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Leases and Licences in Scots Law – An Historical-Doctrinal Analysis



THE UNIVERSITY
of EDINBURGH

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Abstract

For commercial landlords and tenants in Scotland, the common law, rather than legislation, provides most rules for the regulation of their agreement. Yet, despite its widespread practical importance, the Scottish law of landlord and tenant law is riddled with uncertainty due to being severely under-researched. This thesis sheds light for the first time on some of the most fundamental unanswered questions in the area: it evaluates which occupancy agreements can be validly created in Scots law, and how their formation requirements differ.

This is important because different occupancy agreements have different implications for parties. Only leases which have become real rights provide security of tenure for tenants. However, as nominate contracts, any lease (whether it creates a real right or operates purely as a contract) contains implied terms (e.g. repairing obligations, notice requirements). Conversely, licences to occupy are easily terminable and incorporate no implied terms. If all the above types of occupancy agreement exist, it is imperative for the smooth operation of modern Scots law that the requirements for constitution of each are clearly delineated. This ensures parties know their rights and obligations from the outset.

This thesis has three main parts. The first analyses what is meant by the term “lease”. Although the existence of a lease conferring a real right on the tenant is undisputed, an ongoing debate questions the survival of a purely contractual lease, alongside, and distinct from, the real right of lease. This research contributes an historical analysis, exploring for the first time the development of the lease’s cardinal elements. Through this detailed analysis, it is argued that the contract of lease does continue to exist, evidenced by stark differences in the formation requirements between the real right of lease and the contract of lease. The clarity provided by this discussion will be particularly important for tenants: contractual leases would provide access to the lease’s protective implied terms without the additional onerous requirements needed to create real rights.

Only when the scope of the lease is known can the role of licence to occupy be fully understood. The licence to occupy is the focus of the second part of this thesis. Some, such as the Property Standardisation Group, doubt whether the licence exists

in Scots law at all. Yet, commercial parties, drawn by the flexibility and simple termination of licences, have used them extensively (e.g. for “pop-up shops”). However, the current uncertainty means that parties risk their licences being unenforceable. My historical research identifies the introduction and extent of the acceptance of the licence in Scots Law. This is important because we cannot fully understand the law in this area without understanding its historical underpinnings, including the extent to which Scots law has been influenced by English law. Unclear formation requirements create additional problems when creating a licence. This research provides much-needed clarification of issues including the definition of exclusive possession and the role of intention as methods of distinguishing the lease from the licence. A detailed study defining these differences has never been previously attempted in Scots law.

The third and final part of the thesis draws together the two previous strands. It considers the way in which the law distinguishing the real right of lease, the contract of lease and the licence to occupy could be improved. Ultimately, this research will provide an essential exposé of a practically important area of modern commercial law, recently highlighted by the Law Society of Scotland as requiring exploration and clarity. It provides a scheme which ensures parties know precisely which contract they have created and its implications.

Lay Summary

This thesis examines contracts for the occupation of commercial property in Scotland. Examples of these agreements include contracts to use office spaces, or shops in shopping centres. Overall, this is an under-researched area of Scots law, despite its importance in practice. The thesis aims to set out which types of occupation agreements are recognised by Scots law. It then explores how these different agreements are created.

The first part of the thesis explores the “lease”. Despite the single term “lease”, this thesis argues that the term “lease” covers two different types of occupation agreement – the contract of lease and the real right of lease. It demonstrates this by considering how the different agreements are formed. It is acknowledged that both types of lease have the same cardinal elements (terms which must be agreed before the contract can come into being). These are 1) the parties (who is the contract between), 2) the property (what land or building is the occupier occupying), 3) the rent (the money paid from the occupier to the owner of the property), and 4) the duration (how long the agreement is to last). However, it is argued that the rules for what is deemed a valid rent or duration under Scots law is different for real rights of lease and contracts of lease. For example, a real right of lease cannot have a nominal or elusory rent, and cannot be for a perpetual duration. A nominal rent and a perpetual duration could, however, create a contract of lease.

The second part of the thesis examines the licence to occupy. It demonstrates that the licence to occupy is a relatively new concept in Scots law, having been adopted from English law in the early 1900s. The thesis then considers how this occupation agreement can be differentiated from both types of lease. Currently, leases are distinguished from licences to occupy in three main ways. First, a licence is created if not all cardinal elements of a lease are present. Secondly, a licence is created if the tenant is not given exclusive possession of the property. However, it is demonstrated that what is meant by the term “exclusive possession” is unclear. The third way of distinguishing leases from licences to occupy is by considering the intention of the parties – what type of agreement did they want to create? The thesis argues that the law in this area is in need of reform. It is not clear which of these factors is the most

important when distinguishing between leases and licences. Furthermore, the case law in this area is far removed from what is happening in real life.

It is vitally important that these different agreements can be distinguished between because different agreements impose different rights and obligations on the parties. For example, both the real right of lease and the contract of lease contain implied terms by virtue of being called a “lease”. These include terms such as that the landlord must give the tenant a specific notice period before bringing the agreement to an end, or the fact that the landlord is obliged to repair the property. The licence to occupy contains no such implied terms. The benefit of having a real right of lease as opposed to a contract of lease is that a real right can be enforced against successor landlords. This means that the tenant cannot be evicted until the end of the lease, even if the landlord sells the property to someone else. Both the licence to occupy and the contract of lease, however, can be terminated by a new owner. The differences between the agreements are therefore significant.

The final part of the thesis explores options for reform, so that leases and licences can be clearly distinguished. It suggests that the law should adopt a new test based on the purpose of the agreement. It proposes a simple solution to a difficult question: if parties intend to create a lease, then a lease is created (so long as some basic requirements are fulfilled). If they intend to create a licence to occupy, then that is what the parties have created.

Declaration

I, Shona Mairi Warwick, declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where states otherwise by reference or acknowledgment, the work presented is entirely my own.

Shona Mairi Norbash

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Chapter 1: Introduction

1.1 Introduction

This first chapter provides an overview of the thesis which explores the Scottish law surrounding the formation of commercial occupation agreements. It summarises the research questions that this thesis will answer, explains the methodology used to answer those questions, and why these questions are of both practical and doctrinal importance in Scots law.

1.2 Research Questions

This thesis examines an under-researched but practically important area of Scots law – the law of landlord and tenant. This area sits at the intersection between property law and obligations, which makes the area notoriously complex.¹ This thesis aims to identify which types of occupation agreement are recognised as legal categories in Scots law. It will be suggested that three different types of occupation agreement can be identified. The first is the lease. However, it is argued here that the lease is not a homogenous term. Instead, it covers two distinct forms of agreement.² The first is the real right of lease.³ This can be contrasted with the contract of lease. The difference between the two is explained more fully below. The third category of agreement is the licence to occupy. The thesis then analyses the

¹ W S Holdsworth, “The History of the Treatment of Choses in Action by the Common Law” (1919-20) 33 Harvard L Rev 997, 1030.

² These agreements can then be modified further by the parties such that two agreements are rarely the same: I Quigley, “On the wrong track?” The Law Society of Scotland: The Journal (12 February 2007).

³ It is outwith the scope of this thesis to consider whether the right gained by a tenant is a real right in the true sense of the term. This matter has already generated much academic discussion: See for instance: in favour, generally: K Reid, *The Law of Property in Scotland* (1996), L Richardson and C Anderson, *McAllister’s Scottish Law of Leases* (5th edn, 2021) (hereafter “Richardson and Anderson”); against: R Rennie with M Blair, S Brymer, F McCarthy and T Mullen, *Leases* (2015) (hereafter “Rennie”) 66; G Paton and J Cameron, *The Law of Landlord and Tenant in Scotland* (1967) (hereafter “Paton and Cameron”) 103. It is sufficient for the purposes of this thesis to note that certain leases can be enforced against successors to the land, whether that is through creation of a real right, or as some elevated contractual right. In this thesis, the term “real right of lease” is used to describe leases which are enforceable against successors.

way in which these different agreements are created. It sets out the formation requirements, with a particular emphasis on the way in which the different agreements can be distinguished from one another.

This thesis therefore aims to answer some fundamental questions in the law of landlord and tenant. The research questions can thus be simply stated:

Research Question 1:

- What is a “lease”? How is a lease created?

Research Question 2:

- What is a licence to occupy? How is a licence to occupy distinguished from the lease? How could the distinction be made clearer?

1.3 Justification

This research is justified on both a practical and a doctrinal basis.

1.3.1 Doctrinal

As noted above, landlord and tenant law is generally under-researched in Scots law. Just five key texts have examined the area in any depth.⁴ That being said, there has been a recent resurgence in academic interest in the law of leases. Much of that research has analysed areas of landlord and tenant law altered by legislation.⁵ Less research has focused on the common law of leases. The research which has focused on the common law has centred on specific aspects of leases. For example,

⁴ R Bell, *A Treatise on Leases* (4th edn, 1825, edited by W Bell) (hereafter “Bell, *Leases*”; R Hunter, *A Treatise on the Law of Landlord and Tenant* (4th edn, 1876, edited by W Guthrie) (hereafter “Hunter”; J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) (hereafter “Rankine”); Paton and Cameron; Rennie. Note also the shorter more basic text: Richardson and Anderson.

⁵ See in particular the work of M Combe and P Robson on the Private Housing (Tenancies) (Scotland) Act 2016: e.g. M Combe and P Robson, “A review of the first wrongful-termination orders made under the Private Housing (Tenancies) (Scotland) Act 2016: do they sufficiently protect those misled into giving up a tenancy?” 2021(2) *Jur Rev* 88; P Robson and M Combe, “The first year of the First-tier: private residential tenancy eviction cases at the housing and property chamber” 2019(4) *Jur Rev* 325.

Haughey⁶ and Webster⁷ have analysed how lease terms affect successor landlords. Sweeney, and Steven and Skea, have analysed the landlord's hypothec.⁸ The Scottish Law Commission has conducted research into irritancy⁹, the conversion of long leases to ownership,¹⁰ and aspects of termination of leases.¹¹

This recent academic commentary, however, can only be fully comprehended if the basic concepts at the heart of landlord and tenant law are understood. For example, before approaching the issue of which terms in a lease agreement transmit to successors, parties must be certain that the agreement they have created is, under the law, a lease. Likewise, a landlord's hypothec only operates if the agreement is indeed a lease.

A brief look at the law surrounding the way in which different occupation agreements are created in Scots law demonstrates that the law is far from settled. As Gretton and Reid commented in 2017, terms such as "lease" and "licence" are frequently used, which leads to the assumption that the distinction between the two is settled.¹² However, they note that "Alas, it is not so."¹³ Two examples illustrate this point. It is generally accepted that the Scottish lease has four cardinal elements: rent, parties, property and duration.¹⁴ Thus, parties must agree the term of the lease.¹⁵ However, there is a seemingly contradictory rule which states that if a duration is not included,

⁶ D Haughey, "Transmissibility of Lease Conditions in Scots Law – A Doctrinal-Historical Analysis" (2015) 19(3) Edin LR 333.

⁷ P Webster, "The Relationship of Tenant and Successor Landlord in Scots Law", Unpublished PhD Thesis, University of Edinburgh, 2008.

⁸ A Sweeney, "The Landlord's Hypothec", unpublished PhD Thesis, University of Edinburgh, 2020; A Steven and S Skea, "The Landlord's Hypothec – Difficulties in Practice" (2010) SLT(News) 120.

⁹ Scottish Law Commission, *Report on Irritancy in Leases of Land*, (June 2003).

¹⁰ Scottish Law Commission, *Report on the Conversion of Long Leases*, (December 2006), as implemented in the Long Leases (Scotland) Act 2012.

¹¹ Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination*, (May 2018)

¹² G Gretton and K Reid, *Conveyancing 2017* (2018), 155.

¹³ *Ibid.*

¹⁴ The precise meaning attached to each cardinal element is discussed in Chapters 3 and 4.

¹⁵ Erskine, *An Institute of the Law of Scotland* (1773) 2.6.20 (hereafter "Erskine"); Paton and Cameron, 5; Bell, *Leases*, 2; Hunter, 79; Rankine, 1; J Halliday, *Conveyancing Law and Practice in Scotland*, (2nd edn, 1997) 40-02; W Gordon and S Wortley, *Scottish Land Law*, (3rd edn, 2009), 18-136; Richardson and Anderson, 3.

then a duration of one year is implied.¹⁶ It is thus unclear whether duration is, in fact, a requirement of a lease. Furthermore, it is often stated that a lease requires “exclusive possession” to become real.¹⁷ However, no definition of what is meant by this term is forthcoming. The meaning of these terms and the reason for any exceptions to them need to be rationalised.

Therefore, this research aims to provide a clear scheme clarifying the basics of landlord and tenant law in Scotland. Once clarified, the research will provide context for both existing and future research in the area.

1.3.2 Practical

This research is also of utmost importance to practice. When different, but similar, types of agreement exist, parties must know into which type of agreement they have entered. This is because each type of agreement gives rise to different rights and obligations. It is outwith the scope of this thesis to analyse the rights and obligations which arise from the different agreements in detail. It is sufficient for the purposes of this thesis to highlight that significant differences exist, as it then follows that identifying which type of agreement has been created is vitally important.

A lease, whether it is a real right of lease or simply a contract of lease, is a nominate contract.¹⁸ Consequently, there are various rights and obligations which are implied into the contract by virtue of the contract being categorised as a lease.¹⁹ These implied terms are wide-ranging. For example, a lease imposes specific obligations on both parties. Some of the most basic include that the landlord must place the tenant in possession of the property which has been let, whilst the tenant is obliged to enter into possession of the subjects.²⁰ The landlord must ensure that the property

¹⁶ *Gray v Edinburgh University* 1962 SC 157.

¹⁷ *St Andrews Forest Lodges Ltd v Grieve* [2017] DUN 25, 29.

¹⁸ RJ Pothier *Traité des Obligations* (1761), 5–8; Erskine III, 3, 9, 10.

¹⁹ See generally, Richardson and Anderson, ch 3.

²⁰ See, for example, *Graham and Black v Stevenson* (1792) Hume 781; *Blair Trust Co v Gilbert* 1940 SLT 322; *Smith v Henderson* (1897) 24 R 1102; *Mickel v M'Coard* 1913 SC 896.

is fit for the purpose for which the property was let.²¹ The tenant must use the property only for that purpose.²² The landlord is also obliged to make repairs to the property.²³

In addition to the obligations imposed onto both parties, lease-specific remedies are available for breaches of lease terms. These are in addition to the general contractual remedies which apply to all contracts, regardless of whether they are a lease or another contract.²⁴ The most important of these remedies is irritancy.²⁵ Irritancy refers to the landlord's right to bring the lease to an end at an earlier date than that specified in the agreements, as a result of the tenant's breach of contract. Other remedies include the landlord's hypothec.²⁶ This is an implied security which arises when the tenant has not paid rent. It gives the landlord a real right over the moveable property kept on the leased property. Furthermore, the tenant can avail herself of the remedy of abatement of rent. This entitles the tenant to pay a reduced rent if she is prevented, through no fault of her own, from full enjoyment of the subjects let. It can be particularly useful where the landlord is also not at fault. Such remedies apply only to leases, and do not apply if the parties have created a licence to occupy.

Further terms implied into lease agreements regulate the agreement's termination. For example, if no notice is given of the intention to bring the lease to an end at the date specified in the lease, then the lease continues for a further year on the same terms by virtue of tacit relocation.²⁷ Tacit relocation also applies if incorrect notice is given. This may occur, for example, if the notice period does not comply with the period specified in the lease. The rules surrounding notice periods and tacit

²¹ For a particularly evocative case in this regard, see *Kippen v Openheim* (1847) 10 D 242. See also *Brodie v MacLachlan* (1900) 8 SLT 145.

²² *Leck v Merryflats Patent Brick Co* (1896) 5 SLR 619; *Bayley v Addison* (1901) 8 SLT 379; *Duke of Argyle v M'Arthur* (1861) 23 D 1236.

²³ Rankine, 241; Paton and Cameron, 131.

²⁴ Richardson and Anderson, 4.1.

²⁵ See generally Richardson and Anderson, ch 5, and the work of the Scottish Law Commission: Scottish Law Commission, *Report on Irritancy in Leases of Land* (June 2003).

²⁶ See generally Richardson and Anderson, ch 6.

²⁷ *Cinema Bingo Club v Ward* 1976 SLT (Sh Ct) 90.

relocation more generally are a particularly unclear area of law.²⁸ For instance, it is unclear whether parties can contract out of tacit relocation.²⁹ Furthermore, the rules surrounding notice periods are complicated by obscure pieces of legislation.³⁰ Therefore, parties may inadvertently extend their agreement for a further year.

Whilst the above rights, obligations and terms are implied into all contracts of lease, they are not implied into the licence to occupy. As the licence to occupy is not a nominate contract, it is regulated only by the terms included in the agreement. Practically speaking, this means that it is not presumed that the landlord is to be responsible for repairs to the property. It means that neither party can avail themselves of lease-specific remedies for breach of contract. It also means that the contract ends automatically on the date specified in the agreement, without the need for a party to give notice.

A further difference between leases and licences to occupy in terms of the obligations they impose on the parties is the tax implications of the agreement. A lease will be subject, for example, to Land and Buildings Transaction Tax, regardless of whether it is a real right or not.³¹

The last important distinction between the different types of occupation agreement is whether they provide the occupier with a real right in the property. In Scots law, only the real right of lease gives the tenant a real right in the property. This means, for example, that if the landlord sells the property, the new owner must recognise any existing leases over the property and allow them to run their course.³² In other words, the new owner cannot evict any tenants. Sometimes, a real right transforms the lease into an extremely marketable asset. From the landlord's perspective, they can sell the property with a tenant *in situ*. This gives the buyer a guaranteed income, and it may be particularly useful for properties such as shopping centres, where an

²⁸ See generally Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination* (May 2018).

²⁹ *Ibid*, 10.

³⁰ *Ibid*, ch 3.

³¹ Land and Buildings Transaction Tax (Scotland) Act 2013, s53.

³² Richardson and Anderson, 1.7ff.

empty property is not particularly valuable. Conversely, the tenant can also acquire a marketable asset. They can transfer their lease in return for payment. Particularly in the case of longer leases, this can be akin to transferring ownership.

Whilst real rights of lease confer significant rights to the tenant, the same is not true for contracts of lease and licences to occupy. Contracts of lease and licences to occupy confer only personal rights on the tenant. This means that they are not enforceable against successor owners of the land. Thus, the tenant can be evicted if the property is sold, and for that reason, the tenant does not have such an attractive asset to assign.

Under Scots law, a real right of lease can be created if certain requirements are fulfilled. The fundamental piece of legislation in this regard is the Leases Act 1449. It provides that those with a lease for “termes and yeris” may enforce their lease against subsequent owners of the land until the expiry of the duration of their lease.³³ Tenants are obliged to pay the new landlord “sik lik male” as they paid to the original landlord.³⁴ The Leases Act 1449 has been interpreted as applying only to leases which fulfil certain criteria. The reference to “termes and yeris” means the Act only applies to leases which include an ish (an end-date). The reference to “sik lik male” has arguably been interpreted strictly. A rule stating that tenants are obliged to pay any future landlord the same rent as they paid the original landlord could be interpreted as meaning that if no rent was paid to the original landlord, then no rent is due to the subsequent landlord. Instead, it has “uniformly” been interpreted as requiring any lease to which the 1449 Act applies to include a rent, which cannot be nominal or elusory.³⁵ Further requirements which must be met before the Leases Act 1449 applies include the taking of possession of the subjects by the tenant, and for the agreement to be in writing if for longer than a year.³⁶ Originally, the Leases Act 1449 created real rights for any length of lease. However, now it applies only to

³³ “Terms and years”.

³⁴ “The same rent”.

³⁵ Rankine, 144. A more detailed analysis of the meaning of these requirements is conducted in Chapters 3 and 4.

³⁶ Requirements of Writing (Scotland) Act 1995, s1(2)(a)(i) and s1(7).

leases of up to 20 years' duration. Leases of more than 20 years are made real by registration in the Land Register under the Registration of Leases Scotland Act 1857.³⁷

This research explores what differences can be identified, if any, between real rights of lease and contracts of lease at the formation of contract stage. It may be the case that the only difference in the requirements of each type of lease is whether the agreement has been perfected by possession or registration. Alternatively, there may be differences in the cardinal elements of each type of lease. For example, whilst a real lease requires a non-elusory rent, such a rent may be acceptable in contracts of lease.

In summary, the different rights and obligations created by the real right of lease, the contract of lease, and the licence to occupy are illustrated in the following table.

³⁷ Registration of Leases (Scotland) Act 1857, s2.

Table 1: Rights and Obligations under Different Occupation Agreements

	Real Right of Lease	Contract of Lease	Licence to Occupy
Creates a real right, meaning the tenant cannot be evicted if the landlord sells the property.	Yes	No	No
Implies various terms into the contract, such as the landlord's repairing obligation, tacit relocation and notice requirements, and specific remedies such as irritancy or abatement of rent.	Yes	Yes	No
LBTT payable.	Yes	Yes	No

With a myriad of different rights and obligations depending on the type of agreement created, parties may be attracted by strengths and weaknesses of each type depending on their circumstances. For example, a landlord may wish to limit the rights given to the tenant so that they can be easily evicted and do not benefit from any implied terms. If they have more bargaining power, they may wish to create a licence to occupy, rather than a lease, in certain market conditions. However, in some cases, the “tenant” may also prefer a licence to a lease. For example, they may want to trial whether a property suits their needs, and therefore not be concerned about being accidentally tied into the property for a longer period through tacit relocation. Furthermore, the distinction between the two arrangements may be important to third parties such as creditors. It may suit a creditor to argue that a lease

has been created rather than a licence so that they can avail themselves of remedies such as maills and duties.³⁸

Therefore, this research is of significant practical importance. Knowing which agreement has been created is essential due to the different rights and obligations created by each agreement. However, this would not be problematic if the law delineating the differences between these types of agreements were clear. Unfortunately, as highlighted by the Law Society of Scotland, the law in this area is in need of explanation and clarity.³⁹

1.4 Methodology

In terms of sources, as a doctrinal piece of work, this thesis relies primarily on case law and juristic writings. In particular, this thesis has a strong historical element. It provides the first detailed account of the development of the cardinal elements of a lease in Scots law. In particular, it emphasises the impact of the Leases Act 1449 in creating differences between the two types of lease. Additionally, it traces the introduction and development of the Scottish licence to occupy for the first time. There are various justifications for taking an historical approach in legal research, not least that it provides context to the contemporary law.⁴⁰ More importantly with regards to the law of landlord and tenant, there has been no clear break with history.⁴¹ For example, short leases in Scots law derive their status as a real right from the Leases Act 1449. As Robbie explained, in Scots law, “not only does history help to understand the law, it often *is* the law”.⁴²

³⁸ Maills and duties is a diligence which requires a tenant to pay rent to the landlord's creditor, as opposed to the landlord. It is due to be abolished when s207(1) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 comes into force.

³⁹ Law Society of Scotland, *Consultation Response: Discussion Paper on Aspects of Leases: Termination* (September 2018), 1.

⁴⁰ K Reid and R Zimmermann, “Legal Doctrine in a Mixed Legal System” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000), 11.

⁴¹ *Ibid.*

⁴² J Robbie, *Private Water Rights* (2015) 1.11.

This work is not intended to be comparative in nature – instead, it is a detailed study of Scots law alone. That being said, as a mixed legal system Scots law cannot be viewed in isolation. As that mix is largely a mixture of Roman and English Law,⁴³ English law in particular is referred to in this thesis. This is due to the influence of English law on the development of the licence to occupy in Scots law. Where other jurisdictions could provide assistance on undecided matters in Scots Law, they are likewise referred to as a method of suggesting options for possible reform.

The focus of this thesis is primarily on commercial agreements. “Commercial agreements” has no standard definition in Scots law and is often left undefined by authors.⁴⁴ Richardson and Anderson, however, define a “commercial lease” generally as one whose subject matter is a shop, office, factory or “other business premises”.⁴⁵ The Property Standardisation Group, whose aim is to generate documents and procedures for commercial property transactions,⁴⁶ likewise has draft leases for properties including offices, retail units, restaurants and industrial units.⁴⁷ Commercial occupation agreements are usually distinguished from residential and agricultural leases. The latter two categories of lease have dedicated statutory schemes which apply.⁴⁸ Conversely, commercial agreements are heavily reliant on the common law, justifying distinct treatment. Of course, the lines between commercial agreements and other categories of occupation agreement may not always be clear-cut. For instance, many of those with agricultural leases will have commercial aims.⁴⁹ Nonetheless, this thesis proceeds with the definition of commercial occupation agreements being those which fall outside the scope of

⁴³ N Whitty, “The Civilian Tradition and Debates on Scots Law” 1996 TSAR 227 and 442; H MacQueen “Mixture or Muddle? – Teaching and Research in Scottish Legal History” (2001) 2 *Zeitschrift für Europäisches Privatrecht* 359.

⁴⁴ See, e.g. K Gerber, *Commercial Leases in Scotland* (3rd edn, 2016).

⁴⁵ Richardson and Anderson, 1.13.

⁴⁶ Property Standardisation Group, “Who we are”, available: <http://www.psglegal.co.uk/>.

⁴⁷ Property Standardisation Group, “Leases”, available: <http://www.psglegal.co.uk/leases.php>.

⁴⁸ In the residential sector, the primary piece of legislation is now the Private Housing (Tenancies) (Scotland) Act 2016. Some tenancies created prior to 1 December 2017 will be regulated by the Housing (Scotland) Act 1988. In the agricultural sector, the primary statutes are the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003.

⁴⁹ Rennie, 30.12.

agricultural and residential statutory schemes, and which have as their subject matter a property being used for business purposes. Typical examples include those listed by Richardson and Anderson and the Property Standardisation Group.

Despite commercial agreements being the focus of this thesis, as Scotland is a small jurisdiction, cases on the distinction between leases and licences to occupy are limited in number. They cover all categories of landlord and tenant law, including residential and agricultural cases. Whilst these scenarios are not the primary emphasis of this research, they are nonetheless relevant for the general principles they demonstrate, and are referred to for that reason.

1.5 A Note on Terminology

This thesis uses different terminology to differentiate the distinct categories of occupation agreement being discussed. The term “occupation agreements” is used as a holistic term covering real rights of lease, contracts of lease and licences to occupy. The term “real right of lease” or “real lease” refers to leases which can be or have been made into a real right. The term “contract of lease” or “contractual lease” refers to those leases which have not been or cannot be made into a real right. Other authors have preferred to use the term “non-real personal lease”.⁵⁰ The terms “landlord” and “tenant” refer to the parties under either a real right of lease or contract of lease. “Licence” or “licence to occupy” are used to refer to occupation agreements which are not leases. Other texts refer to licences to occupy as a “personal licence[s]”⁵¹ or “rights of occupation”.⁵² The terms “licensee” and “licensor” refer, respectively, to the occupier under the licence and the one granting the right to use the property in a licence arrangement.

⁵⁰ Lord Gill, “Two Questions in the Law of Leases” in F McCarthy, J Chalmers and S Bogle (eds) *Essays in Conveyancing and Property Law* (2015), ch 13; C Bury and D Bain, “A, B and C to A, revisited” 2013 JR 77.

⁵¹ Paton and Cameron, 12.

⁵² Richardson and Anderson, 2.60.

1.6 Map of the Thesis

This thesis is split into three broad parts. The first part of the thesis examines the formation requirements of the Scottish lease in detail. The focus of this discussion is differentiating between different agreements for the occupation of land. Prior to the Leases Act 1449, there was only one type of lease: the contract of lease, a form of *locatio conductio*.⁵³ Therefore, the role of the Leases Act 1449, and whether this Act created a further type of lease – the real right of lease – distinct from the contract of lease, is central to the discussion. It is because of the Leases Act 1449's importance that different types of lease are first compared in chapters 3 and 4 before returning to consider any impact the 1449 Act had on hire and the contract of location more generally in chapter 5. The analysis in the first part of the thesis seeks to achieve two main aims. First, it provides a detailed discussion of the development of the meaning of the lease's different cardinal elements in Scots law. A detailed examination of these requirements has not been previously attempted in Scots law. In doing so, this part also considers whether the term "lease" can be said to have a unified meaning in Scots law.

The second part is dedicated to the licence to occupy. It considers to what extent the licence is a recognised concept in Scots law, and, if the concept is indeed recognised, the origins of the concept. It then considers how the lease is currently distinguished from the licence to occupy, with a specific emphasis on whether the law is sufficiently clear in this regard.

The final part suggests options for reform and clarification of the law regarding leases and licences to occupy. In doing so, it seeks to suggest a coherent,⁵⁴ clear and practically useful way of distinguishing between the different categories of lease, and the licence to occupy, at the formation of contract stage.

⁵³ Bell, *Leases*, 2; Hunter, Vol 1, 28ff.

⁵⁴ For an examination of why coherence is sought after in law, see N MacCormick, *Rhetoric and the Rule of Law* (2005) ch 10.

PART 1: THE LEASE

Chapter 2: The Debate surrounding the Existence of the Contract of Lease

2.1 Aim of Part 1: The Lease

The first part of this thesis analyses what is meant by the term “lease”. More recently, the term “lease” has been used indiscriminately, without clarification of whether the contract or the real right of lease is being referred to, or whether the term is indeed meant to refer to both types of lease.⁵⁵ Indeed, often the term is used to refer to the real right of lease alone, and is contrasted with the licence to occupy.⁵⁶ This has likely contributed to the ongoing debate as to whether the contract of lease continues to exist in Scots law at all.

Whether the contract of lease continues to exist in Scots law is important. As acknowledged in Chapter 1, the lease is a nominate contract with implied terms. Parties need to know whether they can create a contract of lease - a lease agreement with all of the implied terms of a lease but without the additional rights which flow from the agreement being made real - or whether such an agreement would be deemed invalid or another type of contract altogether.

2.2 Does the contract of lease exist? The Current Debate

There is a lack of consensus in Scots law as to whether the contract of lease, distinct from the real right of lease, continues to exist in Scots law. Indeed, it is often presumed that the contract of lease *does* exist, but this point is rarely supported by evidence. For example, the existence of the contract of lease appears to be

⁵⁵ See, for example, the use of the term lease in legislation, such as Section 67 of the Abolition of Feudal Tenure, etc. (Scotland) Act 2000 and use of the term “let” in Section 1 of the Private Housing (Tenancies) (Scotland) Act 2016.

⁵⁶ E.g. *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12.

presumed by the Scottish Law Commission.⁵⁷ Other texts are more ambiguous. *McAllister's Scottish Law of Leases*, for example, explains that whilst it is correct to view a lease as a contract, it must also be viewed as a real right.⁵⁸ This is inconclusive as to whether the contract exists as a separate entity, or whether the real right of lease must be viewed as both a contractual and a real right simultaneously.

Four authors have debated the existence of the contract of lease in more detail. The majority support the position that Scots law *does* continue to recognise a contract of lease. Bury and Bain argue that “A ‘personal’ lease is no less a lease than a lease that has been made a real right”.⁵⁹ However, the main thrust of their argument is an altogether different issue: whether a contract of lease can benefit from statutory protection. As such, they seem to presume that the contract of lease exists, rather than providing evidence in support of this fact.

The opposing view was advanced by Lord Gill in response to Bury and Bain’s analysis.⁶⁰ Lord Gill’s argument in brief is that an agreement for the occupation of land is only to be termed a “lease” if it confers a real right on the tenant. If the agreement does not confer a real right, then the agreement is not a lease at all.⁶¹ Nonetheless, it may still be enforced as another type of contract, such as the licence to occupy. Thus, according to Lord Gill, there is no contract of lease in existence in Scots law.

Lord Gill reaches his conclusion by analysing the controversy surrounding whether or not the right created under the 1449 Act or by virtue of registering a lease in the land register is a real right. Lord Gill thoroughly analyses the development of the law on this issue, concluding that the nature of the tenant’s right under the 1449 Act is

⁵⁷ Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination* (May 2018) 8.42.

⁵⁸ Richardson and Anderson, 1.7.

⁵⁹ C Bury and D Bain, “A, B and C to A, revisited” 2013 JR 77, 81.

⁶⁰ 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.

⁶¹ *Ibid*, para 67.

indeed a real right.⁶² However, this finding does not lead necessarily to Lord Gill's conclusion that the "common law personal lease is no longer part of Scots law".⁶³ Identifying that under the Leases Act 1449, a lease can become a real right says nothing about validity of leases which have not attained this status. To do so, Lord Gill would have had to have shown that the sources suggested that the only recognised lease in Scots law is a real right of lease. Indeed, some of the cases cited by Lord Gill could be said to suggest this. For example, in *Inglis v Paul*, Lord Gill notes that the court says, "A tack is a real right", which could be read as implying a lease is *only* a real right.⁶⁴ Nonetheless, this is not how Lord Gill analyses the cases and uses them to support his argument.

Nevertheless, just because Lord Gill's argument appears flawed, this does not necessarily mean that the conclusion he reached is incorrect. Webster, however, makes a strong argument that the conclusion reached by Lord Gill is indeed incorrect.⁶⁵ The strength of Webster's argument lies in the way evidence is used to support his position. In particular, Webster highlights that a contract of lease may have a nominal or elusory rent, or be for a perpetual duration, which, he explains demonstrates that there is still "room" for the contract of lease in Scots law.⁶⁶

The thrust of the debate surrounding the continued existence of the contract of lease has centred on whether a landlord without valid title can grant a contract of lease, notwithstanding that a real right of lease would be invalid. This has meant that the scope of the discussion has been incredibly narrow. Webster does, however, make a convincing argument that the differences regarding the "parties" requirement point to the existence of the contract of lease. Citing an Inner House case not considered by Lord Gill,⁶⁷ he suggests that the outcome of that case was decided on the basis that

⁶² *Ibid*, para 7ff.

⁶³ *Ibid*, para 69.

⁶⁴ *Inglis v Paul* (1829) 7 S 469.

⁶⁵ P Webster, "The Continued Existence of the Contract of Lease", in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as Good Theory: Festschrift for George L Gretton* (2017), 119.

⁶⁶ *Ibid*, 125.

⁶⁷ *Weir v Dunlop & Co* (1861) 23 D 1293.

there was a valid contract of lease in that situation.⁶⁸ In other words, the contract of lease must exist.

Webster's other arguments, however, are less convincing. For example, when discussing a second case, *Reid's Tr v Watsons Trs*,⁶⁹ Webster explains that the outcome in the case "does not require the conclusion that the [contract of] lease was not valid".⁷⁰ However, that is not the same as stating positively that the court recognised that the contract of lease existed, or needed to exist, in that case.⁷¹ Similarly, Webster argues that if a lease cannot become real, for instance, because the landlord is unable to give possession to the tenant, then the tenant has a contractual claim against the landlord.⁷² The argument being advanced is that this contractual claim flows from the fact there is nonetheless a valid contract of lease. This contract of lease would imply the obligation for the landlord to give possession of the subjects to the tenant. However, just because the remedy is contractual in nature does not demonstrate that the contract of lease exists. Indeed, the contract may be another type, such as a licence to occupy, which would provide contractual remedies to the party prevented from occupying the property.

Therefore, whilst it is clear that most authors support the continued existence of the contract of lease in Scots law, their arguments are weakened by their narrow nature and lack of supporting evidence.

2.3 The Role of Part 1 in Settling the Debate, and Implications for the Rest of the Thesis

The first part of this thesis aims to add a further angle to the debate as to the existence of the contract of lease. It is submitted that there are several indicators that

⁶⁸ Webster, "The Continued Existence of the Contract of Lease" 128.

⁶⁹ *Reid's Tr v Watson's Trs* (1896) 23 R 636.

⁷⁰ Webster, "The Continued Existence of the Contract of Lease" 131.

⁷¹ This case is explained in more detail at 3.4.1, where it is submitted that this was, in fact, the decision reached by the court.

⁷² *Ibid*, 135.

a contract of lease exists, and that it is distinct from the real right of lease. Firstly, the term “lease” will not have one single meaning– it will instead be used in different contexts to refer to two different scenarios: situations which can only be a contract of lease, and those which are clearly a real right of lease. This approach was recently taken in the case of *Gray v MacNeil*, where it was recognised that a lease which was not in writing (and so could not be a real right of lease) was nonetheless an enforceable contract of lease.⁷³ A second indicator of the existence of the contract of lease is that it and the real right of lease will have different requirements for formation.⁷⁴ This is a particularly strong indicator of the existence of the contract of lease. It suggests that there is a category of leases, recognised by the law, which could never become real rights. Thus, the existence of the contract of the lease is unaffected by the capability of that lease to become a real right – they are completely distinct concepts. Webster alludes to this being the case, and provides a compelling analysis in respect of the cardinal element of “parties”.⁷⁵ However, this alone does not provide the full picture. A lease has four cardinal elements, and the parties’ presence is just one of those. This thesis expands the discussion thus far to include a detailed examination of all the cardinal elements of a lease, and what they indicate about the existence or otherwise of the contract of lease.

It is widely accepted that the lease was originally only a contract, enforceable between the parties. Through an historical analysis, however, this part analyses whether or not there is evidence of the contract of lease continuing to be referred to and treated as distinct from the real right of lease after the introduction of the 1449 Act. This part also has the secondary aim of delineating for the first time what the cardinal elements of a lease are, how they have changed over time, and how they are defined. This part of the thesis additionally provides the starting point for the second part of the thesis, which considers the licence to occupy. Only when the

⁷³ *Gray v MacNeil* [2017] SAC (Civ) 9.

⁷⁴ C.f. *Ibid.*

⁷⁵ Webster, “The Continued Existence of the Contract of Lease” 128.

limits of the lease are known can the interaction with the licence to occupy be fully understood.

Chapter 3: The Cardinal Elements in Early Scots Law

3.1 Introduction to Chapter 3

This part examines the cardinal elements of a lease in early Scots law. It lays a particular emphasis on whether there were any differences between the cardinal elements of a contract of lease as opposed to the real right of lease. As Chapter 2 explained, if there are differences between the real right of lease and the contract of lease in terms of their formation requirements, this provides strong evidence that there is a distinct space in Scots law for the contract of lease.

This chapter has four main parts, taking each cardinal element of the lease in turn: duration, rent, parties and property. The first part on duration also considers the definition of a lease and the extent to which it has altered over time.

3.2 Duration

Duration is the cardinal element of the lease which has changed most significantly over time. For example, leases for hundreds, if not thousands, of years were common in the eighteenth century.⁷⁶ Such long leases are not permissible under the current law.⁷⁷ It even appears that under the earliest law, duration was not a necessary element of a lease at all, being a requirement that was added later.⁷⁸ This section examines the requirement of duration in depth, from the early seventeenth century to the mid-nineteenth century,⁷⁹ with a particular emphasis on whether there were any clear distinctions between the contract of lease and the real lease in this

⁷⁶ M Hogg, "Leases: Four Historical Portraits" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (2000) Vol 1, 393.

⁷⁷ Abolition of Feudal Tenure etc. (Scotland) Act 2000, s67. Note also the Long Leases (Scotland) Act 2012 which converted certain long leases to ownership.

⁷⁸ See 3.2.1.

⁷⁹ This period encapsulates the time when the institutional writers were active and when case reports were more accessible.

regard. If no real distinguishing features can be identified, it suggests that the contract of lease may not exist as a distinct aspect of a lease at all.⁸⁰

In the first section, the definitions of both the contract of lease and the real right of lease are examined in detail. Perhaps surprisingly to the modern reader, duration has not always been a feature of such definitions. This first section concludes that, from a definitional perspective, the contract of lease and the real lease became indistinguishable from one another.

Considering the definitions alone does not, however, provide the full picture. The second section considers whether the specific rules regarding duration were the same for real rights of lease and contracts of lease, notwithstanding that duration became a defining feature of both leases' definitions. For example, it is possible that whilst the real lease had strict requirements such as a certain ish, the same was not true between the original landlord and the tenant under the contract of lease. This section concludes that in many respects, the specific rules on duration did indeed differ depending on whether the lease in question was a real right or was being enforced as a contract of lease against the original landlord.

Overall, it is argued that duration can be used to distinguish the contract of lease from the real right of lease. This is important because it demonstrates that despite the introduction of the Leases Act 1449, the contract of lease continued to exist as a distinct contractual arrangement, separate from the real right of lease and with its own distinctive rules.

3.2.1 Duration as a Defining Feature of a Lease

Under the modern law, duration is described as a cardinal element of a lease.⁸¹ It is thus a defining feature of a lease. Nonetheless, this was not always true. This

⁸⁰ 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).

⁸¹ Rennie, ch 1.

section establishes that originally, duration was not an essential characteristic of a contract of lease, although for a lease to be enforceable against successors, it was necessary. This section then traces the shift towards the inclusion of duration as a defining feature of both the real right of lease and the contract of lease. It then considers whether, in light of this change, the contract of lease can be said to remain distinguishable from the real right of lease.

3.2.1.1 Two Distinct Definitions

Under the earliest Scottish law, there was a clear contrast between the definition of a contract of lease and the requirements needed for protection under the Leases Act 1449. Duration was not stated as a requirement for a contract of lease. Instead, it was only cited as a requirement to make a lease real.

For the contract of lease, the lack of a need for duration can be traced to Roman law. Originating in the second half of the second century BC,⁸² the *locatio conductio* is said to be the foundation of Scottish lease law.⁸³ Like Scottish leases prior to the Leases Act 1449, the *locatio conductio* was not enforceable against successors to the landlord and offered the tenant no security.⁸⁴ Zimmermann notes that the defining features of a lease in Roman law were the subject-matter of the lease, the rent and the rent's method of payment.⁸⁵ Although du Plessis suggests that duration was also essential,⁸⁶ this is not supported by the primary texts. Of course, the duration of the lease was often agreed. However, it was not detrimental to the lease's validity if it was not included.⁸⁷ Gaius states that the defining feature of a lease was the rent, just as the price was for sale, and that whether rent was paid

⁸² P du Plessis, "Janus in the Roman Law of Urban Lease", (2006) *Historia: Zeitschrift für Alter Geschichte* 55, 48.

⁸³ R Bell, *Treatise of Leases*, (3rd edn, 1820), 2; Hunter, Vol 1, 28ff.

⁸⁴ du Plessis, "Janus" 55.

⁸⁵ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), 351-355. The extent to which these remained the requirements for other types of contract of location are considered in chapter 5.

⁸⁶ P du Plessis, "The Roman Concept of the Lex Contractus", (2006) 3 *Roman Legal Tradition* 79, 90.

⁸⁷ Zimmermann, *Roman Foundations*, 355, 357.

could be used to distinguish the two in cases where something was leased in perpetuity.⁸⁸ A similar position is found in Justinian's *Digest*.⁸⁹

In one of the earliest references to the law of leases in Scotland, however, duration is included in the description of a lease.⁹⁰ Nonetheless, the *Regiam Majestatem* is not attempting to define or delineate the scope of the lease. Instead, its description is simply to provide background for a particular question regarding non-payment of rent.⁹¹ Practically speaking, most leases would be limited in duration.⁹² Therefore, mentioning duration would make clear what arrangement was being discussed, even if it was not essential to the formation of the contract.

