the pertinent right which the tenant was not able to exercise after the other land had been transferred to a third party. Presumably other contractual remedies should also be available. If the breach is serious enough, the tenant is entitled to terminate the lease.⁶⁹ Where the difficulties with exercise of the pertinent right arise as a result of the successor landlord's actions, there seems to be no reason why it should not be possible for the tenant to claim damages.

7-22. Are these rights real rights? In *Douglas Properties Ltd v Keeper of the Registers of Scotland*⁷⁰ Lord Macfadyen assumed that a right given to one tenant of access over and parking upon an adjacent car park leased by the same landlord to another tenant was a real right, though the point seems not to have been the subject of argument.⁷¹ In *Gyle Shopping Centre General Partners Ltd v Marks & Spencer plc*⁷² Lord Tyre opined that the pertinent rights in that case were real rights. However, the issue was whether the rights bound a successor who acquired ownership of both the subjects of the lease and the land over which the pertinents were exercised: viewing the rights as real rights is not necessary to conclude that they bind such a successor and it is not clear whether this specific point was the focus of argument. In classifying the right as real, Lord Tyre specifically distinguished that issue from the question whether the term was a real condition and bound a successor as such.⁷³ Viewing pertinents of the lease as real rights does explain the ability to enforce directly against other tenants and provides a more straightforward explanation for the ability to rely on the right in a question with a successor who does not acquire the main subjects of the lease. If the proper analysis is that a tenant generally has a real right (which is the predominant Scottish view), it seems acceptable to treat leasehold pertinents as themselves being real rights. At a subsequent stage of the *Gyle v Marks and Spencer* series of cases, both the Outer and Inner Houses proceeded on the basis that Marks and Spencer's rights in the shared areas were real rights.⁷⁴ This seems now to be settled. However, it is also important to continue to view the contractual term in respect of those pertinents as a real condition which binds the successor in respect of the lease. That contractual analysis provides the basis for contractual remedies against the successor landlord.

⁶⁹ Hunter *Landlord and Tenant* vol II 188.

⁷⁰ 1999 SC 513 (OH).

⁷¹ For brief comment, see KGC Reid and GL Gretton *Conveyancing 1999* (2000) 71–72. The case considered a right granted by a landlord to one tenant over subjects leased to another, so the right would have been enforceable by one tenant against the other.

⁷² [2014] CSOH 59, 2014 GWD 18-352.

⁷³ [2014] CSOH 59, 2014 GWD 18-352 at [31]. Lord Tyre indicated that, if it had been necessary, he would have held that the term did transmit to bind the successor.

⁷⁴ *Gyle Shopping Centre General Partners Ltd v Marks and Spencer plc* [2016] CSIH 19, 2017 SCLR 221.

7-23. As for conveyancing practicalities, if the lands subject to the lease and to the pertinent are to pass into separate ownership, the landlord should take care to ensure that, in accordance with the terms of the lease, the tenant will remain able to exercise the pertinent right after any transfer. So if the landlord is transferring only the lands in which the tenant exercises these rights, the landlord may make the transfer subject to the tenant's rights⁷⁵ or, preferably, reserve a servitude in favour of the main subjects of the lease. Alternatively, if the landlord is transferring the main subjects of the lease, but retaining the other lands, a servitude should be granted in favour of the subjects of the lease.⁷⁶ If no servitudes are granted or reserved, this is one of the circumstances in which a servitude may be implied by law from the circumstances of the transfer,⁷⁷ but it is better to make express provision.

C. OBLIGATIONS IN RESPECT OF OTHER LAND

7-24. Just as terms conferring a right to make use of other land owned by the landlord might be sufficiently connected to the lease to bind a successor landlord, so terms which impose an affirmative or negative obligation on the landlord in respect of other land may also bind such a successor. Although they impose an obligation in respect of other land, they too may be so connected to the rights and obligations under the lease that the term is more referable to the lease than to the personal relationship of the original landlord and tenant. If so, that satisfies the general test proposed in chapter 3. There is, however, no juridical basis for holding such a term to bind the owner of the other land to which the obligation relates. The statutory definition of real burden is clear that real burdens benefit and burden only owners:⁷⁸ a tenant's right under a lease cannot be a benefited property. There is, however, the possibility, as yet unexplored in Scotland, of inter-tenant enforcement where identical conditions are imposed in leases from the same landlord.⁷⁹ As with obligations to allow use

⁷⁵ As was done in *Findlay v Stuart* (1890) 29 SLR 15 (OH). The efficacy of a 'reservation of warrandice' was doubted in *Mann v Houston* 1957 SLT 89 (IH) and, in any event, would only protect against that transfer.

⁷⁶ As was done in *Maclean v Fletcher* 1965 SLT (Land Ct) 5.

⁷⁷ *Cusine and Paisley Servitudes and Rights of Way* Ch 8. Possession by a tenant counts for these purposes: *Walton Bros v Magistrates of Glasgow* (1876) 3 R 1130 (IH) at 1133.

⁷⁸ Title Conditions (Scotland) Act 2003 s 1(1): 'an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land'. This was intended to be declaratory of the common law: note to s 1 of Draft Bill in Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181, 2000). Cf the argument by A Todd and R Wishart 'Can Servitudes be granted in favour of tenants under long leases' (2010) 105 *Green's Property Law Bulletin* 1, which appears not to be correct.

⁷⁹ The possibility is noted in Paton and Cameron *Landlord and Tenant* 98, and in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) [850] (HL MacQueen). It could be supported by the various cases in which pertinential rights have been enforced directly against

of other land, the consequences for the landlord who plans on transferring the other property are clear:⁸⁰ steps must be taken to ensure the landlord retains the ability to perform the obligations. This is best done by means of a real burden.

(1) Affirmative obligations

7-25. There appears to be no Scottish case which considers whether a successor landlord is bound by an affirmative obligation in a lease which relates to land other than the subjects of the lease.⁸¹ Instances of such terms are, though, readily imaginable. In leases of units in a commercial development (such as a shopping centre or an industrial estate), the landlord will typically own the whole development. In return for the payment of a service charge, the landlord will undertake to maintain, repair and clean common areas, to keep them lit, and to inspect, maintain and repair conductors serving the premises.⁸² A case from the Netherlands provides another example: a lease of land adjacent to a waterway obliged the landlord to keep the waterway at a certain depth.⁸³ A landlord might own land between the subjects of the lease and the sea and undertake to maintain the sea wall upon that other land.⁸⁴ It is thought that all of these examples would amount to real conditions of the lease as there is a sufficient connection between the landlord's obligation and the tenant's rights under the lease.⁸⁵ If, on the other hand, a landlord undertook to maintain buildings at another location in the same town and this was of no particular

other tenants: see n 48 above. In English law, such enforcement rights arise where there is a 'letting scheme': see the discussion in *Williams v Kiley (t/a CK Supermarkets Ltd) (No1)* [2002] EWCA Civ 1645, [2003] 1 P & CR DG20, and *Woodfall Landlord and Tenant* [11.072]. Note, however, Reid's rejection of the *jus quaesitum tertio* explanation of implied rights of enforcement of real burdens: Reid *Property* [402]. In the South African case of *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* [2015] ZASCA 164, one tenant was able to obtain an interdict against another from operating a business that would have interfered with the first tenant's exclusivity clause, relying on the delict of wrongful interference with its contractual rights.

⁸⁰ See para 7-17 above.

⁸¹ *Mackenzie v Mackenzie* (1849) 11 D 596 (IH) seems at first sight to be such a case. A landlord undertook to trench, drain, lime and enclose woodland adjoining the leased farm. This obligation was held not to bind a succeeding heir of entail. It seems, however, that the tenant also had a lease of the woodland, so it cannot be said that the case relates to an obligation in respect of other land.

⁸² Halliday *Conveyancing* vol II 823 (provision of specimen lease); MJ Ross, DJ McKichan, AH Primrose and MF Fleming *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn, 1993) [4.5].

⁸³ Noted in SE Bartels and JM Milo 'Contents of Real Rights: Personal or Proprietary' in SE Bartels and JM Milo (eds) *Contents of Real Rights* (2004) 5, 7.

⁸⁴ Adapted from *Lyle v Smith* [1909] 2 Ir Rep 58 (KB), where in fact the tenant undertook to maintain such a wall, its maintenance being essential for the preservation of the demised premises (64).

⁸⁵ Indeed, in the second and third examples it could be argued that this duty would be an implied obligation on the landlord, for it is essential for the use and preservation of the leased subjects.

benefit to the tenant as tenant, such an obligation would not amount to a real condition. There must be a considerable connection between the obligation in respect of the other land and the lease itself in order for the term to be a real condition of the lease.

7-26. The English case of *Dewar v Goodman*⁸⁶ provides another example. There a mid-tenant covenanted with his sub-tenant to perform the covenants of the head-lease so far as they affected the land included in the head-lease but not demised in the sub-lease. The aim was to protect the sub-tenant against termination of the head-lease. This covenant was held not to touch and concern the reversion, so it did not bind an assignee to the tenant's interest in the head-lease. The decision has been criticised for adopting too narrow an approach to the 'touch and concern' test.⁸⁷ It is thought likely that, were the same facts to be litigated in Scotland, such an obligation would be held to constitute a real condition so as to bind an assignee of the head-lease, as it was fundamental to the sub-tenant's continued enjoyment of his lease.

(2) Negative obligations

7-27. The two negative obligations which seem most likely to arise are (i) an exclusivity agreement (i.e. an obligation on the landlord in respect of other land which he also owns not to conduct a business competing with the tenant's or to allow such a business to be conducted), and (ii) a restriction on building for the protection of the light or prospect of the subjects of the lease.⁸⁸ Again, the question is whether such terms are sufficiently connected to the relationship of landlord and tenant to constitute a real condition, despite the fact that the obligation they impose relates to other land.

(a) Exclusivity clauses

7-28. The status of an exclusivity clause has arisen in a variety of cases. Although there is recent authority against viewing exclusivity clauses as real conditions, it is suggested that the better analysis is that such a term can be sufficiently connected to a lease to run with the lands.

7-29. In *Optical Express (Gyle) Ltd v Marks & Spencer plc* Lord Macfadyen held that an exclusivity agreement was not a real condition.⁸⁹

⁸⁶ [1909] AC 72 (HL).

⁸⁷ *Kumar v Denning* [1989] QB 193 (CA) at 205; Megarry and Wade *Real Property* [19-040].

⁸⁸ On (ii) see Halliday *Conveyancing* vol II [44-08].

⁸⁹ 2000 SLT 644 (OH) at 650J. We are here considering the substantive objections to the successor landlord being bound. The relevance of the term being in a back-letter was considered at paras 2-52 to 2-57 above.

Its effect was nothing directly to do with the lease of unit 41 [the subjects of the lease], but rather was to restrain the way in which the council as owners or landlords of the other units in the centre might let those other units. In my opinion such an obligation is *prima facie* not *inter naturalia* of a lease.

7-30. In Lord Macfadyen's view, this *prima facie* conclusion was displaced neither by the fact that the subjects were one unit of a shopping centre and the land to which the restriction referred was the remaining units, nor by the 'close practical connection which the exclusivity clause has with the economic judgment which the tenant had to make in deciding whether or not to take the tenancy'.⁹⁰

7-31. Before turning to the earlier authority, not discussed in *Optical Express*, which supports a different position, various arguments of principle fall to be considered. A possible objection to viewing an exclusivity clause as a real condition – though one not mentioned in *Optical Express* or in other Scottish cases – is that the term may seem to benefit the tenant's business rather than (as is a requirement for a term to be a real condition) the tenant as tenant. An English parallel is *Thomas v Hayward*,⁹¹ where a landlord's covenant not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises was held not to run with the land so as to enable an assignee of the tenant to sue upon it. The court held that '[t]he covenant does not touch and concern the thing demised. It touches the beneficial occupation of the thing, but not the thing itself.'⁹² Such an argument is familiar from the law of real conditions generally. On the approach of the Extra Division in the 2014 decision *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd*⁹³ it will not present a problem for exclusivity clauses. However, for completeness (and in particular in case the law is not settled, even after that decision), the previous case law is summarised before turning to the *Rubislaw* case.

7-32. In the earlier case of *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*,⁹⁴ Lord Justice-Clerk Aitchison said:⁹⁵

The law will recognise restraints upon the use of property . . . provided it can be said that the restraints are . . . intended and designed for the benefit of some other

⁹⁰ 2000 SLT 644 (OH) at 650K. The American Restatement also refuses to hold the burden of an exclusivity agreement to 'touch and concern' the reversion on the basis that the performance of the obligation is related to property other than the subjects of the lease: American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977) §16.1, example 5. Cf *Whitsinsville Plaza Inc v Kotseas* 378 Mass 85, 390 NE 2d 243 (Supreme Judicial Court of Massachusetts 1979) at 96 (249), where it was said that 'reasonable anticompetitive covenants are enforceable by and against successors to the original parties'.

⁹¹ (1869) 4 LR Ex 311, described as a 'hard case' in *Kumar v Dunning* [1989] QB 193 (CA) at 205, and criticised in Megarry and Wade *Real Property* [19-040].

⁹² (1869) 4 LR Ex 311, 311.

⁹³ [2014] CSIH 105, 2015 SC 339.

⁹⁴ 1939 SC 788 (IH), revd on a different point, 1940 SC (HL) 52.

⁹⁵ 1939 SC 788 at 802.

legitimate property interest, or its protection, or the peaceable possession of property, or its proper enjoyment, or, to put it more generally, for the securing of the dominant owner's rights and interests of ownership in his own subjects. . . . But, on the other hand, if the restriction is not intended to protect the dominant property as such, or its amenity, or any of the requisites of its proper enjoyment, but is simply devised and intended to create a monopoly, or to impose a restraint of trade in perpetuity for the benefit of a trading or commercial concern, it cannot, in my judgment, receive any effect, except as a personal contract between the original contracting parties, and it is not capable of being erected into a real right⁹⁶ so as to become an inherent condition of the title.

That case concerned a purported real burden, imposed when an owner of two theatres half a mile apart disposed one of them. The owner purported to impose a burden that the theatre being sold could not be used to stage certain types of play. The Inner House held that this was not an enforceable real burden. It might have been thought the passage quoted above, and other passages in that case, were to the effect that commercial benefit does not amount to praedial benefit so as to elevate a personal agreement into a real condition.⁹⁷ However, even before *Hill of Rubislaw*, it seemed unlikely that there was such an absolute rule. Cusine and Paisley argue that commercial interest is sufficient to demonstrate praedial benefit for a servitude⁹⁸ and Gordon and Wortley also accept this.⁹⁹

7-33. Other legal systems certainly accept that their equivalents of the praediality requirement can be satisfied by commercial benefit.¹⁰⁰ Although the point was raised in the consultation preceding the reform of real burdens

⁹⁶ Reid notes that, on his now orthodox terminology, 'real right' here means 'real condition': Reid *Property* [348] n 7. Indeed, Lord Justice-Clerk Aitchison uses the phrase 'real condition' in the preceding paragraph.

⁹⁷ *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788 (IH) 796 and 801. Both passages take the view that real burdens can exist only so as to protect the amenity of the neighbourhood. So, although a restriction upon performing a particular business may constitute a real condition, this is only if the property itself benefits, as it would, say, from a prohibition upon a particularly noisy industry from being carried out in the area.

⁹⁸ DJ Cusine and RRM Paisley *Servitudes and Rights of Way* (1998) [2.51].

⁹⁹ Gordon and Wortley *Scottish Land Law* vol II [25-23].

¹⁰⁰ England: Megarry and Wade *Real Property* [31-058] (restrictive covenants, citing *Newton Abbot Co-op Society Ltd v Williamson & Treadgold Ltd* [1952] Ch 286 (Ch D)), and [26-008] (easements, citing *Moody v Steggles* (1879) 12 Ch D 261 (Ch D)); Law Commission *Easements, Covenants and Profits à Prendre: A Consultation Paper* (Law Com CP No 186, 2008) [3.20]–[3.25]; Germany: JF Baur and R Stürner (eds) *F Baur Sachenrecht* (18th edn, 2009) §33, Rn 13; South Africa: MJ de Waal 'Servitudes' in D Visser and R Zimmermann *Southern Cross* (1996) 785, 795–797; USA: *Norcross v James* 140 Mass 188, 2 NE 946 (Supreme Judicial Court of Massachusetts 1885) (benefit of non-competition covenant did not touch and concern the land), overruled in *Whitsinsville Plaza Inc v Kotseas* 378 Mass 85, 390 NE 2d 243 (Supreme Judicial Court of Massachusetts 1979) (benefit of non-competition covenant did touch and concern where it 'serves a purpose of facilitating orderly and harmonious development for commercial use'). Berger saw no policy objection to this: L Berger 'A policy analysis of promises respecting the use of land' (1970) 55 Minnesota L Rev 167, 214.

in 2003,¹⁰¹ it was not addressed in the resulting legislation. In *CWS v Usher Breweries*¹⁰² a real burden aimed at protecting commercial interests was upheld. The decision is an important one for current purposes. It concerned a shopping precinct on a housing estate which consisted of three units. The titles of each contained a prohibition upon engaging in trade competing with that of the other units, the purpose being to ensure the commercial viability of the development as a whole. It was held that this provided sufficient praedial interest for the restrictions to be real burdens. The same kind of purpose typically underlies the use of exclusivity clauses in leases of units in a commercial development. A question would be whether there needs to be this 'community' element in order to establish praedial benefit; arguably, ordinary commercial benefit is sufficient.

7-34. The Scottish Law Commission noted that the strongest case for viewing a restraint of trade as conferring praedial benefit is where the purported benefited property is specially adapted for the activity in question, meaning that it is likely to be used for the same purpose by future owners.¹⁰³ This is of particular relevance for leases. In the types of lease where the tenant benefits from an exclusivity clause, the tenant is typically obliged to conduct a particular business on the subjects and this obligation will bind an assignee. The tenant's right is therefore to occupy the subjects for a particular business and none other. In the English case of *Thomas v Hayward*,¹⁰⁴ Bramwell B sought to support his conclusion that the covenant did not benefit the land leased by asking what benefit would persist if the tenant ceased to use the demised premises as a public house. He took the answer, 'none', as confirming that the benefit of the exclusivity agreement did not relate to the land but only to its mode of occupation. In most commercial leases, the tenant will not be free (without consent) to use the premises for some other use: rather, the lease is of a unit to be used as a bank or as an optician or as a jeweller, etc. In those circumstances, it seems perfectly reasonable to accept that the tenant is benefited as tenant by a restriction upon the commercial uses of other nearby properties. The restricted nature of the tenant's right makes it appropriate to view the exclusivity clause as sufficiently related to the lease to be a real condition, even although its burden relates to other land.

7-35. This issue has now been put beyond doubt by the decision in *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd*.¹⁰⁵ The Extra

¹⁰¹ Scottish Law Commission *Discussion Paper on Real Burdens* (Scot Law Com DP No 106, 1998) [7.43]; Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181, 2000) [2.25]–[2.27].

¹⁰² 1975 SLT (Lands Tr) 9.

¹⁰³ *Report on Real Burdens* [2.25]. This appears to be a requirement in German law for restrictions upon competition to be treated as servitudes: De Waal 'Servitudes' 797.

¹⁰⁴ (1869) 4 LR Ex 311 at 312.

¹⁰⁵ [2014] CSIH 105, 2015 SC 339, discussed in Gordon and Wortley *Scottish Land Law* vol II [24-36] and [24-37].

Division took an expansive approach to what can count as praedial benefit, stating that ‘anything that can be said to protect or enhance the value of the property itself will be sufficient’.¹⁰⁶ It continued that ‘a real burden must be regarded as benefiting a property if it enables the commercial activity in that property to be carried on more effectively, that is to say, in a more profitable manner’.¹⁰⁷ It did however state that ‘a benefit of this nature will typically be specific to a particular form of commercial activity’.¹⁰⁸ The approach in *Hill of Rubislaw* to praedial benefit is very broad. It may be that with time the law departs from aspects of the position taken in that case and adopts a slightly less expansive approach, in particular to the question whether a mere increase of value is sufficient in and of itself. However, even if it were to do so, for the reasons set out above, an objection to an exclusivity clause in a lease on the basis that the benefit of the term is insufficiently connected to the lease should not succeed. The question whether the relevant obligation is unenforceable as a restraint of trade must also be considered.¹⁰⁹ The circumstances in which an obligation will be subject to the restraint of trade doctrine were considered by the Supreme Court in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*,¹¹⁰ an appeal from Northern Ireland. It held that the inclusion in a long lease for part of a shopping centre of a restrictive covenant on the part of the lessor in relation to the use of other parts of the centre did not engage the restraint of trade doctrine.¹¹¹

7-36. Returning to the Scottish case law in respect of exclusivity clauses, there are earlier Scottish decisions, not referred to in *Optical Express*, which support the view that such a clause can bind a successor of the landlord. As McAllister notes,¹¹² *Optical Express* does not refer to the decision of the Inner House in *Davie v Stark*¹¹³ where it was held that a successor was bound by an exclusivity obligation. In *Davie*, a tenant (Stark) sought to rescind his seven-year lease for breach of a condition that the adjoining shop, which the landlord also owned, would not be let to a person in the same trade. Davie was a singular successor of the original landlord in respect of both properties and refused to be controlled

¹⁰⁶ *Hill of Rubislaw* [15].

¹⁰⁷ *Hill of Rubislaw* [15].

¹⁰⁸ *Hill of Rubislaw* [16].

¹⁰⁹ *Hill of Rubislaw* [20] *et seq.* See also Gordon and Wortley *Scottish Land Law* vol II [24-40] and [24-41].

¹¹⁰ [2020] UKSC 36, [2020] 3 WLR 521.

¹¹¹ The Supreme Court held that the test which had previously applied to determine when the restraint of trade doctrine applied was flawed, and instead held that a covenant relating to the use of land was not subject to the doctrine against restraint of trade if it was of a sort which had become part of the accepted machinery of a type of transaction which had generally been found acceptable and necessary, so that instead of being regarded as restrictive such covenants were accepted as part of the structure of a trading society. See, however, criticism of the decision at (2021) 137 LQR 193.

¹¹² McAllister *Leases* [2.44] *et seq.*

¹¹³ (1876) 3 R 1114 (IH).

in his use of the shop adjoining the subjects of the lease. Stark rescinded the lease and quit the premises, and in this action by Davie for the rent it was held that Stark had been entitled to do so. It seems not to have been disputed that the *type* of term could bind Davie as singular successor.¹¹⁴ Lord Gifford was of the opinion that this point could not be contested and that the condition bound Davie as ‘an integral part of [Stark’s] lease’.¹¹⁵

7-37. The status of an exclusivity obligation also arose in *Mackenzie v Imlay’s Trs*,¹¹⁶ although the consideration is *obiter*. The North of Scotland Property Company owned numbers 116, 118 and 120 Union Street, Aberdeen. It granted a bond and disposition in security to a creditor and then a lease of unit 120 to the pursuer, an auctioneer. Subsequently, and for an extra payment, the landlord agreed with the pursuer not to let an adjoining shop, which it also owned, to any person carrying on an auctioneer’s business. When the landlord was unable to repay its loan, its directors did so on its behalf and obtained in return an assignation of the creditor’s right in security. Although they had not obtained a decree of maills and duties, it was held that the creditors should be treated as if they were bondholders in possession.¹¹⁷ When they granted a lease of the adjoining shop to an auctioneer, the tenant of unit 120 sought interdict. This was refused, both by the Sheriff-Substitute and by the Inner House. The basis of the Sheriff-Substitute’s decision was that the restriction was created after the grant of the bond and disposition in security and so did not bind the holder of a prior real right: ‘ordinary acts of administration’ by the debtor would bind a creditor, but this additional term was not such an act.¹¹⁸ Although the creditor was bound by the lease, he was not bound by the exclusivity agreement. Relying on *Davie v Stark*, the Sheriff-Substitute went on to state that if the bond and disposition in security had been granted after the conclusion of the lease and the exclusivity obligation, the creditor *would* have been bound by the restriction.¹¹⁹ He therefore viewed the obligation as being capable of being a real condition. The Inner House upheld the Sheriff-Substitute’s decision, but its reasoning was different. Lord Dundas stated that ‘[i]t [the restriction] did not, in fact, form part of the pursuer’s lease; and the rent payable under that lease was not to any extent the counterpart of the condition’.¹²⁰ On this reasoning, the creditor would not have been bound even if the lease and letter had been concluded before the right

¹¹⁴ (1876) 3 R 1114 at 1120 (Lord Ormisdale). Lord Justice-Clerk Moncreiff does state (at 1118) that Davie had asserted that he was not bound by the stipulation in regard to the adjoining shop, but the basis of this assertion is not clear. The reported details of the parties’ arguments do not clarify matters.

¹¹⁵ (1876) 3 R 1114 at 1122.

¹¹⁶ 1912 SC 685 (IH).

¹¹⁷ Their ability to grant real rights of lease was contingent upon this status: WM Gloag and JM Irvine *Law of Rights in Security* (1897) 99.

¹¹⁸ 1912 SC 685 at 688.

¹¹⁹ 1912 SC 685 at 689.

¹²⁰ 1912 SC 685 at 691.

in security was granted. It is important to note, however, that Lord Dundas's objection to viewing the term as a real condition was not a substantive one but rather one based on the fact that the exclusivity obligation was documented separately (and paid for separately) from the lease.¹²¹

7-38. The earlier case of *Campbell v Watt* should also be noted.¹²² The case concerned the lease of an inn on the Glasgow–Greenock road. The lease contained express provision that in any smithy erected by the landlord, the landlord would take the tenant bound not to sell liquor to the prejudice of the tenant of the inn. The landlord sold the land and, later, the route of the main road was moved, meaning that the inn lost much business. The new landlord erected a new inn on the route of the new road. The tenant claimed an abatement of rent against the new landlord. Various arguments were advanced, including regarding whether a restraint on the landlord was implied. The Court held that the claim for abatement was well founded, noting that:

It is true, a purchaser is not affected by pactions extrinsic to the nature of a tack, such as those for retention of rent. But the restraint here in question is a natural incident of a tack of such a subject; and, whether conditional or not, it was in the *bona fides* of the transaction that the landlord should not set up a rival inn to the prejudice of his own tenant in the old one.

The Court's conclusion that this type of obligation was inherent in a lease was not followed in the 1888 decision of the Whole Court in *Craig v Millar*.¹²³ The authors of *McAllister*¹²⁴ suggest that, despite this, *Campbell v Watt* still stands as authority for the proposition that an exclusivity obligation binds a successor. It is suggested, however, that the decision now provides no real guidance on that point. The reasoning, as summarised in Hume's report, was that the obligation affected the successor because it was a 'natural incident' of the tack. In Hume's short summary of the reasoning, there is no indication what the court's view would have been about the transmission of the obligation to a successor if the court had not thought that the obligation in question was a natural incident¹²⁵ of the lease.

7-39. *Davie* and, it is suggested, *Mackenzie* too, support the proposition that an exclusivity agreement may be a real condition of a lease. Importantly, this was also Rankine's view.¹²⁶ *Obiter* comment by Lord Drummond Young is to the

¹²¹ As ch 2 discusses, there is, in fact, no absolute rule that a variation to a lease cannot bind a successor.

¹²² (1795) Hume 788.

¹²³ (1888) 15 R 1005 (IH). See discussion of this issue in *McAllister Leases* [3.20]–[3.25].

¹²⁴ *McAllister Leases* [2.44].

¹²⁵ By which it appears to have meant that the term was implied at law into the lease.

¹²⁶ Rankine *Leases* 477 'hazards the opinion' that all of the terms discussed in the preceding chapter could be real conditions; exclusivity clauses were discussed, with reference to *Davie v Stark*, at 439–440.

same effect: he considered that it was ‘clearly correct’ that an exclusivity clause was a real condition.¹²⁷ Rennie also supports the view that an exclusivity clause should be capable of being a real condition.¹²⁸ This is not to say that every exclusivity clause will be held to be referable to the relationship of landlord and tenant. In particular, if the tenant is unrestricted as to the use of the subjects, the view in the English case of *Thomas v Hayward*¹²⁹ that a term on exclusivity is of personal benefit to the tenant and not to the lease itself might reasonably be preferred. One must also consider whether these terms are struck at by the rule against contracts in restraint of trade¹³⁰ or by rules of competition law. The Supreme Court of Appeal of South Africa has held that an exclusivity clause in a lease of a unit in a shopping centre continued to operate between the tenant and a successor landlord by virtue of the *huur gaat voor koop* rule on the basis that this was an integral part of the lease.¹³¹

(b) Building restrictions

7-40. It is thought that a restriction in a lease on building on adjacent land also owned by the landlord, in order to preserve the amenity of the leased subjects, would be a real condition. Such a term would benefit the tenant as tenant, and although the landlord could be said to be burdened as owner of the other property and not of the subjects of the lease, the close connection between the obligation and the tenant’s enjoyment of the subjects of the lease makes it appropriate to view such a term as capable of being a real condition of a lease. A parallel English case is *Ricketts v Enfield Church Wardens*,¹³² where a covenant by the lessor that he and his assigns would not erect or permit to be erected any building in front of a building line on adjoining premises was held to touch and concern the land demised. Neville J relied upon the following passage from Lord Collins’s speech in *Dewar v Goodman*:¹³³

¹²⁷ *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142, 2006 GWD 12-235 at [16]. The importance to both landlord and tenant of ensuring the appropriate mix of tenants in a shopping centre was highlighted. There was, however, no argument upon the point and, surprisingly, *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) was amongst the authorities cited as authority for the proposition that an exclusivity obligation was a real condition. In fact, *Optical Express* held the opposite.

¹²⁸ *Rennie Leases* [15-02].

¹²⁹ (1869) 4 LR Ex 311.

¹³⁰ *McBryde Contract* [19-80]–[19-143]. This point was made, but no opinion was expressed upon it, in *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH) 651, and by S Brymer ‘Enforcing Commercial Lease Terms Against Successor Landlords – Pt 2’ (2001) 50 Green’s Property Law Bulletin 3, 4.

¹³¹ *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* [2015] ZASCA 164. The question has also been considered arguable, but not finally decided, in *Spar Group Ltd v Synergy Income Fund Ltd* [2014] ZAKZDHC 49, a first-instance decision regarding interim relief.

¹³² [1909] 1 Ch 544 (Ch D).

¹³³ [1909] AC 72 (HL) at 77.

The reason why the covenant to do something on land other than that demised presumably does not run is . . . because such a covenant is *prima facie* collateral i.e. does not touch or concern the land demised. But instances may be imagined of covenants to do things on land other than that demised which touch and concern so nearly the land demised as to run with it.

7-41. This was one such instance and it is thought that a similar decision would be reached in Scotland.

D. CONCLUSION

7-42. This chapter has reviewed such Scottish material as there is about whether lease terms which relate to land other than the subjects of the lease are real or personal. The conclusion drawn is that there is no absolute rule that a term must relate only to the subjects of the lease in order to be a real condition; on the contrary, quite often terms which relate to other subjects are real conditions. These can be either rights akin to servitudes, which permit the tenant to make some non-exclusive use of other subjects, or rights akin to real burdens, which impose negative or affirmative obligations on the landlord in respect of other land. In order for such a term to qualify as a real condition of a lease, there must be a sufficiently close connection between the term and the other terms of the lease, so that it is more referable to the relationship of landlord and tenant than to the relationship between the tenant as tenant and the landlord as owner of the other land. Rights of access and exclusivity obligations are probably the most important types of term discussed, and both are examples where such a close connection between the lease and the term can exist, such that the term is a real condition even if it concerns other land. The logic of holding a term to be a real condition is that it is part of the lease. Such terms bind successor landlords regardless of whether the successors also acquire ownership of the other property necessary for the performance of the obligation. If the term is akin to a servitude and confers upon the tenant a right to use other property held by the landlord, the better view is that the right may be enforced independently by the tenant against the successor owner of that other land. That is not possible if the term is akin to a real burden and imposes a positive or negative obligation in respect of other land. If, therefore, ownership of the land is divided, the landlord must take steps to ensure that the obligations of the lease can still be performed in the future, either by granting or reserving a servitude at the time of the division, or by creating a real burden.

8 Options and their Breach

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A. INTRODUCTION

8-01. Until now, this book has been concerned with those rules which determine which terms of a lease are ‘real conditions’, that is to say, terms which bind a successor landlord regardless of whether the successor knows of the term in question. In this and the next chapter, it turns to consider whether a personal condition will bind a successor of the landlord if the successor was aware of it, or acquired gratuitously or for a materially inadequate consideration. In other words, it considers whether the term will bind a successor because of the ‘offside goals’ rule. This point has arisen in various controversial cases concerning options to purchase. In both *Davidson v Zani*¹ and *The*

¹ 1992 SCLR 1001 (Sh Ct).

*Advice Centre for Mortgages v McNicoll*² the tenant argued that a successor landlord was bound by such an option, which is a personal and not a real condition,³ because the successor acquired with knowledge of the option. These decisions reached different results: in *Davidson* the option was held to bind a successor because of the offside goals rule, whereas in *Advice Centre*, this argument was rejected as ‘fundamentally wrong’ and *Davidson* was strongly disapproved.

8-02. Chapter 9 considers the effect of the successor landlord’s knowledge and, specifically, the requirements of the offside goals rule. One of those requirements is that the transfer to the successor must have been in breach of the personal right which the offside goals rule is being invoked to protect. It is therefore crucial, as a first step to ascertaining whether the offside goals rule applies to options, to discover the obligations to which the grant of an option gives rise. Unfortunately, there is no existing Scottish discussion of this point.⁴ This chapter seeks to fill that void. It considers whether grantors of an option to purchase break their obligations to the option-holder if they transfer the subjects of the option to a third party without taking steps to preserve the option-holder’s right. The conclusions drawn may be applied more broadly to other options to acquire a right in respect of land (e.g. an option to renew a lease) and also to other personal rights relating to land (such as licences,⁵ and leases which have not been made real).

8-03. Although the primary purpose of the analysis is to enable the next chapter to consider whether the offside goals rule renders some personal conditions of leases binding upon successors, the material is of broader importance. In particular, regardless of whether the offside goals rule does apply to options, both the grantor of an option and its holder will wish to know what is required of the grantor: the option-holder, so that it may act to protect and vindicate its rights; the grantor, so that it may act in compliance with its obligations. The analysis is relevant for all options, not simply those in leases.

² [2006] CSOH 58, 2006 SLT 591 at [41]–[48].

³ See paras 6-02 to 6-18 above.

⁴ Other legal systems are better provided for: M Dray et al *Barnsley’s Land Options* (7th edn, 2021) is an English text, and FC Dutilleul *Les contrats préparatoires à la vente d’immeuble* (1988) a French. There are also treatments in French works on special contracts. Texts on South African contract law contain discussion: GB Bradfield *Christie’s Law of Contract in South Africa* (7th edn, 2016) 66–70; LF van Huyssteen et al *Contract: General Principles* (6th edn, 2020) 82–88.

⁵ I.e. a contract which permits the use of land and which does not amount to a lease. The exact boundary between lease and licence is unclear: McAllister *Leases* [2.50] *et seq.*

B. PRELIMINARY POINTS

(1) Two types of option

8-04. Two types of option are conceivable. In the standard type, the G(rantor) undertakes to the H(older) that G will transfer certain property to H if H exercises the option. G's obligation to H is not conditional upon G still owning the subjects of the option at the time of its exercise. A typical purpose of the transaction is to give H time to decide whether to purchase property whilst, at the same time, guaranteeing the ability to do so if G so desires. Typically, H will pay for this right. Examples of such options are legion. They might be used where a property developer wishes to acquire a whole site, but is unable to do so in one acquisition. Instead, the developer can acquire options over individual plots, which will be exercised only if it becomes clear that the developer is going to be able to acquire all of the required land. Another common use is where a purchaser requires planning permission for a proposed development and wishes to be able to walk away if either permission is not received or is not to his liking. That favours using an option instead of a conditional contract.⁶ Parties might include an option to purchase in a lease so as to allow the tenant to improve the property without necessarily losing the value of the improvements at the end of the lease.⁷ Also, as in a 'capital allowances lease', the parties may from the outset intend to transfer ownership of the property, need to defer the date of transfer, but nevertheless wish the transferee to be able to enter into occupation immediately: those goals can be achieved by a suitably structured lease containing an option to purchase.⁸ It would obviously defeat the aims of the parties to such options were the grantor to be free, even after granting the option, to transfer to a third party, and the option-holder were to have no recourse against the grantor.⁹

8-05. It is possible to conceive of another type of option, where H is to acquire from G only if G still owns the property when H exercises the option. This gives H only the chance of acquiring. The right which arises upon exercise of the option is conditional upon G still being owner. However, although such an arrangement is possible, it will surely be rare that the parties intend this, as it does not satisfy the goals for which options are typically entered into. In the

⁶ D Neuberger and J Bassett 'Options: are they worth the paper they are written on?' in *The Blundell Memorial Lectures: Current Problems in Property Law* (1988) 1, 22–24. Suspensive conditions can, however, be drafted so widely that there is little difference between an option properly so called and a conditional contract of sale.

⁷ *Corpus Juris Secundum*: vol 52 *Landlord and Tenant* (2003) §112.

⁸ D Bell and R Rennie 'Purchase options in leases' (2006) 51 *JLSS* May/49. See para 6-05 above.

⁹ Millet LJ remarked in respect of a break option that a tenant would not have been content with a right which could be circumvented merely by the landlord transferring the reversion: *System Floors Ltd v Ruralpride Ltd* [1995] 1 *EGLR* 48 (CA) at 51.

English case of *Pritchard v Briggs*¹⁰ it was argued that an option was impliedly conditional upon the grantor not having disposed of the property prior to the exercise of the option, but this argument was rejected.¹¹ A person seeking to establish that an option is conditional in this way faces an uphill task. The default position must be that the grant of an option creates an option of the first kind.

8-06. Plainly, if the option is of the second type, the grantor is free to transfer the property to another. The following discussion is of the rules which apply to options of the first type.

(2) An analysis of options

8-07. The various possible classifications of options (or, as Lord Hoffmann would have it, the various metaphors which may be used to describe the different attributes of an option)¹² were noted earlier in the discussion of options to renew leases.¹³ Whereas the exercise of an option to renew a lease must always result in a contract, an option to acquire property need not. In cases of options to purchase, therefore, there is an additional possible analysis: that exercise of the option gives rise not to a contract but only to a unilateral obligation to convey. This will, however, be unusual. More typically, exercise of an option will result in a contract of sale. This means that the option can either be analysed as that contract, subject to a suspensive condition, or as an obligation to enter into a contract of sale if the option is exercised. Such an obligation could take the form either of a promise to contract or of a firm offer to contract, namely an offer backed up either by a promise not to revoke the offer or a contract not to do so.

(3) Revocation prior to exercise

8-08. It might be argued that, because there is no concluded contract (of sale, in respect of an option to purchase) until the option is exercised, prior to its exercise grantors may revoke their consent to transfer the property to the option-holder. The holder would be left with a damages claim for breach of the option, but could not oblige the grantor to convey. As is discussed below, this approach was adopted for some time in French law, but is thought not to be the rule of Scots law. Rather, in Scots law, on each of the potential analyses in respect of an option, a purported revocation of the option by the grantor

¹⁰ [1980] Ch 338 (CA).

¹¹ [1980] Ch 338 at 386D, 420A and 422E.

¹² *Spiro v Glencrown Properties Ltd* [1991] Ch 537 (Ch D) at 544.

¹³ See paras 5-19 and 5-20 above.

prior to its exercise will be ineffective.¹⁴ If an option is viewed as a conditional promise, it is irrevocable because a promise is a binding obligation which the promisor cannot revoke.¹⁵ The result is the same if an option is viewed as a conditional contract, because on this analysis the grantor has already entered into a contract of sale, albeit a conditional one. The position is also the same for the final possible analysis, namely that the option is a firm offer: acceptance of such an offer results in a contract, even if the offeror had purported to withdraw the offer prior to acceptance.¹⁶ The case of *A & G Paterson v Highland Railway Company*¹⁷ is especially clear on this latter point. Viscount Dunedin, referring to the earlier decision of *Littlejohn v Hadwen*,¹⁸ stated:¹⁹

if I offer my property to a certain person at a certain price, and go on to say: 'This offer is to be open up to a certain date', I cannot withdraw that offer before that date, if the person to whom I made the offer chooses to accept it.

Speaking of an 'obligation' to keep the offer open may mislead, as obligations may be breached. Rather, the offer simply *is* open for acceptance for a particular period of time and any attempt to revoke the offer will not succeed.

8-09. In France, however, in a controversial decision in 1993, the *Cour de cassation* held that the grantor of a *promesse de vente* (a bilateral contract constituting an option to purchase) did *not* irrevocably give consent to enter into a contract of sale.²⁰ Rather, the grantor simply undertook to remain willing to enter into a contract of sale upon exercise of the option. Because the option contract and the substantive contract are distinct, the court reasoned that the grantor could withdraw consent to enter into the substantive contract prior to the exercise of the option, albeit that this would be in breach of the option contract. Such revocation was effective and confined the option-holder to a damages claim for breach of the option contract. As no contract of sale arose from the exercise of the option, the grantor could not be compelled to transfer.

8-10. This approach was roundly criticised for weakening the option-holder's right. Malaurie and Aynès, for instance, wrote that:²¹

¹⁴ This is also the position in England: *Mountford v Scott* [1975] Ch 258 (CA).

¹⁵ *McBryde Contract* [2-20]. See also DM Walker *The Law of Contracts and Related Obligations in Scotland* (3rd edn, 1995) [2.9], citing *Campbell v Glasgow Police Commissioners* (1895) 22 R 621 (IH).

¹⁶ *Littlejohn v Hadwen* (1882) 20 SLR 5 (OH) at 7–8; *A & G Paterson v Highland Railway Co* 1927 SC (HL) 32 at 38; *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84; TB Smith *A Short Commentary on the Law of Scotland* (1962) 747; *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) [617]. Hogg discusses the concept of a 'firm offer' in M Hogg *Promises and Contract Law: Comparative Perspectives* (2011) 223–227.

¹⁷ 1927 SC (HL) 32.

¹⁸ (1882) 20 SLR 5.

¹⁹ 1927 SC (HL) 32 at 38.

²⁰ Civ 3e, 15 décembre 1993, D 1994 507.

²¹ P Malaurie and L Aynès *Les contrats spéciaux* (2nd edn, 2005) [120]. [Il est à souhaiter que ces

One would hope that these decisions, which have been universally criticised, do not constitute precedent, as they remove any security afforded by an option. The court reasons as though it were concerned with the retraction of an offer, whereas the option, even if unilateral, is a contract which obliges the grantor to refrain – for the benefit of the option-holder – from dealing with the property, and by which the grantor has definitively consented to a contract of sale, which consent the holder has accepted.

Some, however, supported the *Cour de cassation's* approach,²² advancing, among other points, the following arguments. First, that it was more consistent with principle to view the consent to enter into the option and the consent to enter into the later sale as distinct and that one could not properly speak of ‘consent’ to that subsequent sale if the grantor of the option had revoked the option by the time the option was exercised. Second, the approach in the 1993 decision promoted economic efficiency by allowing the grantor to breach the option efficiently, while compensating the disappointed option-holder by way of damages. Despite the strident and widespread academic criticism of the decision, its approach was reiterated in later decisions of the *Cour de cassation*.²³ However, much of the force of the rule was removed by the fact that the court also accepted that parties could validly agree that, if the grantor defaulted on the obligation to enter into a contract of sale, the court could declare the contract of sale to exist.²⁴ Apparently such clauses had become standard, at least in professionally drafted options.²⁵

8-11. The 2016 reform of the French law of obligations made specific statutory provision to depart from the 1993 decision. As amended, Article 1124 of the *Code civil* provides that the revocation of a *promesse de vente* during the period afforded to the beneficiary for exercising the option does not prevent the formation of the promised contract.²⁶ It was said that this approach was justified

arrêts, unanimement critiqués, ne fassent pas jurisprudence, car ils retirent toute sécurité à la promesse unilatérale de vente. La cour raisonne comme s’il agissait de la retraction d’une offre, alors que la promesse, fût-elle unilatérale, est un contrat obligeant le promettant à immobiliser le bien au profit du bénéficiaire et dans lequel le promettant a, de manière définitive, donné son consentement à la vente, ce qu’a accepté le bénéficiaire.]