Indeed, it was the position evident in Roman law which was replicated in the early Scottish law of leases. For example, Stair defines a contract of lease as “a personal Contract of Location, whereby Land ... is set to the Tacks-man ... for a hyre, which is called the Tack-duty”.⁹³ Thus, duration is not included in Stair's definition, a point he subsequently re-iterates.⁹⁴ The repetition of the omission of duration as a requirement for the constitution of a contract of lease is important because it suggests that the exclusion is deliberate. These definitions of the contract of lease can further be contrasted with the definition of a real right of lease. Stair states that a real right of lease does require an agreed duration.⁹⁵ Taken together, these points are significant because they illustrate that Stair views the contract of lease as distinct from the real right of lease, with differing definitions: “[Leases] must be considered in themselves; First, As personal rights. Secondly, As by the statute becoming real.”⁹⁶

⁸⁸ Gaius, *Institutes*, 3.142, 3.145.

⁸⁹ D. 19.2.2.

⁹⁰ Stair Society, *Regiam Majestatem* (Stair Society, Volume 11) (1947), 206. See also the discussion of location generally in Chapter 5.

⁹¹ *Ibid.*

⁹² See, for instance, the 14th century lease replicated in Hogg, “Leases: Four Historical Portraits” 396.

⁹³ Stair, *Institutions* (2nd edn, 1693) (hereafter “Stair”) 2.19.1. Note that leases were previously known as “tacks” in Scots law.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 2.19.5.

⁹⁶ *Ibid.*, 2.19.3.

Craig too omits duration as a requirement for a contract of lease.⁹⁷ Unlike Stair, Craig does not include any definitions of a lease, which means that identifying the requirements of a lease is more difficult. Furthermore, the two chapters dedicated to leases do not have an obvious split in content and some aspects of the lease are discussed in more than one place.⁹⁸ Nonetheless, the fact that Craig did not view duration as a requirement for a contract of lease can be deduced through several steps. First, Craig discusses leases from the standpoint of a contract, rather than a real right of lease. This is evident from the fact that when there is a rule that is different for a real right of lease, he specifically refers to the real right of lease. For example, leases as they relate to singular successors are specifically given their own section,⁹⁹ and specificities regarding the removal of tenants involving a singular successor are highlighted as distinct from other instances of removal in the previous chapter.¹⁰⁰ This can be contrasted with Stair, for example, whose work focuses on the real lease and conversely highlights rules which are distinct to a purely personal contract of lease. For example, when Stair refers to constitution of leases generally,¹⁰¹ it is clear he is referring to real leases, having highlighted the different position for personal leases specifically in an earlier section.¹⁰² Therefore, Craig's discussion which is not specifically stated as discussing the real right of lease is discussing the contract of lease.

It is only in these sections of Craig's work that relate to a real right of lease that duration is discussed and stated as a requirement.¹⁰³ As duration is not mentioned elsewhere, it follows that it was not a requirement for a contract of lease. Furthermore, all other requirements are discussed in detail, again suggesting it was not a requirement. For instance, a lease which contains no rent, or rent for an

⁹⁷ Craig, *Jus Feudale*, (1603) (hereafter "Craig").

⁹⁸ For example, the first chapter considers terms of payment at 2.9.13 and 2.9.14, whilst the following one discusses rent explicitly at 2.9.34. Similarly, the defence of possession at 2.9.34 is considered in the first chapter, prior to a more general discussion of possession in the next chapter at 2.10.12.

⁹⁹ *Ibid*, 2.10.8-2.10.10.

¹⁰⁰ *Ibid*, 2.9.32.

¹⁰¹ Stair, 2.19.5.

¹⁰² *Ibid*, 2.19.3.

¹⁰³ Craig, 2.10.9.

indeterminate value, is invalid;¹⁰⁴ a lease can be granted over many types of property - agricultural land, urban land¹⁰⁵ and salmon-fishing; who can grant a lease is comparable with those competent to grant feus.¹⁰⁶ Finally, leases in which no duration has been agreed are specifically considered as valid by Craig, who notes that they are deemed to last for one year.¹⁰⁷ Therefore, it appears that Craig concurred with Stair that, in contrast to a real right of lease, a purely personal contract of lease did not require duration to be agreed.

Nonetheless, some statements in Stair and Craig's work suggest a contradictory conclusion. For instance, Craig notes that a lease must not amount to an alienation, perhaps implying that it must be temporary in nature.¹⁰⁸ However, it does not follow that because a lease must be temporary, that a duration must be agreed. As Craig noted, the law could imply a duration in these cases such that it does not amount to an alienation.¹⁰⁹ Indeed, a lease amounting to an alienation suggests that duration *has* been agreed – a lease with an exceptionally long or unlimited duration. Therefore, the requirement as set out by Craig that a lease must not amount to an alienation does not necessarily contradict the fact that a contract of lease does not need an agreed duration.

Comments by Stair, however, cannot be reconciled so easily. In his *Institutions*, Stair notes that “Tacks must contain an express and terminate endurance, otherways they are null, not only as to singular successors, but even as to the setter and his Heirs, because they are not constitute *habili modo*.”¹¹⁰ This statement clearly implies that a duration is required, even in a personal contract of lease between the original landlord and tenant. Stair goes on to state the rule given by Craig that a lease without duration is valid for a year. However, in contrast with Craig, he states that

¹⁰⁴ *Ibid*, 2.10.2.

¹⁰⁵ *Ibid*, 2.9.9.

¹⁰⁶ *Ibid*, 2.10.1.

¹⁰⁷ *Ibid*, 2.10.7. The implication of one year terms in leases under the modern law is considered in Chapter 9.

¹⁰⁸ *Ibid*, 2.10.5.

¹⁰⁹ *Ibid*, 2.10.7.

¹¹⁰ Stair, 2.19.17.

such a lease is a lesser type of lease with more restrictions such as the inability to grant sub-leases or assign the lease.¹¹¹ These statements do not seem to be reconcilable with his previous statements that consent and rent are all that are required for a personal contract of lease.

Other seventeenth century writers did include duration in their definitions.

Mackenzie, writing in 1684, was one of Stair's contemporaries. His *Institutions of the Law of Scotland* are brief, and his discussion of leases extends to just five pages.¹¹²

What is interesting about his work is his definition of a lease, which is as follows:

“A *Tack* is a *Location*, or *contract*, whereby the use of any thing is set to the *Tacksman*, for a certain hyre, and in *Our Law* it requires necessarily, that the *terms* of the *Entry*, and the *Ish*, must be exprest, that is to say, when it should begin and end, and it must bear a particular dutie, else it is null; and if it be a *valid Tack*, that is to say, if *Write* be *adhibit*, (*verbal Tacks* being onely *valid* for one year) to the thing set, the *Contracters names*, *Tack duty*, *Ish*, and *Entry*, clearly therein exprest, and cloathed with *possession*, it will defend the poor *Tacksman*, against any *Buyer*.”¹¹³

As with the previous writers, Mackenzie deals with the contract of lease and the real aspect separately. What distinguishes Mackenzie's treatment of the contract of lease, however, is the inclusion of duration for a valid contract of lease – the terms of entry and ish must be included in *any* lease. The only distinguishing features of a real right of lease evident from Mackenzie's work are that the lease must be written, and possession must have followed upon the lease – that is to say formalities, rather than substance.

What may account for this difference in approach? Unlike Stair, who sought to infer the law from original sources and contrast the discovered law with other systems,

¹¹¹ *Ibid*, 2.19.17.

¹¹² Mackenzie, *Institutions of the Law of Scotland* (1684), 82-85.

¹¹³ *Ibid*, 83-84.

Mackenzie aimed to concisely clarify and state the law as it currently stood.¹¹⁴ For this reason, his practical text became the go-to textbook for those studying law at the time, being much more accessible than Stair's philosophical work.¹¹⁵ These points taken together with the brevity of his discussion of leases suggest that his piece may have omitted some of the complexities of the law. This could account for the difference in his and Stair's definitions, especially when the majority of contractual leases at the time included duration, regardless of its necessity.

Overall, most authors writing in the seventeenth century suggest that the contract of lease and the real right of lease had different definitions, with duration being omitted from the definition of the contract of lease. This suggests that these early writers viewed the two categories of lease as distinct and as existing independently of one another. Although Mackenzie can be cited for the opposite position, it must be remembered that his account is brief, and more fundamentally, he does not have institutional status. Accordingly, less emphasis should be placed on his definition.

3.2.1.2 The Move to a Single Definition

From the eighteenth century, there was a marked change in definitions of a lease. Whereas most of the earlier writers separated the definition of a contract of lease from the specific requirements necessary for real rights of lease, the same cannot be said of subsequent writers. Instead, there was a move to a single definition of lease, encompassing both the real and contractual aspects.

One such example is Forbes. Although largely forgotten in modern times, Forbes was highly regarded in his time and as such, it is worth considering his brief treatment of the law of leases here.¹¹⁶ Forbes writes:

¹¹⁴ D Walker, *The Scottish Jurists* (1985), 165.

¹¹⁵ *Ibid*, 166.

¹¹⁶ *Ibid*, 193.

“A Tack is a Contract, whereby the Use of any Thing is set or let for Hire, or a reserv’d Rent, call’d the Tack-Duty, from and to a determin’d Time.”¹¹⁷

This definition is referring to leases generally, and no distinction is made between the real right and the purely contractual elements of the lease. In Forbes’ view, they share the same definition, and duration – or “determin’d time” as he refers to it – is a feature of that definition. Furthermore, Forbes reiterates this point a few paragraphs later, writing: “All Tacks must express the Terms of Entry... and of Ish... and the Tack-Duty, otherwise they are null.”¹¹⁸

Like Mackenzie, Forbes’ discussion of leases is brief. Thus, the same criticisms can be made of Forbes’ work: perhaps, since his discussion extends to just seven pages, he did not dedicate enough time to the complexities of lease law and acknowledge the existence of a different definition for the contract of lease as distinct from the real right. Indeed, his *Institutes* were intended as a companion to his *Great Body*¹¹⁹ and as a text for students to use to study the law rather than be a full statement of the law.¹²⁰ Furthermore, despite being highly regarded in his time, his text never attained much popularity, and so is less useful as evidence of any fundamental shift in the law regarding definitions of leases.

The criticism of brevity cannot be levied at Bankton, however, whose discussion spans twenty-six pages. His definition is as follows:

“Tacks or leases, of their own nature, are only personal, being contracts of location, whereby subjects are let for a term of years, or life, for a tack-duty.”¹²¹

¹¹⁷ Forbes, *The Institutes of the Law of Scotland*, 1722 and 1730, 4.6.1.

¹¹⁸ *Ibid*, 4.6.4.

¹¹⁹ Forbes, *A Great Body of the Law of Scotland containing the Harmony thereof with and the Differences from the Civil and Feudal Laws; and shewing how far the Scots and English Law do agree and differ, with incident comparative views of the modern Constitutions of Other Nations in Europe*, Unpublished. See Walker, *Scottish Jurists*, p187ff.

¹²⁰ Forbes, *Institutes*, Preface at ii.

¹²¹ Bankton, *An Institute of the Laws of Scotland in Civil Rights* (1751–1753) (hereafter, “Bankton”) 2.9.1, 94.

What is particularly interesting about Bankton's definition is that it explicitly refers to the purely personal contract of lease and states that it must be for a specified duration. This is further emphasised when Bankton notes that a lease without rent or duration "deviates from the nature of a tack"¹²². This is a marked change from earlier writers such as Stair who explicitly did not include duration in his definition of a contract of lease.

Similarly, Hume specifically includes duration in his definition of a contract of lease, which he calls an "essence" of a contract of lease.¹²³ Despite recognising that the contract and real right aspects of a lease are distinct by discussing them in different sections,¹²⁴ Hume's definition suggests that the definition of a contract of lease no longer had any distinguishing features from the real right of lease.¹²⁵

Of the eighteenth century writers, the only anomaly is Erskine, whose definition does not include duration.¹²⁶ His definition is similar to that of Stair, who influenced Erskine's work.¹²⁷ Unlike Stair, however, at no point does he state that duration must be agreed at all – even for a real lease. Instead, he states that if there is no ish, then it is implied to last for one year.¹²⁸ This does not seem to represent the intention of the statute which does suggest that a duration should be agreed, since the leases protected are those with "termes and yeris".¹²⁹ Although it is a rule noted by other writers too, it is usually accompanied by the general rule that duration must be included to make a lease real.¹³⁰

It was the position stated by Forbes, Bankton and Hume which prevailed into the nineteenth century and beyond. For instance, Bell in his *Principles* states that the lease, "according to the requisites of the contract of location, must fix the Term, the

¹²² *Ibid*, 2.9.1, 95.

¹²³ Hume, *Lectures*, (Paton and Cameron, eds, 1938-1958) (hereafter, "Hume") Vol 2, 56.

¹²⁴ For the contract of lease, see vol 2, 56ff. For real rights of lease see Vol 4, 56.

¹²⁵ *Ibid*.

¹²⁶ Erskine, 2.6.20.

¹²⁷ Walker, *Scottish Jurists*, 212.

¹²⁸ Erskine, 2.6.20.

¹²⁹ Leases Act 1449.

¹³⁰ See, for example, Stair, 2.1917; Bell, *Principles*, 1194.1.

Rent and the Subject”.¹³¹ Again, this explicitly includes duration as a defining feature of the contract of lease, not just the real right. Similarly, Robert Bell, in his *Treatise on Leases*, notes that in Scots law the lease is a contract for the “temporary possession of land”.¹³² Therefore, by the end of the nineteenth century, duration was considered a defining feature of both the real right of lease and the contract of lease.

3.2.1.3 Observations on the Changing Definition of the Lease

In some ways, the shift to include duration in both definitions of a lease is unsurprising. Indeed, the majority of leases at the time would have included a duration. This is evident from the work of Hogg,¹³³ who considered a number of leases from the fourteenth century onwards, all of which contained a duration.¹³⁴ Most leases would be written with the intention to have real effect and so in following the Leases Act 1449, would include duration. Purely contractual leases were rare. If the majority of leases in practice included a duration, then duration becomes a defining feature of a lease. Nonetheless, this does not explain the change taking place in the seventeenth century, given that real leases, and so leases with duration, had existed for hundreds of years at this point.

Nonetheless, there is a shift from the earliest commentators of the law of leases, Stair and Craig, to those writing later who included duration for both the contract of lease and real lease definitions. The effect of this means that there was no difference in definition for either type of lease. Consequently, the real lease and the contract of lease appear indistinguishable. The lack of different definitions could support the argument that the contract of lease no longer existed as a separate aspect of the

¹³¹ Bell, *Principles*, (4th edn, 1839), 1194.

¹³² Bell, *Leases*, Preface at vii. See also Hunter, Vol 1, 79.

¹³³ M Hogg, “Leases: Four Historical Portraits”, 363.

¹³⁴ I am very grateful to Professor Hogg for allowing me access to the leases he examined in writing the aforementioned piece.

lease – the lease was either real, or not considered a lease at all. The rest of this chapter considers whether this was indeed the case.

3.2.2 Meaning of Duration

The previous section established that initially the need for duration at all provided a clear distinction between the real right of lease and a contract of lease – it was not required in the latter. However, over time, definitions ceased to distinguish between the two types of lease. This meant that it was unclear from a definitional perspective whether the contract of lease continued to exist as a distinct aspect of a lease at all, or if instead it had been subsumed by the real right of lease. This section examines the meaning of duration in more detail and considers whether the rules regarding duration were different for contracts of lease and real rights of a lease. This will help to determine whether, in terms of duration, the contract of lease continued to exist as a distinct type of lease. This section concludes that despite one definition encompassing both the real and the personal aspects of a lease, the rules of duration for each aspect were substantially different.

This section considers two different characteristics of duration with regards to a lease. The first is the need for a definite, or determinable, term. That is to say, can the term of a valid lease be the happening of an uncertain event, or must a precise date be determinable at the creation of the lease? The second issue is whether or not there are any rules on the length of duration. For example, can a lease be granted for thousands of years? Can a lease be perpetual? Both issues are considered in turn.

3.2.2.1 “Definite” Duration

The most common situation in which the issue of a definite term arose was in leases granted as security for debts. How such an arrangement would work is succinctly summarised by Haughey: “T lends money to L. In return, L grants T a lease which, while containing a rent, allows that rent to be retained, either for extinction of the

principal sum, for the interest accruing on the sum, or both.”¹³⁵ The lease would be brought to an end when the sum was paid in full, rather than on a date specified in the lease. Other examples of uncertainishes included where the lease was to last for as long as the tenant could continue to pay rent.¹³⁶

Regarding the lease-as-security cases, the law remained unsettled for a long period. At the time Stair was writing his *Institutions*, the uncertainty surrounding such leases is evidenced by his lengthy paragraph of conflicting case law.¹³⁷ The earliest cases, such as *Ronald v Strang*¹³⁸ suggested that such leases were valid against singular successors, as well as the original landlord and his heirs, a view echoed in subsequent cases such as *Cockburn v Sampson*.¹³⁹ These cases represented a more lenient view of the meaning of the Leases Act 1449, with the courts reasoning that the length of a lease could be determined by calculating how long the retention of rent would take to extinguish the debt.¹⁴⁰

By contrast, in many cases, the opposite was decided by the courts.¹⁴¹ In these cases, the ish was deemed to be uncertain and so ineffectual against singular successors. This was the more accepted position, also being stated as the position of the law by several commentators.¹⁴² Importantly, Craig, writing in 1603 before the cases had been decided in favour of the validity of leases-as-security, also stated that such leases were invalid against singular successors.¹⁴³ This statement of the law seems to have been overlooked by those cases which said such leases were valid.

¹³⁵ D Haughey, “Transmissibility of Lease Conditions in Scots Law – A Doctrinal-Historical Analysis”, 19 Edin LR 333, 336.

¹³⁶ Hume, Vol 2, 58.

¹³⁷ Stair, 2.19.28.

¹³⁸ *Ronald v Strang*, 22 January 1625, Mor 15326.

¹³⁹ *Cockburn v Sampson* 10 February 1698, Mor 15247.

¹⁴⁰ Bell, *Commentaries*, (4th edn, 1839) 27.

¹⁴¹ *Lie v Kirkwood* 5 March 1629, Drurie 7195; *Stevenson v Dobie* 16 June 1665, Mor 15240; *Geichen v Walkinshaw* 17 July 1628, Mor 15238; *Hardies*, 1 December 1627, Mor 15190; *Pringle v Fleming* 17 July 1629, Mor 15238; *Douglas’ Creditors v Carlyle* 2 July 1757, Mor 15219.

¹⁴² Forbes, *Institutes*, 2.4.6.4; Bell *Commentaries*, 27.

¹⁴³ Craig, 579-580.

Any doubt as to the validity of lease-as-security leases was removed by the case of *Auchinbreck v MacLaughlin*.¹⁴⁴ The case expressly overruled the cases in which leases-as-securities were held valid against singular successors. Deciding that such cases contained an indefinite lease is the better interpretation of lease-as-security scenarios. Although an expected end date of the lease can be determined by calculating when the rent that had been withheld extinguished the debt, the date is never fully certain. There may be an increase in interest, for example, meaning the amount to be repaid is actually larger than first anticipated and thus the debt takes longer to extinguish.

The exception to the invalidity of such leases against singular successors were cases in which an alternative definite duration was also given in the lease. For example, in *Thomson v Reid*,¹⁴⁵ a lease was granted for seven years or until a debt was extinguished. The lease was valid against singular successors for the definite term of seven years only. Because the lease stated a definite duration, it was enforceable against successors and instead the specific term against removing until expiry of the debt was deemed a personal obligation between the landlord and tenant only. When a lease has become real and is capable of being enforced against singular successors, it does not follow that all terms within that lease also transmit against successors – some are seen as personal to the original landlord and tenant.¹⁴⁶ In these cases, the obligation not to remove was one such personal obligation.

Whilst the settled position was that a lease-as-security was invalid against successors unless it also contained a definite lease, the same was not true for contracts of lease. Leases-as-security were fully enforceable against the original

¹⁴⁴ *Auchinbreck v MacLaughlin* 11 February 1748, Mor 15248.

¹⁴⁵ *Thomson v Reid* 15 June 1664, Mor 15239. See also, *Peacock v Lauder* 27 June 1674, Mor 15244.

¹⁴⁶ The question of which terms transmit to successors is outwith the scope of this thesis, which here is concerned with when a lease is enforceable against successors at all. For discussions of the transmissibility of lease terms, see Haughey, “Transmissibility of Lease Conditions in Scots Law”; P Webster, “The Relationship of Tenant and Successor Landlord in Scots Law”, Unpublished PhD, 2008.

landlord for the indefinite period. This position is expressly stated in several of the cases.¹⁴⁷ This is important as it illustrates that the courts explicitly recognised that the contract of lease existed as a distinct aspect of a lease from the real aspect – there was not either a real lease or no lease at all.

The other instances of an uncertain ish, such as where a lease was to endure for as long as the tenant paid the rent, were even more problematic for the definite duration requirement. Whilst with the lease-as-security cases a provisional end-date could be calculated, the same was not possible for leases whose end-date depended on an event which may not occur, which could mean the lease was perpetual. It is therefore unsurprising that cases were decided in conformity with the principles set out for the lease-as-security cases – if the only ish in the lease was uncertain (and no alternative fixed duration was given), then the lease did not transmit against singular successors. Conversely, such uncertain durations were fully enforceable against the original landlord and his heirs.¹⁴⁸ Although some authorities appear to suggest that leases with such terms were valid against singular successors, these cases can be distinguished as being decided on the basis of personal bar, as opposed to the applicability of the Leases Act 1449.¹⁴⁹

In summary, the rules regarding the need for a definite ish differed depending on whether the lease was being enforced against singular successors – a real lease – or against the original landlord - the contract of lease. This is important because it means that despite the definitions of a lease suggesting that the contractual and real aspects of leases were becoming less defined in terms of the need for duration, this was not the case in practice. Courts regularly distinguished between these two aspects of lease when it passed judgement on questions of uncertain ishes. This is evidence which suggests that the contract of lease continued as a distinct category of lease.

¹⁴⁷ *Hardies*, 1 December 1627, Mor 15190; *Pringle v Fleming* 17 July 1629, Mor 15238.

¹⁴⁸ *Hamilton v Tenants* 2 March 1626, Mor 15183.

¹⁴⁹ *Wight v Earl of Hopetoun* 17 November 1673, Mor 15199.

3.2.2.2 “Limited” Duration

Another way in which the contract of lease and the real right of lease can be distinguished in terms of duration is in a lease’s length. Two aspects of a lease’s length are discussed below. Firstly, whether a lease can be perpetual is analysed. In a perpetual lease, there is an agreed duration, but it does not have an *ish* as it is to last forever. Secondly, long leases for a non-standard length are considered. These can be distinguished from perpetual leases in the sense that they do have an *ish*, even if the *ish* is many years away. It is noted that in both these cases, of *ish* and no *ish*, the rules differ depending on whether it is the personal contract of lease being enforced, or the real right against successors.

3.2.2.2.1 Perpetual Leases

In early Scots law, it appears that neither the contract of lease nor the real lease could be perpetual. In the case of a real lease, the statute itself is clear that a lease cannot be perpetual,¹⁵⁰ and this position was confirmed in subsequent cases.¹⁵¹ Case law suggests this was also the position for contracts of lease. *Gairlies v Stewart*¹⁵² concerned a lease which was perpetual in nature. The agreement was found to be null, even against the original landlord’s representatives. Similarly, Stair notes that a “terminate” duration is necessary in such leases.¹⁵³

Apart from these two brief accounts of the early law, no further mention is made of the fact that contracts of lease could not be perpetual under the early law until 150 years later. For instance, *Gairlies v Stewart* is referred to in *Scott v Straiton*¹⁵⁴ in support of the proposition that early Scots law did not recognise perpetual tacks,

¹⁵⁰ Leases Act 1449.

¹⁵¹ *Oswald v Robb* 20 July 1688, Mor 15194.

¹⁵² *Gairlies v Stewart* 15 July 1615, Mor 15187.

¹⁵³ Stair, 2.19.17.

¹⁵⁴ *Scott v Straiton* 19 February 1771, Mor 15200; see also Bell, *Leases* 34, 73.

even against the original landlords.¹⁵⁵ Interestingly, however, *Gairlies v Stewart* is not referred to prior to these references in the late eighteenth and early nineteenth centuries. Even those who discussed the contract of lease at length, such as Bankton, Erskine and Hume, make no reference to perpetual leases not being effectual. Indeed, Hume goes so far as to claim that Stair was incorrect in his statement that a perpetual lease was ineffectual against the original landlord.¹⁵⁶

Furthermore, there are some cases dated around the time Stair was writing that suggest that perpetual leases were effective against the original landlord, even if they were not valid against singular successors.¹⁵⁷ It is therefore unclear whether the rule in *Gairlies v Stewart* and as stated by Stair was an accurate statement of the law. This is particularly true when one considers Stair's contradictory statement that a contract of lease does not require a duration.¹⁵⁸ If a contract of lease does not require a duration to be agreed at all, it is illogical for perpetual leases to be invalid for the very reason of lacking a finite duration.

Nonetheless, even if the position initially was that such leases were ineffectual, leases granted in perpetuity were soon deemed effective against the original landlord and his heirs, although they remained ineffectual against successors. The famous case in this regard is *Carruthers v Irvine*, where a lease granted for "as long as the grass groweth up and the water runneth down" was upheld against the original landlord and his heirs.¹⁵⁹ Other cases reached a similar conclusion.¹⁶⁰ This position is also reiterated in many of the texts.¹⁶¹ This means that rules regarding the validity of perpetual leases are a further way to distinguish between the real lease and the contract of lease.

¹⁵⁵ See also Bell, *Leases* 34, 73.

¹⁵⁶ Hume, Vol 2, 58.

¹⁵⁷ *Stewart v Viscount of Ayr* 26 July 1631, Mor 15191.

¹⁵⁸ Stair, 2.19.29.

¹⁵⁹ *Carruthers v Irvine* 23 January 1717, Mor 15195.

¹⁶⁰ *Osmond v Frith* 21 February 1815, unreported (as cited in Hume, *Lectures*). *Stewart v Viscount of Ayr* 26 July 1631, Mor 15191.

¹⁶¹ Erskine, *Institutions*, 2.6.30; Hume, Vol 2, 58; Bell, *Principles*, 1194; Bell, *Leases*, 34, 73.

3.2.2.2.2 Long Leases

An issue related to perpetual leases is excessively long leases, lasting up to thousands of years. Such leases are not perpetual since they will eventually reach an end, however some are so long that, if given effect to, they may as well have been perpetual, depriving the original landlord (and indeed many successors) from the use of the property for their whole lives.

It is unsurprising that leases of any length were effectual against the original landlord and his heirs, given that perpetual leases were valid against them also. In situations where singular successors were involved, however, long leases were often not upheld by the court. A number of cases explicitly state that such leases are *only* valid against the original landlord and his heirs. For example, in *Purchasers and Creditors of Jordanhill v Earl of Crawford*,¹⁶² a lease of 400 years was held valid against the original landlord, whilst a lease of 1260 years was effectual against the landlord only in *Irvine v Knox*.¹⁶³

The precise duration for a lease to be considered valid against singular successors was never fully settled.¹⁶⁴ Nonetheless, the maximum length of a valid real lease is not central to this discussion. It is sufficient to note that a maximum permitted duration existed for real rights of lease, whilst there was no such maximum for contracts of lease.

3.2.2.2.3 Conclusions on Limited Duration

In summary, alongside the differing rules on the need for a definite end, the length of duration was a second way in which the rules regarding duration differed for a

¹⁶² *Purchasers and Creditors of Jordanhill v Earl of Crawford* 13 February 1952, Mor 10307.

¹⁶³ *Irvine v Knox* 27 June 1760, Mor 15195.

¹⁶⁴ See discussions in Bell, *Principles*, 1195; Bell, *Commentaries*, 24; Bell, *Leases*, 32-45; Hume, Vol 4, 78-79.

contract of lease and a real lease. A contract of lease could be perpetual, whilst real leases had to be of limited duration. There is evidence to suggest that the length of a real lease was further limited, although the exact maximum length of such a lease remained unclear. Again, these different rules suggest that the contract of lease existed as a distinct category of lease, independent from the real right of lease.

3.2.2.3 Observations on the Meaning of Duration

When considering the definitions of the contract and real right of lease, it is easy to assume that the two aspects of a lease were becoming less distinct. Initially, duration did not define a contract of lease. However, it soon became included in the definitions of both types of lease, as had always been the case for real rights of lease. When the specific meaning of duration is considered, however, the rules for contracts of lease and real rights of lease were very different.

On the one hand, it was eventually settled that real leases needed a definite duration, determinable at the point of creation of the lease. On the other hand, leases with indefinite duration were fully enforceable against the original landlord, and always had been. Furthermore, contracts of lease could be of any length of duration – even perpetual – whereas for real rights of lease, they could not be perpetual and there is evidence to suggest that a lease for a non-standard and long duration was not enforceable against singular successors.

The trend in these developments is surprising when considered against the trends in the definitions of a lease. The definition of a contract of a lease increasingly became more restrictive, with the addition of duration as a defining feature. However, the opposite was true for the specific rules regarding duration. For example, with regards to the length of the lease, it appears that initially, perpetual leases were invalid against the original landlord as well as successors, but the law became more lenient and allowed them to be enforceable as contracts of lease. Similarly, with regards to the need for a definite duration, the rules for real leases became stricter, whilst the rules for contracts of lease remained lax.

3.2.3 Conclusions on Duration

The cardinal element of duration has undergone significant change, not only in its inclusion as a cardinal element of a contract of lease, but also in its specific rules regarding the meaning of duration. Initially, the contract of lease was not defined by the need for duration. Instead, rent was the most important element, which was in line with Roman law. Nonetheless, the definition of a contract of lease soon aligned with that given to the real right of lease and included duration. From this perspective, it could be argued that the contract of lease had been subsumed by the real right of lease so that it no longer existed as a distinct aspect of a lease.

On closer analysis of the specific rules regarding duration, however, it is evident that the contract of lease did indeed continue to exist with its own rules that were generally much wider than the rules for real leases. For example, for contracts of lease, duration could be indefinite or perpetual, both of which were strictly forbidden for real leases.¹⁶⁵ The differing rules for real leases and contracts of lease evidence the fact that the contract of lease did indeed exist as a distinct aspect of the lease, and had not been subsumed by the real lease.

3.3 Rent

Rent is a less controversial requirement of a Scottish lease than that of duration. The definition of a lease, whether that be a contract of lease or a real right of lease, has always included rent.¹⁶⁶ For example, even when the early writers, such as Stair, provided definitions of a contract of lease which did not include duration, they did include rent.¹⁶⁷ To return to the definition given by Stair: a lease is a “contract of Location whereby Land ... is set to the Tacks-man ...for a hyre, which is called the Tack-duty”.¹⁶⁸ His definition of a real right of lease likewise included rent, requiring

¹⁶⁵ See also *Crichton v Lord Ayr* (1631) Mor 11182.

¹⁶⁶ See also the definition of a lease in Roman law and the description of a lease in the *Regiam Majestatem*, both discussed at 3.2.1 above.

¹⁶⁷ Stair, 2.19.1.

¹⁶⁸ *Ibid.*

“the thing set, the Parties, the Rent and the Time” to be included in the written lease.¹⁶⁹ No definition of a lease given by the institutional writers omits rent.¹⁷⁰ There is not, therefore, the need to repeat any in depth analysis of the differing definition of a real lease and a contract of lease here.

Nonetheless, as was noted with regards to duration, just because something is a shared feature of the definitions of both a real lease and a contract of lease, it does not follow that the meaning of each feature is the same. The cardinal elements necessary for a lease to become a real right and enforceable against successors can differ from those necessary to classify a lease as a contract of lease between the original landlord and the tenant.¹⁷¹

Many aspects of the rent requirement are the same regardless of whether the lease in question is a contract of lease or a real right. One example is what constitutes rent. Rent need not be money, and can include “money, the fruits of the ground, or services”.¹⁷² These rents are available for both the creation of a contract of lease and of a real lease.

Nonetheless, several differences in the rent requirement between a real lease and a contract of lease can be identified. This section considers two questions. First, it explores to what extent, if at all, a rent must be agreed in order for a valid contract of lease to be formed or for the creation of a real right of lease. Secondly, it considers to what extent rent must actually be payable under the lease for the lease to be valid. In this regard, the lease-as-security cases, discussed previously in relation to duration, are returned to, considering to what extent leases which wholly or partially assigned the rent back to the tenant or someone other than the landlord, were valid.

¹⁶⁹ *Ibid*, 2.19.5.

¹⁷⁰ See, Hume, Vol 2, 56; Bell, *Principles*, 1193.

¹⁷¹ P Webster, “The Continued Existence of a Contract of Lease” in AJM Steven, RG Anderson and J Macleod, *Nothing So Practical as a Good Theory: Festschrift for George L Gretton* (2017), 125.

¹⁷² Erskine, 2.6.20. See also Bell, *Principles*, 1201.

3.3.1 The Need for a Positive Rent to be Agreed

Rent has been described as “essential to the nature of a lease”¹⁷³ and so one may assume that any contract calling itself a lease must contain a rent. On the other hand, many also note that duration and a definite ish were indispensable to a lease, yet the previous section demonstrated that contracts of lease enforceable between the original landlord and tenant could be perpetual. This meant that contracts of lease effectively dispensed with the requirement for duration. This section asks the same question with regards to the requirement of rent. Is it possible to create a contract of lease with a nil rent? After considering the question of whether leases with no rents are valid, this section considers the related concept of “elusory” rents.

3.3.1.1 Leases with No Rent

In respect of real leases, the law has always been clear about the need for a rent to be agreed for the lease to be effectual against successors to the land. This is evident from the Leases Act 1449 itself, which notes that the leases which are upheld against successors are upheld for “sic lik male” (the same rent)¹⁷⁴ as was agreed between the tenant and original landlord.¹⁷⁵

If there was any doubt as to the need for rent in real leases, the position was confirmed in various authoritative texts from the seventeenth century onwards. For example, Stair notes that “Tacks are not valide as real rights against singular successors unless they have a tack duty”¹⁷⁶. Bankton concurs.¹⁷⁷ Bell, writing in the nineteenth century, agrees that “there must be a rent stipulated” for the Leases Act 1449 to take effect.¹⁷⁸ Therefore, the need for a rent to be included in a real lease is undeniable.

¹⁷³ *Ibid*, 35.

¹⁷⁴ Richardson and Anderson, 2.31.

¹⁷⁵ Bell, *Leases*, 36.

¹⁷⁶ Stair, 2.19.29.

¹⁷⁷ Bankton, 95.

¹⁷⁸ Bell, *Commentaries*, 21.

What is more controversial is the need for a positive rent in a contract of lease. Under the earliest law, the position seemed identical to that of real leases.¹⁷⁹ As Craig noted, “If a tack is granted without rent, or for a rent which is uncertain in amount, the tack is invalid in law.”¹⁸⁰ It should be noted that Craig is not referring to real rights of lease in this statement, but to contracts of lease generally.¹⁸¹ Craig also cites authority for this proposition and it is one of the few statements in his discussion of leases that is supported with a named case: *Countess of Angus v Lord Ardrie*.¹⁸² His use of authority suggests that the rule is well-established.

Several other cases from the sixteenth and seventeenth centuries reach similar conclusions to *Countess of Angus*. For instance, in *Grange Durham v His Brother’s Relict*,¹⁸³ a husband had granted his wife a rent-free, life-long lease. Her husband’s heir sought to remove the wife from the property, arguing that the lease was invalid due to the lack of rent. The judges agreed that because the lease contained no rent, it was invalid. Crucially, this case involved the original landlord’s heir who is treated as if he is the original landlord rather than a successor. Therefore, this case is evidence that the lack of provision of rent in a contract of lease renders it invalid. The same decision was reached in *Aiton v Tenants* fifty years later.¹⁸⁴

Nonetheless, the position was not entirely settled. Another case, *Mellerstains v Haitlie*, reached the same conclusion as *Grange Durham*.¹⁸⁵ In the case, there was a one-off payment, which did not constitute rent as rent must be paid periodically. This lack of rent meant that the contract of lease was not enforceable.¹⁸⁶ Some have questioned whether this case was correctly decided. Robert Bell, for instance,

¹⁷⁹ Note also that rent is also included in the description of leases prior to the Leases Act 1449, which were purely contractual in nature: Lord Cooper (ed), *Regiam Majestatem* (Stair Society, Volume 11) (1947), 206. See also the discussion in Chapter 5.

¹⁸⁰ Craig, 2.10.2.

¹⁸¹ Craig discusses the requirements for a real right of lease in a single distinct part entitled “Singular Successors”: Craig, 2.10.8.

¹⁸² *Countess of Angus v Lord Ardrie*, undated and unreported.

¹⁸³ *Grange Durham v His Brother’s Relict*, 7 June 1575, Mor 15165.

¹⁸⁴ *Aiton v Tenants*, 7 July 1625, Mor 15167.

¹⁸⁵ *Mellerstains v Haitlie*, June 1591, Mor 15165.

¹⁸⁶ *Ibid.*

suggests that the lease should not have been annulable between the original landlord and his heirs.¹⁸⁷ For Bell, the lack of rent does not affect the validity of a contract of lease:

“the want of a stipulation for the payment of rent, though not fatal to the lease, in a question with the granter, and his heirs, or his gratuitous disponees, or with anyone representing him, will yet render it ineffectual against a purchaser or other singular successor.”¹⁸⁸

Other writers agree with Bell’s view. Not long after Craig made the case so strongly for the need for rent for both contracts and real rights of lease, Stair left open the possibility that such leases did not require a rent. He noted that a lease without a rent was invalid against singular successors but made no comment as to their effect against the original landlord.¹⁸⁹ Stair was explicit in relation to the effect of omitting a cardinal element of a lease on a contract of lease elsewhere in his discussion (for example, he noted the need for an agreed duration not only for a valid real right of lease, but also a valid contract of lease).¹⁹⁰ For that reason, it is presumed he would be equally clear if he saw rent as essential for the contract of lease also.

Like Bell, Hume, was more explicit in his view. For example, he considers the need for rent explicitly in his chapter on the contract of lease and notes in his table of contents that rent can be “nominal and illusory, or nil”.¹⁹¹ He continues, noting that a contract of lease is valid even when it says “that the tenant ... shall have it rent free”.¹⁹² Nonetheless, Hume does hesitate to call such a contract a lease, appearing unsure if under a rent-free lease, an occupier can be truly be called a “tenant”.¹⁹³ If these comments by Hume and Bell are correct and a contract of lease can be rent

¹⁸⁷ Bell, *Leases*, Vol 1, 35.

¹⁸⁸ *Ibid*, Vol 1, 36.

¹⁸⁹ Stair, 2.19.29.

¹⁹⁰ *Ibid*, 2.19.17.

¹⁹¹ Hume, Vol 2, xii.

¹⁹² *Ibid*, Vol 2, 59.

¹⁹³ *Ibid*.

free, this is a clear difference in requirements for the validity of a real lease and a contract of lease.

Nonetheless, it was the earlier view which prevailed into the late nineteenth century. Rankine, for instance, states that contracts of lease must include a rent.¹⁹⁴ Thus, the need for a positive rent was the same for both real rights of lease and contracts of lease.

3.3.1.2 *An Elusory or Nominal Rent*

The previous section demonstrated that most early commentators did not go as far as to say that for contracts of lease, a rent-free lease was permissible. Instead, most commentators drew a distinction between rents which were elusory and rents which were not elusory. Elusory rents were valid for contracts of lease, but not real rights of lease.¹⁹⁵

The invalidity of real leases with an elusory rent was clear from the introduction of the Leases Act 1449. As Bankton explained in his *Institute* in 1751: “the statute only secures tacks that have a Mail or rent, which must be real, and not imaginary”.¹⁹⁶ Similar statements can be found in Hume’s *Lectures* where he notes that “elusory” rents are not acceptable for real leases.¹⁹⁷ In the nineteenth century, Bell too noted that an elusory rent made leases invalid for questions with successors.¹⁹⁸ These statements are further supported by case law such as *Alison v Ritchie*.¹⁹⁹

The position was different for contracts of lease. Bankton notes that in questions between the original landlord and his heirs, leases with an elusory rent are valid.²⁰⁰

¹⁹⁴ Rankine, 101.

¹⁹⁵ Webster, “The Continued Existence of the Contract of Lease”, 125.

¹⁹⁶ Bankton, 2.9.6.

¹⁹⁷ Hume, Vol 4, 77.

¹⁹⁸ Bell, *Commentaries*, 28; Bell, *Principles*, 1201.

¹⁹⁹ *Alison v Ritchie*, 3 February 1730, Mor 15196.

²⁰⁰ *Ibid.*

Hume concurs²⁰¹ (which is unsurprising given that he also thought contracts of lease could be constituted with no rent).²⁰² This view prevailed into the nineteenth century, with Rankine explicitly stating that although contracts of lease must include a rent, it can be elusory.²⁰³

3.3.1.3 Defining “Elusory”

The difficulty with the position that contracts of lease can have an elusory rent whilst real leases cannot, is that the phrase “elusory” has never been defined. Bell notes that “there is no criteria according to which this can be ascertained”,²⁰⁴ whilst Rankine repeatedly highlights the issue of elusory being undefined.²⁰⁵ Case law is not helpful either, with cases where an elusory tack-duty prevented the formation of a real lease, such as *Alison v Ritchie*,²⁰⁶ simply being recorded as having an “elusory tack-duty” without expanding on what exactly that meant.²⁰⁷ The only hints of what may be deemed “elusory” can be seen in Hume’s *Lectures* and in a single case. Hume suggests that a rent may be elusory if it is “a penny Scots, or a head of wheat or a bullock’s horn, *if demanded*”.²⁰⁸ The addition of “if demanded” to a clause concerning rent was a method of including a rent with the intention of satisfying the rent requirement, whilst simultaneously ensuring that rent may not be paid at all. In other words, it was elusory. Even if it was paid, it was to be a very low amount. In *Sharp v Burt*, an option to give up parts of the rented property in exchange for a reduction in rent in line with the property’s value was given as an example of an elusory rent, where the value of the property to be given up exceeded the rent

²⁰¹ Hume, Vol 2, 59.

²⁰² *Ibid.*

²⁰³ Rankine, 101.

²⁰⁴ Bell, *Principles*, 1201.

²⁰⁵ Rankine 101, 129, 240 at footnote 99.

²⁰⁶ *Alison v Ritchie*, 3 February 1730, Mor 15196.

²⁰⁷ Similarly, see *Carmichael v Lockhart*, 16 February 1715, Mor 15232.

²⁰⁸ Hume, Vol 2, 59 (emphasis added).

payable.²⁰⁹ It is difficult to draw any general meaning of “elusory” from these two discussions.

Another possible meaning of “elusory” may simply be nominal. Indeed, several texts take the concepts together. Hume, for example, explains that contracts of lease can have nominal and elusory rents,²¹⁰ but such rents cannot create real leases.²¹¹ Similarly, Bell remarks that nominal rents are enforceable against the original landlord,²¹² which he juxtaposes with the unenforceability of real leases with elusory rents.²¹³ A difficulty with this definition is that it is generally accepted that rents which are not at a fair value are nonetheless valid as real rights of lease.²¹⁴ It is noted, for example, that a rent of a “plack”²¹⁵ would defend a tenant against a singular successor, despite being extremely low and indeed, nominal.²¹⁶ Using an extremely low rent was also a valid method of evading the rules preventing retention of rent clauses being invalid against successors.²¹⁷ Therefore, distinguishing between what is simply regarded as a very low rent and what is viewed as nominal is not clearly delineated.