²² D Mainguy ‘L’efficacité de la retraction de la promesse de contracter’ 2004 RTD civ 1.

²³ Civ 3e, 26 juin 1996, D 1997 somm 169.

²⁴ Civ 3e, 27 mars 2008, n° 07-11.721.

²⁵ *Dalloz Code civil annoté* (2021) Article 1124.

²⁶ It also provides that a contract concluded by the option-holder with a third party in violation of the option is null if the third party knew of the existence of the option. In full, Article 1124 provides: ‘1. La promesse unilatérale est le contrat par lequel une partie, le promettant, accorde à l’autre, le bénéficiaire, le droit d’opter pour la conclusion d’un contrat dont les éléments essentiels sont déterminés, et pour la formation duquel ne manque que le consentement du bénéficiaire. 2. La révocation de la promesse pendant le temps laissé au bénéficiaire pour opter n’empêche pas la formation du contrat promis. 3. Le contrat conclu en violation de la promesse unilatérale avec un tiers qui en connaissait l’existence est nul.’ [1. A ‘promesse unilatérale’ is a contract by which one party, the promisor, grants to another, the beneficiary, the right to decide

as it conformed to European harmonisation projects and tended to support the security and effectiveness of options.²⁷ Some argued that this rule constitutes a disproportionate interference with the freedom of contract, which is protected under the French constitution.²⁸ However, the *Cour de cassation* rejected such an argument, noting that the grantor *did* give consent, when granting the option.²⁹ The rule in Scots law is clear and it is suggested that the French experience does not support changing it.

(4) Result of exercise of the option

8-12. Depending upon the analysis adopted, exercise of an option to purchase either results in a contract of sale or a unilateral obligation to convey. The usual remedies are available to enforce or protect this right: the option-holder may enforce the right by specific implement or protect it by interdicting transfer to another,³⁰ or, if the grantor is unable to perform (typically because the grantor is not owner of the property), claim damages.³¹

C. BREACH PRIOR TO THE EXERCISE OF THE OPTION

(1) Introduction

8-13. Although the obligations incumbent upon the grantor of an option after its exercise are clear, recent case law suggests that the position in Scots law prior to exercise is not. Obviously, assuming the grantor owns the property in the first place, the grantor remains able as a matter of property law to convey

to conclude a contract, the essential elements of which are determined and for the formation of which only the beneficiary's consent is missing. 2. Revocation of the 'promesse' during the period allowed to the beneficiary for exercising the option does not prevent the formation of the contract which was promised. 3. A contract concluded in breach of a 'promsesse' with a third party who knew of its existence is a nullity.]

²⁷ Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004539&categorieLien=id>.

²⁸ M Fabre-Magnan 'De l'inconstitutionnalité de l'exécution forcée des promesses unilatérales de vente' 2015 Recueil Dalloz 826.

²⁹ Civ 3e, 17 oct 2019, no 9-40.028.

³⁰ E.g. *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84. Interdict here prevents what would otherwise be an anticipatory breach of the obligation, discussed below at paras 8-27 to 8-38.

³¹ This is an obvious point, although there is no Scottish authority in respect of the particular case of an exercised option. The following English cases are relevant: *Goffin v Houlder* (1920) 124 LT 145 (Ch D); *Wright v Dean* [1948] Ch 686 (Ch D); *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 (Ch D) at 611D (Oliver J), approved on appeal [1981] AC 513 (HL) at 527C (Lord Wilberforce) (although the decision itself was reversed). Likewise French law: e.g. M Storck 'Synthèse – Avants Contrats' in *Juriscasseur Civil Code* (June 2020) [29].

it to someone other than the option-holder.³² The issue is whether the grantor is free to do so as a matter of contract law. Two models are conceivable. On the first approach, until the option is exercised and an obligation to convey arises, the grantor is under no obligation to the option-holder.³³ Of course, if the option is exercised and the grantor is unable to perform, the grantor will be liable for breach of the resulting obligation to convey, but transfer before exercise cannot amount to breach. This approach provides only weak protection for the option-holder, who would not be able to interdict transfer prior to exercise of the option.

8-14. A second approach anticipates the obligations which would arise were the option to be exercised. By granting an option, the grantor irrevocably consents to transfer. Whether an obligation to transfer actually arises is out of the grantor's power: that depends upon whether the holder exercises the option. In recognition of this, and to protect the option-holder, the law binds the grantor to remain, for as long as the option subsists, in a position to perform the obligations which would arise were it to be exercised. The main distinction between the first and second approach is that, on the second, the option-holder could interdict transfer to a third party even before exercising the option. Also, were the option not to be exercisable until some point in the future and were the grantor to transfer before that date, the holder could claim damages for breach immediately, instead of having to wait until the time for exercise of the option arose and then claiming damages for breach of the obligation resulting from its exercise.

8-15. In *The Advice Centre for Mortgages v McNicoll* Lord Drummond Young said, *obiter* and in the context of an option in a lease, that sale by the landlord to a third party did not involve the landlord in any breach of his obligations, even although the tenant had an option to purchase the property at a particular time during the lease.³⁴ This point appears not to have been the subject of detailed argument.³⁵ In the earlier case of *Davidson v Zani*³⁶ Sheriff Principal Ireland took a different view. He held that, even although the obligation to convey to the holder was conditional upon exercise of the option, which could not take place until a particular future date, nonetheless from the time of the grant of the

³² Any transfer by him would therefore not be in excess of capacity, even if it is in breach of an obligation: Hume *Lectures* IV 313; Reid *Property* [689].

³³ This is distinct from the possibility noted above that the option is simply a chance to acquire, as to which see para 8-05 above. On that view, if the grantor is no longer owner when the option is exercised, no obligation to convey would arise. On the view considered here, the grantor is bound to convey and is liable in the usual way should he fail to perform, but comes under no obligation prior to exercise not to disable himself from performance.

³⁴ [2006] CSOH 58, 2006 SLT 591 at [47]–[48].

³⁵ [2006] CSOH 58, 2006 SLT 591 at [47].

³⁶ 1992 SCLR 1001 (Sh Ct). This case was discussed in S Brymer 'Enforcing commercial lease terms against successor landlords' (2000) 49 *Greens Property Law Bulletin* 4 and (2001) 50 *Greens Property Law Bulletin* 3.

option the grantor was bound by an obligation to transfer to the option-holder. Transfer to a third party was in breach of this obligation. He stated:³⁷

If an obligation is qualified only by a potestative condition, such as the condition that the creditor can exact performance when he chooses, then, from the point of view of the debtor in the obligation . . . the obligation is in existence from the time of its constitution, although performance is not due until this is demanded by the creditor.

This decision was disapproved in *Advice Centre*.³⁸

8-16. Steven supports this departure from *Davidson*.³⁹ The argument that transfer by the landlord did not amount to breach had been made previously by Reid and Gretton.⁴⁰ These comments proceed, however, without consideration of all of the relevant authority and, once that authority is explored, it is clear that *Davidson* should be preferred to *Advice Centre* on this point: the grantor of an option is not free to transfer the property to another while the option subsists.⁴¹ If it is going to be said that the offside goals rule does not apply to render an option to purchase binding upon a successor who knew of it, this cannot be because the transfer by the grantor of the option did not amount to breach.

8-17. Although there is no Scottish discussion of the obligations to which the grant of an option gives rise, there has been discussion of this question in other jurisdictions. That is noted next. The position adopted in Common Law systems is of particular importance, because the contractual doctrines relied upon are similar, if not identical, to those of Scots law. For this reason, when the text below analyses why the grantor is, as a matter of contract law, not free to transfer, English and Scottish authorities are cited interchangeably. The approach of the following paragraphs is, first, in section (2), to set out the position to which the grant of an option gives rise in English, Australian, French and South African

³⁷ 1992 SCLR 1001 at 1004.

³⁸ The head-note to the SLT report states that *Davidson* was overruled, but this is incorrect. A superior court may overrule a precedent of a lower court in the vertical line of authority: DM Walker *The Scottish Legal System* (8th edn, 2001) 473. Decisions of the Outer House do not bind sheriffs or the Sheriff Appeal Court: G Maher and TB Smith 'Sources of Law (Formal)' in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 22 (1987) [298]. Hence a decision of either of those cannot be overruled by the Outer House. Plainly, however, sheriffs will follow Outer House decisions unless there is good reason not to.

³⁹ AJM Steven 'Options to purchase and successor landlords' (2006) 10 EdinLR 432.

⁴⁰ KGC Reid and GL Gretton *Conveyancing 2004* (2005) 106. *Advice Centre* is noted in KGC Reid and GL Gretton *Conveyancing 2006* (2007) 102–109. Reid had earlier supported the decision in *Davidson*: Reid *Property* [698], and K Reid and CG van der Merwe 'Property Law: Some Themes and Some Variations' in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 637, 657.

⁴¹ Indeed, preventing the land from being transferred may be one of the reasons for entering into an option agreement: a developer may wish to prevent land from being available to its competitors, although it is not yet in a position to commit to the project.

law; all of those systems accept that the grantor of an option is prohibited from transferring ownership while the option subsists. Then, in sections (3) and (4), the juridical basis for the restriction on the grantor of the option is considered.

(2) Contractual restrictions upon transfer

(a) English law

8-18. The authors of *Barnsley's Land Options* formulate English law as follows:⁴²

[T]he landowner has by the very grant of the option fettered its own powers of disposal, since the grant of an option is coupled with a promise (usually implied) to refrain from putting it out of its power to transfer the land to the option holder. It can be restrained by injunction from parting with the land except subject to the option^[43] and will be liable in damages to the grantee in the event of actual breach.^[44] The grantor is bound to convey when requested and this imports a duty not to do anything whereby it will be prevented from conveying what it has agreed to convey.

Later this text states that the option-holder need not exercise the option in order to be able to claim damages.⁴⁵ In a similar vein, Tromans has argued that a grantor who rids himself of the option property breaches the option contract.⁴⁶ Various cases support this proposition. In *United Scientific Holdings Ltd v Burnley Borough Council*⁴⁷ Lord Diplock held that time was not of the essence for exercising a rent review clause. He distinguished the situation of an option to purchase. Time is of the essence for exercising such a clause, because of the effect of an option on its grantor.⁴⁸

⁴² M Dray et al *Barnsley's Land Options* (7th edn, 2021) [2-006].

⁴³ Citing *Vanderwell v IRC* [1967] 2 AC 291 (HL) at 395; *Commissioner of Taxes v Caraphin* (1937) 57 CLR 127 (HCA) at 134; *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA) at 83.

⁴⁴ Citing *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 (CA) at 611 (Oliver J in High Ct). The breach referred to here is breach of the contract of sale which results from exercise of the option.

⁴⁵ Dray et al *Barnsley's Land Options* [10-021], citing *Ridgewood Properties Group Ltd v Valero Energy Ltd* [2013] EWHC 98 (Ch), [2013] Ch 525, although on the facts of that case the damages claim for repudiatory breach of contract failed: after the grantor of the option transferred the subject of the option, the holder of the option affirmed and therefore could not claim damages for repudiatory breach.

⁴⁶ S Tromans 'Options: as safe as houses?' (1984) 43 CLJ 55, 64.

⁴⁷ [1978] AC 904 (HL).

⁴⁸ [1978] AC 904 at 929C. The passage is *obiter*. The case concerned whether rent review clauses were unilateral contracts. Options were discussed as another instance of that type of contract. Lord Diplock has not always expressed the position so categorically. In *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA) at 83, he stated only that 'a unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except *possibly* an obligation on the part of

[T]he grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition, the grantor needs to know with certainty the moment when it has come to an end.

The Court of Appeal has expressed a similar view:⁴⁹

An option . . . was a unilateral contract under which the grantor undertook to do something if, but only if, certain conditions were satisfied. If those conditions were satisfied the grantor had to comply with his undertaking, and in the meantime, as long as it remained possible that the conditions would be satisfied, he must not put it out of his power to perform his undertaking when the time came. That apart, however, he was under no obligation to do anything.

In a particularly clear passage, the High Court of Australia provided this formulation:⁵⁰

The right of the person who may be called the owner of the option is a right to prevent the owner of the property in question from disposing of it inconsistently with the option, together with a right, if he exercises the option, to compel the owner of the property to carry out the contract which has been made by exercise of the option.

In light of this,⁵¹ it is clear that in English, and also Australian, law the grantor of an option breaks his obligation under the option if he transfers to a third party without taking steps to preserve the option-holder's right.

(b) *French law*

8-19. In French law an option contract – *une promesse unilatérale de vente*⁵² –

the promisor to refrain from putting it out of his power to perform his undertaking in the future' (emphasis added). In *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444 (HL) at 477A his view was that an option does not give rise to *any* legal obligations on the part of either party unless and until it is exercised (emphasis added).

⁴⁹ *Little v Courage Ltd*, Court of Appeal, 21 Dec 1994, *The Times* 6 Jan 1995. The quotation is from *The Times* report. The case concerned an option to renew which was conditional upon certain other factors; obviously not all options will be.

⁵⁰ *Commissioner of Taxes v Caraphin* (1937) 57 CLR 127 (HCA) at 134.

⁵¹ Other relevant authorities include *Pritchard v Briggs* [1980] Ch 338 (CA) at 420F. *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA) at 51 discusses how transfer of the reversion would put performance of an obligation to accept surrender of a lease out of one's power.

⁵² Scots lawyers beware: *promesse* is a false friend. It is not equivalent to the unilateral promise of Scots law. *La promesse unilatérale* is not a unilateral act but rather a contract. *Une promesse unilatérale de vente* is a *contract* by which one party (A) agrees to sell to another (B) who comes under no obligation to purchase but instead has the option to bring a bilateral contract of sale into existence. It is unilateral in the sense that only one party (A) is at the outset bound by obligations (although this is often not the case, for the grantee may be obliged to pay for

is viewed as distinct from the substantive contract of sale which results from the exercise of the option. It seems to be accepted that the grantor of an option (*le promettant*) may not transfer the property to a third party for as long as the option subsists. Grantors contractually disable themselves from doing so for the duration of the option.⁵³ This is reflected in the name for the sum which is often paid in return for the grant of an option: it is called *une indemnité d'immobilisation*. A common view is that an option splits the formation of a contract of sale into two stages: when the option is concluded, the grantor is bound by the obligations of a seller; if the option is exercised the holder (*le bénéficiaire*) then also becomes bound and the *promesse de vente* is transformed into a contract of sale.⁵⁴

8-20. Despite general acceptance that transfer to a third party amounts to breach of the option contract, there has been debate about how best to analyse this breach, or – more accurately – how best to characterise the obligations to which the grant of an option gives rise in terms of French contract law doctrine. This debate need not be explored in detail here. There is support in *la doctrine* for the view that the grantor is bound by *une obligation de ne pas faire* (i.e. an obligation not to do something). Collart Dutilleul describes this as ‘an obligation not to carry out any legal transaction or do anything else liable to destroy one of the essential elements, which already exists, of the envisaged contract’.⁵⁵ He states that, although it is not possible to provide a definitive list of what is prohibited, sale to a third party is certainly included.⁵⁶

(c) South African law

8-21. South African law also recognises that the grantor of an option may not transfer the property to a third party while the option subsists but has not been

the option, in which case the contract is actually synallagmatic): A Bénabent *Droit civil: les contrats spéciaux civils et commerciaux* (6th edn, 2004) [84].

⁵³ See e.g. P Malaurie, L Aynès and P-Y Gautier *Droit des contrats spéciaux* (11th edn, 2020) [99]–[100]; B Gross and P Bihr *Contrats: ventes civiles et commerciales, baux d'habitation, baux commerciaux* (2002) [73]; F Collart Dutilleul *Les contrats préparatoires à la vente d'immeuble* (1988) [226] *et seq.*

⁵⁴ Gross and Bihr *Contrats* [65]; Malaurie, Aynès and Gautier *Droit des contrats spéciaux* [100]. This is strikingly similar to Lord Diplock's analysis in *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444 (HL) at 477A–B.

⁵⁵ Collart Dutilleul *Contrats préparatoires* [227] [‘une obligation de ne pas accomplir d'acte ou de faits susceptibles de faire disparaître l'un des éléments essentiels – déjà présents – du contrat envisagé’].

⁵⁶ Subject to an exception for those cases in which the grantor is permitted to transfer the option contract: Collart Dutilleul *Contrats préparatoires* [228]. *L'Encyclopédie Dalloz* is to the same effect: O Barret ‘Promesse de Vente’ in *L'Encyclopédie Dalloz* vol IX (2011) [105] *et seq.* An earlier edition had noted that certain decisions reveal a reluctance to impose an absolute prohibition and accept the possibility of a transfer by way of contribution of capital into a business or sale of an entire thing if the option related only to part of it: O Barret ‘Promesse de Vente’ in *L'Encyclopédie Dalloz* (2003) [147]–[150].

exercised.⁵⁷ The grantor who breaks the option agreement in this way is liable to the option-holder in damages even although the latter has not exercised the option.⁵⁸ Further, the option-holder is able to interdict transfer.⁵⁹ The position of the option-holder is equated with that of a purchaser.⁶⁰ In *Ginsberg v Nefdt*⁶¹ a lessor was interdicted from transferring the property unless the transfer was made subject to the tenant's option to purchase contained in a lease.

(d) *Conclusion*

8-22. There is, then, strong support in other jurisdictions for the view that grantors of options are not entitled, by transferring the property, to put it out of their power to perform the obligations which would result from exercise of the option. Indeed, the systems considered here are unanimous on this point. This is thought also to be the position of Scots law. The alternative rule weakens the option-holder's position. It is of particular weight that this result is reached by England and other Common Law jurisdictions, as the rules of breach of contract in those jurisdictions are very similar to those of Scots law.

8-23. The exact basis for the restriction upon the grantor's freedom of transfer now falls to be considered. It has been suggested either (i) that there is an implied term in the option not to transfer to a third party, or (ii) that such a transfer amounts to an anticipatory breach of the option. Neither *Barnsley's Land Options* nor *Tromans*, prominent writers in this area of English law, opts for one approach to the exclusion of the other. In some cases, however, it may be important to distinguish between the two: if the breach is anticipatory, the remedies available are different. In particular, the option-holder would have to rescind in order to claim damages prior to the point at which the option could be exercised.⁶² The appropriate basis for the rule is therefore considered here.

⁵⁷ GRJ Hackwill *Mackeurtan's Sale of Goods in South Africa* (5th edn, 1984) [17 G.1.6]; DJ Joubert *General Principles of the Law of Contract* (1987) 53–56; D Hutchison and BJ van Heerden 'Remedies for breach of an option' (1988) 105 South African LJ 547; GB Bradfield *Christie's Law of Contract in South Africa* (7th edn, 2016) 66.

⁵⁸ *Boyd v Nel* 1922 AD 414.

⁵⁹ Early cases did not permit the holder to interdict transfer to a *bona fide* third party: *Gardner v Jones' Exrs* (1899) 16 Supreme Court Reports 206, and *Kohling v Mackenzie* (1902) 19 Supreme Court Reports 287. Such an interdict was, however, granted in *Thomas v Robertson* (1907) 24 Supreme Court Reports 404, and that position has the support of writers and subsequent cases: *Archibald and Co Ltd v Strachan and Co Ltd* 1944 NPD 40 at 46–47; *Van der Merwe v Scheepers* 1946 NPD 147; *Le Roux v Odendaal* 1954 (4) SA 432 at 442–443.

⁶⁰ *Mackeurtan's Sale of Goods in South Africa* [17 G.1.6], cited with approval in three of the cases in the previous footnote: *Archibald*, *Van der Merwe* and *Le Roux*.

⁶¹ (1908) 25 Supreme Court Reports 680.

⁶² And if the option-holder continued with the contract without accepting the repudiation, the option-holder would be treated as having affirmed the contract and therefore not able to sue in respect of anticipatory breach. See *Ridgewood Properties v Valero* [2013] EWHC 98 Ch, [2013] Ch 525.

This discussion should not, however, cloud the fact that the existence of the rule itself is clear.

(3) A rejected basis: implied term

8-24. There has been some discussion whether the rule is based on an implied term, but, on the whole, that has not been accepted. Tromans argues that ‘there would seem to be little difficulty in implying a term against the grantor of an option ridding himself of the option property while the grantee is still entitled to exercise the option.’⁶³ He places particular reliance on a *dictum* of Lord Cockburn CJ in *Stirling v Maitland*.⁶⁴

[I]f a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

Of the cases Tromans cites in support of this argument, only one – *Pritchard v Briggs*⁶⁵ – actually considers the issue and there the Court of Appeal refused to imply the very term which Tromans proposes. The facts of *Pritchard* are rather complex. L sold land and granted to the buyer a right of pre-emption over some other land which L had retained. B became entitled to this right. It was exercisable upon sale of the retained land during the vendors’ lives. L subsequently granted P a lease of the retained land with an option to purchase exercisable upon L’s death. During L’s life the retained land was sold and transferred to B. On L’s death, P exercised the option and sought to claim the land from B. In the High Court there was an argument about whether the sale to B had been in breach of an implied term of the option granted to P. Walton J acknowledged that ‘at first blush this is precisely the kind of term which one would expect to find implied in the grant of an option, because otherwise the grantor would from the first have it in his power to destroy the subject matter of the relationship between him and the grantee as and when he pleased’.⁶⁶ However, he perceived a difficulty in implying such a term: although it might be clear that the grantor should not

⁶³ S Tromans ‘Options: as safe as houses?’ (1984) 43 CLJ 55, 64. See also M Dray et al *Barnsley’s Land Options* (7th edn, 2021) [2-006].

⁶⁴ (1864) 5 B and S 840 at 852, 122 ER 1043 at 1047. See also HG Beale (ed) *Chitty on Contracts* vol I (33rd edn, 2019) [14-024]. Tromans also cites *McIntyre v Belcher* (1863) 14 CB (NS) 654, 143 ER 602, and *Mackay v Dick* (1881) 8 R (HL) 37.

⁶⁵ [1980] Ch 338 (CA). None of the other cases which Tromans cites is directly in point. *Gardner v Coutts* ([1968] 1 WLR 173 (Ch D)) considers whether a right of pre-emption, which according to its express terms was exercisable only upon sale, was also triggered by gift. Others, such as *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 (Ch D) at 611D and *Wright v Dean* [1948] Ch 686 (Ch D), concerned claims for breach of contract for failure to perform the contract of sale which resulted from the exercise of the option.

⁶⁶ [1980] Ch 338 at 358D.

be able to sell, he thought that ‘one ought not to imply only part of an implied term, because one thinks that one sees what that part of it would have been, if one cannot see what the implied term in the round ought to be’.⁶⁷ He could not do this. The only sufficiently clear term which he could envisage was a blanket requirement that the grantor was to maintain the property in the same state as at the point of granting the option. That would render the property economically sterile, and although it might be acceptable were the option to have only a short duration, the parties would not have consented to it in the long term. There was no sufficiently clear term which would pass the ‘officious bystander’ test⁶⁸ to allow the implication of a term in fact.

8-25. On appeal, the focus of the arguments switched from implication to priorities. The Court of Appeal held that the option took priority over the subsequent transfer to B, which had not been in implement of the right of pre-emption, so B was bound by P’s option. Contrary to the first instance judge, the Court of Appeal clearly viewed the option as fettering L’s ability to transfer the property.⁶⁹ This was, however, not on the basis of an implied term. Stephenson LJ commented that ‘that is not an implication, except in the sense that it must be implicit in any promise to sell something to A that you will not sell it to B’.⁷⁰ This echoes an earlier statement of Lord Atkin’s. Commenting upon *Stirling v Maitland*,⁷¹ Lord Atkin had stated that he did not view the principle established by that case as a matter of implication, but rather simply as:⁷²

a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself ‘of his own motion’ bringing about the impossibility of performance is in itself a breach. If A promises to marry B and before performance of that contract marries C, A is not sued for breach of an implied contract not to marry anyone else, but for breach of his contract to marry B.

8-26. In denying that a term should be implied to prohibit transfer by the grantor of the option, the Court of Appeal in *Pritchard* was not denying that the grantor of an option would be in breach if the grantor transferred the property to a third party whilst the option subsisted without preserving the means of performance. Rather, it viewed the implication of a term as unnecessary to reach that result. The restriction upon transfer to third parties was simply a consequence of the main obligation, to transfer the land to the option-holder if the option was exercised. In Lord Atkin’s terminology, this was a ‘positive

⁶⁷ [1980] Ch 338 at 358E.

⁶⁸ *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA) at 227. The test for terms implied in fact is set down in *Marks & Spencer v BNP Paribas* [2015] UKSC 72, [2016] AC 742. But a *Stirling v Maitland* implied term is implied in law not in fact.

⁶⁹ *Pritchard v Briggs* [1980] Ch 338 (CA) at 420F.

⁷⁰ [1980] Ch 338 at 422.

⁷¹ (1864) 5 B and S 840, 122 ER 1043.

⁷² *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 (HL) at 717. The example given is one of the classic cases on anticipatory breach: *Frost v Knight* (1872) LR 7 Ex 111.

rule of law'. In *Ridgewood Properties Group Ltd v Valero Energy Ltd*⁷³ it was common ground between the parties, and accepted by Proudman J, that there was to be an implied term that the grantor of options in that case 'was bound not to do anything which would prevent performance' of the relevant agreements.⁷⁴ But this was treated as just an aspect of the principle of impossibility of performance and the judge's analysis focused on whether there had been a repudiation because the grantor had so acted to put performance out of its power.⁷⁵ Proudman J refused to imply a more specific term that the grantor was prohibited from disposing of the sites during the currency of the agreements.

(4) Repudiation and anticipatory breach

8-27. Instead of an implied term, the matter can be analysed via repudiation.⁷⁶ Transfer of the affected property to a third party by the grantor of an option will typically amount to repudiation of the obligations under the option agreement. As we are considering the position of a transfer which takes place before the option has been exercised, the breach will be anticipatory – it will necessarily occur prior to the time for performance. This section analyses the different ways in which an anticipatory breach may occur before applying those to options in leases.

(a) Rendering performance impossible or repudiation

8-28. There are two forms of anticipatory breach: (i) renunciation of one's obligations under the contract, and (ii) impossibility created by one's own act or default.⁷⁷ There are various cases in which A first contracts (by sale

⁷³ [2013] EWHC 98 (Ch), [2013] Ch 525.

⁷⁴ [2013] EWHC 98 (Ch), [2013] Ch 525 at [28].

⁷⁵ She held that the grantor had repudiated, but that subsequently the option-holder had affirmed.

⁷⁶ 'Implied terms' were often relied upon by contract lawyers to explain particular rules, which later came to be viewed as self-standing rules of contract law. Anticipatory breach is one example; frustration is another. One of the early explanations of anticipatory breach was that contracts contain an implied promise that neither party will do anything to the prejudice of the other inconsistent with the contract: e.g. *Hochster v De la Tour* (1853) 2 El and Bl 679 at 689, 118 ER 922 at 926. This is one of several theories explaining anticipatory breach, but it is no longer generally adhered to: JW Carter *Breach of Contract* (2012) [7-20], but cf E McKendrick *Contract Law* (13th edn, 2019) [19.9]. As noted above, in *Ridgewood Properties Group Ltd v Valero Energy Ltd* [2013] EWHC 98 (Ch), [2013] Ch 525 it was common ground that there was an implied term not to put performance out of one's power, but this was treated as an aspect of the principle against impossibility of performance.

⁷⁷ J Beatson *Anson's Law of Contract* (31st edn, 2020) 510: a passage approved in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 (Ch D) at 438. (A different aspect of the case was appealed: [1957] 1 WLR 979 (CA)). For detailed discussion see Carter *Breach of Contract* Pt III. This is an area where Scots and English law have been said to be identical: *Forslind v Bechely-Crundall* 1922 SC (HL) 173 at 179. McBryde's analysis, however, differs

or otherwise) to transfer property to B but subsequently, and before the time appointed for delivery under the first contract, transfers to C. Indeed, this is one of the classic examples of anticipatory breach. In *Synge v Synge*⁷⁸ the defendant promised to leave property to the plaintiff for her life. Instead, he conveyed the property to a third party. This was a breach of his obligation and the plaintiff was able to recover damages immediately. It is sometimes said that such cases are instances of anticipatory breach by incapacitating oneself from performance. This was certainly the position adopted in some of them,⁷⁹ and authoritative English texts adhere to it.⁸⁰ However, it is not clear that this is the law (or, at least, that this is the only explanation for such cases). The test for impossibility is a strong one.⁸¹ The breach must have become inevitable in fact. In Devlin J's authoritative formulation: breach must have become 'practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities'.⁸² As was remarked in the foundational case on anticipatory breach, sale to a third party does not necessarily render performance of a seller's obligations impossible because 'prior to the day fixed for doing the act . . . the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff'.⁸³ This is not to say that those decisions which hold such a transfer to be an anticipatory breach do not represent the law, but rather that it will often be better to view them as instances of anticipatory breach by repudiation instead of by rendering performance impossible.

8-29. Due to the difficulty of establishing that performance is, in fact, impossible, it is common to rely upon the acts by which the debtor is alleged to

from typical English texts. He classifies breach by 'putting implement out of one's power' separately from anticipatory breach, which he seems to view as coterminous with repudiation: McBryde *Contract* Ch 20, Pts 5 and 7. It is not clear what 'putting implement out of one's power' prior to the time for performance can be but anticipatory breach.

⁷⁸ [1894] 1 QB 466 (CA). Other frequently cited cases are: *Bowdell v Parsons* (1808) 10 East 359, 103 ER 811, and *Schaefer v Schuhmann* [1972] AC 572 (PC) at 586. In *Ford v Tiley* (1827) 6 B and C 325, 108 ER 472, the same reasoning was applied to an undertaking to grant a lease in the future: the grant of a lease to another party in the meantime amounted to an immediate breach. There appear to be no Scottish decisions on this point, but the rule is clearly accepted by the writers: McBryde *Contract* [20-20]; DM Walker *The Law of Contracts and Related Obligations in Scotland* (3rd edn, 1995) [32.8].

⁷⁹ *Ford v Tiley* (1827) 6 B and C 325 at 327, 108 ER 472 at 473; *Bowdell v Parsons* (1808) 10 East 359 at 361; 103 ER 811 at 812; *Synge v Synge* [1894] 1 QB 466 (CA) at 471.

⁸⁰ E.g. E Peel *Treitel The Law of Contract* (15th edn, 2020) [17-057].

⁸¹ It is surprisingly difficult to find a succinct statement in the Scottish authorities recognising that it is a breach of contract to render impossible, by means of actions or failure to act, the performance of obligations. See, however, *Ross v McFarlane* (1894) 21 R 396 (IH) at 407; *Thomas Nelson and Sons v The Dundee East Coast Shipping Co* 1907 SC 927 (IH) at 933 (Lord President Dunedin); Gloag *Contract* 600.

⁸² *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 (Ch D) at 438.

⁸³ *Hochster v De la Tour* (1853) 2 El and Bl 679 at 688; 118 ER 922 at 926.

have put performance out of the debtor's power as amounting to repudiation.⁸⁴ A leading formulation of what is required to establish repudiation by conduct is in *Forslind v Bechely-Crundall*: 'if the defender has behaved in such a way that a reasonable person would properly conclude that he does not intend to perform the obligations which he has undertaken, that is sufficient'.⁸⁵ The fact that the inability created cannot be said to be absolute is no bar to the conduct being viewed as a repudiation. In *Hochster v De la Tour*,⁸⁶ a seminal decision about anticipatory breach, early cases such as *Bowdell v Parsons*⁸⁷ (double sale) and *Ford v Tiley*⁸⁸ (double lease) were explained as examples of repudiation rather than of breach by rendering performance impossible.

8-30. The approach of South African law is of interest here, as it supports the view that breach by transfer of the subject of a contract of sale to a third party is not an instance of rendering performance impossible, but is instead a different category of anticipatory breach. Like Scots law, South African law has imported the concept of anticipatory breach from England.⁸⁹ It distinguishes between cases of absolute and relative impossibility.⁹⁰ The former is an objective concept which predicts breach with absolute certainty. It would be established, say, if a seller destroyed the subjects of the contract of sale. That mirrors what is required in English and Scots law to show that performance has been put out of one's power. Relative impossibility, on the other hand, is a subjective concept: it predicts breach only with reasonable and not absolute certainty. It arises when the debtor does something which makes it unlikely that the debtor will still be able to perform in the future, although it does not render performance absolutely impossible. The transfer by the seller of specific goods to a person other than the buyer is classed under this heading. There is debate about whether such cases are best treated as a separate category or merely an instance of repudiation.⁹¹ For the purposes of this study, the precise classification is not vital. What is significant is that such conduct is viewed as anticipatory breach.

⁸⁴ *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 (Ch D) at 436. See, generally, HG Beale (ed) *Chitty on Contracts* vol I (33rd edn, 2019) [24-030]; McBryde *Contract* [20-23].

⁸⁵ 1922 SC (HL) 173 at 179. See also JW Carter *Breach of Contract* (2nd edn, 2018, Australian edition) [9-09], discussing when a 'disabling act' will be treated as a repudiation.

⁸⁶ (1853) 2 El and Bl 679 at 688, 118 ER 922 at 926.

⁸⁷ (1808) 10 East 359, 103 ER 811.

⁸⁸ (1827) 6 B and C 325, 108 ER 472.

⁸⁹ For a comparison of the two legal systems, see E Clive and D Hutchison 'Breach of Contract' in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 176, 180–183.

⁹⁰ LF van Huyssteen et al *Contract: General Principles* (6th edn, 2020) 417; RD Sharrock et al 'Contract' in WA Joubert and JA Faris (ed) *The Law of South Africa* vol 9 (3rd edn, 2015) [409] and [413].

⁹¹ Van Huyssteen et al *Contract* 417 n 265; Sharrock et al 'Contract' [409].

8-31. There are also some relevant Scottish cases which recognise that a person bound to sell or lease to one person may not, in the interim, sell or lease to another. In *Effold Properties Ltd v Sprot*,⁹² interim interdict was granted to prevent a seller from transferring the subjects of a contract of sale to anyone but the pursuer. Although the case does not analyse matters in these terms, the interdict here prevented an anticipatory breach of contract.⁹³ Burn Murdoch notes that:⁹⁴

an interdict against a vendor from conveying or delivering to others the thing sold to the complainer is of rare occurrence,^[95] but, both on principle and authority,^[96] it is competent in any case where the Court would order specific delivery.

In *London and North Western Rly Co v Scottish Central Rly Co*,⁹⁷ a lessor was interdicted from leasing to another before the first lessee had obtained possession.

8-32. One cannot, however, advance the absolute proposition that all transfers of title to a third party by the seller of specific goods amount to repudiation of an existing contract of sale. Transfer amounts to repudiation only if the debtor takes no steps to remain in a position to perform the debtor's pre-existing obligation; otherwise it reveals no intention of non-performance. The seller, after all, might still remain able to perform even after transferring ownership to another. The obligation to vest ownership is one which is capable of vicarious performance.⁹⁸ There is usually no *delectus personae* in the choice of contracting party in respect of such an obligation. The option-holder could not reject performance on the grounds that the transfer was to be made by a different person. It is not, however, sufficient for the grantors of options simply to assert that they are confident that they will remain in a position to perform. As it was put by Bankes LJ, that is 'substituting a chance for a certainty' and amounts to repudiation.⁹⁹ A grantor must take steps to remain in a position to be able to perform. No doubt there will be difficult cases.¹⁰⁰ There is a tension between the rule that one need not have title to property in order to conclude a contract of sale in respect of that property¹⁰¹ and the rule that transfer of title by a seller to a third party

⁹² 1979 SLT (Notes) 84 (OH).

⁹³ The interdict was later recalled as there was held to have been no concluded contract.

⁹⁴ H Burn Murdoch *Interdict in the Law of Scotland* (1933) [298].

⁹⁵ Citing *Dick v Thom* (1829) 8 S 232 (IH), and *Boyd v Reid* (1836) 14 S 653 (IH).

⁹⁶ Citing *Williamson v North British Railway* (1846) 9 D 255 (IH) at 274 and 279.

⁹⁷ (1847) 10 D 215 (IH).

⁹⁸ On vicarious performance, see Gloag *Contract* 416–418; McBryde *Contract* [12-44]–[12-45]; J Beatson *Anson's Law of Contract* (31st edn, 2020) 444. Two prominent Scottish cases are *Anderson v Hamilton and Co* (1875) 2 R 355 (IH), and *West Stockton Iron Co (Ltd) v Nielson and Maxwell* (1880) 7 R 1055 (IH).

⁹⁹ *Omnium d'Enterprises v Sutherland* [1919] 1 KB 618 (CA) at 621.

¹⁰⁰ A transfer within a corporate group may be one.

¹⁰¹ Stair gives the general principle: Stair *Institutions* I x 13. See also RJ Pothier *Traité des obligations* (1761, reprinted with additions, 1764) in M Bugnet (*Œuvres de Pothier* vol II

will usually amount to repudiation of the contract of sale.¹⁰² As a general rule, however, transfer of title will amount to repudiation.

(b) *Application to options*

8-33. What is the impact of these rules on options? The English case of *Lovelock v Franklyn & Cox*¹⁰³ concerns the anticipatory breach of an option. The defendant was to assign his interest in particular land to the plaintiff upon payment of a sum of money. The option was to last for seven years. Before these seven years had run their course, the defendant assigned his interest in the land to another. This was held to constitute a breach: the grantor had incapacitated himself from performing the contract. This result was, however, said to flow only from the particular terms of the option: it required the grantor to convey the property whenever the option-holder called upon him to do so. By transferring, the grantor put it out of his power to perform this obligation. The court distinguished that from what would have been the position had the option been to acquire at the end of seven years. In that event, the defendant ‘may have all the intermediate time open to him for acquiring the means of performing his contract’¹⁰⁴ and so it was said that the transfer would not, in those circumstances, have amounted to an anticipatory breach. This is unlikely to be the result today. The decision in *Lovelock* precedes the landmark decision of *Hochster v De la Tour*¹⁰⁵ and so stems from a time when rendering performance impossible was the only form of anticipatory breach which was recognised.¹⁰⁶ *Hochster*, however, made clear that conduct could amount to repudiation even if it did not render performance absolutely impossible, and that some cases previously characterised as instances of impossibility could better be viewed as instances of repudiation. Transfer by the grantor of an option without taking steps to ensure continued performance of the option will typically amount to repudiation of

(1861) [133]–[134]; RJ Pothier *Traité du contrat de vente* in M Bugnet *Œuvres de Pothier* vol III (1861) [7]; MP Brown *Treatise on the Law of Sale* (1821) [136]; cf *Campbell v McCutcheon* 1963 SC 505 (IH).

¹⁰² For American analysis, see Z Wolfe *Farnsworth on Contracts* (4th edn, 2020) §8.24, citing numerous cases in which an inconsistent conveyance was held to amount to repudiation. But the text also notes *Neves v Wright* 638 P 2d 1195 (Supreme Court of Utah, 1981) at 1198, which held that the ‘seller of real estate need not have title at all times during the executory period of a contract’, but that this must be ‘carefully applied to avoid unfairness, sharp practice, and downright dishonesty’. In *Gibson v Royal Bank of Scotland* [2009] CSOH 14, 2009 SLT 444 at [39] it was noted that, where a contract of sale provides for completion far in the future, granting a standard security for temporary reasons may not amount to breach of contract.

¹⁰³ (1846) 8 QB 371, 115 ER 916.

¹⁰⁴ (1846) 8 QB 371 at 378, 115 ER 916 at 918.

¹⁰⁵ (1853) 2 El and Bl 679, 118 ER 922.

¹⁰⁶ It is therefore authority for the stringency of the impossibility requirement and suggests that it would not be met where a seller transfers to another some time before the date of entry under the pre-existing contract of sale.

the grantor's obligations even if it does not render performance absolutely impossible. The authors of *Barnsley's Land Options* support this position, and even where the option is not exercisable until a point in the future.¹⁰⁷ In doing so, they rely upon various American decisions in which options were found to have been repudiated when the grantor transferred the land to a third party.¹⁰⁸

8-34. As with contracts of sale, there can be no absolute rule that transfer amounts to repudiation of an option. Rather, it does so only if it reveals an objective intention on the part of the grantor not to perform the obligations previously undertaken. The possibility of vicarious performance was noted above:¹⁰⁹ the grantor might transfer but agree with the purchaser that the purchaser will honour the option if it is exercised.¹¹⁰ Alternatively, the grantor might agree with the purchaser that the property is to revert to the grantor in the event of the option being exercised.¹¹¹ Absent such an arrangement, however, it is thought that transfer will amount to breach.

8-35. What of the argument that a rule that an option-holder could not transfer land would result in the economic sterilisation of the land? It will be recalled that at first instance in *Pritchard v Briggs*, Walton J refused to imply a term prohibiting the grantor of an option from transferring the subjects on the basis that this would render the property economically sterile.¹¹² Presumably he would level the same criticism against the results drawn above from the application of the rules of anticipatory breach. The point may be made slightly differently. In *Advice Centre* Lord Drummond Young's concern was that 'the right to sell is one of the most normal incidents of a right of property, and . . . clear wording or a clear implication would be required to restrict or remove that right'¹¹³ and that this was not present, at least in the case of an option granted by a landlord to the tenant. Such concerns seem misplaced. First, they do not acknowledge the considerable amount of authority in favour of the view that grantors of options are not entitled to transfer. In *Pritchard*, for example, the (English) Court of Appeal found that

¹⁰⁷ M Dray et al *Barnsley's Land Options* (7th edn, 2021) [10-001] and [10-021]. They do not, however, note the decision in *Lovelock*

¹⁰⁸ *Schoonover v Kahn* 377 SW 2d 535 (Kansas City Court of Appeals, 1964); *Fullington v M Penn Phillips Co* 395 P 2d 124 (Supreme Court of Oregon, 1964). In both, however, the acts relied upon as constituting repudiation consisted of more than simply transferring the subjects to a third party. See also *Space Center Inc v 451 Corp* 298 NW 2d 443 (Supreme Court of Minnesota, 1980) at 450, which is clear that loss of title amounts to repudiation.

¹⁰⁹ Para 8-32.

¹¹⁰ This might confer a *jus quaesitum tertio* upon the option-holder. On this approach, the grantor remains liable but would perform vicariously.

¹¹¹ The grantor would then perform the contract personally, not vicariously. Another possibility is for there to be tripartite agreement between the grantor, the transferee and the holder of the option that, from the moment of transfer, the transferee is to be bound and not the grantor. This would amount to a novation.

¹¹² [1980] Ch 338 (CA), discussed at para 8-24 above.

¹¹³ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [47].

the grantor of an option was not free to transfer to another in the period before the option could be exercised. Secondly, and substantively, the property is not sterilised, as the prohibition upon transfer is not absolute. The grantor remains free to transfer, but on the basis that the transfer is subject to the option. Thirdly, and most importantly, the restriction upon transfer is a direct consequence of obligations which the grantor has voluntarily assumed. It is not imposed against the grantor's will, but rather because transfer is inconsistent with, and breaches, the core obligation of the option, by which the grantor has agreed to be bound. A person who contracts to sell property to A should not be free to sell to B merely because the right to sell is one of the incidents of property. The suggestion is no more valid where the transaction concerned is the grant of an option.