Notwithstanding the lack of definition of elusory, it is nonetheless clear that there is some difference in the validity of contracts of lease and real leases with regards to the amount of rent that is agreed under the lease. For real leases, the rent must not be elusory, whilst for contracts of lease, there must simply be a rent of some description.

²⁰⁹ *Sharp v Burt*, 31 July 1788, Mor 15262.

²¹⁰ Hume, Vol 2, 59.

²¹¹ *Ibid*, Vol 4, 77.

²¹² Bell, *Principles*, 1198.

²¹³ *Ibid*, 1201.

²¹⁴ Erskine, 2.6.24; Bell, *Principles*, 1201; Bell, *Commentaries*, 27.

²¹⁵ Equivalent of four Scots pennies.

²¹⁶ *Oliphant v Currie*, 11 December 1677, Mor 15245; *Thomson v Reid*, 15 June 1664, Mor 15239.

²¹⁷ Bell, *Principles*, 1201. On which see “Retention of Rent” below at 3.3.2.1.

3.3.1.4 Conclusion on Need for a Positive Rent to be Agreed

Whilst the law regarding the need for a positive rent for a valid real right of lease is clear, the position is less clear for contracts of lease. The earliest cases and authoritative writers suggest that there must be some rent agreed for a contract of lease to come into being. Nonetheless, this position did not go unchallenged in the following centuries. Several writers, such as Bell and Hume, concluded that a contract of lease did not need a rent to be agreed. This may be a result of these writers reflecting a more practical, commercially-sensible position. Nonetheless, the more widely stated view is that whilst a contract of lease did require rent, such rent could be nominal and elusory. Therefore, although there is probably not such an obvious difference between real leases and contracts of lease regarding the need for a rent to be agreed, there is a clear difference (albeit ill-defined) in the level of rent which is acceptable for each type of lease.

3.3.2 The Need for a Rent to be Payable

A related question is whether any rent must actually be payable for there to be a valid lease. For example, the lease may stipulate a rent to comply with the requirements regarding the need for a positive rent to be agreed. However, the lease may be worded so that any rent is discharged under the lease or assigned back to the tenant, so that in reality, no rent is payable. This section considers whether a lease which has had the rent assigned back to the tenant is valid. As with the discussion surrounding the need for a definite duration, many of the cases where rent has been assigned back to the tenant concern leases-as-security. As explained above, this is where the landlord grants a lease to the tenant and allows the tenant to retain the rent to satisfy a debt owed by the landlord to the tenant. The lease ends when the debt has been paid in full. Other scenarios where rent is retained include meliorations clauses – where the rent due can be reduced if the tenant carries out repairs or improvement to the property. In meliorations cases, it is possible for the rent to be completely extinguished and if the tenant paid more in improvements than he could reclaim under the rent, the landlord would be liable to repay a sum to the tenant. Another related scenario is where rent has been assigned by the landlord to another person, so although rent is paid, it is not paid to the landlord.

It should be noted that this discussion is concerned with the effect of retention clauses on the validity of leases at the formation of contract stage. It is not concerned with the rules regarding irritancy of leases which state that non-payment of rent for two years brings a lease to its end.²¹⁸

3.3.2.1 *The Effect of Retention Clauses on a Lease's Validity*

Under the earliest Scots law, rent could not be assigned back to the tenant and the contract of lease remain valid. Craig, for instance, notes that if rent did come to be assigned to the tenant, the lease would be “rendered invalid”.²¹⁹ As noted above, Craig is discussing contracts of lease at this point.²²⁰ It followed that if the contract of lease was invalid, so too was any real right of lease.

Nonetheless, this position changed with Stair noting that “if [the contract of lease has a rent] but in the Tack itself, it be wholly discharged, ... the tack is valide”.²²¹ Similar formulations can be found in Hume’s *Lectures*²²² and in Bell’s *Principles*.²²³ Therefore, even if the initial position in Scots law was that such clauses invalidated contracts of lease, the law developed such that leases with retention clauses were effectual.

The retention of rent is often stated as a point of difference between the real right of lease and a contract of lease. In questions with singular successors, the retention clause cannot bind successors. For example, Stair notes that any “discharge of the Tack-duty [will not] be valide against the setter’s singular Successor”.²²⁴ Hume agreed, emphasising situations where parties include terms aimed at intercepting the payment of rent such as where rent is retained to discharge a debt owed by the

²¹⁸ See, e.g. Forbes, *Institutes*, 2.2.11.

²¹⁹ Craig, 2.10.2.

²²⁰ Above, 3.3.9.

²²¹ Stair, 2.19.29.

²²² Hume, Vol 2, 59.

²²³ Bell, *Principles*, 1198.

²²⁴ Stair, 2.19.29.

landlord, or where rent is to be paid to someone other than the landlord.²²⁵ Likewise, in his *Commentaries*, Bell states that “a tenant cannot acquire, either by separate bond or contract, or even by a stipulation in the lease itself, a right to retain the rents against singular successors.”²²⁶ Many more shared this view.²²⁷

Retention of rent clauses gave rise to a wealth of case law in the seventeenth and eighteenth centuries. These confirmed the position of the institutional writers that retention of rent clauses were invalid against successors.²²⁸ For a period, there appeared to exist an exception to the rule where if the rent was not totally discharged and a surplus of rent was still payable, the retention of rent clause would be enforceable against singular successors.²²⁹ This seems to have been justified on the reasoning that if the rent had been “a plack” then the rent would have been unchallengeable by singular successors.²³⁰ Nonetheless, this position was subsequently changed so that all retention of rent clauses were invalid regardless of any surplus rent.²³¹

3.3.2.2 Invalid Leases or Invalid Terms?

It has been recently commented by Haughey that these cases were examples where whole leases failed to bind successors due to failing to meet the requirement under the Leases Act 1449.²³² It is respectfully submitted that this conclusion is incorrect. One early case supports Haughey’s view that leases fail to transmit because of retention of rent clauses as they contain no rent for the purposes of the Act.²³³

²²⁵ Hume, Vol 2, 59.

²²⁶ Bell, *Commentaries*, 27; See also his statements in Bell, *Principles*, 1199.

²²⁷ Bankton, 2.9.7.

²²⁸ *Ross v Blair*, January 1627, Mor 15167; *Auchinbreck v McLaughlin*, 11 February 1748, Mor 15248.

²²⁹ *Thomson, v Reid* 15 June 1664 Mor 15167; *Oliphant v Currie*, 4 December 1629, Mor 15245; *Darling v Sampson*, 10 February 1698, Mor 15247.

²³⁰ *Oliphant v Currie*, 4 December 1629, Mor 15245.

²³¹ *Auchinbreck v McLaughlin*, 11 February 1748, Mor 15248; See also: *Cranston v Scot*, 4 January , Mor 15218.

²³² D Haughey, “Transmissibility of Lease Conditions in Scots Law – A Doctrinal-Historical Analysis” (2015) 19(3) *EdinLR* 333, 337.

²³³ *Bennet v Turnbull*, 12 July 1628, Mor 15327, although note this case also failed in the requirement for an ish, and so lack of rent alone did not cause it to fail.

However, most cases are examples of the *lease* transmitting against successors, but a specific *clause* within that lease not transmitting against successors.

For example, in *Ross v Blair*, a lease contained a yearly rent which had been perpetually discharged.²³⁴ The pursuer, a successor landlord, sought payment of the rent. The tenant argued that the discharge of the rent meant there was no rent for the purposes of the Leases Act 1449. Thus, the lease did not transmit to successors and could not be enforced by the pursuer. The court dismissed the tenant's argument, stating that the lease did contain a rent for the purposes of the Act, although the term discharging the rent was not enforceable against singular successors. Therefore, the pursuer was entitled to enforce the lease and demand payment of the rent. In this case, the argument that the lease did not transmit due to lack of rent was explicitly rejected. Instead, only the term discharging the rent did not transmit, not the full lease.

This position was adopted by many of the institutional writers. For example, Erskine notes with regards to retention of rent clauses that "such clauses are unavailable against the landlord's singular successors",²³⁵ whilst Bell notes that "any stipulation" where rent is retained is not enforceable against singular successors.²³⁶ The writers are not stating that the whole lease is invalid. Instead, they are clearly stating that only that specific term is unenforceable.

The modern discussion of these issues by Haughey²³⁷ illustrates a central problem with comparisons of contracts of lease and real leases – often the issue of whether a lease is valid is confused with questions of transmissibility of terms within that lease. For example, Haughey states that "retention clauses were considered intransmissible where they rendered the lease invalid under the 1449 Act for lack of rent".²³⁸ Strictly speaking, this scenario is impossible. If a lease is invalid for the purposes of the

²³⁴ *Ross v Blair*, January 1627, Mor 15167.

²³⁵ Erskine, 2.6.28.

²³⁶ Bell, *Principles*, 1199.

²³⁷ Haughey, "Transmissibility of Lease Conditions in Scots Law".

²³⁸ *Ibid*, 340.

1449 Act due to lacking rent, then the lease as a whole should fail to bind successors. Only if the lease meets the requirements of the 1449 Act, including rent, could the lease transmit against successors. It is only at this point that questions of which terms under that lease were enforceable against that successor are relevant.

Nonetheless, the need for a rent to be payable is often cited as a difference between contracts and real rights of lease (for example, Bell in his *Principles* states “there is a distinction in this regard (as in regards to the term of duration) between questions with the grantor and his heirs, and questions with singular successors.”)²³⁹ However, in reality, it does not affect the validity of either the real right of lease or a contract of lease. If a real right of lease contains a retention of rent clause, the lease itself is as valid against singular successors as it is against the original landlord and his heirs – the only difference is in the enforceability of that specific term against singular successors.

3.3.3 Conclusion on Rent

Despite rent being a less controversial feature of the definition of a lease, rent does not have the same meaning for real rights of lease and contracts of lease. One key difference in the rules regarding whether rent can be retained by the tenant does not demonstrate a difference in the requirements for creation between contracts and real rights of lease. Both leases are valid leases notwithstanding the retention clause, the only difference being the enforceability of that clause against successors. However, the required level of rent for a valid contract or real right of lease does differ. There is evidence to suggest that a contract of lease would be valid even if the agreed rent was nil, but the more widely agreed position is that whilst such leases need a positive rent, it can be a token or elusory amount. This can be contrasted with real leases which are only valid if the rent is not elusory, although the exact meaning of elusory is not defined. Therefore, the rent requirement, alongside the duration

²³⁹ Bell, *Principles*, 1197.

requirement, is evidence that there are different rules regarding the validity of real leases and contracts of lease. This demonstrates that the two types of lease exist as categories of agreement, distinct from one another.

3.4 Parties

The need for two distinct parties to a lease is self-evident as, like in any contract, one cannot contract with herself. That is true regardless of whether the lease is a contract or a real right. The question to be discussed here is therefore not whether there is a need for the parties to be agreed as was the case with the discussions on rent and duration, but instead who is competent to grant a lease. Obviously, those who contract to form a lease must have capacity to contract.²⁴⁰ However, other requirements must also be met. The question which is discussed in this section is whether someone who does not have a real right to the property can grant a valid lease.

3.4.1 Title to the Property to be Leased

Determining any differences between the contract of lease and real right of lease in respect of the parties' requirement is not easy. There are few cases which consider the issue and the authoritative writers who discuss who may grant a lease at any length (many do not)²⁴¹ fail to separate the requirements of a real lease from a personal lease in this regard. Nonetheless, from the few sources available, there does seem to be a difference between real leases and contracts of lease in terms of the need to have title to the property leased.

²⁴⁰ Stair, 2.19.3.

²⁴¹ See, for instance, Stair, who dedicates less than a paragraph to it at 2.19.3; likewise Forbes, *Institute*, 2.4.5.

3.4.1.1 Real Leases

With regards to real rights of lease, landlords must themselves have a real right to grant a real right of lease. This statement may be “obvious” since it is accepted that no one can grant a greater right than they themselves have.²⁴² In relation to leases, this statement was made explicitly in *Tenants of Killilung* which explained that “the Act of Parliament which makes tacks a real right supposes that they proceed from one who was in the right himself”.²⁴³ Often, this real right will be ownership, but having a lesser real right in the property, such as a liferent, is also competent.²⁴⁴

3.4.1.2 Contracts of Lease

For contracts of lease, the position is less clear. The earliest institutional writers suggest that it is only those who have title to the lease that are competent to grant one. These statements are included in the parts about leases generally, rather than in parts dedicated solely to the real lease and so can be said to apply to contracts of lease too. For example, Stair explains that a landlord “must have right to the thing set and power to administrate”.²⁴⁵ Use of the phrase “right” in this description presupposes the person has a real right. Although these descriptions would include people who, for example, control a minor’s estate but do not themselves own the land, arguably it does not seem to be wide enough to cover other non-owners.

Later formulations are wider. Erskine states that “The granter of a lease must either be the proprietor of the subject let, or the administrator of it”.²⁴⁶ Although this appears to be a reiteration of the descriptions of Stair and Forbes, it differs in its use of the word “proprietor” rather than individuals who have a “right to” the land.

Webster notes that the term proprietor did not at the time of Erskine’s writing mean the same as it does today.²⁴⁷ Today, proprietor denotes a party with completed title

²⁴² Webster, “Continued Existence of the Contract of Lease”, 126.

²⁴³ *Tenants of Killilung* (1760) 5 Br Sup 877.

²⁴⁴ Bell, *Principles*, 1183; Rankine 71.

²⁴⁵ Stair, 2.19.3 see also Forbes, *Institutes*, 2.6.5; Bankton, 2.9.18.

²⁴⁶ Erskine, 2.6.21

²⁴⁷ Webster, “Continued Existence of the Contract of Lease”, 134.

to the land, however, previously “proprietor” was used as distinct from a “heritable proprietor” – the latter was infekt, whilst the former was not.²⁴⁸ Therefore, Erskine’s statement should not be taken to mean that landlords must have a real right to grant a lease: it could also encompass those who do not have a real right.

Bell concurs with Erskine that “The granter of a lease must be either the proprietor of the subject let, or one entitled to the full use and possession of the subject, or one in administration of it”.²⁴⁹ This formulation specifically includes someone who does not have a real right in the land but who can nonetheless grant a lease: someone who only has use and possession of the subjects. It is noted that such people do not grant “an effectual or permanent” right of lease,²⁵⁰ as in such leases would not be afforded protection by the Leases Act 1449. Nonetheless, they are valid leases between the original landlord and tenant.

Indeed, many later texts detail the intricacies of leases granted by people who are not infekt and so do not have title to the lands let.²⁵¹ Bell, for example, notes that in the case where someone has granted a lease without title and then subsequently acquires title to the lands, the lease becomes real when the landlord acquires title.²⁵² In the period between the granting of the lease and the landlord becoming infekt, the lease can be extinguished by another completing title before the landlord. Nonetheless, the tenant still has a claim against the landlord in warrandice under their contract of lease.²⁵³ The availability of an action founded on the contract of lease despite the landlord not having good title to the land demonstrates that it is competent for a contract of lease to be granted by a non-owner.

The above descriptions of parties who lack real rights to the land but who can nonetheless grant a valid contract of lease presume that the landlord has at least some relationship to the land allowing him to enjoy use and possession of it. For

²⁴⁸ *Ibid.*

²⁴⁹ Bell, *Principles*, 1181. See also Rankine, 4.

²⁵⁰ *Ibid.*

²⁵¹ Bell, *Leases*, 98, Rankine ch 2.

²⁵² Bell, *Leases*, 100.

²⁵³ *Ibid.*

instance, the right of use and possession may be granted in a contract. But what if the landlord is not entitled to the use and possession of it? Can he competently grant a lease? Pothier, who has been influential in Scots law,²⁵⁴ saw no reason why someone could not grant a lease over land they had no title to.²⁵⁵ He drew parallels with the validity of contracts of sale of items which were not owned by the seller – such contracts were valid, and if the buyer's peaceful possession was disturbed by the real owner, they had a claim in warrandice against the seller. So too, therefore, would a tenant have right against the landlord under a contract of lease if their possession was disturbed by the owner.

To determine whether or not this was also the position in Scots law, two nineteenth-century cases are important. Both concern situations where the landlord had neither title nor right to use and possession of the property and discuss if the leases purportedly granted were valid contracts of lease. In *Weir v Dunlop & Co*,²⁵⁶ a lease had been granted by someone who did not yet have title to the lands nor any right to use or enjoy them, although they soon hoped to obtain title through a sale to them. Nonetheless, the sale fell through, and the land was bought by someone else. The original landlord assigned the lease to the new purchaser, who sought to enforce the lease. The tenant wanted to escape the lease and the court held that the new landlord could not enforce the lease. In the Inner House, Lord Justice-Clerk Glencorse explained that because the landlord had no title to the land, he could “not grant a real right [nor] an effectual right of lease at all”.²⁵⁷ The basis for the decision (with which the majority of judges agree) appears to be that the new landlord could not enforce the lease, because the original landlord (if he should be called such) was unable to enforce the lease. This stemmed from the fact he did not have title to the land. Webster argues that this case is not authority for the position that a lease can only be granted by those with title to the land.²⁵⁸ Indeed, some parts of the

²⁵⁴ For example, he was frequently cited in Bell's work.

²⁵⁵ RJ Pothier, *Treatise on the Contract of Letting and Hiring* (trans GA Mulligan) (1953) §20.

²⁵⁶ *Weir v Dunlop & Co* (1861) 23 D 1293.

²⁵⁷ *Ibid*, 1297.

²⁵⁸ Webster, “The Continued Existence of the Contract of Lease”, 126ff.

judgement are not entirely clear on the matter. For example, Lord Justice-Clerk Glencorse also noted that a lease was “[not] effectual until you have combined in one person the personal obligation and the title to the property”.²⁵⁹ This suggests there can be a contract of lease which exists as a distinct personal obligation between the original landlord and the tenant. When the landlord obtains title to the land, the agreement could become a real right of lease, enforceable against successors.²⁶⁰ Despite this, the decision as a whole appears to be authority for the position that a lease, including a contract of lease, cannot be granted by someone who does not have some link to the lands. The Lord Justice-Clerk’s opinion seems to be that the lease would only be “effectual” in questions between the original landlord and tenant too when the landlord perfected his right with ownership or equivalent, and so no contract of lease exists before this point.

In a second case, *Reid’s Trustee v Watson’s Trustees*,²⁶¹ a landlord’s title to the land was reduced. The tenant sought to escape the lease which the new landowner sought to enforce. The court held that the tenant could indeed be freed from the lease. Lord Traynor, who decided with the majority, stated that there was never a valid lease between the original landlord and the tenant because of the landlord’s lack of good title.²⁶² Nonetheless, the leading judgement, given by Lord Justice-Clerk Kingsburgh and with which the other majority judges agree, suggests that there was a valid contract of lease. His argument appears to be that a contract of lease existed until the landlord lost his right to the land and as such could no longer enforce his side of the bargain. At this point, the tenant was freed from his obligations and as such the new owner of the land could not enforce the lease. Therefore, the majority’s decision was clear that there was a valid contract of lease notwithstanding the landlord’s lack of good title.

²⁵⁹ *Weir v Dunlop & Co* (1861) 23 D 1293, 1298.

²⁶⁰ *Ibid.*

²⁶¹ *Reid’s Trs v Watson’s Trs* (1896) 23 R 636.

²⁶² *Ibid.*, 647.

Taking these two decisions into account, the position in relation to those with no right in the lands at all is not entirely settled. *Reid's Trustee*, however, suggests that there would be a valid contract of lease even when the landlord has no title or right to the use and possession of the lands he has let out.

3.4.2 Conclusion on the Parties Requirement

As with the requirements of rent and duration, there is a difference with regards to the parties' requirement depending on if there is a real lease or a contract of lease. Logically, a real lease requires the landlord to have a real right to the land, and any limited real right, such as liferent, can only confer a real right to the extent of the real right of the landlord. For example, a liferenter can only grant a lease for the maximum duration of his lifetime. On the other hand, contracts of lease can be granted by those who do not have a real right in the land. This is definitely the case for those who only have use and possession of the property as is explicitly mentioned by the institutional writers, but there is also evidence that leases granted by people with no right at all to the land may also be valid as contracts of lease. In cases where the tenant's enjoyment is disturbed by someone with a real right to the property, the tenant would have a claim of warrandice. This would be based on the contract of lease and be against the original landlord. This difference in who can grant a lease depending on if it is a contract of lease or purely personal lease is yet more evidence suggesting that the two types of lease are distinct from one another, and the contract of lease has not, as Lord Gill suggested, been subsumed by the real right of lease.²⁶³

3.5 Property

For completeness' sake, a few words should be said on the final cardinal element of the lease - the property requirement. As Bell notes, "the contract of lease implies a

²⁶³ Lord Gill, "Two Questions on the Law of Leases", 255.

subject let”²⁶⁴ and there are few differences between the requirements of a real lease and of a personal lease in terms of the property requirement. The main difference is in the type of property that can form the subject of a lease. Leases of land are competent as both real and contractual leases, and this initially appeared to be the case for leases of other rights such as fishing.²⁶⁵ This is despite the Leases Act 1449 only mentioning “the ground”.²⁶⁶ This terminology could have led to only leases of land being valid real rights and leases of things other than land being restricted to contracts. However, later texts acknowledged that not all fishing and gaming rights are capable of becoming real, although they are nonetheless valid against the original landlord.²⁶⁷ Some fishing rights remained capable of becoming real, such as leases of salmon fishings, due to their special status as a separate heritable tenement.²⁶⁸ Whether other such rights could become real seemed to depend on whether the lease is of the *land*, with the right to use the land only for fishing implied, or if the lease was of the *right* to fish or shoot itself.²⁶⁹ The former was capable of becoming real, whilst the latter usually did not. Thus, even regarding the property requirement, different rules are evident for contracts of lease as opposed to real leases. It is therefore further evidence of the real lease and the contract of lease having distinct requirements and traditionally existing as separate from one another.

3.6 Conclusions on the Cardinal Elements under Early Scots Law

A detailed analysis of the cardinal elements of a lease evidences that there are notable differences between the real lease and the contract of lease. The discussion of these differing requirements is evidence of the lease traditionally being regarded as two different species. The contract of lease was wider, with less strict formation requirements. Conversely, the real lease, because of its onerous nature in binding

²⁶⁴ Bell, *Principles*, 1208.

²⁶⁵ *Ibid*, 1207.

²⁶⁶ Leases Act 1449.

²⁶⁷ Rankine, 504.

²⁶⁸ See generally, W Gordon and S Wortley, *Scottish Land Law* (volume 1, 2009), 8.85.

²⁶⁹ *Ibid*.

successor landlords, had more restrictive requirements. Thus, it is not the case that only a lease which had not yet become a real right through registration or possession is a contract of lease. There existed contracts of lease that were incapable of being converted into a real right, and which lived out their lifespan as a personal right only, until such time that they are brought to a natural end, or were terminated by a successor landlord. Therefore, it can be said that the contract of lease did continue to exist, distinct from the real right, and is evidence against Lord Gill's proposal that the contract of lease does not exist in Scots law following the introduction of the Leases Act 1449.²⁷⁰

Furthermore, it means that the term "lease" is not restricted only to real leases. In cases where the lease failed against singular successors, the courts still held there was a valid lease against the original landlord.²⁷¹ This is even so when the lease appears to contradict the nature of a lease. For example, if it is an inherent nature of a lease to be temporary in nature,²⁷² then a perpetual lease is surely at odds with the nature of a lease. Nonetheless, it is a valid lease against the original landlord. Therefore, the term "lease" is much wider than it may at first appear. This raises questions with regards to one of the distinguishing features between a lease and a licence – it is often said if a cardinal element of a lease is missing, then it is a licence.²⁷³ It could, however, simply be a contract of lease. This has further implications as certain rights and obligations are implied into the contract of lease, that would not necessarily be included in a licence.²⁷⁴

²⁷⁰ Lord Gill, "Two Questions in the Law of Leases".

²⁷¹ See, for example, *Carruthers v Irvine* 23 January 1717, Mor 15195.

²⁷² Bell, *Leases*, Preface at vii.

²⁷³ *Rennie*, 30.

²⁷⁴ The effect of missing cardinal elements is considered in detail in Chapter 8, whilst implied cardinal elements are considered in Chapter 9.

Chapter 4: Cardinal Elements of the Modern Lease

4.1 Introduction

This part explores the requirements of the lease in the period from the 1800s to present day. As with the previous chapter which focused on the earlier law, it aims to delineate which cardinal elements are necessary for the formation of a lease. It analyses whether any of the differences of meaning between cardinal elements of the real right of lease and the contract of lease identified in the previous chapter persist into the modern law. This chapter also considers the extent to which legal developments may have created new categories of lease, and new differences in formation requirements.

This chapter starts where the previous chapter ended – with the work of Bell. The period after Bell was writing is significant in the development of Scottish landlord and tenant law. It is the period in which the first dedicated textbooks on the subject were written.²⁷⁵ More recently, there has been significant statutory development which has impacted the cardinal elements of the lease.²⁷⁶

4.2 Duration

Modern writers have described the issue of duration as one which should be “quite straightforward for the draftsman”.²⁷⁷ However, as this section will demonstrate, that is not necessarily the case. Like the previous chapter discussing the cardinal element’s development, this chapter examines two issues. The first part investigates whether duration is a necessary feature of leases. The second part explores what constitutes duration, and whether this is the same for real rights of lease and

²⁷⁵ Commencing with the work of R Bell, *A Treatise on Leases* (4th edn, 1825, edited by W Bell).

²⁷⁶ E.g. the Registration of Leases (Scotland) Act 1857; The Abolition of Feudal Tenure etc. (Scotland) Act 2000; Long Leases (Scotland) Act 2012.

²⁷⁷ M Ross and D McKichan, *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn, 1993), 5.17.

contracts of lease. This period is hallmarked by substantial legislation affecting the law of landlord and tenant in Scotland. As such, particular emphasis will be paid to the effect these pieces of legislation have on the cardinal element of duration.²⁷⁸

4.2.1 Is Duration a Necessary Feature of a Lease?

The previous chapter demonstrated that whilst duration was not always a necessary feature of a lease, by the 1800s it had become an essential feature of both real rights of lease and contracts of lease.²⁷⁹ The same is true of the modern law, with the caveat that under certain circumstances, a duration of one year can be implied.²⁸⁰ This peculiarity is considered elsewhere in the thesis, where it is suggested that this rule may no longer be applicable under the modern law.²⁸¹ Nonetheless, even if an exception does exist, it is clear that the general rule under the modern law is that there is no lease unless the duration is agreed.²⁸² For example, Paton and Cameron mention duration as a cardinal element of both the contract of lease²⁸³ and real right of lease.²⁸⁴ Furthermore, omitting duration can imply that the parties do not wish to create a lease.²⁸⁵

4.2.2 What is meant by the Term “Duration”?

As demonstrated in the previous chapter, just because real rights of lease and contracts of lease require duration to be agreed, that does not mean that what constitutes a valid duration is the same for each type of lease.²⁸⁶ The previous section identified two key distinctions in this regard: whether the duration need be

²⁷⁸ In particular, the effect of the Registration of Leases (Scotland) Act 1857 will be analysed.

²⁷⁹ See Chapter 3.

²⁸⁰ *Gray v University of Edinburgh* 1962 SC 157.

²⁸¹ See Chapter 9.

²⁸² Rennie, 1.22; Richardson and Anderson, 2.28.

²⁸³ Paton and Cameron, 7.

²⁸⁴ *Ibid*, 107.

²⁸⁵ Rankine, 115.

²⁸⁶ See Chapter 3.

certain, and whether perpetual leases were valid. This section analyses to what extent these differences exist today.

4.2.2.1 Leases of Uncertain Duration

There is no change in the requirement of real rights of lease to have a certain duration under the 1449 Act. Thus, Rankine notes that the Act has been uniformly interpreted as “demanding a fixed duration”.²⁸⁷ Likewise, Paton and Cameron note that real rights of lease must have a definite ish.²⁸⁸ However, some doubt arises in Paton and Cameron’s explanation of what constitutes a definite ish. They explain:

“Although the Act requires a definite ish, it does not require a fixed ish. The lease may be given for a liferent or successive liferents, but it must provide that it is to come to an end on the occurrence of an event which is bound to happen.”²⁸⁹

In other words, there must be termination on an event which is bound to happen, but it is not essential for a specific date to be determinable at the outset of the agreement. This extends the position stated by Rankine, who restricted this exception to leases for a lifetime only.²⁹⁰ That leases for a lifetime are valid is well supported by authority.²⁹¹ However, it is less clear if a valid ish can be constituted by any event which is certain to happen, despite the precise date of occurrence being unknown. It is difficult to envisage what the courts would consider sufficiently definite to occur, but which is not a lifetime. Indeed, when citing this rule, the only example given by Paton and Cameron is that of a lifetime.²⁹² Case law has indicated some

²⁸⁷ *Ibid*, 139.

²⁸⁸ Paton and Cameron, 107.

²⁸⁹ *Ibid*.

²⁹⁰ Rankine, 139.

²⁹¹ E.g. *Corshill v Wilson* 1626 M 15188.

²⁹² Paton and Cameron, 108: citing *Thomson v Thomson* (1896) 24 R 269 (NB. This case concerned a disagreement between the original landlord and tenant and so is not necessarily authority for the fact such a lease would be valid against singular successors.) See also, Rennie, 5.09.

durations would fail to be sufficiently certain, such as an agreement terminable on notice.²⁹³

Under the earlier law, however, leases of an uncertain duration were valid between the original grantor and his tenant. Whether this continues to be the case is less certain. The clearest statement in favour of the fact that the position remains unchanged is Paton and Cameron. They state, when discussing leases at common law – that is to say contracts of lease – that “the term need not be definite”.²⁹⁴

Other texts are more obscure. For example, contradictory remarks can be found in Rankine’s text. He states that a contract of lease may “be granted in perpetuity, or for a very long period, or for an indefinite period or for no specified period”.²⁹⁵ However, this can be contrasted with the later statement that “it seems to be the better opinion that [the landlord] can bind himself and his successors, universal or singular, by a lease of any length whatever, provided the duration be definite”.²⁹⁶ Of particular note is his inclusion of “himself” and of “universal successors” in this description. This phrasing suggests that this statement applies to both real rights and contracts of lease. As such, this implies that a contract of lease cannot be for an indefinite period - a change from the earlier law.

The most recent texts on leases further complicate the matter. The most recent textbook is silent on the issue.²⁹⁷ Rennie also does not make his position explicit on whether contracts of lease can be for an indefinite period.²⁹⁸ However, his phrasing suggests that he believes uncertain durations are *not* valid for contracts of lease or real rights of lease. He explains:

²⁹³ *East Lothian Council v Duffy* 2012 SLT (Sh Ct) 113.

²⁹⁴ Paton and Cameron, 7.

²⁹⁵ Rankine, 115.

²⁹⁶ *Ibid*, 141.

²⁹⁷ Richardson and Anderson, 2.28.

²⁹⁸ Rennie, 1.22.

“Prior to the coming into effect of the feudal abolition legislation on November 28, 2004 a lease could be granted for any length of time or indeed an indefinite length of time or according to some authors in perpetuity.”²⁹⁹

He then continues: “The term of a lease can no longer exceed 175 years.”³⁰⁰

It is significant that Rennie uses the past tense here. He appears to state that the law was such that indefinite durations were valid for contracts of lease prior to 2004, but that this is no longer the case. However, two distinct issues are being conflated here. Whilst leases can no longer exceed 175 years,³⁰¹ the Act makes no comment about leases of an indefinite duration. It is therefore incorrect to say that the 2004 Act changed the law with regards to leases with indefinite durations. Nonetheless, this is a position which is repeated elsewhere.³⁰²

Interestingly, some cases cited by Rennie in support of his implication that indefinite durations are not valid in contracts of lease suggest the opposite – that indefinite durations *are* valid. In the oft-cited *Dunlop & Co v Steel Co of Scotland*, for example, the court held that an agreement to continue for as long as water was drawn from a pit was terminable on notice by either party.³⁰³ Although this case pre-dates the 2004 Act, he treats it as valid law.³⁰⁴ Rennie notes that this case has been cited as authority for the fact that a lease without an ish is not valid.³⁰⁵ However, he correctly highlights that this was not what the judges in the case said.³⁰⁶ The judges held that there was a valid lease, but that it had an indefinite ish and as such was terminable on notice.³⁰⁷ That is not the same as saying the indefinite ish invalidated the lease. The case therefore suggests that leases with indefinite durations are valid.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ Abolition of Feudal Tenure etc. (Scotland) Act 2000, s67. This is discussed in more detail below.

³⁰² Rennie, 10.01.

³⁰³ *Dunlop & Co v Steel Co of Scotland* (1879) 7R 283.

³⁰⁴ Rennie, 1.22.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*, 287.

Whilst this case is often regarded as unusual in its facts, the principle advanced within it is less unusual.³⁰⁸ Thus, in *Magistrates of Buckhaven and Methil v Wemyss Coal Co*, a lease terminable on two weeks' notice was described as a "let" without "a definite ish".³⁰⁹ More recently, in *South Lanarkshire Council v Taylor*, the fact that there was no entry date nor duration specified was held not to prevent there being a lease between the parties.³¹⁰

By contrast, there are modern cases which confirm Rennie's view that contracts of lease for an indefinite duration are invalid. *Stirrat v Whyte* concerned whether or not an agreement to occupy agricultural land which was "to terminate in the event of the sale of [the] farm at any time" could constitute a lease under the Agricultural Holdings (Scotland) Act 1949.³¹¹ The court unanimously held that it could not. The judges were not, however, unanimous in their reasoning. Lord Guthrie³¹² and Lord Cameron³¹³ explained that the lease in question did not fall within the definition of a lease in the legislation.³¹⁴ This does, however, leave open the possibility of the agreement being a valid lease under the common law. On the other hand, Lord President Clyde and Lord Migdale were of the opinion that the agreement was not a lease at all. Lord President Clyde explained that because it could be "brought to an end at any time", the agreement was more akin to a "revocable licence".³¹⁵ Lord Migdale agreed with this reasoning.³¹⁶ Thus, for these judges, what was fatal to the finding of a lease was that there was no definite end date and that it could be ended at any time through the sale of the farm. The later case of *Mountain's Trs v Mountain* confirms the views of Lord President Clyde and Lord Migdale, that a lease which could be ended at the will of one party was not a valid contract of lease.³¹⁷ They did,

³⁰⁸ Paton and Cameron, 12.

³⁰⁹ *Buckhaven and Methil v Wemyss Coal Co* 1928 SC 66.

³¹⁰ *South Lanarkshire Council v Taylor* [2005] CSIH 6.

³¹¹ *Stirrat v Whyte* 1967 SC 265.

³¹² *Ibid*, 269ff.

³¹³ *Ibid*, 272.

³¹⁴ Agricultural Holdings (Scotland) Act 1949, s93(1).

³¹⁵ *Stirrat v Whyte* 1967 SC 265, 268.

³¹⁶ *Ibid*, 270.

³¹⁷ *Mountain's Trs v Mountain* [2012] CSIH 73.

however, contrast this with the position where there was the ability to end the agreement at any time coupled with a specific contractual duration, such as ten years, or a lifetime.³¹⁸ This would be a valid contract of lease, much like the position for real rights of lease.³¹⁹

A further example which supports Rennie's suggestion that all leases of an uncertain duration are invalid is *Scottish Residential Estates v Henderson*.³²⁰ This case concerned a dispute between the original landowner and the occupier, as opposed to any successors. Thus, it is good authority for the question of whether contracts of lease of uncertain duration are valid. In that case, an agreement for the occupation of property until the owner "needed it back" was held incapable of amounting to a lease. However, the decision in this case must be treated with caution.

First, it seems that the court was unwilling to hold that there was a lease because counsel for the defender suggested different interpretations of the lease's duration - either it was from year to year, or terminable on notice.³²¹ It was because two interpretations were possible that the court held no valid duration existed – in effect, the contract was void for uncertainty.³²² Had counsel argued that only one interpretation was possible, it is plausible that the judge may have accepted that there was a valid duration so as to create a contract of lease.

Furthermore, this case explicitly considers whether there is a lease or a licence to occupy.³²³ In doing so, the court does not expressly consider that this question entails three, and not two, different options. The question is not whether there is a lease or a licence, but also whether any lease is a real right of lease or a contract of lease. If this distinction is not appreciated by the judiciary, then rules which apply only to real rights of lease may inadvertently be applied to all categories of lease,

³¹⁸ *Ibid*, 20.

³¹⁹ See Chapter 3.

³²⁰ *Scottish Residential Estates Development Co v Henderson* 1991 SLT 490.

³²¹ *Ibid*, 491.

³²² *Ibid*.

³²³ Licences to occupy are the focus of Part 2 of this thesis.

including the contract of lease. The case may therefore be less useful for determining whether uncertain durations are valid for contracts of lease.

Finally, the case does not deal well with previous authorities that suggest an uncertain duration can constitute a valid lease. Cases such as *Dunlop & Co v Steel Co of Scotland*, explained above, were dismissed for being substantially different on their facts, without due consideration of the legal issues arising in the case.³²⁴

4.2.2.2 Conclusion on Uncertain Durations in Modern Law

An analysis of the current law demonstrates that the issue of uncertain durations is not entirely settled. However, most authorities support the view that whilst real rights of lease cannot be for an uncertain duration, with the exception of tenancies for life, a contract of lease is valid if it contains an uncertain duration. Contracts with uncertain durations were valid under the earlier law, and modern writers such as Paton and Cameron recognise that this continues to be the case.³²⁵ Whilst some recent texts are less clear on the issue, sometimes even suggesting an uncertain duration is invalid even for contracts of lease, this position is unsupported by evidence.³²⁶ Indeed, the case of *Dunlop & Co* reaches the opposite conclusion to that which Rennie himself reached. Whilst *Dunlop & Co* is often dismissed as an unusual case, it is not so unusual when the previous position in law is considered.³²⁷ Modern case law in this area is generally unhelpful. Whilst there is a strong suggestion in *Scottish Residential Estates v Henderson* that leases cannot be for an uncertain duration, it is questionable whether that is truly the ratio of the case.³²⁸

It is therefore posited that there remains a distinction between the requirements of the contract of lease and the real right of lease: the former can have an uncertain

³²⁴ *Scottish Residential Estates Development Co v Henderson* 1991 SLT 490, 492.

³²⁵ Paton and Cameron, 7.

³²⁶ Rennie, 1.22.

³²⁷ Paton and Cameron, 12.

³²⁸ *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490.

duration, whilst the latter cannot. If this is indeed the law, there are knock-on implications for the distinction between the lease and the licence to occupy, discussed later in this thesis. There are further difficulties when the issue of registration is considered, as explored below.³²⁹

4.2.2.3 Perpetual Leases

The common law regarding perpetual leases has not changed. Perpetual durations remain valid for contracts of lease but are invalid for real rights of lease under the 1449 Act.³³⁰ Thus, leases “forever” are valid against the original landlord and his heirs.³³¹ However, the law as it applied to real rights of lease was substantially altered by the introduction of the 175-year limit on leases in s67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 provides in subsection 1:

“Notwithstanding any provision to the contrary in any lease, no lease of land executed on or after the coming into force of this section (in this section referred to as the “commencement date”) may continue for a period of more than 175 years; and any such lease which is still subsisting at the end of that period shall, by virtue of this subsection, be terminated forthwith.”

The phrasing of this section is interesting for several reasons. First, the term “lease” is not defined anywhere within the Act, except to clarify that it also includes subleases.³³² There is no indication, therefore, of whether it applies to real rights of lease, contracts of lease, or both.

³²⁹ See below at 4.2.3.

³³⁰ Paton and Cameron, 107; Rankine, 139.

³³¹ *Kerr v Waugh* 1752 M 10307; *Carruthers v Irvine* 1717 M 15195.

³³² Abolition of Feudal Tenure etc. (Scotland) Act 2000, s67(5).

To determine the meaning of the term, the rationale for adopting the 175-year restriction can be explored. Put simply, it was necessary to place a limit on the maximum duration of leases to prevent leases being used as a pseudo-feudal system.³³³ This suggests that the term 'lease' must necessarily apply to real rights of lease.

The more difficult question is whether the term also applies to contracts of lease. At first glance, it may seem unnecessary for the Act to apply to contracts of lease. After all, no individual is likely to live for 175 years. However, it must be remembered that contracts of lease are not simply enforceable against the original landlord, but also against his heirs. Furthermore, the landlord may be a company rather than an individual, and therefore may be in existence well in excess of 175 years. Therefore, if the Act did not apply to both types of lease, it would be possible for certain landowners to create valid perpetual leases. This would mean a pseudo-feudal system would be created for certain leases. Therefore, the Act should be deemed to apply to both real rights of lease and contracts of lease.

The phrasing of Section 67(1) is also interesting because it does not definitively state the effect of the subsection. The first clause of subsection 1 could be read to imply that leases for longer than 175 years are invalid. However, the second clause appears to contradict this. This clause refers to leases which are still "subsisting". If a lease is still subsisting at the end of 175 years, then it follows that leases for longer than 175 years are not invalid, they are simply brought to an end after 175 years have elapsed. This is a significant distinction.

There is also a dispute as to the effect of the phrase "terminated forthwith".

Richardson and Anderson explain that "leases have now been given a maximum length by statute" which means that the requirement of an ish under the 1449 Act will now automatically be met.³³⁴ This interpretation implies that not only are leases

³³³ Scottish Law Commission, *Report on the Abolition of the Feudal System* (Scot Law Com No 168) (1999), 9.40 and 2.9.

³³⁴ Richardson and Anderson, 2.36.

brought to an end after 175 years, but that the law also replaces the ish of the lease *within the agreement* as 175 years.

However, Rennie questions whether this is the correct interpretation of the Act.³³⁵ He correctly notes that this provision does not invalidate longer leases, it just terminates them at an earlier date.³³⁶ Furthermore, he argues that it does not necessitate a lease being interpreted as having a 175-year term.³³⁷ The distinction between these views can be illustrated more clearly with an example. Consider a perpetual lease.³³⁸ Under Richardson and Anderson's interpretation, the lease is no longer treated as perpetual and instead the agreements are read as including an ish at the 175-year point. Under Richardson and Anderson's interpretation, such a lease could now in theory qualify for protection under the 1449 Act, as it has a definite ish. Under Rennie's interpretation, the lease would still be regarded as having a perpetual duration, but the lease would stop being enforceable by the parties at 175 years. Under Rennie's interpretation, the lease could not qualify under the 1449 Act; the agreement would still contain a perpetual ish, notwithstanding the fact that it would end after 175 years. However, it must be remembered that leases for longer than 20 years can no longer be made real under the 1449 Act.³³⁹ A perpetual lease and a 175-year lease are both longer than 20 years and would need to be registered to create a real right. Therefore, whether Rennie or Richardson and Anderson's interpretation of the s67(1) is to be preferred has no practical impact unless registrable leases also cannot be perpetual. This is considered in more detail in the next section.

³³⁵ Rennie, 5.09.

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ Or an extremely long lease, e.g. 999 years: *Wewood v Husband* (1874) 1 R 507.

³³⁹ Registration of Leases (Scotland) Act 1857, s20B, s20C.

4.2.2.4 Conclusion on Perpetual Leases

This author prefers the view advanced by Rennie, that the 2000 Act prevents leases longer than 175 years from being enforced after the 175-year date, rather than implying an ish at 175 years into the agreement. The Act presupposes that there are agreements which will have longer durations. This means that, in theory, parties could agree a perpetual lease, but it would no longer be enforceable after 175 years. As such, there remains a theoretical distinction between the requirements of duration between contracts of lease and real rights of lease. Perpetual durations are valid (but unenforceable) for the former, and entirely invalid in the latter.