8-36. For completeness, three potential difficulties with applying the rules of anticipatory breach to options should be considered, even if only so that they may be dismissed. The first arises because of the different ways in which options may be analysed.¹¹⁴ On some analyses (namely viewing an option as a conditional promise or a conditional contract), an obligation to convey, albeit a conditional one, exists from the outset, whereas on another analysis (namely, viewing the option as a firm offer to sell) it might be said that no such obligation exists until the option is exercised. For present purposes the difference does not matter. As discussed above, in the case of an option analysed as a firm offer, the grantor has irrevocably consented to enter into a contract of sale. A purported revocation of that consent has no effect.¹¹⁵ The position is thus little different from that of a person who is under an immediate, if conditional, obligation to convey. This is an instance where Lord Hoffmann's approach of viewing the various analyses as metaphors to describe the legal position of the option-holder is of particular use, at least for the purposes of ascertaining the availability of interdict and the application of the offside goals rule.¹¹⁶

8-37. A second potential difficulty is that it is sometimes suggested that the rules of anticipatory breach do not apply to what Common Law systems describe as unilateral contracts. The classic definition of a unilateral contract is given by Diplock LJ in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd*:¹¹⁷

[O]ne party, whom I will call 'the promisor', undertakes to do or to refrain from doing something on his part if another party, 'the promisee', does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing.

Some court decisions from the United States hold that the rules of anticipatory

¹¹⁴ See para 8-07 above.

¹¹⁵ See paras 8-08 to 8-11 above.

¹¹⁶ *Spiro v Glencrown Properties Ltd* [1991] Ch 537 (Ch D) at 544.

¹¹⁷ [1968] 1 WLR 74 (CA) at 83. See MA Hogg *Obligations* (2nd edn, 2006) [1.09]–[1.15] on the use of the terminology 'unilateral' in Scots law.

breach do not apply to unilateral contracts.¹¹⁸ The logic is that the doctrine of anticipatory breach exists to allow creditors to free themselves from their obligations when it is clear that the debtor is not going to perform. Hence if the creditor has no obligations (as is the case in a unilateral contract), there is no need for protection via the doctrine. Were that also to be the rule here, the rules of anticipatory breach would not apply to options.¹¹⁹ As matters stand, however, there appears to be no support in either English or Scots law for the proposition that anticipatory breach does not apply to unilateral contracts.¹²⁰ Quite the contrary is the case: in the English decision of *Lovelock v Franklyn & Cox*,¹²¹ as we have seen, there was held to have been anticipatory breach of an option, and commentators support that approach. Further, addressing the substance of the argument, such an exclusion has been criticised,¹²² primarily on the basis that there are other reasons for the doctrine of anticipatory breach besides freeing creditors from their obligation to remain ready to perform. Indeed, options may provide a powerful illustration of this. Were the rules about anticipatory breach not applicable to an option, the option-holder would be unable to act to prevent conduct inconsistent with the grant of the option before the option was exercised. The option-holder's right would be reduced to a right to claim damages; other remedies (such as interdict) would not be available to ensure that the grantor remained in a position actually to perform when the option-holder exercised the option. That would significantly weaken the option-holder's position.

8-38. A final issue to be raised is this: the predominant English view is that an anticipatory breach is not an actual breach of contract, but only amounts to a breach once it is accepted by the 'innocent' party.¹²³ This view might be thought to pose difficulties for the application of the offside goals rule, given that a breach of contract is necessary for the application of the rule. An 'innocent party' seeking to rely on the offside goals rule cannot accept the repudiation,

¹¹⁸ JW Carter *Breach of Contract* (2012) [7-72] and [7-78]–[7-82]. See also AL Corbin *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law* vol IV (1951) §962.

¹¹⁹ Even if the option were analysed otherwise than as a unilateral contract, the same reasons which are given for refusing to apply the doctrine of anticipatory breach to unilateral contracts exist in respect of unilateral promises and firm offers.

¹²⁰ Carter's detailed text cites none. In fact, he suggests that it has in fact been applied to options contracts, citing *Wright v Dean* [1948] Ch 686 as an example. *Wright* was not, however, a case of anticipatory breach but rather one where damages were claimed when the grantor was unable to perform the contract arising from exercise of the option.

¹²¹ (1846) 8 QB 371, 115 ER 916.

¹²² E.g. *Corbin on Contracts* vol IV §962; DW Robertson 'The doctrine of anticipatory breach of contract' (1959) 20 Louisiana L Rev 119, 122. RA Lord (ed) S Williston *A Treatise on the Law of Contracts* vol XXIII (4th edn, 2002) §63:60 supports the rule, partly because that text is hostile to the entire concept of anticipatory breach.

¹²³ E.g. *Johnstone v Milling* (1886) 16 QBD 460 (CA) at 472. This view is criticised by JC Smith 'Anticipatory Breach of Contract' in EZ Lomnicka and CGJ Morse (eds) *Contemporary Issues in Commercial Law: Essays in Honour of Prof AG Guest* (1979) 175, 179.

because it is performance of the contract that is desired, not damages. Various points may be made in response to this. First, although that is the orthodox English conceptualisation of anticipatory breach, there is also support for treating anticipatory breach as an actual breach, albeit one governed by particular rules.¹²⁴ The ‘present breach’ doctrine is indeed dominant in the United States¹²⁵ and in South Africa. A previous edition of a leading South African textbook stated: ‘[a]nticipatory breach of contract [is] construed as a breach that sets in immediately due to the breach of an *ex lege* duty, flowing from *bona fides*, not to commit anticipatory breach of contract’.¹²⁶ This is consistent with Lord Atkin’s statement in *Southern Foundries* that there was a ‘positive rule of law’ that the promisor was not of his own motion to make performance impossible.¹²⁷ Further, even if the theory of English law is that anticipatory breach is not an actual breach, it does not follow that it must also be Scots law’s analysis. Clive and Hutchison state that Scots law is ‘ambivalent’ about whether anticipatory breach constitutes an actual breach of contract.¹²⁸ The issue has hardly been debated in Scotland.¹²⁹ Secondly, and most significantly, it seems unlikely that the application of the offside goals rule turns upon what is essentially a question of classification for contract law. It is clear, as discussed above, that the option-holder could interdict transfer to a third party if the grantor’s intentions are discovered in time. Whether the anticipatory breach which justifies that interdict is technically classified as a present breach of contract does not seem of importance for whether the offside goals rule applies. The fact that the transfer could be prevented by interdict should suffice.

(5) A particular rule for options in leases?

8-39. The rule in respect of freestanding options is clear: transfer by the grantor without taking steps to protect the option is not permitted. Are options to purchase in leases to be treated differently? That is the only remaining justification for Lord Drummond Young’s view in *The Advice Centre for Mortgages v McNicoll*¹³⁰ that a landlord breaches no obligation by transferring

¹²⁴ Smith ‘Anticipatory Breach of Contract’.

¹²⁵ JW Carter *Breach of Contract* [721].

¹²⁶ S van der Merwe et al *Contract: General Principles* (3rd edn, 2007) 360. This is not viewed as breach by infringement of a contractual prohibition, but rather simply as breach of contract by wrongful conduct. The current edition maintains this analysis, albeit in different terms, considering that the breach takes place immediately: LF van Huyssteen et al *Contract: General Principles* (6th edn, 2020) 408.

¹²⁷ *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 (HL) at 717.

¹²⁸ E Clive and D Hutchison ‘Breach of Contract’ in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 176, 181.

¹²⁹ There may be more support for the ‘present breach’ theory than is generally acknowledged. See e.g. Green’s *Encyclopaedia* which states that ‘repudiation is in law a wrongful act’: WT Watson ‘Contract’ in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol 4 (1927) §1021.

¹³⁰ [2006] CSOH 58, 2006 SLT 591.

the subjects of the lease while the option subsists. If this view were correct, it would give rise to difficult borderline issues.¹³¹ When is the usual rule to apply and when the rule about options contained in leases? What if the option was granted in a separate ‘back-letter’ contemporaneous with the lease, or if it was granted, say, a week after the lease? The fact that the rule would have fuzzy borders is not a very strong criticism, however, for it is inherent in the concept of boundaries that there will be boundary disputes. The merits of the argument must therefore be considered.

8-40. For a landlord to be free to transfer the subjects of the lease, the option to purchase would have to cease to bind after transfer,¹³² as otherwise the prospect of a damages claim would impinge upon the landlord’s freedom of transfer. An option which is defeasible by the transfer of the subjects is an odd one, for which there is likely to be little demand in practice.¹³³ Nonetheless, there are at least two grounds on which it might be said that an option to purchase which is included in a lease ceases to bind the original landlord after transfer and so can impose no obligation upon the landlord not to transfer. The first is that, as a matter of interpretation, this was what the parties intended. The second is that there is a rule that all personal conditions of leases cease to bind the original landlord in the event of transfer. These grounds are considered in turn. The first is possible, but unlikely; the second is clearly not the law.

(a) *Intention*

8-41. If the parties intend that the tenant will cease to have the benefit of the option if the landlord transfers the property, that intention will be given effect. It was suggested above that, in a freestanding option, the parties will very rarely intend that the benefit of the option should cease if the grantor transfers ownership to someone else.¹³⁴ The question is what the parties’ intention should be taken to be when an option is included in a lease. The point was discussed

¹³¹ The same issues arise with a rule that the offside goals rule cannot apply to the terms of leases: see paras 9-10 to 9-14 below.

¹³² Note that if this construction of the option is adopted, securing performance of the grantor’s obligations with a standard security would do nothing to render it binding upon a successor. If the obligation is conditional upon the grantor being owner at the time of exercise, after transfer of the property there would be no obligation to secure and so the security would lapse: WM Gloag and JM Irvine *Law of Rights in Security* (1897) 2; GL Gretton ‘The Concept of Security’ in DJ Cusine (ed) *A Scots Conveyancing Miscellany* (1987) 126, 128; AJM Steven, ‘Accessoriness and security over land’ (2009) 13 EdinLR 387; Gordon and Wortley *Scottish Land Law* vol II [19-07]. Despite this, *Advice Centre* states both that the option lapses upon transfer by the landlord *and* that the use of a standard security would avoid this consequence: *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [47]–[48]. It is suggested that the correct approach is that the option does not lapse.

¹³³ See paras 8-04 to 8-06 above.

¹³⁴ Paras 8-04 and 8-05 above.

in the English case of *Wright v Dean*.¹³⁵ The grantor of a lease containing an option to purchase transferred the reversion to a third party without taking any steps to protect the option. The tenant, unable to exercise the option against the successor, sought to do so against the original landlord, who argued that he had ceased, upon transfer, to be bound by the option. It was argued that ‘the fact that [the option] is contained in a lease is relevant to its construction and effect’.¹³⁶ Specifically: a landlord is free to transfer property which is subject to a lease and the parties cannot have intended that the option would prevent the landlord from being able to do so. Indeed, typically the parties will have made their view clear that the landlord is to be free to transfer the reversion by defining the term ‘landlord’ or ‘lessor’ as including, where the circumstances admit, successors in title of the original party. That had been done in *Wright*. This, however, was held insufficient to alter the normal rule that contracts bind the parties to them. Wynn Parry J thought that it would require far clearer language than this to demonstrate an intention that the landlord should cease to be bound by the option upon parting with the reversion.¹³⁷

8-42. *Wright* was not cited in *Advice Centre*. Lord Drummond Young made exactly the same points which the original landlord made there and which Wynn Parry J rejected. Lord Drummond Young stated that:¹³⁸

[T]he right to sell is one of the most normal incidents of a right of property, and in my opinion clear wording or a clear implication would be required to restrict or remove that right. Nothing in either the Missives or the Lease comes close to achieving that result. Indeed, in the lease the expression ‘the Landlords’ is defined as including, where the context so admits, all persons deriving title from them.

The approach in *Wright* is to be preferred. First, it is not true that granting an option prevents the landlord from transferring; it merely requires ensuring that the landlord remains in a position to perform the requirements of the option after transfer. That might be done by taking the successor bound by the option. Second, the restriction on the landlord’s freedom of transfer is voluntarily undertaken: as has been shown above, it is inherent in consenting to an option to be bound by it.

8-43. A third response concerns the premise on which the argument is based, namely that a landlord may freely transfer the subjects of the lease. This will be true of most, but not all, leases. Importantly, a landlord is only able to transfer the property subject to a lease without having to take the successor bound to recognise the tenant’s rights *because there is a rule of law which does this for the landlord*. The position of contract law is that if L leases to T for 20 years, L is

¹³⁵ [1948] Ch 686 (Ch D).

¹³⁶ [1948] Ch 686 at 689.

¹³⁷ [1948] Ch 686 at 694. *Wright* was applied in *Kitney v Greater London Properties Ltd* [1984] 2 EGLR 83 (Ch D) at 84.

¹³⁸ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [47].

bound to maintain T in possession of the subjects for those 20 years. If T's right is not real and L wished to transfer the subjects to S, L would have to ensure that S would not challenge T's possession for the remainder of the 20 years. If L did not do so, and S evicted T, L would be liable for breach of contract. This proposition is supported by Gaius¹³⁹ and, in Scotland, by Bankton,¹⁴⁰ Erskine¹⁴¹ and Bell¹⁴² although a different approach was taken in *Advice Centre*.¹⁴³ If, however, the lease in question is a real right, it binds successors by virtue of a rule of law, so L may transfer without having to take S bound. Ownership of land subject to a lease is freely transferable only because there exists this rule of law which ensures that the obligations of the lease continue to bind someone capable of performance after transfer. That free transmissibility does not provide a strong basis for arguing that an option should cease to bind the original landlord after transfer. In respect of options to purchase (at least), there is no rule of law which automatically takes a successor to the landlord bound. Landlords must arrange this for themselves if they are to remain able to perform. It is suggested that Wynn Parry J was correct when he stated in *Wright* that it would require clear language for the original landlord to cease to be bound by an option after transferring the subjects of the lease. This will very much be the exception and not the rule.

(b) Do personal conditions bind the original landlord after transfer?

8-44. The second possible basis for concluding that an option to purchase ceases to bind the original landlord after transfer is that *all* personal conditions cease to bind the original landlord after transfer. Lord Drummond Young stated in *Advice Centre* that 'an option is not *inter naturalia* of the lease . . . and is accordingly personal to the original landlord . . . Thus the option was always liable to be defeated when the property passed to a singular successor.'¹⁴⁴ Read in context, this seems to be stating that as well as not binding a successor landlord, personal conditions cease to exist altogether upon transfer. If that is what was being said it is not correct. The ordinary rule of contract law is that contracts bind the parties to them and no one else. An exception is recognised for certain terms (real conditions) of those leases which are real rights: upon transfer by the

¹³⁹ D 19.2.25.1.

¹⁴⁰ Bankton *Institute* I xx 1 and 2.

¹⁴¹ Erskine *Institute* III iii 15. *Downie v Campbell* 31 Jan 1815 FC is an illustration, involving a lease with a date of entry in the future. See also P Gane (tr) *The Selective Voet* vol III (1956) XIX 2 17. *Stair Institutions* I xv 4 might be thought to suggest that the lessee's contractual right ceases, but that would be inconsistent with the lessor's duty to maintain the lessee in possession for the duration of the lease, which Stair detailed at I xv 6. See also Bell *Leases* vol I 88.

¹⁴² Bell *Commentaries* I 64.

¹⁴³ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [47], discussed in the following paragraph.

¹⁴⁴ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [47].

landlord, the landlord's successor acquires those rights and is bound by those duties of the lease which are real conditions. But some of the terms of the lease do not transmit. To these personal conditions the ordinary rule of contract law applies: the original landlord remains vested in these rights and bound by these duties. Gloag viewed it as 'clear on principle' that 'a landlord must remain liable on any obligations in the lease which do not transmit against the purchaser'.¹⁴⁵ The rule which distinguishes between real and personal conditions is simply one which allocates rights and obligations: it does not terminate them. The suggestion to the contrary is unfounded.

8-45. The statement in *Advice Centre* that personal conditions are extinguished upon transfer by the landlord appears to stem from a broader misapprehension about the behaviour of personal rights upon the transfer of the property to which they relate. Lord Drummond Young stated that any personal rights relating to property, and not only personal conditions of leases, disappear on transfer by the grantor. When discussing contractual licences and leases which do not satisfy the requirements of the Leases Act 1449, Lord Drummond Young said that those rights 'are purely personal, and do not survive the sale of the property'.¹⁴⁶ Such rights 'would necessarily terminate on a sale because they are not valid against singular successors'.¹⁴⁷ But these are contracts and so they bind the original grantor despite the transfer of the property to which they might relate.¹⁴⁸ To give an example: if A contracts to sell property to B, B has a personal right against A. If A then transfers the property to C, A is not freed from the obligation to transfer to B. Zimmermann's outline of the position of the *ius commune* is useful as a summary of the principles which apply in respect of contracts of lease.¹⁴⁹

¹⁴⁵ Gloag *Contract* 264. See also DJ Cusine (ed) *The Conveyancing Opinions of Professor JM Halliday* (1992) 361; KGC Reid and GL Gretton *Conveyancing 2006* (2007) 105. This is also the position of American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977) §16.1, comment d.

¹⁴⁶ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [47]. Presumably the point at which the rights would cease to exist would be transfer and not the conclusion of a contract of sale.

¹⁴⁷ [2006] CSOH 58, 2006 SLT 591 at [49]. See also [24]: 'The rights that the pursuers enjoyed as against Thomas H Peck Limited prior to the sale to the defender were purely personal in nature, and came to an end as soon as that company disposed the property to a third party.'

¹⁴⁸ Authority for this proposition in respect of leases was cited at nn 143–146 above. For discussion of the situation to which grant of an irrevocable licence gives rise, see A Dowling 'Contractual licences: third parties and implied terms' [2006] Conv 197. An important case in respect of licences is *King v David Allen and Sons, Billposting, Ltd* [1916] 2 AC 54 (HL). The grantor of a licence was held to be in breach of contract for having put it out of his power to perform the licence by transferring the subjects of the licence to a third party.

¹⁴⁹ R Zimmermann *The Law of Obligations* (1996) 379. For pugnacious criticism of the notion of a European '*ius commune*', see DJ Osler 'The Fantasy Men' (2007) 10 *Rechtsgeschichte* 169, 179–192. In Osler's view, the '*ius commune*' which Zimmermann describes is that of the Germano-Dutch legal family and not a pan-European legal family. Given the influence of Roman-Dutch law on Scots law, that would not diminish the value of Zimmermann's summary for those areas of Scots law which remain heavily influenced by Roman-Dutch law.

The authors of the European *ius commune* usually summed up the position which had been handed down to them from Roman law in the maxim ‘*emptio tollit locatum*’: sale breaks hire. This is as crisp and poignant as it is inaccurate. First of all, it is not the contract of sale that has any detrimental effect on the relationship between the lessor/vendor and his tenant. It is only on account of the subsequent transfer of possession and of ownership that the lessor/vendor makes it impossible for himself to carry out his obligation under the contract of lease (namely to provide *uti frui praestare licere*), and that he exposes the tenant to the risk of being expelled by the purchaser. And the second point: the contract of lease was, of course, not ‘broken’ by either sale, transfer of ownership or any other transaction. It continued to exist and did, in fact, provide the tenant with his only remedy, the *actio conducti* against the lessor. Whatever transaction had taken place between the lessor and the third party did not affect the tenant’s contractual position, but jeopardized his (continued) detention. *Emptio tollit locatum* therefore really means that the tenant was not in a position to counter the claims of any new owner of the property.

In summary, and contrary to the statements in *Advice Centre for Mortgages*, there is no rule of law that an option to purchase granted to a tenant simply ceases to exist if the landlord transfers ownership of the subjects of the lease. In the unlikely event that the parties wish it to do so, they should provide expressly for this.

D. CONCLUSION

8-46. Although an option may be created in various ways, and may be analysed in various ways, common to all is the grantor’s undertaking to transfer to the holder upon the holder exercising the option.¹⁵⁰ A corollary of this obligation is the requirement to remain in a position to perform if called upon to do so by the holder. It is therefore a breach to transfer the subjects of the option without taking steps to ensure that, if the option is exercised, the grantor could still perform. In practical terms, the most likely means by which this will be achieved is to make the transfer subject to the option. The holder can interdict a transfer which would put performance out of the grantor’s power. Options granted by a landlord to a tenant are no different. This is of considerable importance for the landlord who contemplates transfer: if the landlord transfers, and yet does not take steps to remain in a position to perform, there is a real prospect of being held liable later for breach of contract. The fact that transfer amounts to breach may also be of consequence for the successor landlord. It means that an important condition for the offside goals rule has been satisfied. That rule is the subject of the next chapter.

¹⁵⁰ Unless the parties intend that the option-holder is simply to have the ‘chance’ of acquiring. As discussed above, that is unlikely.

9 The Impact of the Offside Goals Rule

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9-01. Singular successors are not bound by the personal obligations of their predecessor in title.¹ That core principle of property law also flows from the logic of the law of contract: obligations bind only those who have agreed to be bound by them, and a successor has not done so. To this rule there are two exceptions. The first is that category of personal rights known as ‘real conditions’, namely those where the parties to the obligation are the owners of particular things (or the holders of particular rights) for the time being. Real conditions are subject to particular rules of constitution. Chapters 3 to 7 explored those rules in the context of leases. The second exception, frequently referred to as the ‘offside goals rule’,² can result in successors being affected by obligations of a predecessor of which they had knowledge. That second exception is the focus of this chapter. The requirements of the rule are canvassed, before considering whether it applies to the terms of leases. The results which that rule would produce in respect of certain common lease terms are then suggested.

¹ Hume Lectures IV 311–318; Bell *Commentaries* I 307–308; Reid *Property* [688]; *Andrew Melrose & Co v Aitken, Melrose & Co Ltd* 1918 1 SLT 109 (OH) at 111.

² The metaphor used by Lord Justice-Clerk Thomson in *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 (IH) at 501.

A. IN GENERAL: THE IRRELEVANCE OF KNOWLEDGE

9-02. If a term fails to qualify as a real condition of a lease, a successor will not be bound by the term simply by having been aware of it. Although Lord Deas once stated that successors could be said to adopt obligations which are patent on the face of leases,³ that is not the law. The various cases in which terms have been held to be personal are testament to that. Were this not so, the distinction between real and personal conditions of leases would collapse,⁴ as successor landlords will typically be aware of the terms of subsisting leases. As it was put by Lord Low in *Morier v Brownlie and Watson* in respect of a failed attempt to constitute an obligation as a real burden:⁵

It was finally argued that Brownlie and Watson knew of the obligation which the Harpers had undertaken in regard to the unfeued ground, and are therefore bound to implement that obligation. . . . If, as I think was the case, the personal obligation did not affect the lands, then knowledge on the part of the purchasers that such an obligation had been granted appears to me to be of no moment. Assuming that they knew of the obligation, they knew also that it did not affect the lands.

In *Mackenzie v Imlay's Trs*,⁶ *Morier* was referred to in respect of a term of a lease which was held not to bind a successor to the landlord. Both the Sheriff-Substitute and the Inner House held that the successor's knowledge of the term made no difference to whether the successor was bound by it.

9-03. Nor does the fact that successors knew of a term provide a basis for saying that they are personally barred from denying that it binds them.

³ *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH) at 1106. See also *Rae v Finlayson* (1680) Mor 10211, where a clause permitting the tenant to retain rent in compensation for expenses incurred improving the property was held to be personal, but the parties were to be heard on whether the successor knew of the term when he agreed to purchase the subjects. Mackenzie *Observations* 190 noted the oddity of this.

⁴ B Rudden 'Economic Theory v Property Law: The *Numerus Clausus* Problem' in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence 3rd Series* (1987) 239, 246.

⁵ (1895) 23 R 67 (IH) at 74 (Lord Ordinary). *Beckett v Bisset* 1921 2 SLT 33 (OH) at 34 is in similar terms. See also *Campbell's Trs v Corporation of Glasgow* (1902) 4 F 752 (IH) at 757–758; *Gloag Contract* 232; *Reid Property* [392]. There are some cases which held a contractual restriction in respect of the use of moveable property to bind a successor merely because the successor had notice of it: *M'Cosh v Crow and Co* (1903) 5 F 670 (IH); *Wm Morton & Co v Muir Bros & Co* 1907 SC 1211 (IH). The better view is that this is not the law: *Andrew Melrose & Co v Aitken, Melrose & Co Ltd* 1918 1 SLT 109 (OH). The reasoning in *M'Cosh* does not seem to be based on the acquirer having notice. In *Morton and Co* only Lord M'Laren decided that purchasers were bound by an obligation binding on the transferor because of their notice (1225–1226); Lords Pearson (1229) and Ardwall (1232) held that the purchaser had adopted the contract. It is no longer, if it ever was, English law that one who acquires property in goods is bound by the transferor's obligations to use or employ the property in a specified manner: A Burrows (ed) *English Private Law* (3rd edn 2013) [4-138].

⁶ 1912 SC 685 (IH). *Morier* is cited by the Sheriff-Substitute at 690. Lord Dundas (at 693) expresses the same view, although he does not cite *Morier*.

Personal bar requires inconsistent conduct on the part of the person bound,⁷ and if all a successor does is to acquire ownership with the knowledge of a personal condition, there is no inconsistency in behaviour when the successor subsequently refuses to be bound by that term and seeks to assert some right against the tenant which is inconsistent with the personal condition in question.

B. THE EXCEPTION: THE OFFSIDE GOALS RULE

9-04. The offside goals rule is an exception to this general position that a successor's knowledge of a predecessor's obligations is irrelevant. The paradigm case to which it applies is that of double sale: A contracts to sell to B and then, in breach of that contract, A contracts to sell the same property to C who knew of B's prior right. In those circumstances, C is affected by A's prior contract with B, typically with the result that C's title is voidable at B's instance. The rule applies more broadly than cases of double sale. Kenneth Reid's is the leading formulation of the rule. He states that it requires the following to be shown in order for a grantee to be affected by his grantor's personal obligations:⁸

- (i) that there was an antecedent contract or other obligation affecting the grantor;
- (ii) that the grant was in breach of a term, express or implied, of that obligation; and
- (iii) either that the grantee knew⁹ of that antecedent obligation prior to the completion of the grantee's own right¹⁰ or that the grant was not for value.¹¹

⁷ EC Reid and JWG Blackie *Personal Bar* (2006) Ch 2, Pt II, specifically [2-08].

⁸ Reid *Property* [695].

⁹ Where the second grantee is a legal person, the question arises: which natural persons' knowledge is to be attributed to the legal person? See e.g. *Liquidator of Letham Grange Development Co Ltd v Foxworth Investments Ltd* [2011] CSOH 66, 2011 SLT 1152 [23]–[24] (a decision subsequently subject to appeal: [2014] UKSC 41, 2014 SC (UKSC) 203) and *Lebon v Aqua Salt Co Ltd* [2009] UKPC 2, [2009] BCC 425.

¹⁰ It is an open question what is the relevant cut-off point for assessing the second grantee's knowledge. On one view, knowledge acquired at any point before the completion of the second right is sufficient to trigger an offside goal: *Alex Brewster and Sons v Caughey* 2002 GWD 15-506 (OH), a view supported by DL Carey Miller with D Irvine *Corporeal Moveables in Scots Law* (2nd edn, 2005) [8.31] and DL Carey Miller 'Good Faith in Scots Property Law' in ADM Forté (ed) *Good Faith in Contract and Property* (1999) 103, 109. The alternative view is that the point for assessing the second party's good faith is the moment when that party contracts with the transferor. That is supported by RG Anderson "Offside goals" before Rodger Builders' 2005 JR 277, 290–291; RG Anderson 'Fraud on transfer and on insolvency: ta . . . ta . . . tantum et tale?' (2007) 11 EdinLR 187, 202; R Rennie 'Marching towards equity – blindfolded' 2009 SLT (News) 187, 189. The second view seems to be the better one (although it can only apply where the second transfer is preceded by a contract). If that is not the rule, the potential for prejudice to the second purchaser is significant. Such a person may have entered into various other contracts and/or incurred significant expenditure in reliance on the contract to purchase the land, which was entered into in good faith, but later be unable to obtain transfer in implement of that contract.

¹¹ In *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [45] this is extended to grants which are gratuitous or 'for a manifestly inadequate consideration'.

Although this formulation was approved in *The Advice Centre for Mortgages v McNicoll*,¹² it is incomplete. Traditionally it was said that, in addition, the prior right must be capable of being made real.¹³ (Of course, this is simply a metaphor. A personal, contractual right is not ‘made real’ by registration. As Reid puts it: ‘the real right of ownership obtained on registration is not an improved version of an earlier personal right but rather is a different right entirely’.¹⁴) The case cited for this proposition is *Wallace v Simmers*,¹⁵ in which it was held that the offside goals rule did not render a personal right of occupancy binding upon a singular successor of the grantor because that was not a right which could be made real.¹⁶ Reid omitted this requirement from his formulation in order to accommodate the Inner House’s decision in *Trade Development Bank v Warriner & Mason (Scotland) Ltd.*¹⁷ There the court appeared to rely on the offside goals rule to reduce a lease granted in breach of standard condition 6 of a previously registered standard security,¹⁸ a condition which prohibits the debtor from granting leases over the burdened property. A condition of a standard security is not a right which is capable of being made real in the sense in which that expression is used in *Wallace*: it cannot be made a real right, although it certainly is a real condition of the standard security.¹⁹ This means that either the requirements of the offside goals rule as understood after *Wallace v Simmers* must be altered so as to accommodate *Warriner & Mason*²⁰ as an application of the offside goals rule or that case must be explained as an application of something other than the offside goals rule. Initially Reid opted for the latter course,²¹ but in his title in the *Stair Memorial Encyclopaedia* in 1993²² he adopted a different approach, abandoning the requirement that the prior right must be capable of being made real and reformulating the offside goals rule in the manner noted above.

¹² [2006] CSOH 58, 2006 SLT 591 at [46]. It had previously been approved in *Scotlife Home Loans (No 2) Ltd v Muir* 1994 SCLR 791 (Sh Ct) at 795.

¹³ GLF Henry ‘Personal Rights’ (1961) II *Conveyancing Review* 193.

¹⁴ Reid *Property* [644].

¹⁵ 1960 SC 255 (IH) at 259. The outcome of this case has been criticised as unfair: A Wilson ‘The constructive trust in Scots law’ 1993 JR 99, 103–104.

¹⁶ *Dicta* in some earlier cases would support a broader approach: e.g. *Stodart v Dalzell* (1876) 4 R 236 (IH) at 242 (Lord Gifford).

¹⁷ 1980 SC 74 (IH).

¹⁸ 1980 SC 74 at 94. No authority is cited, which makes it impossible to be certain that the offside goals rule was the basis for the court’s decision. Cf 97, where, in respect of a different aspect of the decision, the ‘classic cases’ on offside goals are cited and the traditional formulation (that there must be a personal right capable of being made real) is given.

¹⁹ KGC Reid ‘Standard conditions in standard securities’ 1983 SLT (News) 169 and 190.

²⁰ There is no sign from the judgments that the court was aware that it was proceeding inconsistently with that traditional formulation. See especially the formulation of the offside goals rule in terms which restrict its operation to rights capable of being made real: 1980 SC 74 (IH) at 97.

²¹ Reid ‘Standard conditions in standard securities’ 191.

²² *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993) [695]. This was reissued in 1996, with updates, as KGC Reid *The Law of Property in Scotland*.

9-05. Reid's new formulation relied upon the concept of breach as a control mechanism: in order for a transferee to be bound by the transferor's prior obligation, the transfer must have been in breach of that obligation. The assumption seems to have been that where the first right is purely personal – as in *Wallace* – a subsequent transfer by the grantor will not amount to breach. The result in *Wallace* was thought to be preserved, although via different reasoning.²³ This analysis may be questioned. Provided that a licence or right of occupancy is irrevocable, there can be few clearer examples of breach by the licensor than the transfer of the subjects while the licence subsists without ensuring that the transferee will honour the licence. As chapter 8 discussed, such a transfer would put performance out of the transferor's power and amount to a repudiation of the transferor's obligations under the licence.²⁴ Reid's reformulation therefore radically changes the scope of the offside goals rule: it ceases to be a rule which regulates the ranking of competing entitlements to real rights and becomes instead one which, in some cases, can convert purely personal rights into rights binding upon third parties, undermining a fundamental distinction of private law.²⁵ That is unlikely to have been Reid's intention. There therefore requires to be some further limitation on the operation of the rule, in addition to his three criteria.

9-06. Whether it is a requirement of the offside goals rule that the prior right must be 'capable of being made real' was reconsidered in 2009 in *Gibson v The Royal Bank of Scotland*.²⁶ This case concerned the conflict between, on the one hand, an exercised (but, perforce, unregistered) option to purchase and, on the other hand, a standard security. M granted an option to G. After G exercised the option, but shortly before settlement was due to occur, M granted a standard security to RBS, which was aware of the existence of the option but had taken no steps to enquire whether it had been exercised. RBS registered the standard security. G sought reduction of the standard security. Lord Emslie held that, because RBS knew of the existence of the option, they had been under a duty to enquire. That enquiry would have revealed that the option had been exercised. An exercised option is akin to a contract of sale. A straightforward application of the offside goals rule rendered the subsequently granted standard security voidable.²⁷ Lord Emslie went on to consider what would have been the position

²³ Reid *Property* [697].

²⁴ Paras 8-27 to 8-38 above. See, in particular, *King v David Allen and Sons, Billposting, Ltd* [1916] 2 AC 54 (HL). Cf, however, *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [48].

²⁵ See *Wallace v Simmers* 1960 SC 255 (IH) at 259–60. The point is made in the English context by S Bright 'The third party's conscience in land law' [2000] Conv 398, 408.

²⁶ [2009] CSOH 14, 2009 SLT 444. For comment, see: RG Anderson and J MacLeod 'Offside goals and interfering with play' 2009 SLT (News) 93; R Rennie 'Marching towards equity – blindfolded' 2009 SLT (News) 187; P Webster '*Gibson v Royal Bank of Scotland plc*: options for the offside goals rule' (2009) 13 EdinLR 524.

²⁷ *Trade Development Bank v Crittal Windows* 1983 SLT 510 (IH).

had the option not been exercised (or, which amounts to the same thing, had RBS not been under a duty to enquire and so was not deemed to have been aware that the option had been exercised). That discussion is *obiter*. It casts doubt on whether it is a requirement of the offside goals rule that the prior right be ‘capable of being made real’. RBS argued that the rule applied only to rights ‘immediately capable of being made real’ (which would exclude an unexercised option from its scope).²⁸ G argued that the rule could apply to any prior right which was breached.²⁹ Lord Emslie accepted neither argument and was undoubtedly correct to do so: both are too extreme. To insist that the right be immediately capable of being made real would limit the offside goals rule to situations where the date of settlement of a property transaction has passed and the disposition has been (or ought to have but has not been) delivered. There is no suggestion that that is the law. Nor, as was argued above, can the rule apply to *any* personal right in respect of property. Having rejected these two proposed formulations, Lord Emslie did not, however, opt for one of his own. Instead, he stated that ‘the authorities tend to support an intermediate position whereby . . . the bad faith exception may be applied in a wide range of different circumstances’.³⁰ As an equitable rule, he held that its scope should not be more rigidly confined.

9-07. In *Gibson*, Lord Emslie doubted that the ‘capable of being made real’ test from *Wallace v Simmers* was a ‘rigid universal requirement to be met in all cases’.³¹ He accepted G’s argument that the occupancy agreement which formed the subject of litigation in *Wallace* was precarious and could have been revoked at any time (meaning that subsequent transfer did not amount to breach). On this approach, Lord President Clyde’s statement in *Wallace* that the rule only applied to a right capable of being made into a real right was simply a ‘colourful’³² way of expressing the decision, and not part of its *ratio*. This revisionist interpretation of *Wallace* is unconvincing.³³ There is no suggestion from the report in *Wallace* that the occupancy right was revocable. The facts were that a Mr Simmers (senior) disposed to his son (Mr Simmers, junior), reserving to himself, his wife and his daughter (the Simmers of the litigation) the right to occupy a house and part of the farm free of rent and taxes for ‘such time as he or they might desire to do so’. That arrangement was documented in a minute of agreement signed by the father and son. The daughter was still in occupation when Simmers junior sold to Wallace, who knew of daughter Simmers’ right. Although there may have been an issue about whether daughter

²⁸ [2009] CSOH 14, 2009 SLT 444 at [15].

²⁹ [2009] CSOH 14, 2009 SLT 444 at [26].

³⁰ [2009] CSOH 14, 2009 SLT 444 at [49].

³¹ [2009] CSOH 14, 2009 SLT 444 at [45].

³² [2009] CSOH 14, 2009 SLT 444 at [29].

³³ As I have argued elsewhere: Webster (2009) 13 EdinLR 524, 527. See also J MacLeod *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) [7-66] and [7-84].

Simmers had a *jus quaesitum tertio* allowing her to enforce that agreement, there is no suggestion in the judgments that Simmers junior could simply have resiled from the agreement. The requirement that a right be ‘capable of being made real’ in order for the offside goals rule to apply to it was part of the *ratio* of *Wallace*.³⁴

9-08. It is not clear what is to be gained by side-lining the requirement that the prior right must be capable of being made real. Although there is room for debate at the edges about what counts as a ‘right capable of being made real’ (in particular concerning options, considered below), that requirement is generally understandable. It helpfully expresses the core function of the offside goals rule: that it protects the position of those who are en route to acquiring a real right in property. The offside goals rule provides that a party may not defeat another person’s potential real right when he has knowledge of it.³⁵ It is difficult to envisage another principled manner in which the scope of the rule can be limited so that it applies to some personal rights which relate to property but not to others. Further, it is difficult to see much difference between the *Wallace* rule and the alternative test which Lord Emslie mentioned in *Gibson* on various occasions: namely, that the offside goals rule would not apply if the prior right was not ‘capable, in due course, of affecting [the Register of Sasines or the Land Register] in some relevant way’.³⁶ It is true that the offside goals rule probably applies not just to the grant or transfer of real rights, but to their discharge or variation,³⁷ and to that extent the ‘capable of being made real’ metaphor is slightly inaccurate. However, if that is kept in mind, it is clear enough what the metaphor means and it is more sound than that alternative as proposed by Lord Emslie, because it can be applied to transactions involving moveable property, to which the offside goals rule also applies but to which reasoning based on the importance of the registers is unsuited.³⁸ It is suggested that there is no compelling reason to abandon the ‘capable of being made real’ requirement.³⁹ Apart from *Warriner & Mason*, that requirement accommodates all of the cases to date. The decision in *Warriner & Mason* can be incorporated in a definition of the offside goals rule without abandoning the ‘capable of being made real’ requirement. It could be said that the rule applies where A is bound either by an obligation to grant B a right which is capable of being made real (the paradigm case) or by an obligation to B which is a real condition of an existing real right (the extension to accommodate *Warriner & Mason*). If A subsequently grants a

³⁴ 1960 SC 255 (IH) at 259–260 (Lord President Clyde), with whom Lord Carmont agreed. Lord Guthrie issued a short concurring judgment.

³⁵ As it is put in respect of the doctrine of notice in South African law by H Mostert and A Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 58.

³⁶ [2009] CSOH 14, 2009 SLT 444 at [44] and [49].

³⁷ As convincingly noted by J MacLeod *Fraud and Voidable Transfer* (2020) [7-69].

³⁸ Anderson and MacLeod (2009) 13 EdinLR 524.

³⁹ It was applied by the Sheriff Appeal Court in *Miller v Smith* [2017] SAC (Civ) 26, 2017 GWD 28-444 at [21].

real right in the same subjects⁴⁰ to C in breach of the prior obligation, the grant is voidable at B's instance if C knew of the prior obligation or the transfer was gratuitous or at a material undervalue.

9-09. Whether this is an acceptable formulation of the offside goals rule must be debated elsewhere. It may be better to view the addition necessitated by *Warriner & Mason* as a stand-alone rule.⁴¹ The proposed reformulation is used as the basis for the analysis in this chapter. Two things are clear. The first is that some further limitation is needed in addition to Reid's three criteria. The second is that the core case for the offside goals rule remains the case where the prior obligation is to grant a right which is capable of being made real (or some similar formulation). This is important for present purposes: it emphasises that, if the offside goals rule does apply to the terms of leases, it benefits only particular terms and does not render all personal conditions binding upon a knowing or gratuitous successor landlord.⁴² To apply the offside goals rule to the terms of leases would not therefore undermine the real condition/personal condition distinction. The rule would only have the potential to render some terms binding on a successor. Part D of this chapter considers which.⁴³

C. THE OFFSIDE GOALS RULE AND LEASES

9-10. A first point to consider is whether there is any room at all for the offside goals rule to apply to the terms of a lease. In *The Advice Centre for Mortgages v McNicoll*⁴⁴ there are traces of a view that, once a term has been held to be a personal condition, no other rule of law can override that result. The issue in *Advice Centre* was whether an unexercised option to purchase

⁴⁰ *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH) at 652A.

⁴¹ This approach is favoured by DA Brand, AJM Steven and S Wortley *Professor McDonald's Conveyancing Manual* (7th edn, 2004) [32.55] (departing from the position of earlier editions).

⁴² By definition, where one is seeking to argue that a personal condition is binding on a successor landlord, the grant to the successor will not have been in breach of a real condition of a subsisting real right (i.e. the broader version of the offside goals rule, following *Warriner & Mason*). The offside goals rule could only, therefore, apply to those terms of leases capable of conferring on the tenant a real right.

⁴³ The offside goals rule may not exhaust the ways in which a tenant, enjoying an option or another personal condition, could argue that a knowing successor is liable: the economic delicts may also be of relevance. The point has not been explored in Scotland, although Wortley has discussed whether the economic delicts are the basis of the offside goals rule: S Wortley 'Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right' 2002 JR 291, 308–309. See, too, J MacLeod 'Offside goals and induced breaches of contract' (2009) 13 EdinLR 278, remarking that the standard of knowledge required to establish an economic delict is higher than required to trigger the offside goals rule. For a consideration of the position in England, see RJ Smith 'The economic torts: their impact on real property' (1977) 41 Conv 318.

⁴⁴ [2006] CSOH 58, 2006 SLT 591.

(which, according to *Bisset v Magistrates of Aberdeen*,⁴⁵ is a personal condition) could bind a successor by virtue of the offside goals rule. Some parts of Lord Drummond Young's judgment suggest that the offside goals rule cannot apply because of its potential to produce a result which differs from the rule of lease law about whether the term is a real condition. For instance, his ultimate reason for concluding that *Davidson v Zani*⁴⁶ (which held an option granted to a tenant was protected by the offside goals rule) was wrongly decided was simply that 'the sheriff principal did not give *Bisset* its proper significance'.⁴⁷ However, the preceding ten paragraphs of the opinion in *Advice Centre* discussed the requirements for the offside goals rule to apply, suggesting that, had they been satisfied, the offside goals rule would have applied to bind a successor landlord to the option. At one point, Lord Drummond Young states that the rule would have applied if the lease had contained an express obligation upon the landlord to bind any disponee to the terms of the option.⁴⁸ In his commentary on *Advice Centre*, Steven favours an exclusionary rule. He states clearly: making the option bind the successor landlord by virtue of the offside goals rule would be 'to override the *inter naturalia* doctrine. That must be wrong'.⁴⁹ In fact, the reverse is true.

9-11. It might be argued that, because the rule that only certain terms transmit as part of the lease is a mandatory one which the landlord and tenant cannot circumvent, it should not be circumvented by other rules of law. Hence, to apply the offside goals rule to the terms of a lease would undermine the policy justifications for those rules of lease law which determine which terms are real and which personal. However, the better view is that, if there is a policy objection to a particular term binding a successor, that will express itself in each rule in the legal system which might potentially render the term binding on a successor. Upon analysis, it may be found that, because of the different requirements of each of the rules, there is no conflict between them. In fact, they may actually work together to produce a better result. The case of options to purchase is a case in point. It was suggested in chapter 6 that there are two objections to an option to purchase binding a successor landlord as a real condition of a lease. The doctrinal objection is that such an option is not referable to the lease, because it may be performed as readily by any owner of land, and not more readily by the landlord from time to time. The policy objection is that options are potentially oppressive, because they can result in the successor being forced to surrender ownership at a price, and at a time, over which the successor has no

⁴⁵ (1898) 1 F 87 (IH).