4.2.3 The Impact on Duration of the Registration Acts

The introduction of the Registration of Leases (Scotland) Act 1857 and its subsequent alterations³⁴⁰ have somewhat unintentionally had the biggest impact on the cardinal elements of the modern lease. To fully appreciate the impact of these acts, it is important to understand the rationale behind the introduction of these acts.

4.2.3.1 The Introduction of the Registration of Leases (Scotland) Act 1857³⁴¹

The idea of registering leases was far from new. Certain leases had been registrable since 1617.³⁴² However, these were extremely limited, available only to someone who was an “archbishop, a bishop or other prelate of the realm” and for those leases with a duration of longer than nineteen years.³⁴³ The consequences of these restrictions were considered by a Royal Commission created in 1833 to investigate the ease of creating heritable securities, amongst other areas of law.³⁴⁴ In their Third

³⁴⁰ E.g. by the Land Registration etc. (Scotland) Act 2012.

³⁴¹ For an excellent analysis of the introduction of the Registration of Leases (Scotland) Act, see W Guy “Registration of Leases” (1908-1909) 20 *Juridical Review* 234.

³⁴² Registration Act 1617 c.4.

³⁴³ *Ibid.*

³⁴⁴ W M Gordon, “George Joseph Bell – Law Commissioner”, in A J Gamble (ed) *Obligations in Context: Essays in Honour of Professor D M Walker* (1990), 84. These “law commissioners” should not be confused with those who work for the modern Scottish Law Commission, founded in 1965.

Report, published in 1838, the Royal Commission recognised that tenants outside of these categories often spent “considerable capital” on the land with no easy way of granting security over their leases.³⁴⁵ There was a desire for this “inconvenience” to be rectified by extending the ability to register long leases so that lessees could grant securities over their leases.³⁴⁶ Notwithstanding a longing for change in 1838, there was a lengthy delay until the introduction of the 1857 Act.

This delay was likely caused by a divergence of opinion, not concerning whether registration was necessary, but concerning how precisely it should be achieved.³⁴⁷ The main source of contention was where the leases should be registered – in the Register of Sasines, or in a newly created register. The main concern with registering the leases in the Register of Sasines was that it would in effect create leases which were real rights and equivalent to a feu.³⁴⁸ Having two equivalent real rights was undesirable.³⁴⁹ Thus, in their Third Report, the Royal Commission investigating the issue ultimately recommended that the leases be registered in separate, localised registers.³⁵⁰ A Bill was introduced in 1838 in line with these recommendations.³⁵¹ However, for reasons which are unclear, the Bill did not ultimately become law.³⁵²

The issue did not seem to be discussed further until the introduction of the Registration of Leases (Scotland) Act 1857. For reasons unknown,³⁵³ this Act went further than the Royal Commission’s recommendations.³⁵⁴ It provided for long leases

³⁴⁵ Third Report of the Commissioners, *Conveyancing* (13 January 1838), xl.

³⁴⁶ *Ibid.* See also the evidence of Mr J Connings, Examination No 7 of the Appendix of the same report.

³⁴⁷ Guy, “Registration of Leases” 235.

³⁴⁸ Third Report of the Commissioners, *Conveyancing* (13 January 1838), xl.

³⁴⁹ See, for example, the evidence provided to the Commission by Mr J Conning, who describes lease-hold tenure as “clumsy, expensive and insecure”: Third Report of the Commissioners, *Conveyancing* (13 January 1838), Appendix, Examination Number 7, 72.

³⁵⁰ Third Report of the Commissioners, *Conveyancing* (13 January 1838), xl.

³⁵¹ As listed in P Crockton, *Subject catalogues of the House of Commons Parliamentary Papers 1801-1900 Vol 3, Part 7*, (1988) 236.

³⁵² Guy, “Registration of Leases” 236.

³⁵³ As Guy notes, the report of the parliamentary debate on the introduction of the 1857 Act is very short: Guy, “Registration of Leases” 236.

³⁵⁴ Gordon, “George Joseph Bell – Law Commissioner”, 97.

to be registered in the Register of Sasines.³⁵⁵ It was consequently vehemently opposed by those who feared creation of two equivalent real rights.³⁵⁶

4.2.3.2 *The Impact of the Registration Acts on Lease Law Generally.*

When the Royal Commission contemplated the introduction of generally registrable leases in their report of 1838, they thought it was important to do so “without endangering any essential change on our law of leases as now established”.³⁵⁷ In some ways, the 1857 Act achieved this aim. In others, it fell substantially short.

For example, the introduction of the 1857 Act did not realise the existing fear that Scotland would end up with a leasehold system like that in England.³⁵⁸ Of particular concern was the fact that at the time there was no maximum duration on registrable leases. However, the Scottish Law Commission remarked in their *Report on the Conversion of Long Leases* that ultra-long leases were less popular in Scotland because feuing was possible.³⁵⁹

However, in other ways, the law of leases was substantially changed. First, the registration of leases caused the fears of the Faculty of Advocates – the creation of two equivalent real rights – to be realised.³⁶⁰ As Guy explains:

“The selection of the Register of Sasines as the record for long leases was bound to give colour to the idea that the lessees’ right was on much the same plane as an ordinary property right.”³⁶¹

³⁵⁵ Registration of Leases (Scotland) Act, s1.

³⁵⁶ Some of the concerns are succinctly summarised in “Registration of Long Leases Bill”, *The Journal of Jurisprudence*, Volume 1 (1857) 355, 355ff. The Faculty of Advocates were so opposed that they drafted their own Bill which can be found in the same work at 339.

³⁵⁷ Third Report of the Commissioners, *Conveyancing* (13 January 1838), xl.

³⁵⁸ Rennie, 6.01.

³⁵⁹ Scottish Law Commission, *Report on the Conversion of Long Leases*, (2006) 1.7. Although some “feu-tacks” did exist: *Buchanan’s Trs v Pagan* (1868) 7 M 1.

³⁶⁰ See, for example, the *Campbell v MacLean* (1870) 8 M (HL) 40; *Edmond v Reid* (1871) 9 M 782.

³⁶¹ Guy, “Registration of Leases”, 236.

This had several effects. First, as Guy notes, the choice of the Sasine Register suggested that registered leases created a real right.³⁶² Furthermore, section 16 of the Act equiparated registration with possession under the 1449 Act. Thus, it suggested that these real rights of lease – whether created under the 1449 Act or by registration – were equivalent. It suggests that only leases which could competently become real rights under the 1449 Act could become real via registration. Put simply, it suggests that all real rights of lease have the same requirements for formation.

However, this was not what the Act said. Indeed, it inadvertently created a third class of lease. Section 2 provided:

“Leases registerable under this Act, and valid and binding as in a question with the granters thereof, which shall have been duly registered or recorded, as herein provided, shall, by virtue of such registration, be effectual against any singular successor in the lands and heritages thereby let, whose title is completed after the date of such registration.”³⁶³

What section 2 does is to provide that leases which are valid against the original landlord will be valid against singular successors. Unlike the 1449 Act, it does not provide any additional criterion that must be met in order to register such a lease, except that the lease must be over 20 years long.³⁶⁴

Rankine notes that from a practical perspective, this may be useful. It reduced questions about the permitted length of leases and what was an acceptable rent for a valid real right of lease under the 1449 Act to “little more than a scholastic interest”

³⁶² *Ibid.* As noted in the introduction, the true nature of the “real right” of lease is outwith scope of thesis.

³⁶³ Registration of Leases (Scotland) Act 1857, s2.

³⁶⁴ Initially, the period was a minimum of 31 years: see Rankine, 188; and only to subjects over 50 acres: Guy, “Registration of Leases”, 245.

in most instances.³⁶⁵ However, in reality it created an illogical three-tiered approach to leases:

1. Contracts of lease were valid against the original landlord only, but they could be of an uncertain or even perpetual duration and could contain an nominal or elusory rent.³⁶⁶
2. Real rights of lease under the Lease Act 1449 were valid against singular successors in addition to the original landlord, but only if they were for a certain, non-perpetual duration, and had a non-elusory rent, and only if the tenant had entered into possession.
3. Real rights of lease under the Registration of Leases Act 1857 were valid against successors as well as the original landlord, regardless of whether the duration was certain, uncertain, or perpetual, and even for an elusory rent, so long as the duration was over 20 years long and the lease was registered.

The situation was further complicated by the fact that, when first introduced, the 1857 Act provided an additional method to create a real right of lease – leases could still be made real by possession. Now, registration is the only way to create real rights of lease in leases over 20 years in length, which creates a clearer distinction between the types of lease.³⁶⁷

4.2.3.3 The Effect of the 1857 Act on Duration

With the introduction of the 1857 Act, a new class of real rights of lease was created. All contracts of lease could now be perfected as real leases so long as they were registered and were over 20 years long. This has several implications for the cardinal element of duration as it differs between the real right(s) of lease and the contract of lease. Indeed, it removes some of the distinctions between contracts of lease and

³⁶⁵ Rankine, 142.

³⁶⁶ The effect on rent is discussed at 4.3 below.

³⁶⁷ Registration of Leases (Scotland) Act 1857, s20B and s20C.

real rights, whilst simultaneously creating new differences between real rights created under the 1449 Act and real rights created by registration.

First, it means that long leases of an uncertain duration can be registered. This fact creates clear distinctions between the three types of lease. Uncertain durations are invalid as real rights under the 1449 Act but are valid as both contracts of lease and real rights of lease if they are longer than 20 years and registered.

Nonetheless, this is unlikely to produce many practical differences between the categories of lease in reality. It is difficult to envisage an uncertain duration which is definitely longer than 20 years. The converse situation was summarised neatly in *Miners' Welfare Commission v Assessor for Ayrshire*: "if the duration of a lease is indefinite, it cannot be held to be [twenty] years or under".³⁶⁸ Likewise, it follows that a lease of indefinite duration cannot be held to be over twenty years long. The exception would be cases where the lease was for a period of over 20 years *or until the occurrence of a specified event*. However, as the previous chapter demonstrated, these were deemed to be valid under the 1449 Act, but for the definite period only. As such, there would be no difficulty in treating these as registrable on the same principle. However, just because it is difficult to envisage situations where a lease is for an uncertain duration but is definitely over 20 years does not make it impossible to envisage such situations. Consider a woman who has been sentenced to life in prison for a minimum of 21 years. Could she let her shop "until I am released"?³⁶⁹ Even if this distinction is of limited utility in practice, there is nonetheless a clear theoretical difference regarding uncertain duration depending on whether there is a real right under the 1449 Act, a real right via registration, or a contract of lease.

³⁶⁸ *Miners' Welfare Commission v Assessor for Ayrshire* 1944 SC 184.

³⁶⁹ Note that residential leases cannot have a duration of more than 20 years by virtue of the Land Tenure Reform (Scotland) Act 1974, s8. Thus, in this example, the woman could not lease a residential flat in this way.

Secondly, the 1857 Act means that perpetual leases can be registered. This removes the pre-existing difference between real rights of lease and contracts of lease in this regard. Previously, contracts of lease could be perpetual, but real rights of lease could not be perpetual. The situation is now that both real rights of lease *and* contracts of lease *can* be perpetual. This is because under the Registration of Leases Act 1857 as amended, registration is the only way of creating a real right of lease for leases over 20 years. All perpetual leases by their very nature are longer than 20 years, and so cannot be made real under the Leases Act 1449. As perpetual leases are valid against the original landlord (regardless of which interpretation of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 is preferred),³⁷⁰ and because every lease which is valid against the original landlord is also valid as a real right if registered, then it follows that perpetual leases are also valid as real rights once registered. Thus, there is no longer a distinction between real rights of lease and contracts of lease regarding whether or not they can be perpetual. This is not, as may be presumed, because perpetual leases are no longer permitted at all, but rather they *are* now permissible for both categories of lease.

4.2.4 Conclusion on the Modern Law regarding Duration.

The following table summarises the current law surrounding the requirement of duration.

³⁷⁰ See 4.2.2.3.

Table 2: Duration

	Real Right of Lease under 1449 Act	Real Right of Lease under 1857 Act	Contract of Lease
Must duration be under 20 years?	Yes	No	Yes
Can duration be uncertain?	No	Yes, in theory	Yes
Can duration be perpetual?	N/A	Yes	Yes

This table makes clear that it is no longer appropriate following the Registration of Leases (Scotland) Act 1857 to consider real rights as a homogenous group with identical requirements for formation. Nonetheless, the situation is, in some ways, less complicated than the earlier law. For example, as perpetual leases are now incapable of falling within the 1449 Act, there is no longer a distinction with regards to which leases can be perpetual – perpetual leases are valid for real rights of lease and contracts of lease.³⁷¹

On the other hand, there is a distinction, albeit more in theory than in practice, between the different types of lease regarding uncertain duration. This distinction is more complicated than under the earlier law. There is now no clear division between real leases as a homogenous group and contracts of lease in this regard. Instead, it is important to determine which Act is creating the real right. If it is the 1857 Act, then

³⁷¹ Albeit they cannot be enforced after 175 years: Abolition of Feudal Tenure etc. (Scotland) Act 2000.

a lease of uncertain duration is valid. If it is under the 1449 Act, it is not. Regardless, an uncertain duration is valid for contracts of lease.

A further conclusion is that this evidences that the contract of lease continues to exist as a distinct, albeit limited, category of lease. It is the only agreement which can definitely be for an uncertain duration, particularly if that agreement is likely to last less than 20 years.

4.3 Rent

This part examines the modern law surrounding the meaning and need for rent in lease agreements. There does not seem to be any substantial change from the early law between contracts of lease and real rights of lease under the 1449 Act with regards to the rent requirement. However, again the Registration of Leases (Scotland) Act 1857 has changed the law as it applies to real leases created by registration.

4.3.1 The Meaning of and Need for Rent in Modern Lease Agreements

Scots law continues to require rent to be agreed in both real rights of lease under the 1449 Act and contracts of lease. The meaning attached to rent for each category has also not altered. Whilst some texts do not make it explicit,³⁷² most modern lease texts confirm elusory and nominal rents are valid for contracts of lease.³⁷³ Nevertheless, such rents remain invalid for real rights of lease under the 1449 Act.³⁷⁴

³⁷² Richardson and Anderson, 2.27.

³⁷³ Rankine, 114; Paton and Cameron 6; Rennie, 1.20.

³⁷⁴ R Hunter, *Treatise on the Law of Landlord and Tenant*, (4th edn, 1876, edited by W Guthrie), Vol 1, 475; Rankine, 144; Paton and Cameron, 109; Rennie, 5.10; Richardson and Anderson, 2.35.

4.3.2 The Impact of the 1857 Act on Rent

As the previous section on duration explained, the Registration of Leases (Scotland) Act 1857 inadvertently created a third class of lease – the real right of lease created by registration. Whilst it was surmised that this third class of lease did not create many practical differences between leases in terms of duration, the same cannot be said for the cardinal element of rent.

As illustrated above, there remains a distinction between contracts of lease and the real right of lease created under the 1449 Act regarding rent. Whilst the rent for the former may be elusory or nominal, the same is not true for the latter. Because any lease that is enforceable against the original landlord is registrable and henceforth effective against successors, it follows that elusory and nominal rents are also valid for real rights of lease created by registration. Thus, there is no longer a clear distinction between the requirements for real leases and contracts of lease. Now, it is also important to note which type of real right has been created.

This substantial change does not always seem to be fully appreciated. For example, writing in 1860 after updating his work to reflect recent legislative changes including the 1857 Act, Hunter notes that “The existence and expression of a specified rent are necessary to secure a lessee against singular successors.”³⁷⁵ When he expands on what this means, he states that the rent cannot be elusory.³⁷⁶ Only later in a short section dedicated to the 1857 Act explicitly does he note that any leases valid with the original landlord would be valid against singular successors (a real right of lease) upon registration.³⁷⁷ Likewise, for the majority of other leading texts on lease law, this significant distinction between real rights of lease is implicit rather than explicit. In their chapter on real rights, Paton and Cameron discuss the 1449 Act alone.³⁷⁸ Only in a second chapter entitled “Statutory Provisions Relating to Long Leases” is the effect of the 1857 Act generally noted.³⁷⁹ Likewise in *McAllister’s Scottish Law of*

³⁷⁵ Hunter, Vol 1, 473.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid*, 514.

³⁷⁸ Paton and Cameron, ch 7.

³⁷⁹ *Ibid*, ch 8.

Leases, it is noted that “it is not essential for the conditions of the 1449 Act to be complied with” for registered leases, but this is not expanded upon.³⁸⁰ In none of these texts is it made clear that an elusory or nominal rent is valid under the 1857 Act.

Only two texts do make this position explicit. Rankine explains that “where the [1857] Act applies and is invoked, an elusory rent will be no longer fatal”.³⁸¹ Although Rennie does not mention this point in any of the chapters discussing rent explicitly,³⁸² it is made unambiguously in the chapter relating to sporting leases. It is posited that a “lease for an ‘elusory’ rent, such as was the case in *Palmer’s Trustees*, would be effectual against singular successors if, and only if, registered in the Land Register under the 1857 Act”.³⁸³ Nonetheless, it is unhelpful for such an important statement to be hidden in a somewhat obscure part of this leading text.

Case law is likewise unhelpful. The best authority on the point is *Palmer’s Trustees v Brown*, as highlighted by Rennie.³⁸⁴ The case concerned an unregistered lease of the exclusive right to shoot for 999 years at a rent of a penny per year, if asked. However, the case is not directly authoritative on the issue of elusory rent. At no point does the court discuss the nature of the rent in the case. Instead, the sole concern of the court is whether a sporting lease is capable of registration – the court held that it was. Instead, it was assumed by all parties that the elusory rent in the case was not a bar to the application of the 1857 Act, and so the matter was not discussed by the judges.

Furthermore, the way in which many of the texts are structured may lead to the incorrect assumption that all real leases require a rent which is not elusory or nominal. The majority of texts discuss *only* the 1449 Act in their chapters entitled real rights of lease, and thus the requirement of a non-elusory rent is included. A

³⁸⁰ Richardson and Anderson, 2.39.

³⁸¹ Rankine, 147.

³⁸² Rennie, 6.04; ch 1, ch 12.

³⁸³ *Ibid*, 36.10.

³⁸⁴ *Palmer’s Trustees v Brown* 1989 SLT 128.

separate second section discusses registrable leases. Thus, when looking for the requirement of a real right of lease, the first place one would look would be the section entitled “real leases”. This is particularly so when the sections on registrable leases rarely have a dedicated discussion of the formation requirements of a lease made real by registration.

Some texts are particularly liable to giving this incorrect assumption. For example, in Gretton and Steven, the need for a non-elusory rent is only mentioned explicitly with regards to requirements for a real right under the Leases Act 1449.³⁸⁵ The question of whether or not an elusory rent is permitted under the 1857 Act is not mentioned. Yet, a diagram summarising the requirements to make a lease real includes “rent, parties, property and duration” as prerequisites.³⁸⁶ This implies that these terms are the same regardless of the way in which the lease is made real. Thus, as elusory rents are not permitted for real rights under the 1449 Act, they are likewise not permitted under the 1857 Act. Similar approaches are taken in other textbooks such as *Time-Limited Interests in Land*.³⁸⁷

What is striking about this result regarding rent is that traditional views on the breadth of leases are incorrect. An example of the oft-cited position is that of Bain and Bury: “‘rent’ is interpreted liberally so as to allow for a lease, but less liberally in making the lease effective against the landlord’s singular successors.”³⁸⁸ The 1857 Act meant that terms of the lease were interpreted equally liberally regardless of whether the lease was intended to affect successors or not.

The logical inconsistencies of this result are clear. The view posited by Bain and Bury is sensible; whilst doctrines such as freedom of contract mean that individuals should be able to bind themselves to whatever onerous or disadvantageous terms they please, the law should restrict the ability of such terms to affect successors – particularly when they restrict an owner’s ability to use the land as they wish. This is

³⁸⁵ G Gretton and A Steven, *Property, Trusts and Succession*, (3rd edn, 2017), 20.11.

³⁸⁶ *Ibid*, 288.

³⁸⁷ C Van Der Merwe and AL Verbeke (eds), *Time-Limited Interests in Land* (2012) 150.

³⁸⁸ D Bain and C Bury, “A, B and C to A, *Revisited*” 2013 JR 77, 86.

especially true when the restriction is particularly onerous, which is the case with perpetual leases or leases with elusory rents. It seems unusual that nominal or elusory rents can be enforced only in long leases, where the new owner would have to wait a much longer time period before being able to obtain a new tenant to pay a reasonable sum or use the land herself. Yet the 1857 Act means that such leases are protected, whilst those for a shorter period are not. It is incongruous for it to be more difficult to get protection against successors for a shorter time period than it is for a longer period.

The source of this result, however, makes sense when considered in light of the purposes of the 1857 Act, which had very little to do with the law of leases at all.³⁸⁹ Instead, it was only concerned with making long leases easily available as securities.³⁹⁰ Long leases, and those over a large area, were the only leases of real interest to lenders. Thus, it is no surprise that the 1857 Act applied only to long leases and made the protection easily available. Its effect on the consistency of the law of leases was not considered.

4.3.3 Conclusion on the Modern Law regarding Rent

The current law surrounding whether leases can have a nominal or elusory rent is summarised in the following table.

³⁸⁹ Third Report of the Commissioners, *Conveyancing* (13 January 1838), xl.

³⁹⁰ *Ibid.*

Table 3: Rent

	Real Right of Lease under 1449 Act	Real Right of Lease under 1857 Act	Contract of Lease
Can rent be nominal?	No	Yes	Yes
Can rent be elusory?	No	Yes	Yes

As with leases of an uncertain duration, there is no longer a clear distinction between real rights of lease and contracts of lease regarding whether nominal and elusory rents are permitted. Instead, it is vital to consider how the real right is being formed. Nonetheless, this state of the law provides strong evidence that the contract of lease continues to exist as a distinct entity in Scottish lease law. There are clear statements to the effect that registrable leases can have such rents, and this distinction has only occurred because the law regarding registrable leases is reliant on the common law and contracts of lease.

4.3.4 The Meaning of Nominal and Elusory under the Modern Law

With an important distinction between registered real rights of lease and contracts of lease on the one hand, and real rights of lease under the 1449 Act on the other, it is more important than ever before to determine what is meant by the terms ‘nominal’ and ‘elusory’. Like the works of the institutional writers,³⁹¹ the modern texts on Scottish leases remain unhelpful in defining the terms. Modern cases often contain

³⁹¹ See Chapter 3.

what looks like a nominal or elusory rent.³⁹² However, as Paton and Cameron acknowledge, the lack of judicial confirmation as to whether these are indeed nominal or elusory rents under the law means that the two terms remain unclear.³⁹³

4.3.4.1 *Elusory*

The difficulty in defining elusory is yet to be resolved. The Oxford English Dictionary defines “elusory” as “tending to elude (a danger, argument, law etc.)”.³⁹⁴ To “elude” is further defined as to “befool”, to “escape through dexterity or stratagem” or to “evade compliance with fulfilment of (a law...)”.³⁹⁵ However, how precisely evasion is to be ascertained in the context of rent is unclear. Elusoriness remains “not easily understood as a general doctrine”.³⁹⁶ Indeed, some judges avoid the term altogether because of its imprecise meaning.³⁹⁷ Many leading writers in Scottish lease law omit any attempt to define the term. Indeed, Rankine notes, “there is no criterion according to which the stigma of elusoriness can be ascertained”.³⁹⁸ He notes that all the term requires is a “rent worthy of the name”, particularly as successor landlords are unable to insist that the tenant pays a fair rent.³⁹⁹ This sentiment is repeated by Paton and Cameron, although they do give an example of something which would *not* be elusory: a grassum being paid at the start of the lease and then a low rent thereafter.⁴⁰⁰

The only author to explore the definition of elusory in any detail is Hunter.⁴⁰¹ However, his description emphasises what would *not* count as elusory, rather than providing a positive statement of the term’s meaning. For example, rent is not

³⁹² E.g. *Propinvest Paisley LP v Co-operative Group Ltd* [2011] CSIH 41.

³⁹³ Paton and Cameron, 109.

³⁹⁴ Oxford English Dictionary, “Elusory”.

³⁹⁵ *Ibid*, “Elude”.

³⁹⁶ Hunter, Vol 1, 476.

³⁹⁷ *Mason v Ritchies Trs* 1918 SC 466.

³⁹⁸ Rankine, 144.

³⁹⁹ *Ibid*.

⁴⁰⁰ Paton and Cameron, 109.

⁴⁰¹ Hunter, Vol 1, 475.

elusory just because it is fixed “arbitrarily”⁴⁰² or is “greatly below actual value”.⁴⁰³ All that is required is that the lease includes a rent of some kind.⁴⁰⁴ Where the line between “greatly below actual value” and “elusory” is to be drawn is not easily ascertainable. The term is further complicated by the fact that the term is undoubtedly relative, and therefore dependent on the facts of the particular scenario.⁴⁰⁵ Again this means that general rules are difficult to state.⁴⁰⁶

Hunter argues that the line demarcating elusory from a low rent must be very close to a nil rent. He then provides examples of criterion which may be used as a comparison to determine elusoriness.⁴⁰⁷ He explains that considering the previous rent charged on a property and comparing it to the present rent may be used to indicate whether a rent is elusory.⁴⁰⁸ However, he suggests that a rent would only be elusory if it was further reduced from a rent which was already far below the real value of the property.⁴⁰⁹

A difficulty with Hunter’s approach to defining elusory is that it seems a better discussion of the term “nominal” rather than elusory. As will be illustrated below, most discussion of what constitutes nominal is where precisely the line between a low rent and a “nominal” rent is.⁴¹⁰ This is what Hunter does when defining the term ‘elusory’. Indeed, this area is complicated by the fact that the two terms are often

⁴⁰² *Ibid.*

⁴⁰³ Hunter, Vol 1, 475; J Burton, *Manual of the Law of Scotland* (2nd edn, 1847) 289.

⁴⁰⁴ Hunter Vol 1, 477; Paton and Cameron, 109.

⁴⁰⁵ Hunter, Vol 1, 477.

⁴⁰⁶ Paton and Cameron, 109; Burton, *Manual of the Law of Scotland*, 289.

⁴⁰⁷ Paton and Cameron, 109.

⁴⁰⁸ Hunter, Vol 1, 477.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹⁰ See 4.3.4.1ff.

discussed together.⁴¹¹ In other texts, the term ‘nominal’ is used as an alternative to ‘elusory’.⁴¹²

There remains a dearth of case law in which a rent has been described as elusory. One case describes a rent of 14 pence per annum as *almost* elusory.⁴¹³ This does suggest that elusory is, as Hunter suggests, a low rent. However, in *Bonar v Anstruther*, the court noted that “a penny Scots, or a rose, if asked only” would constitute “elusory”.⁴¹⁴ It is possible that it is the addition of the phrase “if asked only” which makes this rent elusory, as opposed to the low rent.

As highlighted in the previous chapter, the phrase “if asked only” is probably what made a rent elusory under the earlier law. It is also the better approach to defining “elusory”. It seems incorrect to say that if there is a rent, no matter how low it is, that the rent is elusory. Returning to the dictionary definition of “elusory”, it connotes something included only to avoid compliance with a law.⁴¹⁵ The addition of “if demanded” or “if asked only” fulfils this criterion. The phrase outwardly suggests a rent is payable under the lease, thereby apparently fulfilling the requirements of the Leases Act 1449. In reality, however, there is no true rent under the *contract* alone – it exists only if requested by the other party.

4.3.4.2 Nominal

As highlighted above, much of Hunter’s description of elusory could also apply to a definition of “nominal”. The Oxford English Dictionary defines nominal as “Not

⁴¹¹ See, for example: *Duke of Richmond v Countess of Seafield* 1927 SC 83; *Robertson’s Trustees v Smith’s Trustees* 1941 SC439 and in most leading texts: e.g. Paton and Cameron, 109, Rennie 5.10. See also Gretton and Steven, *Property Trusts and Succession*, 287 and articles such as Bury and Bain, “A, B and C to A, Revisited” 86.

⁴¹² Richardson and Anderson 2,35. See also the Oxford English Dictionary definition of nominal which is similar to the way in which elusory could be defined: “Existing in name only; merely named (without reference to fact or reality); not real or actual.”

⁴¹³ *Burgesses of Irvine (Renfrew) v The Magistrates*, 30 June 1752 in W Morison, *Decisions of the Court of Session*, volume 2 (1813) 81.

⁴¹⁴ *Bonar v Anstruther* (1868) 6 M 910.

⁴¹⁵ Oxford English Dictionary, “elusory” and “elude”.

substantial; very small in relation to an expected or required amount; token.”⁴¹⁶ Again, case law is unhelpful in defining what figure would constitute a “token” amount. Cases have suggested that there may be a line between a low rent and one which is nominal, but it does not seem possible to identify where this line could be drawn.⁴¹⁷ For example, some cases have described sums such as £5 as nominal.⁴¹⁸ In other cases, parties have argued that “nominal” meant “existing in name only” and as such the annual rent should be substantially *less* than £5.⁴¹⁹ It was held that, using the dictionary definition of nominal, that being “virtually nothing”, “inconsiderable, hardly more than a matter of form” the annual rent should be fixed at £0.10.⁴²⁰ Yet, this definition must be contrasted with other cases where rents which are “far too low” are not nominal.⁴²¹ Additionally, it is well accepted that rent such as £1 would qualify under the 1449 Act.⁴²² A further problem with this case law is that it is not specifically concerned with whether this rent would qualify under the Leases Act 1449 – sometimes, for example, they concern feus rather than leases.⁴²³

When discussing the issue of what may constitute rent, Blair argues that if nominal means “virtually nothing” then “The law’s answer is that ‘virtually nil’, is treated as the same as nil”.⁴²⁴ Thus, the only rents which the law would forbid would be rents which are nil. Therefore, nominal rents in the sense of extremely low rents are recognised by the law as valid. Blair’s construction of the term is the only definition of “nominal”

⁴¹⁶ Oxford English Dictionary.

⁴¹⁷ *Vestey v Assessor for Sutherlandshire* 1943 SC 145.

⁴¹⁸ *Smith v Warner’s Trs* 1931 SC 459 regarding feu duty. See also *Mason v Ritchie’s Trs* 1918 SC 466 where both 20 shillings and £1 per year were deemed nominal in the feu context. Other cases which do concern leases only contain descriptions advanced by counsel, but which are not endorsed (or rejected) by the court (e.g. *Cowie v Duncan*, First Division 25 November 1841, No 21, reported in M Anderson, *Reports of Cases Decided in the Supreme Courts of Scotland and in the House of Lords on Appeal from Scotland*, Volume 14 (1842), 31).

⁴¹⁹ *Mackintosh v Countess of Seafield’s Trustees* 1979 SLT (Land Ct) 6.

⁴²⁰ *Ibid.*

⁴²¹ *Inglis Trs v Macdonald, Fraser & Co* 15 March 1887, reported in Scottish Law Review and Sheriff Court Reports, Volume 3 (1887) 398.

⁴²² *Oliphant v Currie*, 11 December 1677, Mor 15245. This is despite a penny Scots being described as nominal in *Mason v Ritchie’s Tr.* 1918 SC 466 (albeit in the feu context).

⁴²³ *Smith v Warner’s Trs* 1931 SC 459; *Mason v Ritchie’s Trs* 1918 SC 466.

⁴²⁴ M Blair, “The Scots Law of Leases- A brief commentary and restatement of the necessary characteristics of a Lease” (6th November 2020) unpublished.

which works if it is correct to say that any rent no matter how small qualifies under the 1449 Act.⁴²⁵

Of course, rent need not consist of money. If no low amount of money can be considered nominal, perhaps the phrase could refer to the use of peppercorn rents, or other items such as roses.⁴²⁶ Practical Law, for example, defines nominal rents as low rents, or those where a rose is given.⁴²⁷ However, using a low-value item, such as a peppercorn rather than money to define nominal comes with its own difficulties, not least because often terms such as “peppercorn rent” are used as an alternative to the term “nominal”.⁴²⁸ Indeed, when rent is described as a “peppercorn rent” it often means a low rent such as £1, rather than a physical peppercorn.⁴²⁹ In one case, the “peppercorn rent” turned out to be £1500 per year!⁴³⁰

Other cases suggest that even if the rent were indeed an actual peppercorn, it would not be a nominal rent. Thus, in *Mason v Ritchie's Trustees*, a low rent was described as being either a peppercorn or £1.⁴³¹ Assuming that a rent of £1 is valid, then it follows that a peppercorn would also be valid. In another case, there was a peppercorn rent in a twenty-year lease.⁴³² Nonetheless, these cases discussing peppercorn rents must be treated with caution as they too are primarily concerned with other issues, such as ratings disputes, rather than permitted rents under the 1449 Act.⁴³³

For coherence in this area, it is suggested that nominal and elusory be viewed as synonymous. The definition of these terms should simply be a rent with the addition

⁴²⁵ *Turnbull v Millar* 1942 SC 521.

⁴²⁶ E.g. in *MacDonald v Strathclyde* RC 1990 SLT (Lands Tr) 10, the terms peppercorn rent and nominal rent used interchangeably.

⁴²⁷ Practical Law, “Glossary”.

⁴²⁸ *MacDonald v Strathclyde* RC 1990 SLT (Lands Tr) 10; *Miners Welfare Commission v Assessor for Ayrshire* 1944 SC 184.

⁴²⁹ *Buccleuch Estates Ltd v Hyslop* [2019] 3 WLUK 614.

⁴³⁰ *Campbell v Campbell* [2008] CSOH 101.

⁴³¹ *Mason v Ritchie's Trustees* 1918 SC 466.

⁴³² *Arbitration Appeal no 4 of 2019* [2020] CSOH 46.

⁴³³ See also *Scottish Greyhound Racing Co and Others v Assessors for Glasgow, Rutherglen and Edinburgh* 1947 SC 380.

of the phrase “if demanded”. Indeed, there is judicial support for this approach. In *Falkirk Parish Council v Assessor for Stirling*, for example, it was noted that a feu-duty would be “nominal” if it was “one shilling if demanded”.⁴³⁴

Furthermore, despite the fact that, in theory, there is a distinction between the terms, for clarity, it may be preferable to refer to “elusory” rents only, rather than both “elusory and nominal” rents. This would remove the confusion over the term “nominal”, which has connotations of something small. It is not possible for all rents that are not nil to be valid, but to also recognise a rule which specifies that nominal, small rents are invalid. There is necessarily an overlap between the two. This would necessitate some authors revising which term is used in their texts.⁴³⁵

4.3.4.3 Why It Matters in Practice

The definition of nominal and elusory is not simply a matter of academic interest. Many cases illustrate that terms which may be deemed nominal or elusory are used regularly.⁴³⁶ Whilst it may be easier to fathom why someone would desire to grant a lease for a very low rate in residential scenario (for example, when renting to family or friends), it is perhaps less obvious why a landlord would accept a low rent in a commercial situation.

There are, however, a number of reasons why a party may wish to do so. In one case, for example, a landlord attempted to reduce his own rent, which was calculated on rents he charged to the subtenants.⁴³⁷ He attempted to do so by charging tenants a substantial grassum, but a very low rent.⁴³⁸ Alternatively, the upkeep of a building may be onerous, meaning the landlord would rather pass on

⁴³⁴ *Falkirk Parish Council v Assessor for Stirling* 1928 SC 405.

⁴³⁵ E.g. Richardson and Anderson, 2.35.

⁴³⁶ *Propinvest Paisley LP v Co-operative Group Ltd* [2011] CSIH 41 2; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC(HL) 90.

⁴³⁷ *3639 Limited v Renfrewshire Council* 2020 CSOH 86.

⁴³⁸ This seems relatively common in practice, see for example the transaction described in *Young v Lothian Regional Council* 1992 SLT (Lands Tr) 18, where there was a peppercorn rent and an initial premium of £11,750,000.

this burden to a tenant. A tenant may factor in this increased cost of upkeep when negotiating a rent.

Granting leases at low rents can also be particularly beneficial to landlords in periods where finding tenants is difficult. By letting at a low rent, landlords save on paying business rates on empty properties.⁴³⁹ For example, although the City of Edinburgh Council offers discounts on business rates for empty properties, these extend to only 50% for the first three months, and only 10% thereafter.⁴⁴⁰ Thus by having a tenant, even at minimal rent, landlords can save between 50% and 90% on business rates. It is likely that landlords may seek to do this more often in the coming years, with the increased decline of the high street in favour of online shopping. Likewise, the impact of coronavirus causing business to collapse, coupled with less need for offices because of a shift to home working, will likely create a renters', rather than a landlords', market.⁴⁴¹

Some potential tenants, such as charities, can also often afford only very low rents. This is illustrated by the comments of charities in Glasgow when the council decided to stop accepting symbolic rents of £1 per annum, proposing to increase the rent to almost £3,000 per year.⁴⁴² It is therefore relatively common to lease to charities at a nominal or elusory rent.⁴⁴³

⁴³⁹ E.g. *English Speaking Union Scottish Branches Educational Fund v Edinburgh City Council* [2009] CSOH 139.

⁴⁴⁰ Mygov.scot, "Reliefs for Empty or Newly Re-Occupied Properties" (16 July 2021), available: <https://www.mygov.scot/non-domestic-rates-relief/reliefs-for-empty-or-newly-re-occupied-properties>

⁴⁴¹ See, e.g. Royal Institute of Chartered Surveyors (RICS), "Briefing: Post-Covid Recovery, Scottish Commercial Property" (undated),¹ available: <https://www.rics.org/globalassets/rics-website/media/news/covid19/post-covid-recovery---scottish-commercial-property-.pdf>; and A McMillan (RICS), "Property post-COVID-19: no recovery until 2025" (9 December 2020), available: <https://www3.rics.org/uk/en/modus/built-environment/commercial-real-estate/property-post-covid-19--uk-market-doldrums-continue.html>.

⁴⁴² Scottish Community Alliance, "No More Peppercorn Rent" (2013), available: <https://scottishcommunityalliance.org.uk/2013/05/22/no-more-peppercorn-rent/>; D Leask (Herald Scotland), "Charitable Groups hit with New Rent Hike" (9 May 2013), available: <https://www.heraldscotland.com/news/13103865.charity-groups-hit-with-new-rent-hike/>.

⁴⁴³ E.g. *Rubislaw Quarry Aberdeen Ltd v Hill of Rubislaw (Q Seven) Ltd (No.2)* [2013] CSOH 13, where a property was leased for a peppercorn rent and run as a charitable concern.

The particular risk with regards to the elusory rent requirement is that it is unlikely that a landlord in these scenarios would wish to bind themselves for a long period of time. After all, the market may change in their favour. However, if the rent is deemed “elusory” it would *only* be possible to create a real right of lease under the 1857 Act if the lease is a long lease.

Specifically, parties therefore need to be aware that use of the term “if demanded” would constitute an elusory rent and thus only create a real right in long leases. Parties should avoid using such a term in shorter leases, as it may not qualify under the 1449 Act. Luckily, most of the cases which the author could find using this phrase did indeed seem to be long leases.⁴⁴⁴ Furthermore, until the meaning of nominal is judicially settled, parties should use any very low rents in short leases with caution, particularly as it seems that rents such as peppercorn rents are being used in leases which do not qualify as registrable.⁴⁴⁵

4.3.5 Overall Conclusion on the Modern Law regarding Rent

Rent is a necessary feature of both real rights of lease and contracts of lease in Scots law. However, only real rights of lease under the 1449 Act require the rent to be non-elusory, and non-nominal. These terms are very difficult to define. They may be synonymous, and if so, the law should use the term “elusory” only. This is because “nominal” means “low”, but low rents are valid under the 1449 Act. If low rents are permitted under the 1449 Act, they cannot be “nominal” as nominal rents are forbidden by the Act. Elusory should be defined as a rent “if demanded”. This is not a matter of purely academic interest, as extremely low or rents only payable “if

⁴⁴⁴ *K/S Meadow Way v DGM London Road Ltd* [2019] CSOH 20; *Gyle Shopping Centre General Partners Ltd v Marks & Spencer Plc* [2016] CSIH 19; *East Renfrewshire Council, Petitioner* [2014] CSOH 129; *Propinvest Paisley LP v Co-operative Group Ltd* [2011] CSIH 41; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC(HL) 90; *Inland Revenue v Baillie* 1936 SC 438.

⁴⁴⁵ *Arbitration Appeal no 4 of 2019* [2020] CSOH 46, Crucially, this is not a registrable lease, as to be registered a lease must exceed 20 years. It could have been held an invalid real lease under the Leases Act 1449 for lack of rent.

demanded” are regularly used in Scots law. Parties must be aware that using the phrase “if demanded” may not create a real right in short leases.

4.4 Parties

In the introduction to Part 1 on Leases, it was explained that the discussion about the existence of the contract of lease has stemmed from a debate as to who can competently grant a lease. Several recent cases have dealt with this issue at length.⁴⁴⁶

4.4.1 Who Can Grant a Lease?

The Scottish Law Commission examined the issue through the lens of the doctrine of confusio.⁴⁴⁷ In the typical scenario where a party becomes both the debtor and the creditor to a transaction, then confusio would operate to extinguish the agreement. It is well settled that confusio applies to contractual relationships.⁴⁴⁸ This is why, for instance, a landlord could not grant a contract of lease to himself as tenant. It would also operate to bring a lease to an end if the parties started out as separate legal persons but then became one and the same.⁴⁴⁹ It is less settled, however, whether the doctrine applies to real rights more generally.⁴⁵⁰ Nonetheless, it follows that if there is no contract of lease, there can be no real right of lease, as real rights of lease presuppose a valid contract of lease.

What has proven more controversial in recent years is the precise limits of confusio, and in which situations the doctrine would operate so as to prevent a lease from being created in the first place. What does it mean to be both landlord and tenant at

⁴⁴⁶ *Pinkerton v Pinkerton* 1986 SLT 672; *Clydesdale Bank Plc v Davidson* 1998 SC (HL) 51; *Serup v McCormack* 2012 SLCR 189 (SLC/73/10).

⁴⁴⁷ Scottish Law Commission, *Discussion Paper on Aspects of Leases* (DP 165) (2018), ch 8.

⁴⁴⁸ W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007), 25.30.

⁴⁴⁹ Note, however, the discussion in Report which suggests that what may be operating in leases is not confusio, but the similar doctrine of consolidation: 8.40.

⁴⁵⁰ Scottish Law Commission, *Discussion Paper on Aspects of Leases*, 8.15.

the same time? Particular difficulties have arisen where a lease is created between a group acting as one entity and one of their number.

In *Pinkerton v Pinkerton*, for example, the court held that a valid lease was created by a landlord who granted the lease to himself and three other family members jointly.⁴⁵¹ Subsequent cases, however, have held that a contract between a group and one of its members is not always permissible. Thus, when in *Clydesdale Bank v Davidson* the situation was reversed and it was the landlord who was a group of co-owners that were attempting to grant a lease to one of their number, the court held the agreement incapable of creating a real right of lease.⁴⁵² However, the court did acknowledge that *contractual* rights may be gained by the tenant. In other words, a *contract of lease* would still be valid.⁴⁵³

The court in *Clydesdale* argued that the difference in outcome between *Pinkerton* and *Clydesdale* was whether the group was granting the right to one of their number, or whether the right was granted by one to a group.⁴⁵⁴ It was argued that the scenario in *Clydesdale* was impossible as “a right of sole occupation cannot co-exist with a right of ownership”.⁴⁵⁵ In other words, the sole tenant in *Clydesdale* already had a right of occupation of the whole lands as a co-owner. However, an individual could grant a lease to themselves and others as in *Pinkerton* because they were granting a *lesser* right to the owner – he had to share his lease, and therefore the land, with the others.⁴⁵⁶

If indeed the position advanced in *Clydesdale* is correct (and indeed, it has been judicially approved),⁴⁵⁷ it seems to create a distinction between real rights and contracts of lease with regards to the parties requirement, albeit in a very limited

⁴⁵¹ *Pinkerton v Pinkerton* 1986 SLT 672.

⁴⁵² *Clydesdale Bank Plc v Davidson* 1998 SC (HL) 51.

⁴⁵³ *Ibid*, at 66: “On this analysis the only additional rights which the appellant acquired under the arrangement, as he retained his real right in the property as one of the pro indiviso proprietors, were the personal rights which resulted from his contract with the other proprietors.”

⁴⁵⁴ *Ibid*, at 61.

⁴⁵⁵ *Ibid*.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Serup v McCormack* 2012 SLCR 189 (SLC/73/10).

situation; a contract of lease would be valid if granted by a group of proprietors to one of their number, but this would not be valid for a real right of lease.⁴⁵⁸ Unlike the differences regarding duration and rent, this would be the case regardless of whether the lease was made real by the 1449 Act or by registration. It is the law of property generally which would forbid the agreement becoming a real right, rather than specific requirements of lease law. The fact that a group cannot grant a valid real right of lease to one of their number, but can create a contract of lease, creates a clear distinction between both real rights of lease on the one hand and contracts of lease on the other. As such, it is a clearer distinction than the differences identified with regards to duration and rent, where there was a distinction depending on how the real right was created.

Nonetheless, the distinction which seems to have resulted from *Clydesdale* does not seem correct from the perspective of lease law. As has been illustrated, the Registration of Leases (Scotland) Act 1857 provides that any lease which is valid with the original grantor and is then registered is also valid against singular successors.⁴⁵⁹ Thus, if a contract of lease was created in *Clydesdale*, then a lease made real by registration must also be possible.

The decision in *Clydesdale* has also been academically criticised in its interpretation of when parties are to be treated as one and the same. Reid, for example, disapproves of the assertion in *Clydesdale* that the reason a co-owner cannot grant a lease to one of their number is because the lease cannot grant them any different rights than co-ownership already gives them.⁴⁶⁰ He writes:

“Nevertheless, it is submitted that if all the co-owners acting together are able to grant a lease to a third party, then, equally, they are able to grant a lease to one of their own number. Properly analysed, such a lease is an agreement between, on the one hand, the parties who, acting together, alone have a right

⁴⁵⁸ *Clydesdale Bank Plc v Davidson* 1998 SC (HL) 51, 59.

⁴⁵⁹ Registration of Leases (Scotland) Act 1857, s1.

⁴⁶⁰ K Reid, *The Law of Property in Scotland* (1996), para 28.

of exclusive possession and, on the other hand, a party who by himself has no such right. The debtor and creditor are not the same.”⁴⁶¹

When analysed this way, there does not seem to be any credible distinction between the parties in *Pinkerton* and those in *Clydesdale*. In *Pinkerton*, a party grants a lease to himself and others as a whole. In *Clydesdale*, a group as a whole grants a lease to a single individual. Reid is correct. In both instances, the creditor and debtor are not the same legal person.

4.4.2 Conclusion on Parties

The discussions of *confusio* as they apply to leases, particularly with regards to who can grant a valid lease, are useful in analysing the distinction between real rights of lease and contracts of lease. Cases such as *Clydesdale* are careful to distinguish between the property rights issues and the contractual rights issues raised by the doctrine. This alone provides strong evidence that the requirements of real rights and contracts of lease may not be the same. Indeed, if the position in *Clydesdale* is accepted as correct, a distinction between real rights of lease (both under the 1449 Act and the 1857 Act) on the one hand and the contract of lease on the other has been created. Whilst a contract of lease may be created between a group of co-owners as landlord and one of their number, this would not attract the status of a real right.

⁴⁶¹ *Ibid.*

Table 4: Parties

	Real Lease under the 1449 Act	Real Lease under the 1857 Act	Contract of Lease
Can co-owners grant a lease to one of their number?	No.	No.	Yes.

4.5 Property⁴⁶²

For completeness, the cardinal element of property must be briefly discussed. It suffices to say that the law does not seem to have advanced far from the position under the earlier law, and the law remains complex.⁴⁶³ Whilst leases of subjects such as fishing or the right to shoot were confirmed as capable of being constituted as valid contracts of lease,⁴⁶⁴ there remained doubt as to whether they can create a valid real right of lease under the 1449 Act. There is authority that whilst some leases, such as leases of salmon fishings or an area of ground to stalk deer can create a real right,⁴⁶⁵ others, such as trout fishing and other shooting rights, cannot.⁴⁶⁶ Paton and Cameron reiterate that often the particular wording is important.⁴⁶⁷ If a party let land with the right to shoot or fish, this would be likely to attract the protection of the 1449 Act – if it is purely a right to shoot or fish which has

⁴⁶² For a thorough overview of the different possible subjects of a lease, see Hunter, Vol 1, Book 2.

⁴⁶³ Richardson and Anderson, 2.34.

⁴⁶⁴ *MacPherson v Macpherson* (1839) 1 D 794; *Sinclair v Lord Duffus* (1842) 5 D; *Menzies v Menzies* (1861) 23 D. (HL) 16; *Crawfurd v Stewart* (1861) 23 D 965; *Birkbeck v Ross* (1865) 4 M. 272; *Farquharson* (1870) 9 M 66; *Stewart v Bulloch* (1881) 8 R 381. It does, however, appear to depend on the way in which the agreement is phrased: *Inland Revenue v Anderson* 1922 SC 284.

⁴⁶⁵ *Gemmell v Riddell* (1847) 9 D 727; *Farquharson* (1870) 9 M 66; cf *Duke of Richmond v Duff* (1857) 5 M 310. See generally, W Gordon and S Wortley, *Scottish Land Law* (volume 1, 2009), 8.85.

⁴⁶⁶ *Pollock, Gilmour & Co v Harvey* (1828) 6 S 913.

⁴⁶⁷ Paton and Cameron, 105; 106.

been granted, it often would not. In the case of leases of fishing rights, however, the law has been recently clarified in the affirmative by section 66 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003: the Leases Act 1449 does apply to fishing leases.⁴⁶⁸ However, the law remains uncertain for leases of shooting rights.⁴⁶⁹

Nonetheless, because it is possible to register any lease which is valid against the original landlord, it follows that leases of fishing and shooting can be created as real rights by registration.⁴⁷⁰ Fishing leases are also now specifically mentioned as capable of registration under the 1857 Act.⁴⁷¹

4.6 Conclusion on Cardinal Elements of Modern Leases

The Registration of Leases (Scotland) Act 1857 created a third category of lease. There is now a real right of lease, created by registration, which shares features of both real rights created under the Leases Act 1449 and contracts of lease. These are summarised in the table below.

⁴⁶⁸ Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, s66.

⁴⁶⁹ In Rennie, *Leases*, however, the authors suggest that shooting rights would be valid real rights of lease under the Leases Act 1449: Rennie, *Leases*, 36.09.

⁴⁷⁰ *Palmer's Trustees v Brown* 1989 SLT 128.

⁴⁷¹ Registration of Leases (Scotland) Act 1857, s20D, as inserted by Land Registration etc. (Scotland) Act 2012 sch 2 para 16.

Table 5: Overview of the Meanings of the Cardinal Elements

		Real Right of Lease under 1449 Act	Real Right of Lease under 1857 Act	Contract of Lease
Duration	Can be perpetual.	No.	Yes.	Yes.
	Can be for an uncertain duration.	No.	Yes (in theory).	Yes.
Rent	Can be nominal and elusory.	No.	Yes.	Yes.
Parties	Group can grant to one of its number.	No.	No.	Yes.
Property/Subject Matter	Can be e.g. fishing or shooting.	Fishing, yes. ⁴⁷² Other types remain uncertain.	Yes.	Yes.

This chapter has demonstrated that differences in the formation requirements of different types of lease have continued from early Scots law to the modern day. The situation has been further complicated by the addition of a third category of lease in the modern law: real rights created by registration. These findings are important because they demonstrate that occupation agreements must be examined in detail to discover whether or not they are valid in law. Just because they are incapable of creating a real right does not mean that they are invalid leases. They may be a valid

⁴⁷² Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, s66.

contract of lease. In the words of Webster, the contract of lease “does still exist in Scots law”.⁴⁷³

⁴⁷³ Webster, “The Continued Existence of the Contract of Lease” 135.

Chapter 5: An Analysis of the Law of Hire

5.1 Introduction

This chapter analyses the law of hire. Hire was traditionally discussed under the heading of the contract of location by the institutional writers – a term which originated from Roman law.⁴⁷⁴ Only Forbes and Bell discuss the topic under a heading more recognisable to the modern reader, that of “hiring”.⁴⁷⁵ The contract of location is a contract “by which one Party gives to the other the Enjoyment or Use of a Thing, or of his Labour, during a limited Time, for a certain Rent or Hire”.⁴⁷⁶ It has always been a commercially important contract which “embraces a variety of the daily and most indispensable transactions of life.”⁴⁷⁷ Indeed, it has only become more important with the emergence of hire-purchase.⁴⁷⁸

Today, the term “hire” connotes the hiring of moveable objects, such as a car. Traditionally, however, the contract of location was much wider, also encompassing the provision of work or services and the hiring of land. Indeed, the personal contract of lease is also a contract of location. Nonetheless, the lease has been given special treatment since the Leases Act 1449, evidenced by the institutional writers, who often dedicated specific parts of their work to the lease, rather than simply discuss it under the contract of location. Similarly, the lease was the only aspect of the contract of location which was the subject of dedicated monographs.⁴⁷⁹

It is for the reason that the contract of location traditionally encompassed the lease too that it provides a useful comparator to a discussion of lease. This chapter aims to identify the extent to which the contract of lease was included in discussions of the

⁴⁷⁴ P du Plessis, *Borkowski's Textbook on Roman Law*, (5th edn, 2015) 281.

⁴⁷⁵ Forbes, *Institutes*, 3.2.1; Bell, *Commentaries*, 481.

⁴⁷⁶ Forbes, *Institutes*, 3.2.1.

⁴⁷⁷ Hume, *Lectures* II, 56.

⁴⁷⁸ J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 241. See generally, J Gow, *The Law of Hire Purchase* (2nd edn, 1968).

⁴⁷⁹ Indeed, this happened from a relatively early stage, with R Bell's *A Treatise on Leases* being first published in the early 1800s. Subsequent monographs include Hunter; Rankine; Paton and Cameron; Rennie.

contract of location, thereby having a unified contract of location. This chapter also aims to analyse the requirements of formation of the contract of location, or hire, to compare and contrast it with those requirements of the lease to discover whether or not they have always been distinct from one another, regardless of whether they were discussed together.

What follows is largely a discussion of the works of the institutional writers, with a limited discussion of case law. There is a distinct lack of cases (or perhaps a lack of reported cases) on the topic, evidenced by the lack of references to cases in the works of the institutional writers.⁴⁸⁰ Furthermore, Morison's Dictionary, for instance, although having a section dedicated to the lease, does not have a section on the contract of location, and the few cases discussing it are found under various headings. One can surmise that perhaps, aside from those instances of location which involved land, location generally involved lower value claims which would not have been heard in the higher courts recorded by Morison, if they were brought to court at all.

This chapter has three parts. First, it considers how the contract of location was distinguished from other similar contracts. Second, it analyses the extent to which the location of land, the lease, was discussed in the general discussions of the contract of location. Finally, it discusses the essentials of the contract of location, with a view to establishing the similarities or differences between the lease and other instances of location.

5.2 Distinguishing the Contract of Location

A definition of the contract of location has already been given above. Bell notes that, essentially, it comprises three elements, "the subject, the hire, and the time".⁴⁸¹ The two parties were the Locator, or the Lessor, who provided the subject-matter, and

⁴⁸⁰ This remains true in the modern law: see the lack of case law in Stair Memorial Encyclopaedia, *Leasing and Hire of Moveables (Reissue)* (2001).

⁴⁸¹ Bell, *Commentaries*, 481; Bell, *Principles*, 134.

the Conductor, or Lessee, benefitting from the use of the subject-matter.⁴⁸² The contract of location shares similarities with other contracts, including sale, loan and *mutuum*. The institutional writers often took the time to distinguish it from these other contracts. It is worth, therefore, explaining briefly the distinguishing features of the contract of location.

5.2.1 Sale

Arguably, location suffered from a more limited discussion by the institutional writers because of its “near affinity” to the contract of sale.⁴⁸³ Discussions of location usually followed on from those of sale, and indeed, Bell described hire as “nothing else than the sale of the use and benefit of the thing, or of the labour which forms the subject of it”.⁴⁸⁴ It was this similarity that led to some writers neglecting to discuss location in detail.⁴⁸⁵

Nonetheless, comparisons to sale were useful. For example, parallels between the two contracts highlighted the essentials of the contract of location. An example is given by Bankton who notes that “as no sale is without a price, so no location without a hire”. This emphasises the importance of an agreed payment for the contracts of location to be created.⁴⁸⁶ Given the similarity of the two contracts, time was also spent explaining how exactly the two differed. Stair noted that whilst the contract of sale required the price to be in money, the position was less clear for contracts of location, arguing that other fungibles (such as grain) were a competent payment for the creation of a contract of location.⁴⁸⁷ He also explained that a further distinction was the lack of transfer of ownership of the property between the parties in a

⁴⁸² Bankton, 1.20.1.

⁴⁸³ *Ibid.* See also: Stair, *Institutions*, 1.15.1

⁴⁸⁴ Bell, *Commentaries*, 481. See also, Erskine, 3.3.14; Bankton, 1.20.

⁴⁸⁵ Erskine, 3.3.14.

⁴⁸⁶ Bankton, 1.20.1. See further discussion below.

⁴⁸⁷ Stair, 1.15.1. See also: Mackenzie, 191.

contract of location.⁴⁸⁸ This resulted in the contract having only personal effect between the parties, so a subsequent sale could trump the lessee's right.⁴⁸⁹

Over a century later, Bell developed this further. Not only did he explain that the contract of hire gave the recipient a right to use the property only, rather than ownership,⁴⁹⁰ he also explained that this meant any physical transfer of the property was “*temporary* rather than *permanent*”.⁴⁹¹ As MacQueen notes, Bell was the first to highlight a further difference between the two – in location, there was no transfer of risk between the parties either.⁴⁹² Against a backdrop of ensuring the law met the needs of a commercial society,⁴⁹³ Bell highlighted this as a “practical distinction which it is important to mark”.⁴⁹⁴

5.2.2 Other Contracts

The other main contracts from which location was distinguished were those involving fungibles, where an equivalent item was to be returned, rather than the specific item loaned as in location.⁴⁹⁵ A contract involving fungibles was known as *mutuum*, a term originating in Roman law.⁴⁹⁶

⁴⁸⁸ Stair, 1.15.4; Erskine, 3.3.14.

⁴⁸⁹ Stair, 1.15.4.

⁴⁹⁰ Bell, *Commentaries*, 482.

⁴⁹¹ *Ibid*, 133, note emphasis in original.

⁴⁹² H MacQueen, “Pragmatism Precepts and Precedents: Commercial Law and Legal History” in A Simpson, S Styles, E West, and A Wilson (eds), *Continuity Change and Pragmatism in the Law: Essays in Honour of Professor Angelo Forte* (Aberdeen University Press, 2016), 34; Bell, *Principles*, 133, note; Bell *Commentaries*, 481.

⁴⁹³ J Cairns, “Historical Introduction” in K Reid and R Zimmermann, *A History of Private Law in Scotland*, 159.

⁴⁹⁴ Bell, *Commentaries*, 481.

⁴⁹⁵ Stair, 1.15.1; Bell, *Commentaries*, 481-482; Bell, *Principles*, 137, note.

⁴⁹⁶ On the Roman contract of *mutuum*, see generally, R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Legal Tradition* (1996) ch 6; P Du Plessis, *Borkowski's Textbook On Roman Law*, (5th edn, 2015) 304.

MacQueen also notes that the need for a rent to be paid in location distinguished it from gratuitous contracts such as deposit or loan in the case of moveables, or mandate in the case of labour or work.⁴⁹⁷

5.2.3 Conclusion on Location Distinguished

Whilst the contract of location may appear similar to other contracts, it nonetheless has distinguishing features. Primarily, its temporary and non-gratuitous nature alongside the need for the specific object to be returned when the contract concerns a moveable, sets location apart from other similar contracts. As Bell noted, it is important that location be identified, as alongside the specific obligations implied in a contract of location,⁴⁹⁸ it also determined which party had the risk of destruction.⁴⁹⁹

5.3 Hire and Lease

Despite the lease simply being at its core a personal contract of location, it was common for the institutional writers to dedicate part of their works to the lease specifically, given the “special” nature of the lease providing the tenant with a real right.⁵⁰⁰ Such discussions were generally situated in the sections of their works on real rights, as opposed to personal rights.⁵⁰¹ Conversely, the contract of location generally was discussed in their sections concerning obligations, following the traditional Roman classification.⁵⁰² This split between the discussion of the contract of location in the obligations part and the lease specifically in the real rights part was

⁴⁹⁷ MacQueen, “Pragmatism Precepts and Precedents” 34.

⁴⁹⁸ The obligations under the contract of hire are outside the scope of this chapter, but see, for example, Bell, *Principles*, 141-145; 148-152; Erskine, 3.3.15; 1.15.16; Forbes, *Institutes* 3.2.3; 3.2.4; Stair, 1.15.5; 1.15.6.

⁴⁹⁹ Bell, *Principles*, 133, note; Bell *Commentaries*, 481.

⁵⁰⁰ Leases Act 1449.

⁵⁰¹ Although, note that in Balfour’s *Practicks*, his discussion of lease or “assedations” as he refers to them, although discussed in a separate section to location generally, it follows directly on from that discussion of location: see Balfour, *Practicks*, 199ff. Similarly, writing in the eighteenth century, Hume discusses leases in both the part of his *Lectures* concerning real rights and location: see Hume, *Lectures*, 1.99.

⁵⁰² du Plessis, *Borkowski’s Textbook on Roman Law*, 281ff.

a trend that can be traced to Hope's *Practicks*, dating to the seventeenth century.⁵⁰³ This trend continued throughout the following centuries.⁵⁰⁴

Despite often receiving its own dedicated part of a work, the lease was frequently also discussed in the parts of the work that concerned the contract of location generally. For example, the lease was sometimes used to illustrate general principles of the law of location. This approach can be seen in the *Regiam Majestatem*, which predated the Leases Act 1449, where a question is posed regarding what happens when payment of rent is not made on time.⁵⁰⁵ The answer is illustrated by reference to the leasing of "church lands". More interesting, however, are the texts which continue to do this after the introduction of the Leases Act 1449. This suggests that the contract of location continued to be viewed as a unified subject, encompassing all the traditional strands of *locatio*: the hire of land, the hire of moveables, the hire of a piece of work, and the hire of labour. Because the lease had been given qualities of a real right by statute, that justified it being discussed elsewhere too. At its core, however, it was still viewed as falling within the scope of location generally. This section considers the extent to which other instances of location and the lease were treated as one united concept or distinct concepts and any potential reasons for such treatment.

5.3.1 A Unified Approach

In the sixteenth century, a unified approach to the discussion of the contract of location is evident. In Balfour's *Practicks*, the sole example of the contract of location is the letting of land, despite the following heading being dedicated to leases specifically.⁵⁰⁶

⁵⁰³ Hope, *Major Practicks* (3 Stair Society 1987), 2.6 (location) and 3.19 (leases, specifically).

⁵⁰⁴ See, Stair, Erskine, Bell.

⁵⁰⁵ Lord Cooper (ed), *Regiam Majestatem* (Stair Society Volume 11), 206.

⁵⁰⁶ Balfour, *Practicks*, 199ff.

The same was true of the approach taken in the seventeenth century. Writing at least fifty years before Stair,⁵⁰⁷ Hope's two short paragraphs regarding the contract of location discuss only examples of letting land.⁵⁰⁸ Interestingly, the reference provided for the first of those paragraphs (regarding the obligation of the lessor to give possession) is to Balfour's title on leases specifically, rather than to his title on location.⁵⁰⁹ This further emphasises the lack of clear distinctions being drawn between location generally and the lease as a specific example of location – what one saw as more appropriate to discuss under the specific topic of lease, the other thought as equally useful in illustrating location generally.

Like the writers before him, Stair's discussion of the contract of location is limited, albeit extending to more than just two paragraphs. His discussion of the contract of location is placed in the part of his work concerning obligations, as opposed to real rights, following the Roman structure of the law. Roman influence is evident throughout the title on location, with many references to the Digest.⁵¹⁰ Stair gives few examples of the contract of location, but like those before him, the primary example used was the letting of land.⁵¹¹ He does so, despite noting the "special nature" of leases which he discusses at length in another title in the part of his work concerning real rights.⁵¹² Unlike Balfour and Hope, however, Stair does not limit his discussion to purely the letting of land and also draws examples of location from scenarios involving the letting of work. This clearly illustrates the unitary approach to the contract of location – not only was lease used as an example of location, but it was discussed alongside the other types of location.

This approach continued into the eighteenth century. In his *Institutes*, Forbes explicitly notes that land alongside moveables can be the subject of the contract of location. However, he gives little detail, instead directing the reader to his specific

⁵⁰⁷ The latest date referred to in Hope's *Major Practicks* is 1633: See Hope, *Major Practicks*, vii (Introduction).

⁵⁰⁸ *Ibid.*, 2.6.

⁵⁰⁹ *Ibid.*, 2.6.1.

⁵¹⁰ Stair, 1.15.

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

title on leases.⁵¹³ In his *Great Body*, Forbes discusses the letting of land at length alongside the letting of moveables and of labour and work.⁵¹⁴ Bankton too, like Stair and Forbes, uses the subjects of land and work as illustrations of the rules surrounding location, dwelling at length on his examples of the letting of land. Hume goes further, discussing the location of land at length before commenting that he does not think it “necessary to say much touching the other ordinary cases of location, whether the use of a thing, or of service and labor”, having already dwelled on location of land in detail and the rights and duties of the parties under these specific types of location being “plain and simple”.⁵¹⁵

This unified approach to location demonstrates that although these writers noted the special nature of the lease, created by statute, they ultimately recognised that it was, at its core, simply a branch of the contract of location. This is in-keeping with the general position of the earlier writers with regards to the contract of lease. As discussed in Chapter 3, they did not view the contract of lease as distinct from the real lease, which simply provided the tenant with additional protection.

5.3.2 Moving Away from the Unified Approach

Nonetheless, not all writers took a unified approach to location. The earliest example of a differing approach is Erskine, who explicitly omitted land from his discussion of location.⁵¹⁶ He explains that leases were initially a category of location, but since having been altered by statute, they no longer shared common ground with the other instances of location.⁵¹⁷ This approach is interesting, because like those writers before him, he too generally followed the classification of Roman law, where location would have also included leases. Nonetheless, by explicitly stating that the lease is

⁵¹³ Forbes, *Institutes*, 3.2.2.

⁵¹⁴ Forbes, *Great Body*, 845ff.

⁵¹⁵ Hume, *Lectures*, 1, 99.

⁵¹⁶ Erskine, 3.3.14, note use of the term “moveable”.

⁵¹⁷ *Ibid.*

no longer rightly included in discussions of location, he moves away from the traditional approach.

Despite being unusual for the time, Erskine's approach of omitting to include the lease in discussions of location prevailed into the nineteenth century. Although Bell notes in his *Commentaries* that strictly speaking, there can be location of land, he does not discuss it alongside his other categories of location.⁵¹⁸ Indeed, Bell generally disregards the traditional classification of the contracts of location, taking a more practical approach to the classification⁵¹⁹ – although he maintained a distinction between *locatio rei* (letting of things) and *locatio operum* (generally services), he divided the latter into “a number of subgroups which appear to be of Bell's own devising”.⁵²⁰ Because of his more practical approach to his work, it is unsurprising that Bell discussed lease in a different part of his work, given that the lease normally conferred a real right, rather than simply personal rights like other cases of location. Thus, it was entirely different in nature and practical result.

Further evidence of Bell's moving away from the traditional approach is his reference to location as hire first and foremost, rather than *locatio conductio*. He is one of the few writers to do so, and do so consistently.⁵²¹ One can surmise that this again highlights Bell's practical approach – the contract was known in practice as “hiring”, and would have come into even more frequent usage following the industrialisation period which provided a backdrop to Bell's work.⁵²² Whether intentional or not it provides a clear terminological distinction between hire on the one hand and the lease of land on the other.

⁵¹⁸ Bell, *Commentaries*, 481.

⁵¹⁹ This is to be expected given Bell's work generally – Bell was the first institutional writer to reject the Roman classification of law generally, instead organising it in terms of commercially related topics: see generally, Walker, *Scottish Jurists*, “Bell”.

⁵²⁰ MacQueen, “Pragmatism Precepts and Precedents” 40.

⁵²¹ This may have been a result of English influence evident in Bell's work on hire e.g. Jones' *Essay on Bailments* – although note the reliance also on non-English sources. Although writers as early as Balfour referred to the contract as “hiring”, they did so alongside the paragraph heading of location: Balfour *Practicks* 199. See also, Forbes, *Institutes*, 3.2.1.

⁵²² A Rodger, “The Codification of Commercial Law in Victorian Britain” (1992) 108 LQ Rev 570, 571.

Later in the nineteenth century, *Bell's Dictionary and Digest of the Law of Scotland* also noted that location was either a contract for the use of moveables or of service, thus cementing the idea that lease had broken from the other instances of location, being treated as a distinct branch of the law in its own right.⁵²³

5.3.3 Conclusions on Lease and Location Distinguished

Overall, a clear shift is evident from the lease being used a primary example of location generally, to it being omitted from such discussions. This resulted in the letting of things referring only to moveables, whilst leases were discussed in other parts of the works, usually in the parts on real rights. This shift is unsurprising given the findings of the earlier chapters of this thesis which established that the contract of lease and the real aspects of lease were traditionally dealt with distinctly, before there was a change to simply discussing the real lease at the expense of a discussion of the contractual aspects of lease. This coincides with when the lease no longer was discussed under the heading of location generally.

5.4 Requirements of the Contract of Hire

Bell notes that “The essentials of this contract [of hire] are 1. a subject let and hired; 2. the hire or consideration to be given for it; and 3. the time”.⁵²⁴ This section analyses the requirements for the formation of a contract of hire, and identifies any similarities or differences between these requirements and those of the contract of lease, discussed in the previous chapters.

⁵²³ G Watson, *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890), 669.

⁵²⁴ Bell, *Principles*, 134; see also, *Commentaries* 481.

5.4.1 Rent⁵²⁵

Of the cardinal elements of a contract of location, a rent given in exchange for the use of the object was most important in the contract's creation. It is the requirement which is dealt with most extensively by the institutional writers. Several remarks can be made about the rent.

5.4.1.1 Agreement on the rent perfects the contract

First, agreement on the rent was essential in the formation of a contract of location. Stair, for instance, notes that there can be "no Location without an Hire".⁵²⁶ This position is continued into the following centuries.⁵²⁷ However, a different approach was evident in Bankton's work. Despite the obvious importance of rent in creating the contract, Bankton notes that occasionally, the contract of location could come into being without a rent being agreed.⁵²⁸ This is what he called a "Tacit" or "implied" contract, which arose when one party took use of property where usually a price would be paid, but without a rent being agreed.⁵²⁹ In such circumstances, the other party was liable to pay the ordinary rate.⁵³⁰

Bankton is the only writer to discuss this implied contract of location in any detail, although arguably it is evident in Stair's earlier work, where he notes that the rent need not be expressly stated in the contract, and could be the market rate.⁵³¹ Nonetheless, it is unclear whether in the scenario contemplated by Stair only covered situations where it was agreed that there should be a rent, or also went

⁵²⁵ Note that the term "rent" is generally used in this discussion to mean the sum given in exchange for the use of the object, rather than the other terms used by the institutional writers, such as "hire" or "consideration", to avoid confusions with terminology. Traditionally, the term "hire" was used to denote this sum, however, the meaning soon shifted to describe both the sum paid and the contract as a whole.

⁵²⁶ Stair, 1.15.1. The rent must be agreed before the contract is created. See also Bankton, 1.20.429.

⁵²⁷ Erskine, 3.3.14.

⁵²⁸ Bankton, 1.20.431.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.* A modern example would be the hiring of a taxicab – upon arriving at the destination, the passenger could not refuse to pay arguing no price was agreed beforehand. It is customary that such journeys are not undertaken for free and the passenger must pay the ordinary fare.

⁵³¹ Stair, 1.15.1.

further like Bankton, implying a scenario where rent was not discussed, but was customarily paid.

Writing fifty years later, Bell, as he so often does, clarifies the position regarding the need for rent to be agreed when he notes that agreement on rent is an essential term, and agreement upon it perfects the contracts, binding parties from that moment.⁵³² In contrast to the earlier writers, he does not leave the question to doubt – as an essential term, if rent is not agreed, then the contract does not come into existence at all.

5.4.1.2 The rent must be certain

Likewise, the law was settled on the need for the agreed payment to be certain. Some writers simply noted that the rent needed to be certain,⁵³³ whilst others went on to explain what exactly was meant by this term. Obviously, this included being expressly agreed in the contract, but Stair noted that it could also include sums that had previously been paid for a similar contract or what the average person would deem “reasonable” for such a contract.⁵³⁴

By the eighteenth century, this reasonable standard appears to have morphed into the market-rate.⁵³⁵ In the nineteenth century, Bell widened the scope of the reasonable or market rate to include any rent which was “ascertainable by reference to a standard”, without any need for such a standard to be reasonable or typical for the transaction.⁵³⁶ Thus, what was essential was that the rent was determinable.⁵³⁷

⁵³² Bell, *Commentaries* 481; Bell *Principles*, 134.

⁵³³ Forbes, *Institutes*, 3.2.1; Forbes, *Great Body*, 845; Bankton, 1.20.429; Erskine, 3.3.14.

⁵³⁴ Stair, 1.15.1.

⁵³⁵ Bankton, 1.20.431.

⁵³⁶ Bell, *Principles*, 140.

⁵³⁷ One surmises that again this is in keeping with Bell’s ever practical and commercial-orientated approach to his discussion – assigning a market rate to leases could hinder good deals between businesses.

5.4.1.3 What can constitute rent

Whether rent must be paid in money was an issue never fully resolved by the institutional writers who had different opinions on the topic.⁵³⁸ Stair highlights the debate, which, he says, originated in Roman Law. He states that the issue was of utmost importance in Roman law due to the nature of the contract as a nominate contract which was perfected by consent alone, as opposed to contracts which required an additional step such as the physical transfer of the property.⁵³⁹ Stair argues that hire can be validly constituted by money or another fungible, such as oil or grain. He explains that because in Scots law certain contracts,⁵⁴⁰ of which location was one, were perfected by consent alone, he saw no reason why those with non-monetary hire, as long as they included a rent, should not be deemed a contract of location, considering they resulted in the same effect binding the parties.⁵⁴¹

Despite MacQueen noting that the debate went unresolved, those writers that discuss the topic do agree that the rent need not be paid in money.⁵⁴² In the early eighteenth century, for example, Forbes, without going into any detail on his reasons, agrees with Stair that a contract of location can be created with a rent consisting of money “or any other Fungible”.⁵⁴³ Writing about thirty years later, Bankton notes that whilst rent is usually paid in money, payment by other means such as the fruits of the land was valid.⁵⁴⁴

This position was generally accepted by the later eighteenth century, with Erskine similarly noting that payment of the rent in money was typical, but therefore not the

⁵³⁸ MacQueen, “Pragmatism Precepts and Precedents” 34.

⁵³⁹ Stair, 1.15.1.

⁵⁴⁰ I.e. not those which needed the transfer of property to be effectual.

⁵⁴¹ Stair. 1.15.1. Although Stair uses Roman law as a backdrop for his discussion, Stair omits to follow it on this point, there being an approach that fits with his understanding of Scots law. W Gordon, argues that Stair reverts to civilian authorities only when there was no Scottish rule available, perhaps suggesting this debate was not as controversial as MacQueen suggests: W Gordon, “Roman Law in Scotland” in R Evans-Jones (ed) *The Civil Law Tradition in Scotland* (1995) 13, 29.

⁵⁴² MacQueen, “Pragmatism Precepts and Precedents” 34.

⁵⁴³ Forbes, *Institutes*, 3.2.1: see also Forbes, *Great Body*, 845ff.

⁵⁴⁴ Bankton, 1.20.7.

only possibility.⁵⁴⁵ Arguably, by the nineteenth century, it was a non-issue, with Bell making no comment either way.⁵⁴⁶

5.4.1.4 Comparison with lease generally

These findings are generally in-keeping with the findings of the earlier chapters on the contract of lease. The law was clear that a rent had to be agreed before a lease could be created, regardless of whether it was a real lease or a personal lease.

Unfortunately, the generally more limited discussion of location by the writers, and a lack of cases, means that there is no evidence either way to show whether or not the price agreed in a contract of location could be nominal, as in the case of a contract of lease.

5.4.2 Duration

As highlighted above, one of the key distinguishing features between sale and hire is the temporary nature of hire. Nonetheless, despite its importance in distinguishing the contract of location from other contracts, agreement on the duration of the contract was not always emphasised as important in the contract's formation. Often this would not be a practical problem – the duration *would* be agreed. The question is nonetheless of doctrinal importance.

In one of the earliest Scottish references, duration is included in the description of location. In the *Regiam Majestatem*, location is described as “let[ting] out a thing to another *for a certain time* in consideration of an agreed rent or hire”.⁵⁴⁷ Nonetheless, subsequent definitions do not emphasise its importance. In the seventeenth century, Stair omits the temporary nature of the agreement from his definition of location.⁵⁴⁸

⁵⁴⁵ Erskine, 3.2.1.

⁵⁴⁶ Bell, *Principles* 140.

⁵⁴⁷ Lord Cooper (ed), *Regiam Majestatem*, (Stair Society, Volume 11), 206.

⁵⁴⁸ Stair, 1.15.1. See also Mackenzie, also writing in the 17th century, who likewise omits duration from his definition: Mackenzie, 191.

Nonetheless, the temporary nature is subsequently implied when Stair highlights the difference between sale and location, noting that in location, the property is not alienated – in other words, ownership is not transferred.⁵⁴⁹ However, this is by no means clear. The lack of transfer of ownership does not rule out, for example, the lessee being entitled to the property indefinitely or forever. The first explicit reference to duration lies in his discussion of the conductor's obligations, where he notes that after paying the hire, the conductor's next most important obligation is "after the end of Location, to restore the thing locat".⁵⁵⁰

Despite these remarks regarding the limited duration of the lease, Stair does not state conclusively the need for a duration to be agreed for the contract to come into being. Why he omits it is unclear. It is possible that he thought that the temporary nature of the contract was obvious and did not require detailed discussion. However, given his thorough treatment of the other requirements for constitution of a contract of location, this seems unlikely.

Alternatively, it may be that agreement on duration was *not* an essential for the contract to come into being. Just because there are obligations to return the item does not necessarily mean that the time of returning must be agreed at the outset. For example, it may be that the contract is terminable on reasonable notice, which triggers the obligation to return the item. Unfortunately, Stair simply does not give enough detail to make any certain conclusions on this issue.

This unsatisfactory position on the need for duration persisted in subsequent institutional works. Erskine, for example, notes that there is an obligation to return the item at the "time agreed on by the parties", although he does not state whether or not this must be agreed beforehand.⁵⁵¹ Perhaps tellingly, like Stair, Erskine does not include duration in his definition of the contract of location, instead only mentioning the need for a subject of the contract and an agreed hire.

⁵⁴⁹ Stair, 1.15.1.

⁵⁵⁰ *Ibid.*

⁵⁵¹ Erskine, 3.2.1.

Bankton too omits duration from his definition, first mentioning duration when he discusses the parties' obligations.⁵⁵² He is one of the few institutional writers to suggest that the contract was terminable on notice.⁵⁵³ However, this is only mentioned with regards to tacit leases of land, and no other examples occurring in other types of location are given. The rule may be particular to land only. The fact that the lease was used as the example of location rules generally, however, suggests it was applicable to all contracts of location.

The first writer to explicitly include the need for an agreed duration in his definition of contracts of location is Forbes. However, his discussion of location is brief. Thus, it may be that this phrasing was used for succinctness, rather than to indicate any fundamental shift in the nature of the contract.⁵⁵⁴ The same cannot, however, be said of Bell who expressly states that duration is "an essential" of the contract in his extensive discussion of location.⁵⁵⁵ Nonetheless, duration appears less important than the other essentials, the subject matter and price, both of which are given a distinct section in his *Principles*, unlike duration.⁵⁵⁶ Therefore, Bell's discussion leaves open questions which were settled with regards to the lease, such as whether the duration must be certain, or whether it could be perpetual.

Overall, it seems that duration was not deemed an essential of a contract of location until the nineteenth century discussions by Bell. Prior to Bell, it seems that only the subject matter of the contract and the hire to be paid were essential, with suggestions that the contract could be terminable on notice. This is in-keeping with the findings earlier in the thesis with regards to the contract of lease. Whereas for a real right of lease, there must be a duration agreed by the parties that was fixed and not perpetual, contracts of lease did not have these same restrictions and were valid even if the duration was perpetual or indefinite. Therefore, for contracts of lease, duration appeared less important than the other essentials of the contract, such as

⁵⁵² Bankton, 1.20.1ff.

⁵⁵³ *Ibid*, 4.20.8.

⁵⁵⁴ Forbes, *Institutes*, 3.3.1

⁵⁵⁵ Bell, *Commentaries*, 481; Bell, *Principles*, 134.

⁵⁵⁶ Bell, *Principles*, 139; 140.

the price or hire to be paid. Again, this highlights that at its core, the contract of lease was no different to the other types of location.

5.4.3 Subject

The final essential element of the contract of location was the subject of the contract, whether that be a thing to be used or a person to provide a service. The issue does not need to be discussed in depth here, having considered above the extent to which discussions of location also included the location of land. Nevertheless, there seems to be one key difference between the contract of location of moveables as opposed to land which is worth noting. Bell notes that the subject of the contract need not be “fixed upon; as the horse-hirer may engage to furnish horses for a carriage, although the parties have not fixed upon any particular horses of which the use is to be given.”⁵⁵⁷ This can be contrasted with the position for leases where the property being let must be sufficiently identifiable.

5.5 Conclusions on Hire

The contract of location is a wide concept, encompassing a wide variety of scenarios. Originally, discussions of the contract of location encompassed discussions of the lease, given that at its core, the lease was a purely personal contract. Nonetheless, over time, the contract of lease stopped being discussed alongside the other instances of location. This coincided with the period when the contract of lease started being discussed alongside real rights of lease.⁵⁵⁸ It also seems to coincide with a more practical approach being taken to the topic, particularly evident in the work of Bell, for example, who had less regard for the traditional divisions of the law in favour of a presentation of how the law worked in

⁵⁵⁷ Bell, *Commentaries*, 482.

⁵⁵⁸ Chapter 3.

practice.⁵⁵⁹ With most leases granting the tenant a real right, it is unsurprising that it stopped being discussed alongside the personal contract of location.

What has also become clear is that the contract of lease itself was no different in terms of its requirements for constitution than the other cases of location – the subject had to be agreed, as did the price, but the exact duration seemed to be less central to the contract. Therefore, the only peculiar aspect of a lease compared to other instances of location was when it became a real right. It is therefore perhaps regrettable that the later writers did not discuss the location of land alongside the other contracts of location, perhaps contributing to the decline of the contract of lease being recognised as distinct from the real lease in the nineteenth century.

⁵⁵⁹ Walker, *Scottish Jurists*, “Bell”.

PART 2: THE LICENCE TO OCCUPY

Chapter 6: The Introduction of the Licence to Occupy in Scots Law

6.1 Introduction

The previous section examined the development of the cardinal elements of the lease in Scots law and argued that there are different types of lease in Scots law. This part focuses on a different occupation agreement, the licence to occupy. The licence to occupy is a novel concept in Scotland and does not have the same pedigree that the lease has in Scots law. Little research has been conducted into the Scottish licence to occupy to date. Part 2 of this thesis therefore examines the licence to occupy in detail. This first chapter examines the introduction and origins of the licence to occupy in Scots law. The interaction between the lease and the licence in Scots law cannot be fully understood without understanding its historical underpinnings, including the extent to which Scots law has been influenced by English law. Subsequent chapters examine the way in which the lease and the licence are currently distinguished from one another.

This chapter has two main parts. The first part pinpoints the moment of the introduction of the licence to occupy into Scots law, explaining the development and acceptance of the concept by the judiciary. The second part explores whether the source of the licence to occupy can be located. It is suggested that there are two possibilities of the licence in Scots law: it was either an English transplant, or it was a Scottish invention.

6.2. Preliminary Points

Before considering the origin of the term “licence to occupy” as a distinct category of occupation agreement, distinguishable from the contract or real right of lease, two preliminary points must be made. The first considers the terminology of “licence”, whilst the second considers the content of the agreement.

6.2.1 Use of the Term “Licence” in Scots Law

As will be illustrated later in this chapter, the term “licence to occupy” has newly developed to refer to a contract for the occupation of property.⁵⁶⁰ However, the term “licence” itself is not novel in Scots law, nor is its use novel when referring to someone using another’s land.

The term “licence” has been used in various senses in Scots law, primarily to mean a permission to do something.⁵⁶¹ Regarding the use of another’s property, the term has traditionally been used to refer to scenarios where someone occupies someone else’s property by their own volition, but their presence on the land is tolerated by the land’s owner. For example, Erskine explains:

“Where one possesseth at his own request, by the tolerance or bare licence of the proprietor, it is called “possession *precario*.”⁵⁶²

Thus, it would be correct to state that in Scots law that a postman who enters onto someone else’s property to post a letter through the letterbox has a “bare licence” to do so. He can be asked to leave at any time. Similarly, if a friend is invited to a party at someone’s home, and then offends the owner, they can be asked to leave by the owner and must do so as the owner no longer tolerates them being there.

However, these situations where there is a “bare licence” are different from the way in which the licence to occupy is used in the modern sense of the term. Licence in the sense used by Erskine is not something which parties positively agree to. It is not a formal contract that parties have negotiated. Instead, it arises purely from the actions of the parties. Of course, Scots law recognises contracts created by conduct.⁵⁶³ Nonetheless, the bare licence differs in that it does not create any contractual obligations between the parties. The term is simply used to describe the

⁵⁶⁰ See 6.3.

⁵⁶¹ For example, someone can obtain a driving licence, or bodies such as councils can grant licences to do certain activities, such as run a pub. Other examples include the licence of intellectual property rights.

⁵⁶² Erskine, *Institute II*, 1, 23.

⁵⁶³ W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007) 6.73.

legal basis on which someone is allowed to be on another's land – it is a permission, rather than a contract.