⁴⁶ 1992 SCLR 1001 (Sh Ct).

⁴⁷ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [51]. See also [48].

⁴⁸ [2006] CSOH 58, 2006 SLT 591 at [48]. This technique is discussed in GL Gretton and KGC Reid *Conveyancing 2006* (2007) 104–106, who are sceptical about whether it would work.

⁴⁹ AJM Steven 'Options to purchase and successor landlords' (2006) 10 EdinLR 432, 436.

control. That type of term should not bind a successor landlord automatically, even when unaware of the existence of the option, which is the consequence of a term being a real condition. Neither of those objections would be circumvented by the offside goals rule applying to render an option binding on a successor. (Whether it actually does so is controversial, and is discussed below.) First, the option would bind by virtue of the offside goals rule, which provides a separate doctrinal basis for binding the successor. Secondly, the rule would only render an option binding on a successor who knew of the option. Far from undermining the rule of lease law, in the case of an option the offside goals rule may be said to supplement it to produce a solution more in step with the realities of legal practice, where there seems to be considerable demand for options to be able to bind successors.

9-12. Of course, if the application of the two different rules did result in a clash of policy, then that would require to be addressed. But in the absence of such a clash – and experience to date has not revealed a situation in which there is such a clash – to refuse to apply the offside goals rule to terms of leases could result in paradoxical situations. Why, it might legitimately be asked, if the rule can apply to a freestanding option, should it *not* apply to a term of a lease? What if the option agreement is concluded contemporaneously with the lease, but is recorded in a separate document?⁵⁰ Of course, there are boundary issues with all rules, so by itself this is not a very convincing argument. But it is a factor to be borne in mind if there is little other support for the suggestion that the offside goals rule cannot apply to the terms of a lease. It serves to highlight the question: what is it about the term being in a lease which means that the offside goals rule should not apply to it? It is suggested that, unless there is a rule of lease law the rationale or policy of which would be undermined by the application of the offside goals rule, there is nothing to prevent the offside goals rule applying. On the contrary, it may be positively beneficial for the rule to apply.

9-13. In other systems the same conflict arises: lease law provides that a particular type of term will not bind a successor, but other rules of law can produce a different result. The legal systems under consideration in this work do not prevent these alternative rules from being applied just because this would produce a different outcome from a rule of lease law. In South African law, for example, regardless of whether an option to purchase binds a successor landlord by virtue of the rule *huur gaat voor koop*,⁵¹ the South African equivalent of the offside goals rule (the doctrine of notice) does apply and it results in the option binding a knowing or gratuitous successor.⁵² Similarly, in England the fact that the burden of an option to purchase does not touch and concern the reversion at

⁵⁰ As is advised by D Bell and R Rennie 'Purchase options in leases' (2006) 51 JLSS May/49, 50.

⁵¹ See para 6-16 above.

⁵² See para 9-28 below. The position appears to be similar in French law: C van der Merwe and A-L Verbeke (eds) *Time Limited Interests in Land* (2012) 438–439.

common law did not preclude the application of equitable rules which results in an assignee to the reversion being bound.⁵³ In German law an option to purchase would not bind a successor landlord under BGB §566,⁵⁴ but contractual rights to acquire property can in some circumstances be protected against transfer by the debtor by registering a *Vormerkung* in the Land Register (*Grundbuch*).⁵⁵

9-14. This brief comparative survey suggests that other legal systems find no structural reasons for refusing to apply rules to personal conditions of leases which could render those terms binding upon successors in title of the landlord. There is no convincing reason why the rule of Scots law should be different. The simple assertion that the offside goals rule produces a result which conflicts with that of lease law is insufficient. The reasons for the rule of lease law require to be analysed. Only if they are jeopardised by applying the offside goals rule need the question be asked: which rule of law is to take priority?

D. CONSTRUCTIVE KNOWLEDGE OF TERMS OF LEASES?

9-15. In the application of the offside goals rule to the terms of leases, it might be argued that the requirement of knowledge is automatically satisfied. The position in respect of registered and unregistered leases should be distinguished.

9-16. In respect of registered leases, *Trade Development Bank v Warriner & Mason (Scotland) Ltd*⁵⁶ is authority for the proposition that a party acquiring property rights – such as a purchaser or person taking a sub-lease or assignation – is to be treated as having knowledge of what a search of the register would reveal. In that case the holder of a standard security granted by a tenant sought to reduce a sub-lease which, it contended, had been granted in breach of standard condition 6 of the standard security, which prohibits sub-leasing without consent. For various reasons, the sub-tenant had not carried out searches of the register before taking the sub-lease. This was held to be no defence: the sub-tenant was treated as though it had investigated title and discovered what there was to discover. Lord Cameron stated:⁵⁷

⁵³ However, often an option must be registered in order to bind a transferee: see para 9-28 below.

⁵⁴ H Roquette *Mietrecht* (5th edn, 1961)194.

⁵⁵ §883 BGB. *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol VI *Sachenrecht* (8th edn, 2020) §883 Rn [43]. I am grateful to Professor Sonja Meier for her assistance with this point. The right of first refusal which §577 BGB gives to certain types of tenant is not, however, registrable: Rn [18].

⁵⁶ 1980 SC 74 (IH).

⁵⁷ 1980 SC 74 at 102. Earlier Lord Cameron stated (at 100) that the effect of registration was ‘to make public notification to such persons who may resort or require to resort to the record of what is there recorded’; see also 105. Note that the judges’ reasoning on this point is based on there being a duty to search the register in those circumstances, not upon there being universal constructive knowledge of material published in the register.

If the rule of law is that in the case of recorded interests in land an intending purchaser or lessee is entitled to act ‘on the faith of the record’, then it seems a necessary corollary that the record must be consulted by such a purchaser or lessee and that if he fails to do so he must take the consequences.

This was sufficient for the court to hold that the sub-tenant was to be treated as knowing of the existence of the registered lease, the security and its provisions regarding standard condition 6. Today the Land Registration etc (Scotland) Act 2012 states expressly that a fact which can be discovered from the archive record is not, by reason only of that circumstance, a fact which a person is deemed to know: section 14(4). The practice in respect of registered leases is to note in the burdens section of the landlord’s title sheet that the terms of leases specified in the schedule of leases are burdens. As far as the writer is aware, there is no case considering whether a successor will be treated as having the knowledge that the scrutiny of those leases would confer. Applying the reasoning of *Warriner & Mason*, however, the safest (and, it is thought, correct) view is that the successor would be so treated. They are not just documents in the archive record, but in the usual course are referred to in the title sheet itself.⁵⁸

9-17. Some authorities support the proposition that a successor has constructive knowledge of the terms of unregistered leases. In *Stewart v M’Ra*⁵⁹ Lord President Hope stated that ‘a party intending to lend money on land, is just as much bound to look at the leases affecting it as a purchaser is’. In his notes on *Stair, More* stated that purchasers are presumed to make themselves acquainted with the terms of subsisting leases before purchasing or acquiring property.⁶⁰ These statements must, however, be set against the emphasis placed by texts discussing the offside goals rule upon the requirement of the successor having ‘certain knowledge’ of the right by which the successor is alleged to be bound.⁶¹ It is suggested that a successor should not be said to have constructive knowledge of the terms of an unregistered lease (or of unregistered variations to a registered lease). One justification for applying the offside goals rule to leases is that, in some cases, it is appropriate for a knowing successor to be treated differently from one who is ignorant of the terms of an unregistered lease. To hold that a successor had constructive knowledge of such terms would undermine that argument. In most cases, the issue will not arise, as the successor will have checked the terms of subsisting leases and so will have actual knowledge.⁶² Part E considers which lease terms satisfy the other requirements of the offside goals rule.

⁵⁸ See in this respect KGC Reid and GL Gretton *Land Registration* (2017) [4.31] esp n 186.

⁵⁹ (1834) 13 S 4 (IH) at 6.

⁶⁰ JS More *Notes to Stair’s Institutions* vol I (1832) ccxlvii.

⁶¹ *Stair Institutions* I xiv 5, given renewed emphasis by RG Anderson ““Offside goals” before *Rodger Builders*’ 2005 JR 277.

⁶² *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [48].

E. THE OFFSIDE GOALS RULE AND PARTICULAR LEASE TERMS

(I) Options to purchase

9-18. It is clear that once an option has been exercised, the option-holder is protected by the offside goals rule, for the holder is in the same position as an ordinary purchaser with concluded missives.⁶³ Further, knowledge of the existence of an option triggers a duty to enquire whether the option has been exercised. Three cases from the 1990s and 2000s consider whether the offside goals rule protects an option to purchase prior to its exercise. In both *Davidson v Zani*⁶⁴ and *The Advice Centre for Mortgages v McNicoll*⁶⁵ a tenant had an option to purchase the subjects of the lease which could only be exercised at a particular point in time. When the subjects were transferred before the option was exercisable, the tenant argued that the successor was bound by the option because of the successor's knowledge of it. In *Davidson* the argument was successful: it was held that an option to purchase contained in missives but which was not in the subsequently executed lease did bind a knowing successor. In the subsequent Outer House decision of *Advice Centre for Mortgages*, *Davidson* was strongly disapproved and it was said (*obiter*) that the offside goals rule did not render an option to purchase binding upon a singular successor. The tenant's argument based upon the offside goals rule was described as 'fundamentally wrong'.⁶⁶ Finally, in *Gibson v Royal Bank of Scotland*⁶⁷ the opinion was expressed, again *obiter*, that an unexercised option would bind a knowing successor by virtue of the offside goals rule. For the reasons set out below, it is thought that *Davidson* and *Gibson* are right on this point and *Advice Centre* is wrong.

9-19. The following issues arise when determining whether an option-holder may invoke the offside goals rule against a knowing or gratuitous transferee so as to render an unexercised option binding upon the transferee:

- (i) whether the transfer of ownership is in breach of the option;
- (ii) whether the option is a right to which the offside goals rule applies; and
- (iii) if the rule does apply, whether a suitable remedy is available.

The first issue, a fundamental requirement of the offside goals rule,⁶⁸ was discussed in the previous chapter, where the conclusion was drawn that, so long as the option is not intended to be conditional upon the grantor still being owner

⁶³ This point is usefully confirmed by *Gibson v Royal Bank of Scotland plc* [2009] CSOH 14, 2009 SLT 444 [34]–[36].

⁶⁴ 1992 SCLR 1001 (Sh Ct).

⁶⁵ [2006] CSOH 58, 2006 SLT 591.

⁶⁶ [2006] CSOH 58, 2006 SLT 591 at [42].

⁶⁷ [2009] CSOH 14, 2009 SLT 444 at [50].

⁶⁸ See para 9-04 above.

at the time of exercise (which is unlikely), transfer to a third party without taking steps to preserve the option-holder's rights does amount to breach of the option. The other two issues are now considered.

(a) Applicability of offside goals rule

9-20. Whether an unexercised option is a right to which the offside goals rule applies depends on whether, in the traditional phrase, it is a right 'capable of being made real'.⁶⁹ This is not an issue specific to lease law, although, coincidentally, in each of the cases which have considered the point, the parties to the option have also been parties to a lease. The issue goes to the scope of the core type of offside goals case (as opposed to any extension that might be necessary in order to accommodate *Trade Development Bank v Warriner & Mason (Scotland) Ltd*).⁷⁰ For options, the fundamental question is whether a right 'capable of being made real' encompasses only what would previously have been called *jura ad rem acquirendam* (i.e. a direct personal right to acquire property) or whether it may be interpreted more broadly so as to include the position of an option-holder.

9-21. Sometimes the point is put in this way: prior to an option being exercised there is no right to call for a conveyance and so no right 'capable of being made real'. Given the inaccuracy of the 'right capable of being made real' metaphor,⁷¹ the argument might be phrased in other terms, namely that the offside goals rule applies only to personal rights the correlative obligation of which is to confer a real right upon the creditor. The holder of an unexercised option is one stage removed from acquiring such a personal right. Indeed, the holder might never do so, for the option might never be exercised. Until the option is exercised, the option-holder has only a personal right to acquire a personal right to acquire a real right. That is certainly true if an option is analysed as a firm offer to enter into a contract of sale, in which case the option and the contract resulting from it can more readily be viewed as separate. If, however, an option is analysed as a conditional contract of sale, one might say that there exists from the outset a contractual right to conveyance, albeit one which is subject to a potestative condition (i.e. a condition which it is in the power of one party to the contract to satisfy). These alternatives are identical in respect of the obligations incumbent upon the grantor.⁷² In practical terms, the option-holder's position is the same whichever analysis is adopted: by exercising the option, an obligation to convey is triggered.

⁶⁹ See paras 9-04 to 9-09 above.

⁷⁰ 1980 SC 74 (IH); see paras 9-08 and 9-09 above.

⁷¹ See para 9-04 above.

⁷² See para 8-36 above.

9-22. In *The Advice Centre for Mortgages v McNicoll*,⁷³ Lord Drummond Young addressed the issue of the nature of the option-holder's right from a different perspective. Although he noted that the distinction had not been made in any of the other cases, he stated that 'an option may properly be characterised as a power rather than a right, and what is made real is not the entitlement in the option but the right that arises when it is exercised'.⁷⁴ Yet characterising an option as conferring a power is not determinative of the issue. In the Hohfeldian terminology to which Lord Drummond Young seems to be referring, the characterisation of an option as conferring a 'power' is indeed correct.⁷⁵ However, the fact that an option may be characterised as conferring a 'power' is not conclusive against the application of the offside goals rule. The holder of an unrecorded disposition also has a 'power'⁷⁶ (that is to say, the ability unilaterally to affect another's legal position) and there is no doubt that the grantee of a disposition is protected by the offside goals rule.

9-23. Given the variety of theories which it is possible to advance about the nature of an option, formalistic reasoning about the classification of the option-holder's right is unlikely to resolve whether the offside goals rule applies. Instead, the question should be posed in neutral terms: does the rule apply to protect the legal position of a person who, by taking the further step of intimating an intention to acquire a property, can oblige another to convey to him? Or is its application limited to those who are already bound to acquire, so that it only affects owners who will certainly be required to transfer ownership? Put another way: does the rule apply only where there is certain to be a competition to complete title? Or can it apply more broadly to protect a potential competitor for title? And if the latter, are there any limits to the length of time for which the rule can offer its protection?

9-24. The bulk of the reasoning in *Advice Centre for Mortgages* related to breach. In places, however, Lord Drummond Young indicated that, if the transfer did amount to a breach of the option, the offside goals rule would render an unexercised option binding upon a successor.⁷⁷ In *Gibson v Royal Bank of Scotland* Lord Emslie stated that there was 'no good reason' why the offside goals rule should not apply to options.⁷⁸ It is suggested that he was right to reach that conclusion, for at least five reasons.

9-25. First, it is already established that the offside goals rule applies to rights of pre-emption. This is the basis on which the decisions in *Matheson v Tinney*⁷⁹

⁷³ [2006] CSOH 58, 2006 SLT 591.

⁷⁴ [2006] CSOH 58, 2006 SLT 591 at [51].

⁷⁵ WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 Yale LJ 16, 50–51.

⁷⁶ Reid *Property* [644].

⁷⁷ *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [48] and [50].

⁷⁸ [2009] CSOH 14, 2009 SLT 444 at [50].

⁷⁹ 1989 SLT 535 (OH).

and *Roebuck v Edmunds*⁸⁰ are explained.⁸¹ Yet a pre-emption right is weaker than an option: it gives the holder the power to purchase only if the grantor triggers the pre-emption, typically by selling the property. In an option, the holder has the power to purchase regardless of whether the grantor decides to sell although, depending on its terms, the holder may only be able to exercise that power at a particular point in time.⁸² The objection that the initial personal right is too remote from the real right which would result from exercise may also be made in respect of rights of pre-emption. *Matheson* and *Roebuck* cannot stand with a decision that the offside goals rule does not apply to options.⁸³

9-26. Second, the position of the holder of an unexercised option is analogous to that of a purchaser. An option-holder has as strong a claim to prevent transfer of the property as does a purchaser. The grantor of an option may not transfer the subjects of the option to a third party without taking steps to preserve the option-holder's rights, just as a seller may not transfer without protecting the purchaser's rights. The second grantee would acquire in the knowledge that the transfer to him was as much a breach of contract as it would be if the first transaction had been a sale as opposed to the grant of an option. Admittedly, prior to exercise, the option-holder only has a negative claim to prevent transfer of the property; there is no positive claim to demand transfer of the property. However, whether such a positive claim comes into existence is exclusively within the option-holder's control. It is suggested that the option-holder is no less worthy of protection than the purchaser.

9-27. Third, if the offside goals rule does not apply to options because it is said not to apply to those who have the power, but no obligation, to acquire, it must also exclude from its scope contracts of sale subject to a potestative condition (at least until the condition is purified). There has previously been no suggestion that this is the case. Many house sales are subject to such a condition: they are subject, for example, to the sale of the purchaser's own house or to a

⁸⁰ 1992 SCLR 74 (OH)

⁸¹ Reid *Property* [698]. Anderson has noted that the earlier law differed: see Anderson *Assignment* Ch 11, Pt B. In *Stirling v Johnson* (1756) 5 Br Sup 323 a transfer in breach of a right of pre-emption was not reduced, despite the transferee's bad faith. It was said that the transferor was 'in pessima fide to transgress the prohibition, and as the purchaser knew it, he was particeps; but the answer to this was, that as he knew of the prohibition, so he knew it was ineffectual in law': 324. For criticism, see Erskine *Institute* II iii 13, n 37. Cf *Workman v Crawford* (1672) Mor 10208 where an obligation to denude on payment of sums due was said to be of no effect against a singular successor, unless he knew of the back-bond in which the obligation was contained or acquired without onerous cause.

⁸² The contrast is not as absolute as this. As Wade has remarked in an English context, one could conclude an option which is conditional upon the grantor ceasing to make a particular use of the subjects: HWRW 'Rights of pre-emption: interests in land' (1980) 96 LQR 488, 490. This makes the different treatment of options and pre-emptions even more difficult to justify.

⁸³ Both were, however, cited with approval by Lord Drummond Young in *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at [50].

satisfactory survey (the purchaser being the sole judge of whether the survey is satisfactory).⁸⁴ Similar terms may feature in contracts relating to the acquisition of commercial property. Nor has it been suggested to date⁸⁵ that the offside goals rule does not apply to a contract of sale with a future date of entry (which could be another objection to the rule applying to an unexercised option).

9-28. Fourth, other legal systems use their equivalents of the offside goals rule to allow options to be enforced against successors in title. In South Africa, for example, the position of an option-holder is equated to that of a purchaser⁸⁶ and the doctrine of notice applied to give protection.⁸⁷ In English law an option to purchase a legal estate is a form of estate contract, which is an equitable right and may accordingly bind third parties,⁸⁸ although there are statutory provisions which require such rights to be registered in certain circumstances in order to bind a transferee.⁸⁹ In French law, too, although the option-holder's right is purely personal, it is protected against transfer by the grantor in certain circumstances: Article 1124(3) of the *Code civil* provides that a contract concluded in violation of a 'promesse unilatérale de vente' (i.e. a purchase option) with a third party who knew of the existence of the option is a nullity.⁹⁰

9-29. Fifth, there appears to be practical demand for the law to protect the holder of an option, which may be a commercially significant transaction. In the

⁸⁴ See cl (third) of the 'Combined Standard Clauses' (2018, available at www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-f/division-c/advice-and-information/scottish-standard-clauses/).

⁸⁵ Other than in argument in *Gibson v RBS* [2009] CSOH 14, 2009 SLT 444 at [15].

⁸⁶ E.g. *Le Roux v Odendaal* 1954 (4) SA 432 (NPD) 442 D–F. In *Le Roux v Nel* [2013] ZASCA 109 at [5], in an opinion with which the entire Supreme Court of Appeal of South Africa concurred, Brand JA stated that it was 'well established by now . . . that for the purposes of the doctrine of notice, a prior option places the holder [i.e. of an option] in the same position as a prior purchaser'.

⁸⁷ *Cooper Landlord and Tenant* 300–303; *Kerr Sale and Lease* 441; *McGregor v Jordaan* 1921 CPD 301; *Archibald and Co Ltd v Strachan and Co Ltd* 1944 NPD 40 at 46–47; *Van der Pol v Symington* 1971 (4) SA 472 (TPD); *Spearhead Property Holdings Ltd v E & D Motors (Pty) Ltd* [2009] ZASCA 70, 2010 (2) SA 1. In one case, however, the application of the doctrine to options and rights of pre-emption has been explained on the basis that the doctrine of notice applies to personal rights in respect of property, not only those who hold a *jus ad rem* or an analogous right: *Cussons v Kroon* [2001] ZASCA 69, 2001 (4) SA 833 at [13]. The case is controversial, but does not change the fact that the holder of an option is protected by the doctrine of notice.

⁸⁸ Gray and Gray *Elements* [8.1.71]–[8.1.82]. Also: M Dray and A Rosenthal *Barnsley's Land Options* (6th edn, 2016) [2.110] *et seq.*

⁸⁹ Registration is required for unregistered land in the Land Charges Register by the Land Charges Act 1972 and in the Land Register in respect of registered land by the Land Registration Act 2002. Where the option subsists in respect of registered land, there is an exception to the need for registration where the beneficiary of the estate contract is 'in actual occupation', which will typically be satisfied where the option is held by a tenant: Land Registration Act 2002 s 29(1), (2)(a)(ii) and Sch 3 para 2.

⁹⁰ See also P Malaurie, L Aynès and P-Y Gautier *Droit des contrats spéciaux* (11th edn, 2020) [102].

Scottish Law Commission's consultation on land registration, some commercial property solicitors mentioned difficulties in protecting option agreements.⁹¹ The Commission took the view that the protection of options was outside the scope of the land registration project so did not make any recommendations to allow registration of options.⁹² As the law stands, an option may be protected to a certain extent by means of a standard security. But that can be cumbersome. Almost certainly, it would be better if options could be protected by some sort of registration scheme. However, absent that straightforward manner of protecting an option-holder's right, the offside goals rule is a useful method of doing so.