6.2.2 The Content of the Licence to Occupy

Furthermore, some remarks must be made about the content of the licence to occupy. As later chapters illustrate, the licence to occupy “falls short” of a lease in some way.⁵⁶⁴ For example, the cardinal elements are not sufficiently agreed, or, in terms of the rights and obligations conveyed, the licence grants substantially less than a lease. Like the term “licence”, the content of the licence to occupy is also not a novel idea in Scots law.

Even prior to formal recognition of the “licence to occupy” as a contract in Scots law, there may have been agreements which did not fulfil the requirements for a valid lease but were nonetheless enforceable between the parties. Any such contracts would, under modern law, be called a licence to occupy. However, as that term was not previously recognised, such contracts would simply be an innominate contract.

Nonetheless, such agreements would be extremely limited in number, given the wide nature of the lease in Scots law.⁵⁶⁵ As Rankine explains, the term “lease” is wide and is intended to cover agreements which would not be a lease under English law.⁵⁶⁶ He gives examples of agreements such as the hiring of a seat in a church or a place of entertainment, or the right to pump water from a pit, all of which were valid leases under Scots law.⁵⁶⁷

Therefore, in a limited number of cases, Scots law would recognise agreements which fell short of a lease, even if they were not called “licences to occupy” at the time. However, what was not present under the early law was a link between the

⁵⁶⁴ Chapters 7, 8 and 10.

⁵⁶⁵ Chapters 3 and 4.

⁵⁶⁶ J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), 2.

⁵⁶⁷ *Ibid.*

term “licence” and these limited contracts. The following section examines when and how these contracts came to be recognised as “licences to occupy”.

6.3. Locating the Introduction of the Licence to Occupy.

The introduction of the licence to occupy occurs in three main overlapping periods, beginning in the later eighteenth century. The first period sees the term “licence” being used more frequently in reference to agreements for the occupation of land. However, the cases do not view the licence as something entirely distinct from the lease. The second period is characterised by cases where arguments are advanced by counsel that a licence to occupy exists as entirely distinct from the lease. In this period, however, the arguments are rejected. The final period is characterised by the general acceptance that the licence to occupy exists in Scots law. This period is also characterised by debates not as to whether the licence exists, but rather about the scope of its application.

6.3.1 The First Uses of the Term “Licence” in Reference to Scottish Occupation Agreements

One of the earliest examples of the term “licence” being used to describe an occupation agreement is in *Miller v Walker*.⁵⁶⁸ In that case, the landowner let a mine for a period of 19 years. The rent was a set amount per tonne of ore removed from the mine. Although not the main legal question in the case, it was necessary for the court to determine whether this arrangement created a lease. The court held that no lease had been created by this agreement. In particular, the court held that the agreement lacked a valid rent. It was important that the payment of rent was entirely

⁵⁶⁸ *Miller v Walker* (1875) 3 R 242. Interestingly, this usage of the term “licence” coincides with the term’s increasing usage in other areas of law in Scotland, such as intellectual property: *Cairds v Sime* (1887) 12 App. Cas. 326; *Hecla Foundry Co v Walker Hunter & Co* (1889) 14 App. Cas. 550; *Bayer v Baird* (1898) 25 R 1142. There does not, however, appear to be any significant connection between the increasing usages of the term in these different legal contexts.

dependent on the mining of ore. There was no obligation to mine, nor an obligation to pay any rent if the occupier refused to mine ore.⁵⁶⁹ Consequently, there was no true obligation to pay rent, and as such, no lease.

In characterising the agreement as something other than a lease, the Lord President, with whom the other judges concurred, referred to the agreement as a “licence to work” the land. Nonetheless, despite acknowledging that the agreement was not a lease in the true sense of the term, the judges continue to refer to the agreement as a “lease” throughout their judgement. Lord Ardmillan’s formulation is particularly interesting. He stated that the “nature of this [type of] lease” was a licence to work.⁵⁷⁰ This demonstrates that, as Rankine suggests, no other term than lease was recognised by Scots law at this time.⁵⁷¹ Even when the agreement is not a lease in the true sense of the word, the courts continued to refer to the agreement as a “lease”. The term “licence” was not yet a distinct concept. At most, it was a subset of the species of contract known as a “lease”.

Other cases around the same time also use the phrase “licence to work” when describing occupation agreements. The term was not, however, used consistently. For example, in *Irving v Leadhills Mining Co*, the phrase was used in two different ways.⁵⁷² First, it was used as a synonym for the term “lease”. Elsewhere, the phrase was used to describe the quality of the right granted under a lease i.e. the lease gives a licence to work.⁵⁷³ Another example is *Forrest v Merry and Cunninghame*, where again “licence to work” appears to be used to describe the right given under a specific type of lease.⁵⁷⁴

These cases are important in the development of a licence as a distinct concept. Although often used as a synonym for the term “lease”, these cases demonstrate that not all leases were treated equally. Some agreements which the courts termed

⁵⁶⁹ *Ibid*, 248.

⁵⁷⁰ *Ibid*, 251.

⁵⁷¹ Rankine, *Leases*, 2.

⁵⁷² *Irving v Leadhills Mining Co* (1856) 18 D 833.

⁵⁷³ *Ibid*, at 839, quoting the earlier decision.

⁵⁷⁴ *Forrest v Merry and Cunninghame* [1909] AC 417.

“leases” were not leases in the true sense of the word, usually as they lacked a cardinal element. However, no other term was recognised for occupation agreements, meaning that these agreements were nonetheless referred to by the judiciary as “leases”. In other cases, the term licence was used to illustrate the fact that the rights the occupier received under a particular lease were more limited than those which a traditional lease would provide. As such, these cases demonstrate that the courts recognised that not all occupation agreements granted the same rights as a traditional lease. It is these agreements which provided fewer rights that became the licence as it is known today.

6.3.2 Attempts to Recognise the Licence to Occupy as a Distinct Concept

In the period following the “licence to work” cases, a series of ratings cases were heard in court. These cases disputed whether the agreement in question was truly a lease. If the agreement was not a lease, then the occupier would not be liable for rates. It is in these cases that the first arguments in favour of the licence as a concept entirely distinct from the lease can be identified.

In the case of *The Glasgow Tramway and Omnibus Company v The Corporation of the City of Glasgow*, the dispute concerned whether a purported lease of the sole right to use the tramways to a tramways company had been created.⁵⁷⁵ It was argued for the defenders that the agreement did not create a lease. Instead, they argued it was only a statutory licence.⁵⁷⁶ The defenders claimed that no exclusive right of occupation had been given, and the right which had been conferred – the right to use tram lines – was “not a lettable subject”.⁵⁷⁷ The court was unconvinced by this argument. The Lord President explained that although the lease in this situation was peculiar, the peculiarities were not “sufficiently essential” as to deny it

⁵⁷⁵ *The Glasgow Tramway and Omnibus Company v The Corporation of the City of Glasgow* (1897) 24 R 628; note this case was reversed on other grounds.

⁵⁷⁶ *Ibid*, 634.

⁵⁷⁷ *Ibid*.

was a lease.⁵⁷⁸ The hallmarks of a lease, such as occupation, sole use, and rent suggested that the agreement was indeed a lease.⁵⁷⁹

Notwithstanding the lack of success of the “licence” argument in *The Glasgow Tramways Corporation* case, it was an argument that was advanced numerous times in subsequent cases. Another such example is *Wilson & Co v Assessor for Kincardineshire*, heard in December 1912.⁵⁸⁰ In that case, a hotelier contracted with an advertising company, allowing them to place an advertisement for tyres on his premises, in the exchange for an annual sum. The exact location of the advertisement on the premises was to be determined at a later date but the hotelier was not allowed to permit any other tyre advertisements on the premises. The contract was to run for three years and could thereafter be ended by either party by giving three months’ notice. The advertising company was to be allowed reasonable access to the site for matters relating to their advertisement.⁵⁸¹ Again, the appellants argued that the agreement did not amount to a lease – it was only a licence to occupy. They argued that the advertisements did not “occupy” land, and that the payments made were not rent for the occupation of any land, but for the privilege of erecting the hoarding.

Once again, this argument was unsuccessful. Lord Cullen sided with the respondents who emphasised the passage from Rankine where he states that the extent of the land let, and the purpose for which land is let are irrelevant to an agreement’s status as a lease.⁵⁸² A landlord may split his land in whatever way he wishes, even if the sections he lets are very small. What was important to Lord Cullen was the fact that these small strips still attracted a value which was demonstrated through the sum payable, which he characterised as rent.⁵⁸³ As such,

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid*, 637-638.

⁵⁸⁰ *Wilson & Co v Assessor for Kincardineshire* 1913 SC 704.

⁵⁸¹ *Ibid*, 705.

⁵⁸² *Ibid*, 707.

⁵⁸³ *Ibid*, 709.

this agreement was a lease, and fell to be treated as such under the relevant ratings acts.

These early ratings cases demonstrate a reluctance on the part of the court to recognise the licence to occupy as a distinct concept in Scots law. In *Wilson*, for example, the court explicitly recognises that the situation may be a licence in English law. Nonetheless “what they describe as a licence” is a lease in Scots law.⁵⁸⁴

6.3.3 Judicial Acceptance of the “Licence to Occupy”

Despite an earlier unwillingness to recognise the licence as a context distinct from a lease, later ratings cases demonstrate that judicial opinion was changing. In *Inland Revenue v Anderson*, a tenant of a farm purported to sublet the right to shoot on the land of which he was a tenant.⁵⁸⁵ The question for the court was whether or not the subletting of the right to shoot was sufficient to confer occupation onto that party and thus remove the original farm tenant from being deemed occupier under the relevant income tax acts. Giving the leading judgement with which Lord Cullen and the Lord President concurred, Lord Mackenzie concludes that the purported lease of the shooting rights did not confer possession so as to remove the original farm tenant as occupier under the income tax acts. He noted that although leases over shooting rights were competent,⁵⁸⁶ the purported shooting “lease” in this instance was not in law a lease. It was constructed in a way very different to the usual way in which shooting leases were written. For example, the number of guns that could be used were limited and it did not appear to confer any exclusive right to shoot. As such, the arguments advanced against the existence of a lease were very similar to those which were advanced and rejected in cases such as *Wilson* and *The Glasgow Tramways Association* – a non-standard occupation of property and the lack of

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Inland Revenue v Anderson* 1922 SC 284.

⁵⁸⁶ *Ibid.*, 288.

exclusivity. In this case, however, the court held that all that had been acquired by the shooter was “more of a personal delegation than a tack”.⁵⁸⁷

Despite recognition that the agreement was not a lease, Lord Mackenzie does not refer to the contract between the farmer and the party granted shooting rights as a “licence”, although the official report of the case describes it as such.⁵⁸⁸ Again, the lack of use of the term suggests that it was not sufficiently developed in Scots law to warrant being used to cover the situation at hand. What is clear and is in contrast to the earlier cases concerning licences,⁵⁸⁹ however, is that this personal contractual right was something distinct from a lease which necessitated the use of a different term to describe the situation. As such, this case suggests that the judiciary was more willing to recognise another contract distinct from a lease. The fact that others were already using the term “licence” to describe the arrangement further suggests that the term was becoming used more often and was developing its own legal meaning.

The case is also important in illustrating a shift in legal thought away from the traditionally wide lease acknowledged by Rankine.⁵⁹⁰ It was explained above that previously, a licence-type arrangement may exist if the cardinal elements of a lease were missing, even if such agreement was not yet called a licence. However, *Anderson* goes somewhat further. It is not solely concerned with whether the hallmarks of a lease are present, but instead focuses on something else - the extent of possession. Under the previous law, if all cardinal elements of a lease (rent, parties, property and duration) were present, then the agreement was a lease. Under the law advanced in *Anderson*, an agreement may contain all of the cardinal elements of a lease but nonetheless fail to be a lease. In *Anderson*, the additional factor to consider is the extent of possession. This did not previously appear to be

⁵⁸⁷ *Ibid*, 289.

⁵⁸⁸ *Ibid*, 284.

⁵⁸⁹ E.g. *Miller v Walker* (1875) 3 R 242.

⁵⁹⁰ Rankine, *Leases*, 2.

crucial, considering limited and temporary occupation would suffice for creation of a lease. Again, the example of a seat in a place of entertainment is apt.⁵⁹¹

The change in legal thought evidenced in *Anderson* was explicitly linked to the term “licence” in the leading case of *United Kingdom Advertising Co Ltd v Glasgow Bag-Wash Laundry*, which firmly established the licence in Scots law.⁵⁹² Its facts were very similar to those of *Wilson* - an advertising company contracted for three years to put up advertisements in designated wall spaces in Post Offices in exchange for a fixed annual sum. Similar arguments were advanced: in particular, the appellants argued there was no lease created by this arrangement as the subjects were not sufficiently certain nor was there exclusive possession as the wall spaces to be used were undefined. The arrangement was therefore only a licence. Conversely, the respondents argued that all the constituents of a valid lease were present and therefore a lease existed.⁵⁹³

In contrast to the *Wilson* case, the court held that this agreement was not a lease but a “mere” licence to occupy.⁵⁹⁴ There were a number of reasons cited by the judges in reaching their conclusion, including the fact that the arrangement did not seem comparable to a traditional lease,⁵⁹⁵ and, most importantly, the fact that no exclusive possession of the subjects had been granted.⁵⁹⁶ Instead, the Lord President Clyde noted that the arrangement was more “in the nature of a licence”.⁵⁹⁷ It did not matter that the agreement had been termed a lease, as often these terms were used inaccurately and without thinking of their specific legal meaning.⁵⁹⁸ Instead what was important was the factual outcome created. Factors that were important in deciding that there was a licence was the lack of sufficient possession transferred to the

⁵⁹¹ *Wood v Leadbitter* 13 M and W 838, as cited by Rankine, 2.

⁵⁹² *United Kingdom Advertising Co Ltd v Glasgow Bag-Wash Laundry* 1926 SC 303.

⁵⁹³ *Ibid*, 305, 306.

⁵⁹⁴ *Ibid*, 306.

⁵⁹⁵ *Ibid*, per Lord President.

⁵⁹⁶ *Ibid*, 307 per Lord Hunter.

⁵⁹⁷ *Ibid*, 306.

⁵⁹⁸ *Ibid*.

advertiser.⁵⁹⁹ The other Lordships agreed with the Lord President. Lord Hunter noted “there is at the best a licence to exhibit advertisements”,⁶⁰⁰ whilst Lord Sands comments that calling the situation at hand a lease was “far-fetched”.⁶⁰¹

Whilst the judges provide clear reasoning for their decision, it is nonetheless difficult to reconcile with earlier cases such as *Wilson*. The judges do not explain the reasons for the differing decision in the case, despite *Wilson* being cited by the defenders. It simply seems that the arguments about the unusual nature of the agreement and extent of possession were accepted in this case, leading to a different outcome, whereas previously they were rejected. The case is therefore an important turning point in the development of the licence to occupy in Scots law: indeed, it is the first case to positively recognise that the more general concept of a “licence” exists in Scots law.

The case is also important because, it is the first to explore the concept of a licence in some depth under the specific name of a licence, whilst previous cases merely alluded to the concept. It also begins to set out a test for determining whether or not a licence has been constituted in a factual situation. Nonetheless, it is worth noting that the requirements illustrate more accurately the requirements of a lease than they do the positive requirements of a licence. For example, if a lease does not have exclusive possession, then the contract is not a lease, and is, therefore, more likely to be a licence. That does not mean however, that in all situations where there is no exclusive possession, a licence has been created. Furthermore, the requirements set out are non-exhaustive. Apart from stating that possession is one potential test, and asserting that the terminology used is not exclusive, no other identifying factors are mentioned. The case could be criticised for introducing the concept to Scots law without providing any real guidance on its scope or purpose.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*, 307.

⁶⁰¹ *Ibid.*

Despite the significance of the decision in *UK Advertising Co*, formally recognising the licence to occupy as part of Scots law, the case did not lead to an influx of rulings where a licence was found. The first cases citing *UK Advertising Co* do so only in passing.⁶⁰² Nonetheless, steadily more cases began to discuss the licence to occupy and whether it applied to the case at hand.

For instance, in *MacDuff & Co v Assessor for Glasgow*, the court confirmed the existence of the licence.⁶⁰³ It was another case regarding the fixing of advertisements to a physical structure, and whether the agreement in question created a lease. The court held that this scenario should be interpreted as a licence to occupy rather than a lease on a similar basis to that in *UK Advertising Co*.

Even cases which held that the particular facts of the case did not create a licence to occupy nonetheless recognised the existence of the licence. For instance, in *David Allen & Sons Billposting Ltd v Assessor for Clydebank*, the court held that an agreement for the erection and use of advertising hoardings was a lease.⁶⁰⁴ However, both Lord Hunter⁶⁰⁵ and Lord Fleming⁶⁰⁶ explain that the agreements are leases, not because the licence does not exist, but because the agreements are within the Scottish definition of a lease. This is unsurprising given that both judges heard the earlier case of *MacDuff* which confirmed the existence of the licence. Lord Pitman, however, was more critical of the licence to occupy.⁶⁰⁷ Indeed, his statement that “A licence to use a heritage is just a lease of heritage” denies its existence in Scots law.⁶⁰⁸ This statement is often quoted, but it must be acknowledged that Lord Pitman was in the minority.⁶⁰⁹

⁶⁰² See, for example, *Allan v Millar* 1932 SC 620 and *Franco-British Electrical Co Ltd v Assessor for Glasgow* 1934 SC 160.

⁶⁰³ *MacDuff & Co v Assessor for Glasgow* 1935 SC 374.

⁶⁰⁴ *David Allen & Sons Billposting Ltd v Assessor for Clydebank* 1936 SC 318.

⁶⁰⁵ *Ibid*, 327ff.

⁶⁰⁶ *Ibid*, 331.

⁶⁰⁷ *MacDuff & Co v Assessor for Glasgow* 1935 SC 374.

⁶⁰⁸ *David Allen & Sons Billposting Ltd v Assessor for Clydebank* 1936 SC 318, 335.

⁶⁰⁹ See e.g. *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12; and *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25.

Similarly, in *London Midland & Scottish Railway Co v Assessor of Public Undertakings*, although the court held the agreement in question to be a lease, they nonetheless recognised that the licence to occupy was an alternative possibility.⁶¹⁰ The court therefore sought to explain how a lease could be distinguished from a licence, by considering issues such as who has occupation and absolute control. This case illustrates the position of most future cases on the matter – instead of considering the extent to which the concept exists, the courts attempt to set parameters upon the concept.⁶¹¹

Although the vast majority of cases on the lease/licence distinction are ratings cases, the concept has since developed and is recognised in other factual scenarios. Likewise, the licence to occupy has been acknowledged in the commercial context in non-ratings disputes,⁶¹² in residential cases,⁶¹³ and in the agricultural setting.⁶¹⁴ These cases have also sought to delineate the parameters of the concept of the licence to occupy. For example, in *Gray v University of Edinburgh*, the court explained that the absence of an *ish* may indicate the creation of a licence to occupy, rather than a lease.⁶¹⁵ The existence of the licence is also recognised by academic commentators.⁶¹⁶

The position is therefore well summarised in the case of *Conway v Glasgow City Council* where Sheriff Gordon notes that “the law develops and, in my view, the difference between a lease and mere licence to occupy is now recognised”.⁶¹⁷

⁶¹⁰ *London Midland & Scottish Railway Co v Assessor of Public Undertakings* 1938 SC 751.

⁶¹¹ E.g. *White & Carter (Councils) Ltd v McGregor* 1962 UKHL 5, 1962 SC (HL) 1. How the current law distinguished between a lease and a licence is considered Chapters 7 and 8.

⁶¹² *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12.

⁶¹³ Such as *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490; *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25.

⁶¹⁴ E.g. *South Lanarkshire Council v Taylor* (2005) CSIH 6.

⁶¹⁵ *Gray v University of Edinburgh* 962 SC 157, citing Rankine, *Leases*, 12.

⁶¹⁶ E.g. Rennie, 2.10ff; Paton and Cameron, 12; Richardson and Anderson, 2.52.

⁶¹⁷ *Conway v Glasgow City Council* 1999 SCLR 248, 255.

6.3.4 Preliminary Conclusions

The licence to occupy as an alternative contract to the lease is a relatively recent development in Scots law. The term was first used in relation to occupation agreements in the late eighteenth century to describe a more limited right under a lease or a lease that was defective in some way. However, it was not until the ratings cases decided in the early nineteenth century that the concept was advanced as, and eventually accepted as, a concept entirely distinct from a lease. Whilst the concept could have been confined to the rating context, modern case law demonstrates that the licence to occupy is now established in all areas of landlord and tenant law.

6.4 The Origins of the Licence to Occupy in Scots law

The previous section identified the point of judicial acceptance of the licence in Scots law. This part considers the origin of the concept in Scots law, exploring whether it was a legal transplant from English law, or an indigenous legal invention.

6.4.1 English Influence

At first glance, there appears to be a strong English influence on the development of the Scottish licence to occupy. This is evidenced by the English cases which were used to support arguments in favour of the existence of the licence to occupy as well as the terminology used.

6.4.1.1 The Cases

When the existence of the licence was argued in the early cases of *The Glasgow Tramway and Omnibus Company*⁶¹⁸ and *Wilson*,⁶¹⁹ English authority was provided in support. For example, in *The Glasgow Tramway and Omnibus Company*, the defenders sought to rely on English case of *Midland Railway Co v Overseers of the Parish of Badgworth*.⁶²⁰ In *Wilson*, the appellant cited *Provincial Bill Posting Co v Low Moor Iron Co*⁶²¹ and *Burton v St Giles's and St George's Assessment Committee*.⁶²²

There are several reasons why the parties in these cases would seek to rely on English authority. Importantly, the rating acts, such as the Advertising Stations (Rating) Act 1889 discussed in *Wilson*, had nation-wide application to both Scotland and England. Therefore, if there was authority in point concerning the Act, regardless of whether it was Scottish or English, it would have been logical to look to that authority in an attempt to persuade the judiciary that your argument was correct.

Furthermore, when looking to English law, there would be a wealth of authority on the existence of the licence to occupy. The concept of the licence has a much longer pedigree in England than in Scotland and can be traced to a much earlier date. Whilst Scots authorities do not even mention licences in relation to the occupation of land until the late nineteenth century, England had been using the concept since the 1520s,⁶²³ and was refining the concept by the following century, as illustrated by a case from 1673.⁶²⁴ Although this early case centred upon a licence to sell alcohol on a property, it established clear parameters for the licence doctrine, such as that licences do not pass title to the property nor any other interest in it to the licensee.⁶²⁵

⁶¹⁸ *The Glasgow Tramway and Omnibus Company v The Corporation of the City of Glasgow* (1897) 24 R 628.

⁶¹⁹ *Wilson & Co v Assessor for Kincardineshire* 1913 SC 704.

⁶²⁰ *Midland Railway Co v Overseers of the Parish of Badgworth*, 1864, 34 L J Mag Cas 25.

⁶²¹ *Provincial Bill Posting Co v Low Moor Iron Co* [1909] 2 KB 344.

⁶²² *Burton v. St Giles's and St George's Assessment Committee* [1900] 1 QB 389.

⁶²³ J Baker, *The Oxford History of the Laws of England Volume VI: 1483-1558* (2003), 642.

⁶²⁴ *Thomas v Sorrel* [1673] EWHC (KB) J85.

⁶²⁵ *Ibid*, per Vaughan CJ.

From that point onwards, the concept has developed into a fully developed branch of landlord and tenant law.⁶²⁶ Most English landlord and tenant textbooks have a full chapter dedicated to the concept, which can be contrasted with Scots law's current leading textbook on leases having licences reduced to a couple of paragraphs within another chapter.⁶²⁷ There are even books devoted solely to the concept in England, something still not achieved in Scotland despite the term being used for over a century.⁶²⁸

Nonetheless, it will be recalled that in both *The Glasgow Tramway and Omnibus Company* and *Wilson*, the court rejected the arguments in favour of a licence to occupy. This suggests that English law was perhaps not as influential as first appears. More fundamentally, in *UK Advertising Co v Glasgow Bag-Wash Laundry*, the case which established the existence of the licence in Scots law, English law was not referred to at any point by either counsel or the judiciary.⁶²⁹ This suggests that the court was not heavily influenced by English law.

6.4.1.2 Other Indicators of English influence

Nonetheless, despite the lack of explicit references, it seems likely that English law would have had influence on the decision in *UK Advertising Co v Glasgow Bag-Wash Laundry* in some way. In particular, the case bears a striking resemblance to an English case that was decided in the period between *Wilson* and the *UK Advertising Co v Glasgow Bag-Wash Laundry* case.⁶³⁰ *King v David Allen & Sons Billposting Ltd* was a House of Lords case.⁶³¹ In that case a contract had been formed between the owner of a cinema and an advertising company, allowing the

⁶²⁶ Although cases on distinguishing a lease from a licence to occupy still reach court: e.g. *Monmouth Borough Council v Marlog* (1995) 27 HLR 30.

⁶²⁷ Rennie, *Leases*, 2.15.

⁶²⁸ I Jeffries Dawson and R Pearce, *Licences Relating to the Occupation or Use of Land* (1979); J Sharples, *Land Licences* (2011).

⁶²⁹ *United Kingdom Advertising Co Ltd v Glasgow Bag-Wash Laundry* 1926 SC 303.

⁶³⁰ *King v David Allen & Sons Billposting Ltd* 1916 2 AC 54.

⁶³¹ *Ibid.*

advertising company to affix posters and other advertisements to the wall of the cinema for a yearly payment. The landowner then granted a lease of the cinema to a third party. The question was whether the agreement had created a property right allowing the advertiser to enforce the agreement. It was held that there was only a licence, creating no property rights and meaning the lease had ended the contractual licence. The advertiser was, however, entitled to damages for breach of contract by the landowner. Although the case stemmed from Ireland, it seems heavily based on English law, with English cases cited throughout and also featuring in the judgement of the court. Being a House of Lords case, it would have had some prominence and it is highly possible that the judges in *UK Advertising Co v Glasgow Bag-Wash Laundry* were aware of it. That could account for the apparent different approach that was taken when compared to the *Wilson* case. *King* came between the two cases and could be a contributing factor in the different results.

Furthermore, it is significant that the both *UK Advertising Co v Glasgow Bag-Wash Laundry* and *Wilson* (the first cases to accept the existence of licence-type agreements and then use the term to refer to them) use terms such as “exclusive possession”. Exclusive possession is the primary distinction between leases and licences in the English context. Use of this term further suggests that the court was influenced by English law.

More importantly, the use of the term “licence” itself suggests English influence. As acknowledged above, English law had recognised the licence as an alternative contract to the lease since the sixteenth century. The fact that the Scottish courts chose to endorse this particular term, which was not previously recognised in Scots law, rather than some other term, suggests that Scots law was endorsing a concept of a licence similar to that recognised by English law.

6.4.2 A Native Invention?

On the other hand, the Scottish licence may be what Reid refers to as a “native invention”.⁶³² The approaches in several of the aforementioned cases tend towards this conclusion. For example, in the earlier cases such as *Miller v Walker*, there was no English authority cited for the inclusion of the phrase “licence”.⁶³³ This suggests that the Scottish courts were recognising the limits of the Scottish lease without English influence and chose to refer to these more limited agreements as licences. Indeed, the term “licence” had been used to refer to the occupation of someone else’s land in the sense of a bare licence. Instead of adopting the English term, the courts may instead have been adapting the Scottish term to cover contractual agreements as well as implied rights to be on another’s land.

Furthermore, as noted above, the case of *UK Advertising Co v Glasgow Bag-Wash Laundry* did not cite English authority.⁶³⁴ Instead, the court reasoned to its conclusion by contrasting the agreement in question with the Scottish lease. It was this factual comparison of the agreement and a typical Scottish lease that led to the conclusion that the “agreement bore no resemblance to a lease of heritage”. Similarly, the case of *MacDuff* did not rely on any English authority when finding a licence to occupy.⁶³⁵ Instead, the judges relied only on Scottish cases.

Also in support of the “native invention” of the licence is the case of *David Allen & Sons Billposting Ltd*.⁶³⁶ Of particular interest in this case is the discussion by Lord Hunter of the differences between English law and Scots law in this area.⁶³⁷ In particular, he explains that the definition of a lease in Scotland and England is quite different: something that may not be a lease in England may constitute one in Scotland – the situation in *David Allen & Sons Billposting Ltd* was one of those cases. Furthermore, he is critical of the appellant’s main argument establishing the

⁶³² K Reid, “Property Law: Sources and Doctrine” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, Volume 1 (2000), 196.

⁶³³ *Miller v Walker* (1875) 3 R 242.

⁶³⁴ *United Kingdom Advertising Co Ltd v Glasgow Bag-Wash Laundry* 1926 SC 303.

⁶³⁵ *MacDuff & Co v Assessor for Glasgow* 1935 SC 374.

⁶³⁶ *David Allen & Sons Billposting Ltd v Assessor for Clydebank* 1936 SC 318.

⁶³⁷ *Ibid*, 328.

parameters of the concept of a licence in Scots law, as it relies solely on English authorities, *Wilson v Tavener*⁶³⁸ and *Provincial Bill Posting Co v Low Moor Iron Co*,⁶³⁹ rather than Scottish authorities.⁶⁴⁰ Crucially, however, Lord Hunter was not stating that the licence did not exist in Scots law. Indeed, Lord Hunter explicitly recognises that the licence is a possibility.⁶⁴¹ He is simply saying that the Scottish licence should not be conflated with the English licence. The English licence is wider than the Scottish licence. This judicial statement recognising the differences between the Scottish and English licence to occupy further suggests that the concept's origins in Scotland are not English.

6.4.3 Conclusion on the Origins of the Licence to Occupy

It is impossible to state conclusively whether the origins of the licence are English or a Scottish invention, particularly when the leading case does not explain the reasons for its change in approach. Nonetheless, it is submitted that on balance, the English licence was instrumental in the development of the concept north of the border. English case law is referred to in support of the existence of the licence to occupy in the earliest Scottish cases. Although the argument that the licence existed in Scots law was rejected in these cases, it was these same arguments which were ultimately later accepted by the courts. Furthermore, the terminology of both “licence” and “exclusive possession” are used in the English lease/licence context, whereas previously the terms had little meaning in Scots law. Similarly, a focus on exclusive possession as distinguishing the lease from the licence to occupy in Scots law in the *UK Advertising Co v Glasgow Bag-Wash Laundry* case is akin to the way in which leases and licences are distinguished in English law. It cannot be a coincidence that the terminology used to describe the agreement and the hallmarks of the licence to

⁶³⁸ *Wilson v Tavener* [1901] 1 Ch 578.

⁶³⁹ *Provincial Bill Posting Co v Low Moor Iron Co* [1909] 2 KB 344.

⁶⁴⁰ *David Allen & Sons Billposting Ltd v Assessor for Clydebank* 1936 SC 318, 328.

⁶⁴¹ *Ibid.*

occupy as described in the founding case in Scots law are identical to that of English law.

6.5 Overall Conclusion on the Introduction of the Licence to Occupy in Scots Law

The term “licence” and agreements falling short of a lease have traditionally been recognised in Scots law. However, initially, the term licence did not refer to a contract or agreement which fell short of a lease, which remained nameless. This chapter demonstrated that the introduction of the licence to occupy as an alternative contract for the occupation of land occurred in the twentieth century. Because of the ratings cases, which concerned a UK-wide statute, parties in Scotland began arguing that it was possible to create an agreement akin to the English licence to occupy. Whilst initially rejected, the substance of the licence to occupy was judicially recognised in *Inland Revenue v Anderson* in 1922. The concept was given the name “licence” four years later in *UK Advertising Co v Glasgow Bag-Wash Laundry*. The terminology and substance of the contract at the moment of its introduction strongly suggest that the licence to occupy is a legal transplant from English law. Given that there was a UK-wide statute and a House of Lords case on the issue, it is unsurprising that Scots law aligned with English law on this issue. Having established the origins of the licence to occupy in Scots law, the following chapters consider the way in which the licence to occupy has developed in Scots law, and how it can be distinguished from the lease under the modern law.

Chapter 7: Distinguishing the Lease from the Licence to Occupy: Exclusive Possession

7.1 Overview

Chapter 6 explained that the emergence of the licence to occupy as a distinct category of occupation agreement was a recent development in Scots Law, beginning in the late nineteenth and early twentieth centuries. It has since become judicially accepted into Scots law.⁶⁴² The licence to occupy is also accepted by academic commentators.⁶⁴³ However, because of its relatively recent introduction, the parameters of the licence's application are not yet fully developed. Rennie sets out three main methods for distinguishing between the lease and the licence to occupy in Scots law.⁶⁴⁴ The first is the existence of "exclusive possession". The second method involves examining whether any cardinal elements of a lease are missing, and the third method involves assessing the intention of the parties.

Exclusive possession is the most oft-cited distinguishing feature of a lease as opposed to a licence to occupy and has generated significant judicial and academic commentary.⁶⁴⁵ As such, it merits a chapter of its own. The other two methods for distinguishing the lease from the licence are considered in the following chapter.

This chapter comprises three parts. First, the weight attached to the need for exclusive possession in a contract of lease is analysed. Although this is a matter that is often discussed in the case law,⁶⁴⁶ and was recently discussed in an article dedicated to the topic, there have been recent developments in this area

⁶⁴² *Conway v Glasgow City Council* 1999 Hous LR 20, per Sherriff Gordon at 6.29: "the law develops, and in my view the difference between a lease and a mere licence to occupy is now recognised."

⁶⁴³ For example, Paton and Cameron, 12.

⁶⁴⁴ Rennie, 2.15.

⁶⁴⁵ *Ibid.* See also, Paton and Cameron, 14; Richardson and Anderson, 2.52.

⁶⁴⁶ See, for example, discussions in *Cameron v Alexander* 2012 SLCR 50; *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7; *St Andrews Forest Lodges Ltd v Grieve* [2017] DUN 25.

necessitating a re-evaluation of the topic.⁶⁴⁷ Next, the precise meaning of exclusive possession is analysed. As far as the author can determine, there has been no attempt in Scots law to define exclusive possession or draw together any useful guidelines for determining when exclusive possession will be established. Finally, some problems with using exclusive possession as a method of distinguishing between a lease and a licence are considered, and it is suggested that it is not the most useful way to distinguish the two.

7.2. The Importance of Exclusive Possession

In Scots law, the phrase “exclusive possession” originated in the leading licence case in Scotland, *United Kingdom Advertising Co v Glasgow Bag-Wash Laundry*, where Lord Hunter explained that in the case:

“There is at the best a licence to exhibit advertisements in certain post-offices subject to certain conditions. That gives the licensees no exclusive right of possession of any part of the post-offices for any purpose whatever. It gives them merely a limited personal right.”⁶⁴⁸

Richardson and Anderson note, however, that there is some “controversy” surrounding the need for exclusive possession as a necessary element in a lease.⁶⁴⁹ This part analyses the current weight given to the factor when determining whether a contract is a lease or a licence.

It is unsurprising that possession has been drawn out as a distinguishing factor between a lease and a licence to occupy given that possession has always played an important role within the context of landlord and tenant law. The most obvious example of this is that it is a requirement which must be fulfilled before a tenant

⁶⁴⁷ M Skilling, “The Fifth Element: Should Exclusive Possession Be Considered an Essential Requirement for the Constitution of a Contract of Lease in Scots Law?” (2017) 7 ASLR 1.

⁶⁴⁸ *United Kingdom Advertising Co v Glasgow Bag-Wash Laundry* 1926 SC 303, 307.

⁶⁴⁹ Richardson and Anderson, 2.58.

obtains a real right under the Leases Act 1449. Nonetheless, with the introduction of the Registration of Leases (Scotland) Act 1857, the need for possession arguably became less important for this purpose.

Conversely, exclusive possession for all valid leases (i.e. including contractual leases and not only real leases) appears to have become more important since the *United Kingdom Advertising Co* case. Subsequent cases highlighted the phrase “exclusive possession” used in *United Kingdom Advertising Co* and emphasised its importance as the distinguishing feature between the two contracts. For instance, in *Commercial Components (Int) Ltd v Young*, Sheriff Principal Hay suggested that exclusive possession was a “badge” of a lease,⁶⁵⁰ a phrase repeated by future cases, such as *Conway v Glasgow City Council*.⁶⁵¹

Skilling, in a recent article concerning whether the exclusive possession should be regarded as the “fifth element” for the formation of a valid contract of lease, argues that the phrase “badge” of a lease in *Commercial Components* has been “stretched in its interpretation”.⁶⁵² He argues that the above cases do not go as far as to say that there was a requirement for exclusive possession to be proven for a lease to be established.⁶⁵³ Instead, they illustrated that exclusive possession was something which generally was lacking from licence contracts and if exclusive possession could be shown, it is an “obvious outward sign” that the contract is a lease.⁶⁵⁴

This scepticism as to the role of exclusive possession as a necessary feature of a lease is also evident from cases such as *Cameron v Alexander*:

“Where the court is trying to determine the proper nature of some innominate arrangement, the right to ‘exclusive possession’ may be an important pointer to a lease. That is not to say that exclusive possession is a necessary feature

⁶⁵⁰ *Commercial Components (Int) Ltd v Young* 1993 SLT (Sh Ct) 15, 17.

⁶⁵¹ *Conway v Glasgow City Council* 1999 Hous LR 20, 26.

⁶⁵² Skilling, “The Fifth Element”, 13.

⁶⁵³ *Ibid*, 10, 13.

⁶⁵⁴ *Ibid*, 13.

of a lease... the four common law cardinal features of a lease have been authoritatively described as being the parties, the subjects, the rent and the ish. We have found little persuasive authority to justify a further cardinal feature...”⁶⁵⁵

Nonetheless, the position appears to have changed. In the recent case of *St Andrews Forest Lodges Ltd v Grieve*, the court elevated the status of exclusive possession to a cardinal element:

“The position today is therefore that the grant of exclusive possession to the occupier has been recognised as the ‘fifth cardinal element’ of a lease in Scots law, and as an important feature which can assist in distinguishing a lease from a licence.”⁶⁵⁶

The court based this finding on cases such as *Chaplin v Assessors for Perth*, where the court described exclusive possession as “one of the tests of a proper lease”.⁶⁵⁷ The court also cited Gloag and Henderson in which a lease is defined as a contract where “an owner or occupier of land grants exclusive possession of it to a tenant in return for rent”.⁶⁵⁸ Furthermore, the court emphasised the English case of *Street v Mountford*, which explicitly creates exclusive possession as a requirement for a lease under English law.⁶⁵⁹ This is despite the fact that prior to *St Andrews Forest Lodges Ltd v Grieve*, English cases on the matter had been expressly noted as “of no assistance” due to the different nature of a lease north and south of the border - a lease in Scotland being much wider than that in England.⁶⁶⁰

As Skilling notes, the decision in *St Andrews Forest Lodges Ltd v Grieve* is significant and means that exclusive possession is now more important than ever

⁶⁵⁵ *Cameron v Alexander* 2012 SLCR 50. See also comments by M Dailly, “Lease or licence in Scots law” SCOLAG Journal, August 1996, 126.

⁶⁵⁶ *St Andrews Forest Lodges Ltd v Grieve* [2017] DUN 25, 29.

⁶⁵⁷ *Chaplin v Assessor for Perth* 1947 SC 373, 378.

⁶⁵⁸ Gloag and Henderson, *Law of Scotland* (13th edn, 2012), 35.02. The same definition is included in the most recent edition: Gloag and Henderson, *Law of Scotland* (14th edn, 2017), 35.02.

⁶⁵⁹ *Street v Mountford* [1985] UKHL 4.

⁶⁶⁰ *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12, 7.

before in distinguishing a lease from a licence to occupy.⁶⁶¹ As such, the position is currently unclear: given the reluctance of previous cases to go as far as the court in *St Andrews Forest Lodges Ltd v Grieve*, coupled with the fact that it is only a sheriff court decision, a more authoritative decision is awaited to confirm whether its position is correct.

7.3. The Meaning of Exclusive Possession

As exclusive possession appears increasingly important in determining whether an agreement is a lease, it is important that the term has a clear meaning. Nonetheless, at present, no clear definition of the term “exclusive possession” exists. Instead, its meaning must be inferred from various cases. Unfortunately, these cases are unhelpful in that they are the result of unusual factual circumstances. They do not define exclusive possession, but instead provide examples of what does, or does not, amount to exclusive possession based on the facts of the specific case at hand. It is difficult to extract any generally applicable guidelines for determining whether or not there is exclusive possession in any case.

Similarly, commentators discussing exclusive possession shy away from defining the term. Skilling, for instance, notes that the term “[requires] clarification”, but does not attempt to clarify the term himself.⁶⁶² Likewise, despite Rennie regarding the role of exclusive possession as “crucial” in determining if an agreement is a lease or a licence to occupy, he offers no explanation of the term.⁶⁶³ Instead, he discusses two cases which illustrate the principle, before concluding that the distinction between the two cases, and so what exactly is meant by exclusive possession, “is not abundantly clear.”⁶⁶⁴

⁶⁶¹ M Skilling, “St Andrew’s Forest Lodges Ltd v Grieve: the lease’s Fifth Element in action” (2018) 2 JR 122, 126.

⁶⁶² Skilling, “The Fifth Element”, 9.

⁶⁶³ Rennie, 2.14.

⁶⁶⁴ *Ibid.*

Other areas of law which have considered the meaning of “exclusivity” in licences, such as intellectual property, are also unhelpful for determining the meaning of exclusive possession in licences to occupy in Scots law. In intellectual property, whether a licence is exclusive or not is absolute.⁶⁶⁵ In an exclusive licence, the owner of the intellectual property is completely excluded from using the property.⁶⁶⁶ In occupation agreements, even if the occupier has “exclusive possession” the owner (landlord) will always require some rights to enter and use the property for certain purposes, such as to repair the property. Conversely, in non-exclusive intellectual property licences, the intellectual property will be able to be reproduced multiple times and can practically be used by multiple people at once. In occupation agreements, however, there is one property. Multiple persons using the same property may be practically difficult.⁶⁶⁷

From an analysis of the cases, it appears that the role of exclusive possession in the context of leases and licences to occupy centres around what is excluded in the lease or reserved to the landlord, and the discussion below proceeds on that analysis.

7.3.1 Exclusive Possession – Part of the Agreement or a Subsequent Fact?

Before exploring what is meant by the term exclusive possession, there is a preliminary question requiring consideration, namely, at what point exclusive possession is relevant. There are two possibilities. The first is that exclusive possession is something which must be agreed in the contract, and so whether or not exclusive possession exists is something that can be determined only by reference to the contract. On the other hand, exclusive possession may be regarded

⁶⁶⁵ See generally D Spiers, *Intellectual Property Law* (2009), 23ff.

⁶⁶⁶ “Exclusive” licences are sometimes contrasted with “sole” licences. The latter allows both the licensor and licensee to use the intellectual property, but no others: R Furneaux and R Kaye, Practical Law, “Intellectual Property Transactions in UK (England and Wales: Overview)” (1 March 2021).

⁶⁶⁷ This issue is discussed in more detail in Chapter 11.

as a fact which follows after the contract has been concluded— for instance, regardless of what is provided for in the contract, there is a lease only if exclusive possession is actually taken by the tenant.

Generally, the courts place emphasis on the first of these two interpretations. For example, in *Brador Properties Ltd v British Telecom Plc*, once the provisions of the agreement were considered as a whole, the court found that exclusive possession had been granted.⁶⁶⁸ They did not consider what was occurring in reality. Likewise, in cases such as *Devon Angling Association v Scottish Water*,⁶⁶⁹ and *South Lanarkshire Council v Taylor*,⁶⁷⁰ whether or not exclusive possession has been granted was determined solely by the provisions of the agreement in question.

There is an argument, however, that the latter view is at least a possible interpretation. Skilling, for example, takes both interpretations as equally valid in his article on the topic.⁶⁷¹ Furthermore, in *Brador Properties Ltd v British Telecom Plc*, the court noted that should the terms of the contract have been ambiguous, it would have been open to the court to consider the way that the contract worked in practice.⁶⁷² This is interesting given that there is a presumption in favour of exclusive possession if the agreement is silent, and one would argue that the law should point in the same way in cases of ambiguities.⁶⁷³ The judges in *Brador* do, however, seem to have been heavily influenced by the fact the agreement was clearly a sham. Thus, it is perhaps not so useful as an indicator of a general principle.

Some commentators, however, have gone further.⁶⁷⁴ For example, Blair suggests that two parties both being granted the use of the same subjects would not have exclusive possession for the purposes of creating a lease, because as a matter of

⁶⁶⁸ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12, 8.

⁶⁶⁹ *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7.

⁶⁷⁰ *South Lanarkshire Council v Taylor* [2005] CSIH 6.

⁶⁷¹ Skilling, “The Fifth Element”, 9.

⁶⁷² *Brador Properties Ltd v British Telecom Plc* 1992 SC 12, 9.

⁶⁷³ E.g. Richardson and Anderson, 3.10.

⁶⁷⁴ *Cameron v Alexander* 2012 SLCR 50, 53.

fact, neither party could have exclusive possession.⁶⁷⁵ It seems that this is regardless of what the contract stated, i.e. even if the contract was silent and so benefitted from any presumption that exclusive possession was granted. A similar argument was made in the Editor's Note on *Conway v Glasgow City Council*, where it was stated that exclusive possession as a requirement of a lease was useful, because "otherwise a landlord could in fact let out the same subjects to more than one person and the tenant would have no recourse."⁶⁷⁶ These arguments are flawed. Under general contractual principles, multiple contracts can be formed over the same subject-matter. For instance, an object can be sold twice – the fact the second buyer cannot have their contract fulfilled does not prevent there being the formation of a valid contract in each case. Indeed, the second buyer can sue upon that contract for damages for non-performance. Likewise, in a lease, a landlord could let the same subjects to two people. Had the agreement been silent on the issue of exclusive possession, both would impliedly be entitled to it. If both parties took up possession, meaning that neither's possession was exclusive, both would be entitled to sue for breach of the implied term – the fact that neither had exclusive possession would not prevent a finding that a lease existed in the first place.

Furthermore, if exclusive possession is to be determined by subsequent facts, then it poses problems of circularity. For example, the right to exclusive possession and the obligation to give such possession are implied in any lease.⁶⁷⁷ However, if exclusive possession is necessary for the creation of a lease and is determined as a matter of fact, then a tenant would be unable to sue under their right to be placed into exclusive possession under a lease. This is because they would not have a valid lease until they had been given such exclusive possession. Such a scenario would also contradict the general rules of contractual formation, where a contract is formed when there is *consensus in idem* between the parties. Additionally, it would mean that there was no longer a distinction between real leases for a year where

⁶⁷⁵ M Blair, 'Ancillary Rights as Real Rights' (2015) 60(10) JLSS 32.

⁶⁷⁶ *Conway v Glasgow City Council* 1999 Hous LR 20, 6.66.

⁶⁷⁷ E.g. Rankine, Chapter X.

possession perfects the contract, and a contract of lease, requiring only agreement on the cardinal elements, as both would have the same requirements. This would in practice prevent a real right of lease under the 1449 Act from being formed, as a real lease must be founded upon a contract of lease. However, if no *contract* was formed until possession was taken, possession *for the purposes* of the Act would not arise as it could not be founded on a pre-existing contract of lease. Both would purportedly arise at the same time.

Therefore, for coherence of the law, exclusive possession should be understood to be determined by interpretation of the contract alone, as opposed to what happens as a matter of fact after the contract has been concluded.

7.3.2 Reservations which are Not Fatal to the Existence of a Lease.

Having established that exclusive possession is to be determined by considering the terms of the agreement, the precise meaning of exclusive possession can now be addressed. Several exclusions or reservations do not appear to prevent the courts finding that there is exclusive possession by the tenant, and thus a lease created.

7.3.2.1 Reservations Delineating the Subject of the Lease

If parts of the subjects are reserved to the landlord, it was highlighted in *Cameron v Alexander* that this did not prevent there being exclusive possession.⁶⁷⁸ If a part of the subjects is specifically not included in the grant of a lease, it is instead a way of explaining which subjects *have* been granted under the lease. As noted in *Cameron*, “The effect of the reservation of [specific physical parts of the property] is that these parts are simply not part of the leased subject.”⁶⁷⁹ These reservations “are not strictly

⁶⁷⁸ *Cameron v Alexander* 2012 SLCR 50, 51, 54.

⁶⁷⁹ *Ibid*, 51.

a reservation, but merely a convenient way to define the subjects".⁶⁸⁰ As such, they do not prevent a lease being held to exist, provided that the subjects which have been granted are exclusively possessed.⁶⁸¹

7.3.2.2 Reservations Permitting the Landlord to Fulfil their Obligations

As landlords have several obligations under a lease requiring entry to the property, such as to repair or maintain the property,⁶⁸² it would be illogical for such reservations to the landlord to prevent a finding of a lease.⁶⁸³ As such, any specific rights to enter the property for these purposes which are explicitly mentioned in the contract are not relevant reservations, and instead are reiterations of the implied rights in any lease.

Nonetheless, there are similar examples of clauses which are not simply restatements of implied rights but are still tolerated in leases. For example, in full repairing and insuring (FRI) commercial leases, where the tenant is in breach of his obligation to ensure the property is kept in good repair, the landlord may wish to carry out the works himself and recoup the cost from the tenant. However, the right to enter the property to conduct these works is not implied. As such, if this right is not explicitly mentioned in the lease, then it would interfere with the tenant's right to (exclusive) possession if the landlord entered the property.⁶⁸⁴ What this means is that normal FRI leases will include a clause allowing the landlord to enter the property for this purpose. This is important because it means that the lease includes a clause which must adversely affect the tenant's right to exclusive possession (as if it is not included, then the landlord's access would be a breach of the tenant's right to that exclusive possession). Yet, these leases are still treated as leases and not as

⁶⁸⁰ *Ibid*, 54.

⁶⁸¹ *Ibid*.

⁶⁸² E.g. Rankine, Chapter XI.

⁶⁸³ Rennie, 7.15.

⁶⁸⁴ *Possfund Custodian Tr Ltd v Kwik-Fit Properties Ltd* [2008] CSIH 65.

licences to occupy. Thus, such terms must not be fatal to the findings of exclusive possession and that the agreement is a lease. Of course, such terms are necessary to allow the landlord to remedy a tenant's breach of a lease, and so it is logical that they are permitted. However, their permissibility raises further questions as to precisely which erosions of exclusive possession are permitted.

7.3.2.3 Reservations Permitting the Landlord to Enter Premises at Will

Although Rennie suggests that a lease which specifies that the landlord can take access to a property "at will" will preclude a finding of exclusive possession, case law demonstrates that simply taking access does not prevent a finding of exclusive possession.⁶⁸⁵ For instance, in the case of *Bradford Properties Ltd v British Telecom Plc*, the agreement specifically permitted the landlord to enter the premises at any time for any reason. Nonetheless, the court held that where a landlord reserves the right to enter the property at any time at his own discretion, this term is not inconsistent with a finding of exclusive possession.⁶⁸⁶ Any right to enter should be distinguished from the right to enter *and use* the property, which is more problematic for the finding of exclusive possession and is discussed in more detail below.⁶⁸⁷

7.3.3 Reservations which May Exclude a Finding of Exclusive Possession.

Having considered instances which do not prevent a finding of exclusive possession, this part considers the reservations which may result in there not being exclusive possession such that the agreement in question is not a lease. There is no single category of reservation which conclusively prevents a finding of exclusive possession. Instead, whether a reservation is permitted depends on its extent.

⁶⁸⁵ Rennie, 2.15.

⁶⁸⁶ *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12, 9.

⁶⁸⁷ *Ibid.*

Broadly, these can be split into two categories – reservations of use, and the provision of services.

7.3.3.1 Reservations of Use

A reservation of use is when the landlord states that they are entitled to share the use of the property with the tenant to a greater or lesser extent. As noted above, a reservation of use is distinguishable from a reservation of the right simply to enter the property. A reservation of use is a relevant indicator of exclusive possession, because if the landlord is entitled to use the property with the tenant, the tenant cannot exclude the landlord, and so the parties can be said to occupy the property jointly.

Although often these reservations concern rights reserved to the landlord, the reservation may instead be in favour of some other individual.⁶⁸⁸ Skilling noted that the term specifically refers to exclusive possession vis-à-vis the landlord.⁶⁸⁹ This position was also argued by the pursuer in *Denovan v Blue Triangle (Glasgow) Housing Association*, who claimed that the landlord had limited his own right to enter the property by only permitting certain third parties to enter the property. Thus, exclusive possession could be found because the *landlord* had no right to enter and use the subjects.⁶⁹⁰ Skilling notes that this reasoning explains, “why multiple tenants under the same lease agreement can still be regarded as exclusive possessors of the leased property”.⁶⁹¹

It is submitted that this analysis is incorrect. The reason that co-tenants have exclusive possession is that they are all party to a single tenancy agreement, rather than the fact that the exclusion only applies to landlords. It would be illogical for there

⁶⁸⁸ E.g. *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7.

⁶⁸⁹ Skilling, “The Fifth Element”, 2.

⁶⁹⁰ *Denovan v Blue Triangle (Glasgow) Housing Association* 1999 Hous LR 97, 17.58-17.60.

⁶⁹¹ Skilling, “The Fifth Element”, 2. See also, Rennie, 2.15.

to be a finding of exclusive possession when the landlord had not reserved rights in favour of himself but had done so in respect of someone else. For example, consider a tenant who had a lease for a property which included a reservation that someone else could be permitted to share the accommodation with them should the landlord enter into an arrangement with someone else. It would be fanciful to suggest that either tenant had exclusive possession, notwithstanding the reservation is in favour of someone other than the landlord. This analysis is supported by case law. For example, in *South Lanarkshire Council v Taylor*, it was emphasised that exclusive possession constituted the power to exclude all other persons, including, but not limited to, the landlord.⁶⁹²

Not all reservations of use are fatal to a finding of exclusive possession. Often, if the reservation relates to a use which is different from that which has been granted under the lease, then there is no issue with a finding of exclusive possession. That would explain, for example, why an agricultural lease, a sporting lease, and a mineral lease could all be granted over the same piece of land, or why a landlord could grant a sporting lease and reserve the right to use the land for agricultural purposes himself. As noted in *Cameron v Alexander*:

“Perhaps the most obvious example of the sharing of rights to use the subjects is the reservation of sporting rights in an agricultural lease. ... The exercise of sporting rights may occasionally involve considerable disruption of agricultural activity. ... However, there has never been any question of an agricultural lease losing its status because the landlord has reserved such rights.”⁶⁹³

This reasoning has also been used to explain cases such as *South Lanarkshire Council v Taylor*, where the tenant of grazing was required to remove from the property at short notice to allow the landlord to use the space for events.⁶⁹⁴ In that

⁶⁹² *South Lanarkshire Council v Taylor* [2005] CSIH 6, 5.

⁶⁹³ *Cameron v Alexander* 2012 SLCR 50, 56.

⁶⁹⁴ See *ibid.*

case, the court noted that the purpose for which the landlord reserved the use of the land (for events) was “different from the purpose of [the tenant’s] occupation,” (for grazing).⁶⁹⁵ The court held that there was nonetheless a lease in that case. In *Cameron v Alexander*, it was argued that the reason such a large reservation had been permitted was because the nature of the reservation was different from the use given under the lease. Thus, because the reservation in *Cameron* was for the same use (agriculture), the case should be distinguished. The court was not persuaded by this argument, noting that “there is nothing to suggest that the distinction [between the use granted and the use reserved] played any part in the court’s reasoning.”⁶⁹⁶ This suggests that even reservations for different uses may prevent a finding of exclusive possession if severe enough, which is further discussed below.

In any event, even where there is a reservation of the same shared use, this does not automatically result in a finding of no exclusive possession. For example, in *Conway v City of Glasgow Council*, the pursuer, who rented a hostel room, had the right to use shared facilities.⁶⁹⁷ Obviously, there can be no exclusive possession of a shared facility. Although the court held that the pursuer did not have a lease on the facts of the case, it explicitly noted that the right to use shared facilities did not prevent there being a lease.⁶⁹⁸ The court in *Cameron v Alexander* gives further examples, such as the right to use outside washing and toilet facilities in tenement flats before it was common to have such amenities privately within each flat.⁶⁹⁹ In some instances, these facilities would be shared also with the landlord, but nonetheless, there could be a valid lease in such a scenario.⁷⁰⁰ It should be noted, however, that the use of shared facilities generally implied that there is some part of the property which is exclusively possessed by the tenant – for instance, the flat inside the tenement building in the aforementioned example.

⁶⁹⁵ *South Lanarkshire Council v Taylor* [2005] CSIH 6, 6.

⁶⁹⁶ *Cameron v Alexander* 2012 SLCR 50, 56.

⁶⁹⁷ *Conway v Glasgow City Council* 1999 Hous LR 20.

⁶⁹⁸ *Ibid*, 31.

⁶⁹⁹ *Cameron v Alexander* 2012 SLCR 50, 59.

⁷⁰⁰ *Ibid*.

Therefore, it can be concluded that a reservation of the same use is more likely to pose a problem for establishing exclusive possession. This is particularly so if the reservation is for the use of the whole property. Nonetheless, a reservation for a purpose different from the original grant may nonetheless be of such a magnitude as to prevent a finding of exclusive possession.

What is of more importance, then, is how severe the reservation of use must be to prevent a finding of exclusive possession. Whether the reservation does prevent such a finding is a “matter of degree”.⁷⁰¹ In *Cameron v Alexander*, the respondents argued that the relevant matter of degree was a *de minimis* exception.⁷⁰² Anything more than that would prevent a finding of exclusive possession, and so prevent the finding of a lease. This is arguably a very strict test for exclusive possession, meaning that only the smallest of reservations can be reserved if an agreement is to be held a lease. The respondent in *Cameron* was relying on statements in *South Lanarkshire Council v Taylor* that

“a limited reservation in favour of the landlord or a limitation in the nature of the use to which the occupier would not necessarily be inconsistent with the existence between them of the relationship of landlord and tenant.”⁷⁰³

However, a limited reservation is not necessarily the same as a *de minimis* reservation, and indeed the court in *Cameron* held that the test was not one of whether the reservation was *de minimis*.⁷⁰⁴ The court noted that the case which the respondent was relying on, *South Lanarkshire Council*, dealt with an “interference which could hardly be described as *de minimis*”.⁷⁰⁵ In that case, the tenant was required to vacate her premises on twenty-four hours’ notice to allow the landlord temporary use of the premises. The court held the arrangement nonetheless conferred exclusive possession on the tenant and amounted to a valid lease. As the

⁷⁰¹ *South Lanarkshire Council v Taylor* [2005] CSIH 6, 7; *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7, 22.

⁷⁰² *Cameron v Alexander* 2012 SLCR 50, 3, 52.

⁷⁰³ *South Lanarkshire Council v Taylor* [2005] CSIH 6, 7.

⁷⁰⁴ *Cameron v Alexander* 2012 SLCR 50, 57, 59, 65.

⁷⁰⁵ *Ibid*, 57.

tenant was completely prevented from using the premises for the periods where it was used by the landlords, the reservation was clearly significant.

Instead of a *de minimis* test, the court in *Cameron v Alexander* stated, perhaps unhelpfully, that the test is whether or not the reservation “in any substantive sense derogate[s] from the grant”. This is arguably a less restrictive test than one which is *de minimis*, allowing much more to be reserved, so long as it does not strike at the core of the rights of use given to the tenant. It is a test supported by case law.⁷⁰⁶

When a reservation would be deemed to be a substantive derogation from the grant is not entirely clear. What is evident from the case law, however, is that there can be a significant reservation in favour of the landlord, whilst the requirement of exclusive possession is still fulfilled. One such example is *South Lanarkshire Council*, discussed above. *Cameron v Alexander* itself is another example. It concerned an agricultural lease and the fact that the landlord had reserved the right to use the property for accommodating “two or three cows” and the right to use a stall in the stable, did not prevent the arrangement constituting a lease.⁷⁰⁷ Likewise, in the recent *Devon Angling Association v Scottish Water* case, the fact that the landlord had reserved his own right to fish, and the ability to permit others to fish, did not prevent the court finding that there was exclusive possession such that a valid lease was created. It is difficult to argue that there is exclusive possession at all in such a case: the landlord has not given any exclusive right to fish – it is entirely shared with others.

Therefore, where precisely the line is drawn as to whether or not there is exclusive possession is unclear. General principles are difficult to extract because case law is heavily reliant on the specific facts of the case. Nonetheless, it seems that even large reservations are not fatal to such a finding.

⁷⁰⁶ E.g. *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7, discussed below.

⁷⁰⁷ *Cameron v Alexander* 2012 SLCR 50, 29.

7.3.3.2 Services

The second situation which often prevents the finding of a grant of exclusive possession is the provision of services in addition to use of the subjects.⁷⁰⁸ The distinction is best illustrated by examining two cases concerning whether or not there was a lease of a garage.

In the first, *Broomhill Motor Co v Assessor for Glasgow*, individual garages were provided to car owners in exchange for payment.⁷⁰⁹ The payment covered not only rent as payment for using the garage to store their cars, but also the right to assistance and motor advice from the garage owners. The landlords retained keys to enter the property to inspect it and clean. The court held that such an arrangement did not create a lease, because the landlords never parted with their own occupation of the garages.⁷¹⁰

In the second case, *Chaplin v Assessors for Perth*, garages owned by someone who had no knowledge of the motoring industry were provided to car owners in exchange for a payment.⁷¹¹ In this arrangement, no services were provided, and it was this crucial factor that provided the basis for the court to depart from the earlier authorities such as *Broomhill*.⁷¹² In *Chaplin*, the arrangement was held to qualify as a lease.

Broomhill Motor Co and *Chaplin* are part of a series of valuations cases and their usefulness for determining generally applicable rules concerning the difference between a lease and a licence to occupy has been questioned.⁷¹³ In *Bradford*, Lord Justice Clerk Ross explained:

⁷⁰⁸ Paton and Cameron, 14.

⁷⁰⁹ *Broomhill Motor Co v Assessor for Glasgow* 1927 SC 447.

⁷¹⁰ *Ibid*, 454.

⁷¹¹ *Chaplin v Assessors for Perth* 1947 SC 373.

⁷¹² *Ibid*, 377.

⁷¹³ *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12, 9.

“I do not find these [valuation cases] of great assistance because I agree with counsel for the claimants that they were all concerned with a different question, namely what was the proper unit of valuation, and because when consideration was given to the services provided, that was done not in order to decide whether there was a lease but in order to determine whether there was a *unum quid*.”⁷¹⁴

Indeed, it is arguable whether the discussions in the above cases regarding services truly concern if an agreement lacks exclusive possession. Although Rennie discusses both *Broomhill* and *Chaplin* under the heading “Licences – the issue of exclusive possession”⁷¹⁵ (and indeed only these two cases), suggesting they are indeed linked to the issue of exclusive possession, at no point does the court in *Broomhill* mention exclusive possession.⁷¹⁶ Although there is discussion in *Broomhill* of whether or not the landlord had given up control of the garages to the tenants, and it was an important finding that they had not given up control, the fact that a service was provided was not the crucial factor in determining such control had not been passed to the tenants.⁷¹⁷ Instead, the location of the garages within a building of which the garage owner retained full control and the fact the landlord retained keys to each garage were the important factors in the decision. The services provided are therefore unsatisfactory as a determining factor between the two cases. On the other hand, although the *Chaplin* judgment explicitly discusses the issue of exclusive possession, the judges treat the provision of services and exclusive possession as two distinct matters.⁷¹⁸

Indeed, using the provision of services to determine whether or not there is exclusive possession seems artificial. These are distinct issues that need to be discussed separately. An example may help to illustrate this point. If a tenant hired a cleaner to

⁷¹⁴ *Ibid.*

⁷¹⁵ Rennie, 2.12.

⁷¹⁶ See also, Skilling, “The Fifth Element”, 9.

⁷¹⁷ *Broomhill Motor Co v Assessor for Glasgow* 1927 SC 447, 454.

⁷¹⁸ *Chaplin v Assessors for Perth* 1947 SC 373, 378 (see also Lord Keith, 378, and Lord Jamieson 379).

clean their property, the fact that the cleaner came to the property would not prevent the tenant from having exclusive possession of the property. The cleaner would enter the premises only with the permission of the tenant, and the tenant would be able to refuse the cleaner entry should they wish. If the cleaner happened to be the landlord, why should exclusive possession not be found to exist? The landlord still enters the property with the agreement of the tenant for a specific purpose, and the tenant is entitled to refuse the services. Likewise, in the *Broomhill* case, the “tenant” only accessed the services of motor advice from the “landlord” when they wished for the service to be provided. The issue of whether there was exclusive possession is a separate concern. Had the garages not been located within the workplace of the “landlord”, preventing a finding of exclusive possession, the result may have been different, notwithstanding the provision of services.

Nonetheless, the provision of services may be a useful indicator of whether there is a lease or a licence to occupy. An argument could be made that if the landlord provides services alongside the grant of right to occupy subjects, then some of the requirements of a lease are not fulfilled. For example, it may be possible to argue that rent is not sufficiently established, as it is unclear which proportion of the “rent” is for use of the subjects, and which proportion is for the provision of services. But such a concern relates to whether or not the cardinal elements of a lease are sufficiently identified, not with whether there is exclusive possession.

Identifying whether services are provided in addition to the use of a piece of land may also provide a useful method of distinguishing a lease from a licence. For example, it provides a simple explanation of the reason why a guest in a hotel does not have a lease – services, such as cleaning, or the provision of room service, are also provided. A better approach, it is suggested, would be to discuss the provision of services as a separate indicator of there being a lease or a licence, rather than artificially being considered as demonstrating a lack of exclusive possession. This approach is evident in some English cases. For example, in *Uratemp Ventures v Collins*, the court held that the long-term occupier of a hotel room had exclusive

occupation, and thus a lease, notwithstanding the provision of services.⁷¹⁹ This suggests that the two are distinct questions (and indeed the question of exclusive possession has more weight attached to it).

The most striking absurdity, however, with using the provision of services as a distinguishing factor between the lease and the licence, is that the vast majority of commercial leases encompass the provision of services. A service charge is paid by the tenant, reimbursing the landlord for the services provided such as repairs to common parts, heating and lighting, and fire alarms and security systems.⁷²⁰ So common is the provision of services and the related service charge that there has been a recent book dedicated to the topic⁷²¹ and a code of practice regulating its use.⁷²² Nonetheless, these leases are still enforceable as leases, and not licences to occupy.

Two potential conclusions can be drawn from this discussion. First, the provisions of services cannot be fatal to the creation of all leases. That raises the question of in which leases services are permissible. It could be argued that the provision of services is only permissible in commercial leases. However, the *Broomhill* case was commercial in nature and the provision of services appeared fatal to the conclusion that there was a lease. Conversely, the provision of services has not prevented the finding of a lease in certain more residential scenarios.⁷²³ Nonetheless, a distinction on permissibility of the provision of services depending on the type of lease does not seem easily drawn. In any event, such a distinction should be avoided to prevent making a difficult area yet more complex: a unified rule should be sought if possible.

⁷¹⁹ *Uratemp Ventures Ltd v Collins* [2001] UKHL 43.

⁷²⁰ D Garrity and L Richardson, *Dilapidations and Service Charge* (2019), 86.

⁷²¹ *Ibid.*

⁷²² *Royal Institute of Chartered Surveyors Professional Statement on Service Charges in Commercial Property* (2018), commencing 1 April 2019 and replacing the previous *RICS Code of Practice in relation to Service Charges in Commercial Practice* (3rd edn 2014).

⁷²³ *Uratemp Ventures Ltd v Collins* [2001] UKHL 43. Note that although this is an English case, it is thought to apply to Scottish leases too: Rennie, 2.16. Note also that arguably, this was a special case where the court sought to find a lease for policy reasons.

The second conclusion is that perhaps not all *types* of service provision are fatal to a finding of a lease. Again, the difficulty lies in discovering which services would be permissible, as this is not a distinction that has been considered by the Scottish courts.⁷²⁴

7.3.3.3 Conclusion on the Meaning of Exclusive Possession

In summary, exclusive possession remains undefined and there is no single conclusive way of determining whether or not exclusive possession exists in each case. Indeed, it does not appear that possession is really what the courts are examining when they consider whether or not there is exclusive possession. What the cases appear to turn on is the extent of a reservation of use in favour of the landlord or if services are provided. Therefore, perhaps exclusive possession would be better defined as two distinct elements, “a lack of reservation by the landlord of a use of the subjects of such a magnitude that it undermines the grant”, and “a lack of provision of services by the landlord”.

7.4 Problems with Exclusive Possession as a Method of Distinguishing a Lease from a Licence

Having attempted to define the term exclusive possession, the following section highlights some problems with its use as a method of distinguishing between the lease and the licence to occupy.

⁷²⁴ In English law, some cases suggest a relevant “type” of service is one which requires the landlord to be given unrestricted access to the services: see, *Street v Mountford* [1985] 1 AC 809, 818; and *Crancour v De Silva* (1987) 18 HLR 47.

7.4.1 Misleading Terminology

One problem of using exclusive possession as the method of distinguishing between a lease and a licence is that it is inherently misleading. There is no need for exclusivity in leases, nor does the term possession adequately describe what is being assessed.

7.4.1.1 “Exclusive”

As explained above, the term exclusive possession is actually concerned with the *extent* to which the landlord has retained some right of use. As the court noted in *Devon Angling Association v Scottish Water*, “if ... a landlord may reserve certain rights, it is difficult to see how such a right would ever be consistent with a requirement of exclusive possession”.⁷²⁵ The courts therefore are not concerned with *exclusive* possession, but rather with *sufficient* possession.

A more fundamental problem with any possession under the lease needing to be “exclusive” is that, as Carr has argued, possession is inherently exclusive.⁷²⁶ Possession has a physical and a mental aspect, and, as he explains:

“In the *corpus* aspect it is vital that the physical holding is to the exclusion of physical holding by others. As regards *animus*, the intention to possess whether it be *domini* or *sibi habendi* always carries a concomitant intent to exclude others.”⁷²⁷

Thus, to speak of “exclusive” possession as opposed to possession alone does not make any practical difference to any understanding of the term “possession”. If a tenant possesses the property, then he does so exclusively. If he does not “possess”

⁷²⁵ *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7, 21.

⁷²⁶ D Carr, “Possession in Scots Law: Selected Themes”, (unpublished MSc Thesis, University of Edinburgh, 2005) 45.

⁷²⁷ *Ibid*, 46.

exclusively, then he does not truly possess at all. As a consequence, “sufficient possession”, which seems to be the most accurate reflection of the current law regarding leases, is illogical.

7.4.1.2 “Possession”

The term “possession” is also problematic. In Scots law, not all leases are for the occupation of heritable property. In a typical lease for the occupation of land, what is being possessed is the land itself. However, the land itself is not the only subject of a lease in Scots law. The right to draw minerals, or to fish are also valid subjects of a lease.⁷²⁸

There are difficulties surrounding the possession of an incorporeal moveable – in this case, the *right to use* the property for a specific purpose. The current position in Scots law is that only tangibles can be possessed and so incorporeal moveables are not capable of being possessed.⁷²⁹ This leaves a group of leases which are valid under Scots law, but where “exclusive possession” is impossible. This means that exclusive possession cannot be a test for all types of lease. Skilling suggests that this may not be problematic, noting that McAllister suggests that the leases for specific uses are “special cases” not requiring exclusive possession.⁷³⁰ Nonetheless, the vast majority of leases (which are not special cases) would need to fulfil the requirement. However, this view is unconvincing given recent cases such as *Devon Angling* which concerned a lease to fish. In that case, the agreement was held to be a lease because there was sufficiently exclusive possession. This demonstrates that

⁷²⁸ Paton and Cameron, 73-84.

⁷²⁹ See generally, E Descheemaeker, “The Consequences of Possession” in E Descheemaeker (ed), *The Consequences of Possession* (2014) 27ff. On Scots law specifically, see: Craig, *Jus Feudale*, 2.7.3; Stair, Inst 2.7.3; K Reid, *Property Law in Scotland*, para 120; D Cusine and R Paisley, *Servitudes and Rights of Way* (1998) para 1.70; D Carey Miller, M Combe, A Steven, and S Wortley, “National report on the transfer of movables in Scotland”, in W Faber and B Lurger (eds), *National Reports on the Transfer of Movables in Europe, Volume 2: England and Wales, Ireland, Scotland, Cyprus* (2009), para 2.1.3(c). Compare D Carr, *Possession in Scots Law: Selected Themes*, 60.

⁷³⁰ McAllister, *The Scottish Law of Leases*, 54; see also Richardson and Anderson, 59.

these so-called “special cases” leases are being determined by reference to exclusive possession and so any such definition should account for these leases too.

Another potential workaround for the need for exclusive possession in leases such as fishing is if they are framed as a lease *of land* for a specific use. The requirement of exclusive possession could then be fulfilled, as the tenant could exclusively possess the *land*. Indeed, leases for a particular use or activity are more dubious in their creation of a real right.⁷³¹ It has been held that contracts for certain uses are incapable of amounting to a lease conferring a real right on the tenant.⁷³² In these cases, the better approach is to create a lease of the *land* itself, with the caveat that it is for a specific use, such as to draw minerals or to fish. Such a lease would be capable of conferring a real right. As Skilling notes, in the case of *Farquharson*, for example, it was important that in a lease for the purposes of shooting on an estate there was the intention that the tenant had exclusive possession of the *land*.⁷³³

Nonetheless, such an interpretation does not fit with the decided cases. For example, if a lease of the right to use a piece of land is perfected by having exclusive possession of the land, but only for a specific purpose, then only one lease could validly be created over the land. As demonstrated above, that is not the case in practice. Multiple valid leases such as to shoot, to farm and to draw minerals, can be created over the same piece of land, provided they are for different purposes.

The position must therefore be that there must be exclusive possession of each *use* of the property granted under a lease, rather than of the property itself. So, should more than one lease be granted for the same use, it could be argued that there would not be exclusive possession. The possession of each use of the property is

⁷³¹ Although this section is not concerned with the distinction between a real lease and contract of lease, it should be noted that the majority of cases are concerned with whether the tenant has a real right of lease, or a licence to occupy, and so the ability of the contract to create a real right is important.

⁷³² *Pollock, Gilmour & Co v Harvey* (1828) 6 S 913. See also the discussion in Chapter 3 and 4, noting some such contracts have, however, are capable of being made real as separate legal tenements: W Gordon and S Wortley, *Scottish Land Law* (vol 1, 2009), 8.85.

⁷³³ Skilling, “The Fifth Element”, 7-8, citing *Farquharson* (1870) 9 M 66 at 69 per Lord President Glencorse.

impossible however, as a right to use is an incorporeal and so incapable of being possessed.⁷³⁴

A more accurate terminology would be to refer to the requirement as “exclusive use” (or indeed “sufficient use”), thus avoiding the problems of the inability of an incorporeal to be possessed. It also seems, as discussed above, that this is truly what is being assessed by the courts when they are determining whether or not there is exclusive possession. The courts consider whether a *reservation of use* by the landlord prevents a finding of exclusive possession.

Nonetheless, even a change of terminology which better reflects the spirit of what is being assessed by the courts when they are determining exclusive possession, does not mean it is applicable to all leases. One problematic scenario was highlighted by the recent Upper Tribunal for Scotland decision regarding whether a tenant in a house of multiple occupancy had a private residential tenancy under the Private Housing (Tenancies) (Scotland) Act 2016.⁷³⁵ Sheriff Ross considered the issue (which did not ultimately determine the outcome of the case) of whether the appellant had a valid lease with the pursuers. Of relevance was whether there had been sufficient identification of the subjects, a cardinal element of the lease. The appellant occupied a single room in the property, sharing the communal spaces with other tenants. The room she occupied changed throughout her time in the property. The tribunal held that the fact she had changed rooms did not pose an issue, as what she had was a lease for a *pro indiviso* quarter share of the flat, which, the court held, was a valid subject of a lease. This raises the question of how there could be exclusive possession under such a lease, when the very wording of the subjects implied that it will be shared with someone else.⁷³⁶ Such a scenario should also be contrasted with situations involving co-tenants. In such a situation, all the tenants are said to exclusively possess the whole property together.

⁷³⁴ See n734.

⁷³⁵ *Affleck v Bronsdon* [2019] UT 49.

⁷³⁶ G Gretton and K Reid, *Conveyancing* 2019 (2020), 53.

7.4.2 Exclusive Possession Does Not Determine the Existence of a Lease

The second problem with recognising exclusive possession as a way of identifying whether there is a lease or a licence is that it is not a requirement of a lease.⁷³⁷ Instead, the right to exclusive use of the property let is a consequence of the agreement being a lease.⁷³⁸ Therefore, a lease is capable of being formed regardless of whether or not there is exclusive possession. Scots law differs from English law. In English law, exclusive possession is a requirement for there to be a lease.⁷³⁹ In Scots law, only the cardinal elements of a lease are required for an agreement to be a lease. Exclusive possession is not a cardinal element. If exclusive possession is lacking, it should not prevent a lease being created if the other elements are present.

Indeed, in all of the cases where there has been a discussion of whether or not there is a licence to occupy or a lease and the court has identified the cardinal elements of a lease to be present, the court has found that the tenant also had exclusive possession. That is so even if the reservations within the purported leases are arguably severe, such as the complete sharing of use in *Devon Angling Association*. Indeed, even in the recent case of *St Andrews Forest Lodges Ltd v Grieve*, where the court arguably elevated the need for exclusive possession to a cardinal element, they nonetheless found there was sufficient exclusive possession in addition to the presence of the cardinal elements. In those cases where the courts have held that there was not exclusive possession, there has usually been some other failure in the cardinal elements of a lease. These points are explored in more detail in the following chapter.⁷⁴⁰

⁷³⁷ Unless the position in *St Andrews Forest Lodges Ltd v Grieve* [2017] DUN 25 is approved.

⁷³⁸ Paton and Cameron, 127.

⁷³⁹ *Street v Mountford* [1985] UKHL 4.

⁷⁴⁰ Chapter 8.

Therefore, the importance of exclusive possession as a method of determining whether or not there is a lease has been overstated and it is not necessary to create a lease. The courts are unwilling to find that there has not been sufficiently exclusive possession when the cardinal elements are present. Indeed, it would prevent many cases reaching court if it was explicitly stated that exclusive possession was not a requirement for a lease in Scots law. At present, the suggestion that there may be some reservations which do prevent exclusive possession being found may encourage parties to try their luck.

7.4.3 Uncertainty

In his article, Skilling remarks that “Legal certainty is perhaps the strongest argument that can be made in favour of a requirement for exclusive possession”.⁷⁴¹ He continues:

“By settling this issue in the positive and establishing exclusive possession as a requirement for the characterisation of a contract as a lease, the uncertainties regarding this area of law would be brought to an end, creating an unambiguous distinction between leases and licences. Contracting parties would be in no doubt that, in order for an agreement to be classified as a contract of lease, the owner of the property must grant the occupier exclusive possession thereof”.⁷⁴²

This argument is weak. Although on the face of it, adding the fifth element to a lease makes the distinction clear, establishing exclusive possession as a cardinal element does nothing to resolve the problem of the obscure meaning of exclusive possession. As noted above, whether there is or is not exclusive possession is a matter of degree and turns on the particular facts of the case. No clear statement has been made by the courts as to when something would be inconsistent with a

⁷⁴¹ Skilling, “The Fifth Element”, 18.

⁷⁴² *Ibid*, 19.

grant of exclusive possession. Adding exclusive possession as a requirement of a lease would make determining whether or not there was a lease even more difficult. At present, the parties to an agreement know that there is a lease if it contains the four fundamental elements of a lease (which are simpler to establish than exclusive possession) and can proceed on that basis.

7.4.4 Conclusion on Problems

Exclusive possession as the distinguishing feature between a lease and a licence is riddled with problems. Apart from the artificiality of the term exclusive possession, the term has not been sufficiently defined so as to be of any practical use in determining whether or not a lease or a licence has been formed. Even if exclusive possession could be sufficiently defined, it would not be possible to fulfil in every type of lease which has been identified in Scots law, particularly those over a *pro-indiviso* share of a property. Nonetheless, it seems that exclusive possession has not yet been used as the basis for any decision in Scots law where a lease was not found: the current cases can be explained by something else missing from the lease. This could justify a departure from using exclusive possession as a method for distinguishing a lease from a licence.

7.5 Overall Conclusion on Exclusive Possession

This chapter has demonstrated that exclusive possession is given significant weight by the courts as a method for distinguishing the lease from the licence to occupy. However, the phrase has remained undefined. This chapter sought to extract the meaning of exclusive possession from the decided cases. The cases demonstrate that the term does not refer to exclusive possession, but to sufficient possession. However, what amounts to “sufficient” cannot be ascertained from the current case-law. Even if this issue were clarified, other problems with exclusive possession justify a move away from the exclusive possession test. The following chapter considers whether the other methods for distinguishing between the lease and the licence are

given equal weight alongside the exclusive possession test, and whether they would provide a more coherent distinction between the leases and licences than exclusive possession.

Chapter 8: Distinguishing the Lease from the Licence: Intention and Missing Cardinal Elements

8.1 Introduction

The previous chapter examined exclusive possession as a method for distinguishing the lease from the licence and argued that the doctrine was insufficient to meet that aim. This section considers the other methods that are cited as methods of distinguishing a lease from a licence: intention and missing cardinal elements. These methods have not yet generated much academic discussion. This chapter therefore analyses for the first time the weight given to each method in distinguishing between occupation agreements by the court, and to what extent each test could be used to rationalise existing decided cases.

8.2 Intention

8.2.1 Introduction

Richardson and Anderson note that the criteria for identifying a lease as opposed to a licence includes “(1) The express terms of the agreement (e.g. whether the document calls itself a lease or a licence)”.⁷⁴³ Others expand this test, referring to it as one of discovering whether “the intention of the parties as disclosed in the document” is to create a lease or a licence.⁷⁴⁴ At present, no texts have dealt with intention in this context at any length. This section aims to remedy this by fully exploring the extent to which the intention of the parties is relevant to the classification of occupancy agreements.

This section has two main parts. The first part defines what is meant by the term “intention”. The second part analyses the case law on the topic to discover how

⁷⁴³ Richardson and Anderson, 2.52.

⁷⁴⁴ Rennie, 2.15.

much weight the courts give to the parties' intentions. In this sense, it is explanatory, but where relevant, the court's reasoning in reaching its conclusions is also assessed for its soundness.

It will be noticed that many of the cases discussed in this section are the same as those discussed in the chapter on exclusive possession. This is unsurprising given the dearth of case law in this area. However, the previous section explored only what those cases said as to the meaning of exclusive possession, and whether it was necessary for an agreement to be held to be a lease. This section analyses whether agreement on the essentials of a lease (including exclusive possession, or not, as the case may be) is *sufficient* for there to be a lease, or if contrary intention can prevent such a finding.

8.2.2 Defining intention

Intention is a term with different meanings. As such, in questions of the creation of a lease or a licence to occupy, intention will, in certain senses, always have relevance. For example, for an agreement to have legal effect, parties must demonstrate that they intended to create legal relations and form a contract.⁷⁴⁵ This is a basic rule of contract formation that applies to all contracts, including leases and licences to occupy.

On the other hand, intention can refer to the reasons or motivations for entering into a contract. An example of this would be if someone entered into an occupancy agreement for a particular property because they believed they were getting a

⁷⁴⁵ For example, in *Karoulias SA v The Drambuie Liqueur Co Ltd* 2005 SLT 813, it was proven that the parties did not intend their agreements to have legal effect until formally written. Therefore, the court would not give effect to an unwritten agreement. There is a (rebuttable) presumption that social and domestic arrangements do not give rise to legally binding arrangements: *Balfour v Balfour* [1919] 2 KB 571. For an overview of the law in this area, see H MacQueen, *MacQueen and Thomson Contract Law in Scotland* (5th edn, 2020), 2.64ff.

bargain. Generally, this type of subjective intention is irrelevant in legal matters.⁷⁴⁶ Again, this is a general rule of contract law.

Thirdly, intention may refer to the intention to form a particular contract, such as sale or lease. It is this meaning of intention which is discussed in this section. Intention can be demonstrated in different ways. Intention may be inferred only from the substantive content of the agreement. For example, in the lease context, this refers to whether the parties agree that the agreement is to have, for instance, a rent, or a duration. The intention as to *content* can be distinguished from the intention as to the *effects* of the agreement. Often these two aspects of intention align. However, this may not always be the case. For example, an agreement may have all the hallmarks of a lease but make clear it is to operate as a licence to occupy. The question is whether this stated intention as to the effect of the agreement overrides the content of the agreement. It is this particular instance of intention – intention as to the *effect* of the contract - that is the focus of this discussion.

Some legal systems hold that the only intention to conclude a contract which is relevant is the intention as to the content of the arrangement.⁷⁴⁷ That is to say, once the parties have agreed the content of their arrangements, it is for the law, rather than the parties, to determine what the effect of that arrangement is. This part considers to what extent Scotland also takes this approach.

8.2.3 The (Ir)relevance of Intention

Having defined intention, this part analyses the weight given to intention by the courts when distinguishing between a lease and a licence. Unfortunately, of the few

⁷⁴⁶ For example, courts are unwilling to reduce contracts that have been formed on the basis of an uninduced error in motive: *Spook Erection (Northern) Ltd v Kaye* 1990 SLT 676. However, occasionally the reasons for entering an arrangement are relevant, for example, in relation to sham agreements. These are considered in the lease context in Chapter 11.

⁷⁴⁷ To take English law as an example, in the leading case of *Street v Mountford* [1985] AC 809 at 826, Lord Templeman stated that “[t]he only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent.”

cases which discuss differentiating the nature of such an arrangement, even fewer deal expressly with the relevance of the intention of the parties. As such, any general treatment is to be gleaned from the three cases that explore the issue in depth.

8.2.3.1 Two contradictory leading cases?

The early 1990s saw two cases deal explicitly with the issue of intention. Both were heard in the Inner House of the Court of Session, but they reached apparently opposite conclusions on the matter.

The first of the Inner House decisions was *Scottish Residential Estates Development Co Ltd v Henderson*.⁷⁴⁸ This case is frequently cited in support of the proposition that intention is relevant when determining whether a lease or a licence has been created.⁷⁴⁹ In *Henderson*, a woman was permitted by a property development company to occupy a property until such a time as the company required the property back. When the time came, however, she refused to leave on the basis that she had a lease of the property. The court held that she did not have a lease. It emphasised the fact that the documents forming the contract did not demonstrate intention to create a lease. The court saw the issue as one of interpretation of the contract to determine the intention of the parties, and then giving effect to that intention.⁷⁵⁰

Skilling argues that that this case is strong authority for the courts using an intention-based test. As he explains:

“were this case to be examined without taking the intentions of the parties into account, all of the essential requirements of a lease could be seen, counsel for the pursuers having accepted the payment of repair bills and an obligation

⁷⁴⁸ *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490.