9-30. There are two main arguments against the offside goals rule applying to an unexercised option. First, if options are thought to be so oppressive to owners that they cannot be constituted as a real burden⁹³ (where the successor would have guaranteed knowledge of the option), it may be thought that the law should not render them binding on successors in other ways. That argument has logical force. However, at the same time as recommending that it should not be possible to create an option as a real burden, the Scottish Law Commission accepted that options could be made to affect a successor in other ways. Indeed, in light of the authorities at the time, the Commission even acknowledged that an option could bind a successor via the offside goals rule.⁹⁴ It seems, therefore, that the Commission's concerns should be viewed in their context: it was discussing whether an option could be created as a perpetual restriction over land in favour of other land. In the context of a contractual option, that level of permanence is not likely to be present.

9-31. The second argument stems from dissatisfaction with the offside goals rule itself. Some view the offside goals rule as an unfortunate mire of uncertainty in the otherwise supposedly firm meadow of property law.⁹⁵ It is viewed as an unnecessary departure from the normal rule that most rights in land become real only by registration. The rule is said to be unnecessary because the first grantee already has a remedy: a damages claim against the seller. Unsurprisingly, those of this view do not wish to see the rule broadened. Indeed, some would prefer

⁹¹ Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, 2010) [14.58]. Commentary regarding *Advice Centre for Mortgages* reveals a similar concern: I Quigley 'On the wrong track?' (2007) 52 JLSS Feb/48, 51.

⁹² It suggested, however, that the issue could be considered in other future projects: Scottish Law Commission *Report on Land Registration* [14.59]–[14.60].

⁹³ As was suggested by the Scottish Law Commission in its review of the law of real burdens, discussed at paras 6-10 to 6-11 above.

⁹⁴ Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181, 2000) 207 n 21. See, too, Reid *Property* [698]. Cf G Gretton and KGC Reid *Conveyancing 2004* (2005) 106.

⁹⁵ See e.g. R Rennie 'Marching towards equity – blindfolded' 2009 SLT (News) 187; RG Anderson 'The offside goals rule in practice' (Lecture to Royal Faculty of Procurators, Conveyancing Conference, June 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630342); Scottish Law Commission *Report on Land Registration* (Scot Law Com No 222, 2010) [14.61]–[14.62].

it to be abolished, at least in respect of land. This ‘uncertainty’ argument can, however, be overplayed. In its key requirements, the rule is well-established.⁹⁶ Undoubtedly, it would be better if a contractual right to land could be protected by registration of some form of notice. But that is not (yet) the law. As for the argument that the offside goals rule is unnecessary: that argument challenges the premise of the rule, that preferring the first grantee over a second, bad faith, grantee is a fairer result than allowing the second grantee to take the property unaffected by the first right and confining the first grantee to a remedy in damages.⁹⁷ It would view the remedy of damages against the grantor as adequate (even although that claim might turn out to be worthless).

9-32. The arguments in favour of the offside goals rule applying to options are the stronger. As long as the offside goals rule continues to exist, it should apply to options to purchase. It would, almost certainly, be better for option-holders to be able to protect their position by some form of registration, as is possible in England and Germany. Thought should therefore be given, in due course, to whether the system of advance notices introduced by the Land Registration etc (Scotland) Act 2012 could be extended to cover options. As matters stand, an advance notice provides only a 35-day priority period.⁹⁸ If it were possible to protect an option simply by means of registration, the need for the offside goals rule to apply to options would be removed.

(b) The option-holder's remedies

9-33. This point is particular to options in leases: in such cases, the offside goals rule is put to a different use from usual.⁹⁹ In the paradigm offside goals case, where A contracts to sell to B but, in breach of that contract, transfers to C, B seeks reduction of the transfer to C and implement against A of the obligation to transfer.¹⁰⁰ That approach is still open where the first grant is a freestanding option: if A grants an option to B and then transfers to C, B might exercise the option against A,¹⁰¹ and then seek reduction of the transfer to C and implement

⁹⁶ Perhaps the unresolved issue of the greatest significance is whether knowledge acquired after contract, but before registration, triggers the rule. It is suggested that it should not: see para 9-04 above. To hold otherwise could severely prejudice a second purchaser who, in good faith, has acted in reliance on the view that a valid title will be acquired.

⁹⁷ Or, at least, they do not view it as sufficiently more fair to justify the additional complexity caused by the offside goals rule. In *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at [67] Lord Rodger explained that the offside goals rule prevented an ‘unfair’ result.

⁹⁸ Land Registration etc (Scotland) Act 2012 Pt 4.

⁹⁹ AJM Steven ‘Options to purchase and successor landlords’ (2006) 10 EdinLR 432, 436.

¹⁰⁰ If B has already been granted a disposition, B need not seek implement, but will simply register the disposition.

¹⁰¹ B will in any event wish to exercise the option in a question with A so as to be able to claim damages for breach of the resulting obligation to transfer if the offside goals argument is unsuccessful.

against A of the obligation to convey resulting from exercise of the option.¹⁰² In the case of an option in a lease, however, the tenant (B) is unlikely to be able to seek reduction of the transfer to the successor (C), as B may well have recognised the transfer in other ways, such as by having paid rent to the new landlord. Instead, B will wish simply to assert against C the core right to which exercise of the option gives rise, namely the right to acquire ownership.

9-34. It is relatively untested whether the offside goals rule can operate in this way but there is both case law and strong academic support for it being able to do so. *Davidson v Zani*¹⁰³ held that it could. Sheriff-Principal Ireland granted declarator that the unexercised option was binding on a successor landlord who acquired with knowledge of it. Supporting this approach, Reid notes two other situations in which it would be useful for the offside goals rule to operate by allowing A's obligation to be enforced directly against C, rather than reducing the transfer from A to C.¹⁰⁴ One is where the first grantor has become insolvent: reduction would have the unfortunate consequence that the property would fall into the insolvent estate. The other is where the first grant is of a subordinate real right.¹⁰⁵ In *Stodart v Dalzell*¹⁰⁶ Lord Gifford stated that the result of what is now known as the offside goals rule is that the impugned grantee is made liable in the obligations of the grantee's author. MacLeod's detailed study of voidability of titles also supports this approach.¹⁰⁷ It is suggested, therefore, that the offside goals rule can be used to assert a right against a successor. Only if this is true can a tenant rely upon the offside goals rule to enforce an option to purchase against a successor landlord.

9-35. On the assumption that the rule can provide a remedy in the case of options in leases, at least two practical issues arise. First: against whom should the option be exercised? Second: to whom should the purchase price be paid?

¹⁰² Whether B could use the offside goals rule to reduce the transfer without having exercised the option is undecided, but is thought to be unlikely.

¹⁰³ 1992 SCLR 1001 (Sh Ct).

¹⁰⁴ Reid *Property* [700].

¹⁰⁵ In *Greig v Brown and Nicolson* (1829) 7 S 274 (IH) a servitude was enforced against a singular successor of the grantor on this basis despite not having been made real. There is academic support for the offside goals rule applying to leases (see paras 9-36 to 9-39 below): if it does so, in such a case, it applies to render the right granted by A binding upon C.

¹⁰⁶ (1876) 4 R 236 (IH) at 243.

¹⁰⁷ J MacLeod *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) [7-70]–[7-77]. He argues that there is a reduction *ad hunc effectum* of the bad faith grantee's title. Reduction can take two forms: catholic (in which case the title is reduced for all purposes) or *ad hunc effectum* (in which case the title is reduced only for the particular purposes of the reduction, and for all other purposes remains valid). As to the latter, see GL Gretton 'Reductions of heritable titles' 1986 SLT (News) 125, 127. It is the type of reduction granted if property is transferred in breach of an inhibition. MacLeod argues that where the offside goals rule applies, the reduction is *ad hunc effectum* i.e. the bad faith grantee's title is reduced only to the extent necessary to enable the first grantee's right to be completed.

The answer to both, following the approach in *Davidson*, is ‘the successor’.¹⁰⁸ Nonetheless, the tenant would be well advised to serve notice simultaneously on both the grantor of the option and the successor – the former to preserve any potential damages claim, the latter to demand transfer.

(2) New lease to commence at the ish of current lease

9-36. Chapter 5 discussed the various means by which parties might extend a lease. One possibility (albeit, it is thought, now rare in practice) is to conclude a lease to commence at the ish of the current lease. Where the second lease is for 20 years or less, it does not bind a successor who acquires prior to its date of entry, for it is not until then that the tenant can begin to possess by virtue of the new lease. The rule is no different if the successor is aware of the second lease. In *Johnston v Monzie*¹⁰⁹ ‘it was offered to be proved . . . that the purchaser knew of this prorogation; but the Lords did not listen to that’. This differed from the earlier case of *Richard v Lindsay*,¹¹⁰ where a landlord granted his tenant a second lease to run from the expiry of the first and this was held to bind a successor who acquired in the meantime, with knowledge of the second lease.¹¹¹ It is the rule in *Johnston* which is generally accepted.¹¹²

9-37. What of the offside goals rule? Reid’s three criteria are met:¹¹³ there is an antecedent obligation affecting the grantor; the second grant is in breach of that prior obligation (for, unless the transferee is taken bound by the future lease, or other steps are taken to ensure that performance will be forthcoming, the transfer will put performance out of the transferor’s power);¹¹⁴ and the transferee knew of the obligation. The issue is whether leases are rights to which

¹⁰⁸ Cf the South African case of *Spearhead Property Holdings Ltd v E & D Motors (Pty) Ltd* [2009] ZASCA 70, 2010 (2) SA 1, where it was held that the doctrine of notice did not mean that the successor landlord had been substituted for the original landlord in the option agreement, only that any transfer to which the tenant was entitled once the option had been exercised could be demanded from the successor landlord. The Supreme Court of Appeal held that the tenant required to serve notice of exercise of the option against the original landlord who had granted the option. The tenant could then rely on the doctrine of notice to claim transfer from the new landlord.

¹⁰⁹ (1760) 5 Br Sup 877.

¹¹⁰ (1725) Mor 15217. In his notes to the edition of Stair which he edited, More explained *Richard* as creating a personal exception in the acquirer: JS More *Notes to Stair’s Institutions* (1832) ccxlv. This is classic offside goals language.

¹¹¹ There are other specialities to the decision notably that the second lease was granted on deathbed. Hunter viewed the case as proceeding upon this ground: Hunter *Landlord and Tenant* vol I 491.

¹¹² Rankine *Leases* 149; Paton and Cameron *Landlord and Tenant* 115 (although they do not note the conflict with *Richard*); *SME Landlord and Tenant Second Reissue* [235]; *Birkbeck v Ross* (1865) 4 M 272 (OH) at 276–277; *Jacobs v Anderson* (1898) 6 SLT 234 (OH).

¹¹³ Reid *Property* [695]; and see para 9-04 above.

¹¹⁴ See paras 8-27 to 8-38 above.

the offside goals rule applies at all. *Johnston* seems to deny the possibility, and this position has been reiterated in two cases since, but without any clear explanation as to why the law should be so. In *Birkbeck v Ross*¹¹⁵ the parties had agreed a two-year shooting lease and a further ten-year lease to commence upon the expiry of the first lease. The subjects were sold during the first lease and the question was which, if either, of the leases bound the successor. The Lord Ordinary (Barcaple) held that neither did. The main ground of decision was that the Leases Act 1449 did not apply to a shooting lease. In going on to consider the effect of the successor's knowledge of the existence of a lease, he stated that knowledge could not make up for the fact that the 1449 Act did not apply to such leases, and concluded, *obiter*.¹¹⁶

The question undoubtedly assumes a different aspect if the purchaser's right to object rests entirely upon the want of possession under the minute of agreement [which contained the second lease]. It seems less inconsistent with legal principle to hold that a defect of this kind may be supplied by a proof of the purchaser's knowledge of the right, and want of good faith. But looking to the principle on which leases, in their own nature merely contracts personally binding upon the parties to them, are effectual against singular successors, the Lord Ordinary thinks it impossible to hold that an obligation to enter into a lease on which there has been no possession, and the term of entry under which has not arrived when the lands are sold, is binding upon the purchaser in respect of his knowledge of the contract.

9-38. In *Jacobs v Anderson*¹¹⁷ a head-landlord undertook to a sub-tenant to grant him a lease upon expiry of the head-lease. The sub-tenant argued that the head-landlord's successor was bound by this obligation because he had been aware of it when he purchased the property. Lord Kyllachy rejected this:¹¹⁸

It may not be easy to fix the precise limits of the doctrine established or recognised by the cases of *Marshall*,^[119] *Petrie*,^[120] *Stodart*,^[121] and other cases of that description. But it is certainly the fact that that doctrine has never been applied to leases or similar contracts affecting land which remain merely personal and on which possession has not followed. The Act of 1449 provides the rule in such cases; and, indeed, the point seems to have been more than once expressly decided. See *Johnstone*,^[122] *Pollock*,^[123] *Birkbeck*.^[124]

¹¹⁵ (1865) 4 M 272 (OH).

¹¹⁶ (1865) 4 M 272 at 276.

¹¹⁷ (1898) 6 SLT 234 (OH).

¹¹⁸ (1898) 6 SLT 234 at 234.

¹¹⁹ *Marshall v Hynd* (1828) 6 S 384 (IH).

¹²⁰ *Petrie v Forsyth* (1874) 2 R 214 (IH).

¹²¹ *Stodart v Dalzell* (1876) 4 R 236 (IH).

¹²² *Johnston v Monzie* (1760) 5 Br Sup 877.

¹²³ *Pollock, Gilmour and Co v Harvey* (1828) 6 S 913 (IH).

¹²⁴ *Birkbeck v Ross* (1865) 4 M 272 (OH).

9-39. If the rule is clear, the reasons for it are not. These passages provide little insight into why leases are excluded from the offside goals rule. Both show signs of influence of the original view that a lease was simply a contract. This book has not proposed a conclusive view on the thorny question of whether lease should best be characterised as a real right or as a personal right which behaves in a particular way.¹²⁵ It proceeds on the working assumption that when a lease is protected by the 1449 Act or by registration, the tenant is both a party to a contract of lease and holds a real right. But even if a lease is not a real right, it clearly has some real characteristics and there seems to be no good reason why one of these could not be that it benefits from the protection of the offside goals rule. Reid suggests that the exclusion of leases from that rule ought to be reconsidered¹²⁶ and there is other academic support for this position.¹²⁷ The South African doctrine of notice applies so as to bind a knowing successor to a lease which has not been made real.¹²⁸ One possibility, hinted at by Lord Barcable in *Birkbeck*, is that the offside goals rule might apply to a lease which has commenced but where the tenant has not taken possession, but not to a situation where the term of entry had not arrived when ownership of the land is transferred. This may be a concern where the lease is to begin substantially in the future. But it is thought it should not be a concern where the lease is to begin in the near future. The offside goals rule almost certainly applies to contracts of sale even although they have a future date of entry.¹²⁹ If the offside goals rule were to apply to leases, there seems to be no reason why they should be treated differently.

(3) Options to renew

9-40. In chapter 5 the current rule about renewal options was outlined: in an unregistered lease, as the law stands, such an option is a personal condition, whereas in a registered lease the option is probably real.¹³⁰ It was suggested that the law in respect of unregistered leases could usefully be developed to allow an option to renew the lease to bind a successor.¹³¹ If that development were not to take place, it might be argued that an option to renew an unregistered lease should bind a knowing or gratuitous successor by virtue of the offside goals

¹²⁵ See paras 1-48 to 1-53 above.

¹²⁶ Reid *Property* [697].

¹²⁷ DA Brand, AJM Steven and S Wortley *Professor McDonald's Conveyancing Manual* (7th edn, 2004) [32.60]. Both this text and Reid *Property* cite *Greig v Brown and Nicolson* (1829) 7 S 274 (IH), a case in which a servitude was enforced against a singular successor of the grantor despite its not having been made real.

¹²⁸ Cooper *Landlord and Tenant* 284.

¹²⁹ The suggestion to the contrary in argument in *Gibson v Royal Bank of Scotland* [2009] CSOH 14, 2009 SLT 444 at [15] was rejected by the court at [49].

¹³⁰ See paras 5-19 to 5-37 and 5-58 above.

¹³¹ See paras 5-44 to 5-47 above.

rule. Such an argument would have one old authority in its favour.¹³² However, that case predates current formulations of the offside goals rule. In order to succeed, a tenant would require to overcome both the current refusal to hold that a lease benefits from the offside goals rule¹³³ and also the arguments about whether options can benefit from that rule.¹³⁴ Although in both instances the tenant has a strong argument, it is suggested that a more useful development of the law would be to hold that an option to renew an unregistered lease binds a successor as a real condition.

(4) Other uses of the offside goals rule

9-41. There have been two other modern cases where parties have sought to rely upon the offside goals rule in connection with a lease. The discussion in this chapter makes clear why, in both, the argument based on the offside goals rule could not have succeeded. In *Allan v Armstrong*¹³⁵ a tenant sued his solicitors for negligence when a successor landlord asserted that he was not bound by a break option contained in missives of let but not in the lease itself. One of the solicitor's arguments was that, because the successor had known of the term, it was bound by it and so there was no loss on which to found a negligence claim. As a break option is a real condition,¹³⁶ the offside goals point need not have been taken. The real issue was whether the fact that the option had been omitted from the formal lease prevented it from binding a successor. It was suggested in chapter 2 that it should not necessarily have that effect.¹³⁷ In any event, the offside goals argument would have been unsuccessful: a break option is not a right to acquire a real right and so the offside goals rule would not render it binding upon a successor.

9-42. The other modern case in which an offside goals argument has been made in respect of leases is *Optical Express (Gyle) Ltd v Marks and Spencer plc.*¹³⁸ A successor landlord granted a lease over one unit in a shopping centre (unit 56) in breach of an exclusivity agreement entered into by the original landlord with the tenant of unit 41. The tenant of unit 41 sought to have the lease in respect of unit 56 reduced, and the tenant to whom the lease had been granted interdicted from carrying on business. Lord Macfadyen held that that offside goals rule did not have that effect.¹³⁹

¹³² In *Clerk v Farquharson* (1799) Mor 15225, magistrates allowed proof as to whether the successor was aware of the landlord's obligation to grant a further lease. This case predates current formulations of the offside goals rule.

¹³³ Noted at paras 9-37 to 9-39 above.

¹³⁴ Noted in respect of options to purchase at paras 9-18 to 9-35 above.

¹³⁵ 2004 GWD 37-768 (OH).

¹³⁶ See paras 5-39 to 5-41 and 5-59 above.

¹³⁷ See paras 2-52 to 2-57 above.

¹³⁸ 2000 SLT 644 (OH).

¹³⁹ 2000 SLT 644 (OH) at 651L–652A; see AJM Steven 'Keeping the Goalposts in Sight' 2000 SLT (News) 143.

It [the pursuer's argument] involves in my view a confusion between two types of real right. If the pursuers are right in their primary contention, the pursuers have a real right against the first and second defenders [the successor landlords] in the sense that the exclusivity clause as part of the lease of unit 41 has become enforceable against the first and second defenders as singular successors of the council.^[140] But the pursuers have no real right, and no right capable of being made real, in the subjects of the lease between the first and second defenders and the third defenders, namely unit 56. As is in my view clear from what was said by Lord President Emslie in *Trade Development Bank v Warriner & Mason (Scotland) Ltd*, the sort of right that will prevent a party from taking a right to subjects in good faith is a prior right in respect of the relevant subjects which is either real or capable of being made real.

The conclusion is correct, but there is room for greater precision in terminology. If the pursuers had succeeded in their first and second arguments, the exclusivity clause would have bound the successor landlords not as a real right, but as a real condition of the lease of unit 41.¹⁴¹ Recourse to the offside goals rule was therefore an attempt to use the broader variant of that rule, à la *Trade Development Bank v Warriner & Mason (Scotland) Ltd*,¹⁴² namely that a right granted in breach of a real condition of an existing real right is voidable. As was noted above, some prefer to view this as a self-standing rule, and not as an application of the offside goals rule.¹⁴³ This book expresses no concluded view on that point. The reason that the rule from *Warriner & Mason* (be it an instance of the offside goals rule or otherwise) could not be applied in *Optical Express* was that the real condition bound the successor as landlord of unit 41 and not as owner of unit 56. In order for the offside goals rule to apply, the conflict of rights needs to be in respect of the same property. The distinction, explored in chapter 7,¹⁴⁴ between (i) a real condition of a lease (recognised by Scots law) and (ii) a condition which might benefit a tenant of one plot of land for the time being and burden the owner for the time being of other land (which is not recognised by Scots law as a real condition), is therefore of critical importance.

F. CONCLUSION

9-43. This final chapter has considered whether successor landlords are bound by a personal condition in a lease if they know of it, or acquire gratuitously or for a materially undervalue consideration. The general rule is that knowledge does not render a personal condition binding upon a successor landlord: the

¹⁴⁰ Lord Macfadyen held that such a clause was not a real condition. Chapter 7, however, suggests that this is not the law: see paras 7-28 to 7-36 above.

¹⁴¹ The distinction between real right and real condition was noted at para 9-04 n 19 above.

¹⁴² 1980 SC 74 (IH); see paras 9-08 and 9-09 above.

¹⁴³ See para 9-09 above.

¹⁴⁴ See paras 7-08 to 7-10 above.

successor may well know of the condition, but that does not affect the fact that it is personal. The offside goals rule is an exception to that general rule. It is most likely to be of importance in respect of options to purchase. This chapter suggests that the offside goals rule does apply to options to purchase and rights of pre-emption, despite one relatively recent authority to the contrary. Thus, although such a term is not a real condition, it can bind a successor landlord who acquires with knowledge of it. In theory, the rule might also apply to render obligations or options to renew a lease binding upon a successor, but this is likely to be of less practical significance and would require the courts to develop the law in various ways. Finally, the offside goals rule does not render voidable leases granted in breach of real conditions (such as exclusivity clauses) which relate to property other than the subjects of the lease.

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