⁷⁴⁹ Skilling, “The Fifth Element”, 9; Rennie, *Leases*, 2.15; Richardson and Anderson, 2.52; F Rollo “Licences to Occupy: Can solicitors do More than Constitute in Writing What Could Amount to a Licence?” 2005 78 Prop LB 3.

⁷⁵⁰ *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490, 491.

to maintain the surrounding woodlands as rent, and it being possible to infer an ish using the ... principle in *Gray v Edinburgh University*.”⁷⁵¹

However, Skilling has instead highlighted the main problem with *Henderson* as the basis of establishing an intention-based test for the existence of a lease or a licence. The case is confined to a specific circumstance where the agreement also missed an essential element of a lease – an ish.⁷⁵² The pursuer sought to argue that the ish could be inferred on the basis of *Gray v University of Edinburgh*.⁷⁵³ However, Lord Dunpark noted that:

“As appears from *Gray*, before an ish may be inferred, there must be a lease and that means that the terms of this offer and acceptance must be such as to constitute a lease and nothing other than a lease. In our opinion that depends upon whether on a sound construction of these documents the pursuers intended to create a tenancy in favour of the defender and the defender accepted occupation of this cottage qua tenant[.]”⁷⁵⁴

Therefore, the case is only authority for the proposition that the parties must have intended to create a lease and failed (or at least, not demonstrated an intention to create something other than a lease) before the exception in *Gray* applies. It is not necessarily authority for the more general position that intention can be used to determine whether or not an agreement, which has all of the cardinal elements of a lease but is named as and intended to be as a licence, would be treated as such by the courts. This is, however, how it has been interpreted by the commentators in this area.⁷⁵⁵

Instead, cases where all cardinal elements are present, yet there is clear intention to create only a licence, should be considered to establish any general rules in this

⁷⁵¹ Skilling, “The Fifth Element”, 9.

⁷⁵² See also the criticisms of Sheriff Collins in *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 35ff.

⁷⁵³ *Gray v University of Edinburgh* 1962 SC 157. This case is discussed further in Chapter 9.

⁷⁵⁴ *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490, 491.

⁷⁵⁵ Rennie, 2.15.

area. This was the scenario in the second key case heard the following year: *Brador Properties Ltd v British Telecom Plc*.⁷⁵⁶

The court in *Henderson* noted that the defender's suggestion that the parties had created a lease without intending to do so was a "peculiar proposition".⁷⁵⁷

Nonetheless, just a year later, the case of *Brador Properties* reached that exact conclusion.⁷⁵⁸ Interestingly, the judgment makes no mention of the *Henderson* case from the year before.

In *Brador*, a commercial tenant sought to avoid the prohibitions on subletting in his lease by granting a licence allowing someone to occupy the property. The agreement contained the following clause (amongst others) clearly demonstrating the parties' intention:

"the agreement does not in any way constitute a lease or tenancy. Possession of the office is retained by Network Nine subject, however, to the rights created by the agreement."⁷⁵⁹

The court held that the agreement was nonetheless a sub-lease. The court was persuaded by the fact the agreement fulfilled all the requirements of a lease,⁷⁶⁰ and the fact that the arrangement was designed to evade the agreement between the original landlord and tenant against sub-letting.⁷⁶¹

Skilling argues that *Brador* "support[s] the proposition that the intention of the contracting parties ought to be the court's primary concern in determining the existence of a lease or licence", citing it as evidence of the courts taking an intention-based approach.⁷⁶² This argument is flawed. Although the court in *Brador* does discuss intention, it is referring to the tenant's intention to subvert their agreement

⁷⁵⁶ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12.

⁷⁵⁷ *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490, 491.

⁷⁵⁸ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12.

⁷⁵⁹ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12, 15-16.

⁷⁶⁰ *Ibid*, 22.

⁷⁶¹ *Ibid*, 20.

⁷⁶² Skilling, "The Fifth Element", 11.

with the original landlord – in other words, their reasons for entering the contract. As explained above, that is different from the intention to conclude a particular contract, such as a licence rather than a lease.

The better view, given by those such as Rennie⁷⁶³ or in Gloag and Henderson,⁷⁶⁴ is that *Brador* illustrates that intention demonstrated by the terms as to the effect of the agreement are *not* conclusive. Taking an objective approach to the content of the agreement, the court in *Brador* disregards the parties' intention as to the agreement's effect. The parties were explicitly clear in the agreement that it was not to create a lease. Instead, the court considered only the substance of the agreement to determine whether or not there was a licence or a lease.

However, *Brador*, like *Henderson*, is unhelpful in establishing a general rule on the role of intention. The agreement in *Brador* was clearly a sham arrangement, and the court was influenced by this fact.⁷⁶⁵ This can be seen, for example, by the way that the court had to stretch the meanings of clear terms in order to find them consistent with there being a lease. As discussed in the previous chapter, for example, it is hard to see how a landlord's ability to enter a property at any time can be said to give the tenant exclusive possession.⁷⁶⁶ Likewise, the court had to extend the principle in *Gray v University of Edinburgh* to all cardinal elements of a lease.⁷⁶⁷ Thus, the court were not saying that the terms used by the parties demonstrated an intention to create a lease, but rather that the terms were not *inconsistent* with the creation of a lease. Furthermore, when there is overtly a sham arrangement influencing the decision of the court, it does not give any clear indication of how the court is to act in the absence of the agreement being a sham. Illustrative of this is the fact that this case was between the sub-landlord and the head-landlord, who had suffered because of the sham by having his agreement subverted. Had the case been

⁷⁶³ Rennie, 1.14.

⁷⁶⁴ Gloag and Henderson, *The Law of Scotland* (14th edn. 2017), 35.02.

⁷⁶⁵ Shams are discussed in detail in Chapter 11.

⁷⁶⁶ Chapter 7.

⁷⁶⁷ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12, 21.

between the tenant and the purported licensee, one wonders whether the court would have been so quick to dismiss the agreement.

8.2.3.2. After *Brador* and *Henderson*

Following the decisions in *Brador* and *Henderson*, the role of intention was unclear. Neither case provided clear authority for the relevance of intention when all elements of a lease were present and there was no apparent sham arrangement.

This was reflected in the advice that was being given by law firms to their clients. Those firms advised making the intention to create a lease or licence clear, but also noted that this may not be enough to determine the matter.⁷⁶⁸ Likewise, the academic texts cite intention as one of the ways that the court may decide whether there was a lease or a licence, leaving open the option that the courts may use some other indicator instead.⁷⁶⁹

In the few cases following *Brador* and *Henderson* in which the court was asked to decide whether an agreement was a lease or a licence, the issue of intention was not dealt with expressly. However, the cases show a strong correlation between the intention displayed in the agreement and the ultimate outcome of the case. Often, as in *Brador*, this has meant the court has had to expand the definitions of the cardinal elements and exclusive possession to find the agreements in conformity with the parties' intentions.

To illustrate this point, in *South Lanarkshire Council v Taylor*, the agreement was described as a "Monthly Grazing Lease", and it was agreed by the parties that all but the disputed clause were consistent with the grant of a lease.⁷⁷⁰ The disputed clause (permitting the tenant's temporary removal with 24 hours' notice) appeared to

⁷⁶⁸ See, for example the advice given by Morton Fraser, dated 8 September 2015: available <https://www.morton-fraser.com/knowledge-hub/when-licence-lease>.

⁷⁶⁹ For instance, note the use of the word "may" in Rennie, 2.15.

⁷⁷⁰ *South Lanarkshire Council v Taylor* [2005] CSIH 6.

preclude the grant of exclusive possession to the tenant. Arguably, the meaning of exclusive possession was stretched to accommodate finding the agreement consistent with the parties' clear intention to grant a lease in that case.⁷⁷¹

The court in *Devon Angling Association v Scottish Water* reached a similar conclusion.⁷⁷² In that case, an agreement allowing the pursuer to fish was contained in a "document [purporting] to be a lease" and which was "described as so".⁷⁷³ Again, the court held the agreement was a lease, notwithstanding the large derogation from the grant to the lessee – allowing the landlord to share the right to fish - which could have been said to prevent exclusive possession being granted to the tenant.⁷⁷⁴ The court was more explicit in their judgment about upholding the parties' intentions, putting weight on the fact that the agreements were constructed in a similar manner to others which had been held to be leases.⁷⁷⁵ Likewise, they contrasted cases such as *East Lothian Angling Association v Haddington Town Council*,⁷⁷⁶ where the agreement was described as a "permission to fish" only and required yearly renewal. In *East Lothian Angling Association*, the agreement, again in line with the parties' intentions, was held to amount only to a licence.

Generally, the cases in which the contracts have been held to be licences to occupy have not demonstrated any intention to be a lease. This intention can be inferred by the informal nature of parties' agreements, for example, by the lack of a written agreement.⁷⁷⁷ Alternatively, where there is a written agreement, it will not have any similarity to a lease. An example of the latter scenario is *Denovan*. In that case, the

⁷⁷¹ As noted in Chapter 7, the derogation in this case was large - a total prohibition of use for a period if the landlord needed to use it.

⁷⁷² *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7.

⁷⁷³ *Ibid*, 17.

⁷⁷⁴ Again, see the discussion in Chapter 7.

⁷⁷⁵ *Lamington Angling Improvement Association v Millar* (1924) 40 Sh Ct Rep 190.

⁷⁷⁶ *East Lothian Angling Association v Haddington Town Council* 1980 SLT 213.

⁷⁷⁷ *Conway v Glasgow City Council* 1999 Hous LR 20; *Commercial Components (Int) Ltd v Young* 1993 SLT (Sh Ct) 15.

agreement was framed only as “conditions of residence” rather than something more akin to a lease.⁷⁷⁸

However, despite the strong correlation between intention and outcome, illustrating a desire for courts to uphold the parties’ intentions, the court outwardly takes a *substantive content* approach to the interpretation of the contract. Thus, where agreements are called leases, courts will find the cardinal elements to be present. If it is a licence, they will find a cardinal element to be missing. They then base their decision on the presence or lack thereof of the cardinal elements. However, as illustrated above, this often results in the artificial stretching in meaning or denial of the presence of each cardinal element. Acceptance of intention as to the type of agreement created, regardless of the agreement’s content, as a relevant factor in determining whether an agreement is a lease or a licence would therefore more accurately reflect what the court is doing in practice. Additionally, acceptance of intention’s relevance could prevent the creation of further artificiality regarding the cardinal elements as is currently occurring with exclusive possession.

8.2.3.3. *Much-needed clarity at last? St Andrews Forest Lodges v Grieve*⁷⁷⁹

The lack of clarity regarding the emphasis to be placed on parties’ intentions when deciding an occupancy agreement’s status in Scots law remained undiscussed by the courts for over twenty-five years. Then, in 2017, the Sheriff Court case of *St Andrews Forest Lodges v Grieve* examined the issue at length, reviewing all the relevant authorities in the area.⁷⁸⁰

In somewhat unusual facts, the owners of a failed holiday park business were permitted to remain in one of the properties by the company’s administrator until such time that the business was sold. When the company found a buyer, the couple sought to purchase the property they were staying in from the new owner. An

⁷⁷⁸ *Denovan v Blue Triangle (Glasgow) Housing Association Ltd* 1999 Hous LR 97.

⁷⁷⁹ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25.

⁷⁸⁰ *Ibid.*

occupation agreement between the couple and the new owners was entered into until the sale could be finalised. When the sale fell through, the owners sought to evict the couple. The couple resisted eviction on the basis that they had a lease. The owners argued that the agreement amounted only to either a holiday let or a licence to occupy, neither of which gave the couple security of tenure.

The thrust of the new owner's argument was heavily reliant on the rationale of the decision in *Henderson*. They argued that the agreement was only a licence to occupy on the basis that:

“An agreement could have all the hallmarks of a tenancy yet not be a tenancy if that was not what parties intended... [Although] there was agreement as to parties, premises, rent and duration... the absence of intention to create a tenancy was fatal to the agreement being a lease.”⁷⁸¹

The owners led evidence as to the parties' intentions. For instance, they noted that the agreement was entitled “Holiday Let” and they ran a holiday letting business only and had no interest in residential letting. They also highlighted that both parties were aware of the statutory scheme to create a residential let and chose not to pursue this arrangement.⁷⁸²

Conversely, countering the points on intention that the owners had made, the occupiers noted that the term “licence” was never used.⁷⁸³ The main argument of the occupiers, however, was that the court should adopt the English approach to the lease/licence distinction from *Street v Mountford*, and look to the substance of the agreement to determine its nature.⁷⁸⁴ Given that all the cardinal elements of a lease had been agreed, the court should find that a lease existed.⁷⁸⁵

⁷⁸¹ *Ibid*, 4.

⁷⁸² *Ibid*, 5.

⁷⁸³ *Ibid*, 15.

⁷⁸⁴ *Ibid*, 16.

⁷⁸⁵ *Ibid*.

The court in *St Andrews Forest Lodges* found in favour of the occupiers. The court gave weight to the “clear and useful parallels” of the English decision in *Street v Mountford*⁷⁸⁶ and disregarded the “*obiter dicta*” comments regarding intention in *Henderson*.⁷⁸⁷ Ultimately, Sheriff Collins adopted the approach of the court in the Scottish case of *Brador*, concluding that:

“All the essentials of a lease being present, including exclusive possession, I consider that as a matter of law it is a lease and not a licence which the parties by their agreement created, whatever their intentions as to its legal status.”⁷⁸⁸

The court thus conclusively dismissed the parties’ intentions as irrelevant, and advocated for a *substantive content*-based approach to deciding whether an agreement is a lease or a licence.

8.2.4. An Unsubstantiated Approach?

It is not enough, however, that the decision in *St Andrews Forest Lodges* provided clarity. The way in which the decision was reached should also be a result of correctly interpreting previous decisions and applying the correct legal principles. Thus, the decision merits a deeper analysis, being the most recent authority on the issue and given the extensive review of the authorities by Sheriff Collins.

Broadly, Sheriff Collins’ analysis can be split into two parts. Firstly, he emphasises the importance and relevance of the English approach to intention. Secondly, he surveys the Scots case law on the lease/licence distinction, interpreting their stances

⁷⁸⁶ *Ibid* 34; M Skilling, “St Andrew’s Forest Lodges Ltd v Grieve: The Lease’s Fifth Element in Action” 2018 JR 122, 123.

⁷⁸⁷ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 36.

⁷⁸⁸ *Ibid* 47. Although the court acknowledged that even if intention was relevant, they would have found that intention present, as the parties agreed to create a holiday *let*: 48.

on intention, and particularly focussing on the apparent *Brador/Henderson* dichotomy. Each of these strands will now be considered in turn.

8.2.4.1. English Law

Given the apparent clarity on the role of intention in English law, it is perhaps unsurprising that Sheriff Collins places weight on the approach taken there. The fact that in English law, intention is irrelevant when creating a lease or licence has been described as “second nature” to English lawyers.⁷⁸⁹ The position was clearly stated in *Street v Mountford*.⁷⁹⁰ As Lord Templeman famously explained:

“If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.”⁷⁹¹

Nonetheless, such reliance on English law is misguided. First, there are substantial differences in this area between the two jurisdictions. Although Sheriff Collins correctly acknowledges that there are differences between Scots and English law in the area, he dismisses them as insignificant.⁷⁹² The ways in which the two legal systems are similar, he reasons, justifies the court following the approach of *Street v Mountford*.⁷⁹³

However, the parallels Sheriff Collins draws between the two systems are not as self-evident as he suggests. For instance, he asserts that Scots law has, like English

⁷⁸⁹ P Williams, “Exclusively yours – a look back at *Street v Mountford*” (2014) 18(3) L&T Review 92, 93.

⁷⁹⁰ *Street v Mountford* [1985] 1 AC 809.

⁷⁹¹ *Ibid*, 819.

⁷⁹² *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 34.

⁷⁹³ *Ibid*.

law, accepted exclusive possession as determinative in distinguishing a lease from a licence – a proposition which was far from settled in Scots law prior to *St Andrews Forest Lodges*.⁷⁹⁴ Likewise, that the words used in an agreement in both jurisdictions are not conclusive of whether a lease or a licence has been created is uncertain in Scotland prior to *St Andrews Forest Lodges*, as has been explained above.⁷⁹⁵ In asserting this purported similarity, Sheriff Collins is, in fact, relying on the very conclusion he is seeking to prove. Thus, applying *Street v Mountford* in Scotland only on the basis that the two jurisdictions are largely indistinguishable in the area is a flawed approach.

This is compounded by the fact that Inner House in *Bradford* (which Sheriff Collins prefers over the decision in *Henderson*) explicitly disregards English law as useful because the two legal systems are so different in this area, and specifically rejects *Street v Mountford* on that basis.⁷⁹⁶ Sheriff Collins disregards the Inner House's dismissal simply because it does not directly reject the soundness of the *reasoning* employed in the English decisions.⁷⁹⁷ But, at no point does Sheriff Collins go on to assess the validity of that reasoning, assuming it is "good law in that jurisdiction".⁷⁹⁸ Whilst it is undoubtedly true that *Street v Mountford* continues to be applied in English law, the decisions which result from it are often highly controversial and heavily criticised by academics. The extent to which it is good law is therefore debateable.

That *Street v Mountford* is "good law" has been challenged in three ways. First, critics point out that it produces absurd results. By emphasising only the content of the agreement on the basis of *Street*, leases have been granted in English law by those who lack title. For example, in *Bruton v London Quadrant*, a licensee competently granted a lease.⁷⁹⁹ *Bruton* has been widely criticised on its legal basis,

⁷⁹⁴ See, Chapter 7, and Skilling, "The Lease's Fifth Element in Action".

⁷⁹⁵ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 34.

⁷⁹⁶ *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12, 19.

⁷⁹⁷ *Ibid*, 34.

⁷⁹⁸ *Ibid*, 33.

⁷⁹⁹ *Bruton v London Quadrant* 2000 1 AC 406.

as those who lack good title should be unable to create proprietary rights such as leases.⁸⁰⁰ It has also been criticised for its resultant practical implications.⁸⁰¹ Nonetheless, the decision has become so entrenched in English law that overturning it does not seem “remotely likely”.⁸⁰² Furthermore, it means that creative and useful initiatives, such as property guardianship schemes, cannot be created.⁸⁰³ These only function if proprietary rights are not created, but they have been found to constitute leases in English law.⁸⁰⁴

Aside from the practical issues resulting from the decision in *Street v Mountford*, the basis for the decision can also be criticised. In a persuasive article, Hill argues that the cases relied upon by Lord Templeman provide “very little support” for his conclusion that an agreement which provides a party with exclusive possession of a property for a term and for rent must necessarily be a tenancy.⁸⁰⁵ This is because, he explains, the cases relied on concern radically different factual scenarios to the

⁸⁰⁰ See for example: S Pascoe, “Street v Mountford gone too far - Bruton v London and Quadrant Housing Trust” (1999) 2(6) JHL 87; M Dixon, “The non-proprietary lease: the rise of the feudal phoenix” (2000) 59(1) CLJ 25; S Bright, “Leases, exclusive possession and estates” 2000 116(Jan) LQR 7; M Pawlowski, “Contractual licences, personal tenancies and tenancies at will” (2001) 5(6) L&T Review 117; M Pawlowski and J Brown, “Bruton: a new species of tenancy?” (2000) 4(6) L&T Review 119; M Pawlowski, “Occupational rights in leasehold law: time for rationalisation?” 2002 Conv. (Nov/Dec) 550; M Pawlowski, “Meaning of property in the leasehold context” (2006) 10(3) L&T Review 63; M Lower, “The Bruton tenancy” 2010 Conv. 38.

⁸⁰¹ See for example, D Rook, “Whether a licence agreement is a lease: the irrelevance of the grantor’s lack of title” (1999) Conv. (Nov/Dec) 517; D Hunter, “Conservatism v contemporaneity: putting the cart before the horse” (1999) 2(5) JHL 65.

⁸⁰² P Williams, “Exclusively Yours – A look back at Street v Mountford”, L&T Review 2014, 18(3), 92-95, 95.

⁸⁰³ A guardian scheme allows an intermediary to take control of a property that would otherwise be empty on behalf of the owner, and permit someone to occupy the property (usually for a reduced rent) for a short period (often until the owner is ready to redevelop the property): See Ministry of Housing, Communities and Local Government Guidance, “Property guardians: a fact sheet for current and potential property guardians”, 30 May 2018, available: <https://www.gov.uk/government/publications/property-guardians-fact-sheet/property-guardians-a-fact-sheet-for-current-and-potential-property-guardians>.

⁸⁰⁴ *Camelot Property Management Ltd v Roynon* unreported 24 February 2017 (CC (Bristol)). This is a “generous interpretation” of *Street*, according to D Whayman, “Old Issues, New Incentives, New Approach? Property Guardians and the Lease/Licence Distinction” (2019) 83 Conv 44, 49.

⁸⁰⁵ J Hill, “Intention and the creation of proprietary rights: are leases different?” (1996) 16 Legal Studies 200, 206.

facts of *Street*.⁸⁰⁶ The results in those particular scenarios do not lead to conclusions which should logically be applied in a *Street*-type scenario.⁸⁰⁷

The categories of factual circumstances outlined by Hill can be summarised as follows:⁸⁰⁸

- 1) cases where there is no written agreement;
- 2) cases where there is a written agreement, but it contains ambiguous terms;
- 3) cases where parties intend to create a lease but do not fulfil the cardinal requirements of such a contract; and
- 4) cases where the cardinal elements of a lease are fulfilled, but where the parties demonstrate that they intend it to operate as only a licence to occupy.

Whilst *Street* is an example of the fourth scenario, Hill contends that most of the cases relied upon by Lord Templeman are examples of the other three.⁸⁰⁹ In the first two scenarios, there is no clear intention which the court can rely on, so it is unsurprising that the court in these cases rely on the content of the agreement to determine its nature.⁸¹⁰ It does not follow that in cases where there *is* clearly evidenced intention, that this should be overridden by the content of the agreement. Likewise, in scenario 3, cases which do not fulfil the basic requirements of a lease cannot be a lease, regardless of intention.⁸¹¹ It does not follow that agreements which do fulfil the basic requirements of a lease *must* be leases, regardless of intention.

Indeed, *Street* disregards the fact that previously, the intention of the parties was important in deciding whether an agreement was a lease or a licence under English

⁸⁰⁶ *Ibid*, 206.

⁸⁰⁷ *Ibid*, 207.

⁸⁰⁸ *Ibid*, 206. The only exception is *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513. That case too can be criticised for the fact reaching its conclusion solely on type 2 or 3 cases.

⁸⁰⁹ *Ibid*, 207.

⁸¹⁰ *Ibid*, 206.

⁸¹¹ *Ibid*.

law.⁸¹² Street⁸¹³ remarks that up until and including *Somma v Hazelhurst* decided in 1978,⁸¹⁴ the approach of the courts was to favour freedom of contract, and thus intention.⁸¹⁵ These cases were dismissed by Lord Templeman in *Street* as incorrect decisions.⁸¹⁶ In particular, he emphasised that the fact that these agreements were shams should have been relevant. However, the court in *Somma* considered this exact point, stating that the court should not regard an agreement as a sham simply because the court disagreed with the result it produced.⁸¹⁷ Thus, the decision in *Street* does not appear to be founded on logically sound applications of previous cases.

Finally, it appears that in English law, the intention based approach may be seeing a resurgence.⁸¹⁸ For example, in *Camelot v Khoo*,⁸¹⁹ another property guardianship case, the agreement was found not to be a lease because the court did not wish to undermine the commercial purpose of the agreement,⁸²⁰ particularly as there was no sham or pretence.⁸²¹ As well as this apparent judicial U-turn, there have been calls for a Licence Act, specifically to permit licences and give effect to parties' intentions.⁸²²

Overall, Sheriff Collins' conclusion that *Street* remains "good law" is incorrect, and it should not have justified adopting the content-based approach in Scots law.

⁸¹² Whayman, "Old Issues, New Incentives, New Approach?" 47.

⁸¹³ Note that this is the commentator Roger Street, not to be confused with the *Street v Mountford* case on which he is commenting!

⁸¹⁴ *Somma v Hazelhurst* (1978) 1 WLR 1014; see also *Aldrington Garages Lt v Fielder* (1978) 37 P&CR 461 and *Sturolson & Co v Weniz* (1984) 272 EG 326 .

⁸¹⁵ R Street, "Coach and Horses Trip Cancelled?: Rent Act Avoidance After *Street v Mountford*" [1985] 49 Conv. 328.

⁸¹⁶ *Street v Mountford* [1985] 1 AC 809, 825.

⁸¹⁷ *Somma v Hazelhurst* (1978) 1 WLR 1014, 1025.

⁸¹⁸ Whayman, "Old Issues, New Incentives, New Approach?" 47.

⁸¹⁹ *Camelot Guardian Management Ltd v Khoo* 2018 EWHC 2296, c.f. *Camelot Property Management Ltd v Roynon* unreported 24 February 2017 (CC (Bristol)).

⁸²⁰ *Ibid*, 29. Note that the court used this intention to justify finding that there was no *exclusive possession*, as opposed to finding that all of the hallmarks of a lease were present and nonetheless a licence. Note exclusive possession is a cardinal element of a lease in English law. See also the decision in *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd* [2001] EWCA Civ 1686.

⁸²¹ *Camelot Guardian Management Ltd v Khoo* 2018 EWHC 2296.

⁸²² P Clark, "Licence to Lease?" (2015) 6 Conv. 474, 479.

8.2.4.2 Scots Law

In addition to the criticisms that can be levied at the decision in *St Andrews Forest Lodges v Grieve* regarding its reliance on English law, it can be further criticised for its interpretation of the Scottish cases in this area. Just as the court in *Street* used English cases that were not in point to justify its decision, so too did the court in *St Andrews Forest Lodges* with Scottish cases.

Of interest in Sheriff Collins' extensive review of the authorities is his return to the earlier so-called valuation cases. Whilst the court in *Brador* viewed these as unhelpful given that they did not primarily concern the lease/licence distinction,⁸²³ Sheriff Collins gave the authorities weight in establishing the irrelevance of intention.⁸²⁴ He uses the case of *Wilson* to illustrate a scenario where a lease was created despite no apparent intention from the parties to do so.⁸²⁵ He juxtaposes this with *UK Advertising Company*,⁸²⁶ where typical lease terms such as "rent" and "sublet" existed, but where the court held that it was a licence to occupy.⁸²⁷ Taken together, Collins argues that these demonstrate that Scots courts do not take parties' intentions as determinative as to the nature of the agreements created.

However, to borrow from Hill's taxonomy, these are type 2 scenarios – where the written agreement is ambiguous.⁸²⁸ Particularly given that the licence was not a fully established concept at the time,⁸²⁹ it is understandable that the court in *Wilson* presumes that an agreement with the hallmarks of a lease, and in the absence of evidence to the contrary, was intended to be a lease. *Wilson* is not a case of a licence agreement being held in court to amount to a lease, as Sheriff Collins

⁸²³ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12, 19.

⁸²⁴ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 30.

⁸²⁵ *Ibid*, 27. On this point, see also K Gerber, *Commercial Leases in Scotland* (3rd edn, 2016), 2.03.

⁸²⁶ *UK Advertising Company v Glasgow Bag-Wash Laundry* 1926 SC 303.

⁸²⁷ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 27.

⁸²⁸ Hill, "Intention and the creation of proprietary rights" 206.

⁸²⁹ See Chapter 6.

implies. Instead, it is a case of an untitled, ambiguous document being determined as a lease.

Conversely, in *UK Advertising Company v Glasgow Bag-Wash Laundry*, although the agreement was more detailed, it was still ambiguous. Although there were some indicators of a lease, such as the terms “subletting” and “rent”,⁸³⁰ these scarce references were “not enough to determine its true character”.⁸³¹ To resolve the ambiguity, the court had to consider the content of the contract as a whole, which demonstrated that it was a licence to occupy only. Again, the content was only considered because the contract was ambiguous. Ambiguities also justify the content-based approach taken in the other early cases cited by Sheriff Collins, such as *Broomhill Motor Co*⁸³² and *Chaplin*.⁸³³

As Hill explained, these cases in which a court considers the content of an agreement to determine its nature when its terms are ambiguous do not logically lead to the conclusion that when parties’ intentions are clear, it is to be disregarded in favour of the content of the agreement.⁸³⁴ To take Hill’s argument a step further, these cases could also be taken to support the argument that the intention of the parties *is* relevant to determining the nature of the agreement. When the terms of an agreement are unclear, the only indicator as to the intention of the parties is the content to which they have agreed. Thus, in *Wilson*, the intention of the parties, as discovered by looking at this particular contract in its entirety, was to create a licence only. The converse was true in *Glasgow Bag-Wash Laundry*. In both instances, the court gave effect to that intention.

Furthermore, although not cited directly in support of his argument as to the irrelevance of intention, other cases cited by Sheriff Collins, such as *Popular Amusements*, could also be said to support the proposition that intention *is* relevant

⁸³⁰ *UK Advertising Company v Glasgow Bag Wash Laundry* 1926 SC 303, 306.

⁸³¹ *Ibid*, 306.

⁸³² *Broomhill Motor Co v Assessor for Glasgow* 1927 SC 447.

⁸³³ *Chaplin v Assessor for Perth* 1947 SC 373.

⁸³⁴ Hill, “Intention and the creation of proprietary rights”, 207.

in determining the nature of an agreement.⁸³⁵ In that case, the (ambiguous) agreement in question was granted by someone who was a tenant of a lease agreement themselves. The original lease did not permit sub-leases, and the court saw this an important indicator of the intention of the parties as to the nature of the disputed agreement. It was supposed that the tenant was not intending to breach these conditions by granting something which would amount to a sub-lease. The court gave effect to that intention.⁸³⁶ Thus, the sub-agreement was not a lease.

The more recent cases referred to by Sheriff Collins can also be criticised using Hill's taxonomy. For example, *Mann v Houston* illustrates Hill's third category of case. In *Mann*, there was intention to create a lease, but the parties did not agree all the cardinal elements.⁸³⁷ Because the agreement lacked an essential element of a lease, it could not create a lease. The fact that intention cannot perfect a lease is not authority for the proposition that intention is irrelevant when an agreement fulfils the necessary requirements of a lease. Yet, this is what Sheriff Collins implies.⁸³⁸ As such, the case has been incorrectly used.

Finally, Sheriff Collins analyses the two leading cases on the role of intention in the lease/licence distinction: *Bradford* and *Henderson*. Although it has been explained above that *Henderson* is not a good authority for the proposition that intention is relevant (indeed, it is a Hill type 3 case), Sheriff Collins regards it as such.⁸³⁹ This is, after all, in line with many of the academic texts.⁸⁴⁰

Therefore, in reaching his conclusion that intention is not relevant, Sheriff Collins must either dismiss or distinguish the case. After distinguishing the case on the facts, he then explains that he believes the comments regarding intention in *Henderson*

⁸³⁵ *Popular Amusements Ltd v Assessor for Edinburgh* 1909 SC 645.

⁸³⁶ *Ibid*, 652, per Lord Dundas.

⁸³⁷ *Mann v Houston* 1957 SLT 89.

⁸³⁸ Note that although Sheriff Collins notes that there was no rent in *Mann v Houston* and thus no lease at 26, he does not state that this is the reason why intention failed in that case. He thus implies that the case demonstrates courts generally do not deem parties' intention important.

⁸³⁹ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 36.

⁸⁴⁰ Skilling, "The Fifth Element" 9; Rennie, 2.15; Richardson and Anderson, 2.52.

were strictly obiter and thus not binding upon him.⁸⁴¹ He also attempts to dismiss the court's approach in *Henderson* on its merits. However, Sheriff Collins alludes only to two reasons why the methodology in *Henderson* was wrong. First, the case contradicts the English approach.⁸⁴² Secondly, *Brador* uses a different methodology.⁸⁴³ Neither of these justifies the conclusion that the approach in *Henderson* was flawed. Just because English law or another case uses a different approach, it does not follow that it is necessarily a better approach. Sheriff Collins likewise does not justify his support for the decision in *Brador*, offering no reasons *why* it is to be the preferred over *Henderson*. As discussed above, *Brador* is not without its flaws as a basis for establishing a *content*-based approach to the lease/licence distinction.

Overall, the Scottish cases relied upon by Sheriff Collins in reaching his conclusion are not as authoritative for his stance as he suggests that they are. At best, they do not logically support his conclusion, and at worst they indicate that the courts *do* usually give effect to the parties' intentions – the very conclusion he sought to disprove.

8.2.5. Conclusion on Intention

What this part has demonstrated is that following the case of *St Andrews Forest Lodges v Grieve*, the role of intention is clear: parties' intentions as to the type of contract they intend to form is irrelevant when establishing whether parties have created a lease or a licence. Once parties have determined the content of their agreement, the law determines its effect. However, what this part has also illustrated is that the purported basis for the decision in *St Andrews Forest Lodges* is far from sound: it places undue weight on English law in the area and the Scottish cases upon which it relies do not lead necessarily to the conclusion reached.

⁸⁴¹ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 36.

⁸⁴² *Ibid*, 41.

⁸⁴³ *Ibid*, 42.

What this part has not done, however, is consider the merits or otherwise of an intention-based approach to distinguishing the lease and the licence – this is considered in chapter 12. Given the unsoundness of the current law in this area, it is still open for the law to either move towards an intention-based approach, or to further cement the content-based approach into Scots law.

8.3 Missing Cardinal Element (MCE) Test

8.3.1 Introduction

Rennie explains that the final way in which an agreement may be determined to be a licence as opposed to a lease is “if one of the cardinal requirements for a lease is missing such as rent or term”.⁸⁴⁴ Initially, this test seems the most obvious distinguishing feature between a lease and a licence. If an agreement lacks one of the essential elements of a lease, then it cannot be a lease. This seemingly simple statement is, however, qualified by other concepts that have already been discussed. The first is that contracts of lease have much wider cardinal elements than the real right of lease.⁸⁴⁵ That means that parties should be wary that it is not sufficient to create a licence by including in an agreement a cardinal element, such as an elusory rent, which would not satisfy the requirements needed to create a real right of lease; parties may have nonetheless created a contract of lease. This contract of lease would imply extensive terms into their arrangement. Secondly, this area is complicated by presumptions and the rules which suggest that agreement on all cardinal elements is not necessary to create a lease.⁸⁴⁶ These points must be kept in mind in the following discussion.

Some groups, such as the Property Standardisation Group, have surmised that omitting a cardinal element is the only sure way of creating a licence to occupy

⁸⁴⁴ Rennie, 2.15.

⁸⁴⁵ See Chapters 3 and 4.

⁸⁴⁶ See Chapter 9.

rather than a lease.⁸⁴⁷ Others, such as Rennie, suggest it is only one of many ways of creating a licence.⁸⁴⁸ The main aim of this section is to determine the weight that is, and should be, given to the test in Scots law. To do so, this part is divided into two main sections. The first considers the cases which have been explained based on the missing cardinal element, whilst the second considers cases which have not been explained on the basis of the missing cardinal element test. This second section is most important. It illustrates that the missing cardinal element test could be used to rationalise the vast majority of existing cases which have been decided on the basis of one of the other tests, such as the exclusive possession test. If the missing cardinal element test were accepted as the basis for these decisions, the law in this area would be much simpler.⁸⁴⁹

8.3.2. Cases Explained on the Basis of the MCE Test

Unlike the exclusive possession test, it is clear that the missing cardinal element (MCE) test is part of Scots law. This is evidenced by that fact that there are many cases in which the court has held that there was no lease because a cardinal element of a lease was omitted.⁸⁵⁰ This lack of agreement on all cardinal elements is viewed as *sufficient* to deny the agreement the name “lease”. Instead, the agreements amount only to licences to occupy.

Most commonly, this is because the agreement lacks a rent. A straightforward example is *Wallace v Simmers*, where a family entered an arrangement which permitted the occupant to stay in a house rent-free.⁸⁵¹ The court held the agreement was not a lease. The short judgments do not detail the reasons for the court’s decision. Subsequent texts, however, have interpreted the lack of rent as fatal to the

⁸⁴⁷ Property Standardisation Group, “Guidance Notes – Licence to Occupy (v2)” (January 2017), 1.

⁸⁴⁸ Rennie, 2.15. See also Richardson and Anderson, 2.52.

⁸⁴⁹ On this point, see Chapter 12.

⁸⁵⁰ See the cases discussed below.

⁸⁵¹ *Wallace v Simmers* 1960 SLT 255.

lease's creation.⁸⁵² A similar scenario occurred in *Mann v Houston*.⁸⁵³ In that case, a garage was purportedly let for ten years for a one-off payment at the start of the occupation. Although there was payment in return for occupation, it is well settled that rent must constitute a continuing periodical payment, and that lump sums (often termed "grassums") are not rent.

In both of the previous cases, the parties explicitly agreed that there was to be no rent. However, if parties agree that there is to be a rent, but cannot agree what that should be, then again, it has been held that no lease can be created.⁸⁵⁴ Admittedly, it is difficult to reconcile this fact with the apparent ratio of *Shetland Isles Council v BP*.⁸⁵⁵ This case seems to suggest that if parties agree all the other cardinal elements and agree that there is to be a rent but cannot agree what that is to be, then the court will imply a rent and a duration of one year into the agreement.⁸⁵⁶ This case should be treated with caution, however, as the ratio is not entirely clear.⁸⁵⁷ A different scenario occurred in *Whillock v Henderson*.⁸⁵⁸ In that case, there were various payments which could have been viewed as rent. However, there was insufficient agreement as to which of the payments was actually rent. The court held that this uncertainty between the parties as to what was rent prevented there being a rent for the purpose of finding a lease. A final, more recent example is *Ali v Serco*.⁸⁵⁹ In that case, there was no lease because the occupiers – failed asylum seekers – did not pay any rent. Instead, the Home Office paid a company to house the asylum seekers, in an agreement external to the occupation agreement, and this was fatal to the agreement being a lease.

Rent is not the only cardinal element that may be missing and thus prevent the creation of a lease. Richardson and Anderson note cases where an agreement did

⁸⁵² Rennie, 12.01; Stair Memorial Encyclopaedia, *Landlord and Tenant* (2nd Reissue) (2021), para 7.

⁸⁵³ *Mann v Houston* 1957 SLT 89.

⁸⁵⁴ *Gray v University of Edinburgh* 1962 SC 157.

⁸⁵⁵ *Shetland Isles Council v BP* 1990 SLT 82.

⁸⁵⁶ Richardson and Anderson, 2.28.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ *Whillock v Henderson* 2007 SLT 1222.

⁸⁵⁹ *Ali v Serco* (2019) CSIH 54.

not include a duration, nor agreement on the subject matter.⁸⁶⁰ For example, in *Holloway Brothers (London) v Assessor for Edinburgh*, the court held that there was not a lease as “There was no ascertained area, no fixed duration, no ish.”⁸⁶¹ Again, this area is complicated by the presumption of lease and the rule that a duration of one year can be implied.⁸⁶² The presumption and implication of duration result in the MCE test imposing a positive obligation on the parties with respect to the duration requirement. It is not sufficient for parties to create a lease by omitting duration from their agreement. Instead, parties must explicitly state that there is to be no duration or include a duration which is not sufficient to create a lease. To illustrate this point, the case of *Scottish Residential Estate v Henderson* can be returned to.⁸⁶³ In that case, how long the occupant could stay in the cottage could not be guaranteed by the owner.⁸⁶⁴ Richardson and Anderson explain that there could not be a lease as “no definite duration had been specifically agreed by the parties”.⁸⁶⁵

Although there are few cases cited to support the point, it would also be theoretically possible for an agreement to fail to satisfy the parties or the property requirement.⁸⁶⁶ For example, it is necessary for the landlord and tenant to be different parties as one cannot contract with oneself. A lease purporting to have one party as both landlord and tenant would fail.⁸⁶⁷ With regards to the property requirement, parties should clearly denote the subject of the agreement. If it is unclear what forms the subjects of the contract, then there is no lease.⁸⁶⁸ However, this can sometimes be proven by

⁸⁶⁰ Richardson and Anderson, 2.52.

⁸⁶¹ *Holloway Brothers (London) v Assessor for Edinburgh* 1948 SC 300. See also *Gray v University of Edinburgh* 1962 SC 157.

⁸⁶² *Gray v University of Edinburgh* 1962 SC 157. See also the discussion in Chapter 9.

⁸⁶³ *Scottish Residential Estates v Henderson* 1991 SLT 490.

⁸⁶⁴ *Ibid*, 491.

⁸⁶⁵ Richardson and Anderson, 2.53. See also *Stirrat v Whyte* 1968 SLT 157. It is possible, however, that this case has been wrongly decided. See Chapters 3 and 4. Indefinite durations see valid for contracts of lease, so it could be possible to view this as a valid contract of lease, albeit not capable of creating a real right.

⁸⁶⁶ See for example, the cases discussed below such as *United Kingdom Advertising Co v Glasgow Bag-Wash Laundry* 1926 SC 303.

⁸⁶⁷ Richardson and Anderson, 2.24; *Pinkerton v Pinkerton* 1986 SLT 672, but see the discussion in Chapter 4. See also *Holloway Brothers (London) v Assessor for Edinburgh* 1948 SC 300. Note that a party could not contract with oneself to create a valid licence to occupy either, as this is a general contractual principle.

⁸⁶⁸ *Ali v Khosla (No 1)* 2001 SCLR 1072.

other means.⁸⁶⁹ For example, if the tenant is in possession of the subjects, the extent of their possession can be used.⁸⁷⁰

The above cases illustrate that generally, parties must be agreed on the cardinal elements of a lease before a lease can come into being. These elements must also be sufficiently identified in the agreement. A missing cardinal element prevents the creation of a lease. However, to prove the existence of the MCE test, the opposite must also be true – cases which have all cardinal elements present must be held to be leases. It is to this issue that we now turn.

8.3.3 Cases Which Have Not Thus Far been Explained on the Basis of the MCE Test

Despite its importance in assessing the weight currently given to the MCE test in Scots law, the leading texts do not consider cases where all cardinal elements are present in their discussion of the MCE test. Nonetheless, an analysis of the cases demonstrates that when all cardinal elements are present, the courts find that there is a lease. This is unsurprising given that the previous section found that the *content* of the agreement determines its nature.

For example, in *Brador Properties v BT*, the agreement was held to be a lease notwithstanding the parties had made it clear that they intended the agreement to be a licence.⁸⁷¹ It was important that the court could identify all of the cardinal elements of a lease. Likewise, the fact that all elements of a lease were present justified a finding of a lease in other cases such as *St Andrews Forest Lodges v Grieve*,⁸⁷² and *Devon Angling Association v Scottish Water*.⁸⁷³ Indeed, with the exception of one case,⁸⁷⁴ the author found that all cases which considered whether there was a lease

⁸⁶⁹ *Affleck v Bronsdon* 2019 UT 49.

⁸⁷⁰ *Piggott v Piggott* 1981 SLT 269.

⁸⁷¹ *Brador Properties v BT* 1992 SC 12.

⁸⁷² *St Andrews Forest Lodges v Grieve* (2017) DUN 25.

⁸⁷³ *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7.

⁸⁷⁴ *Broomhill Motor Co v Assessor for Glasgow* 1927 SC 447: see discussion below.

or a licence to occupy and where all cardinal elements of a lease were present were found to be leases.

However, this strong correlation alone does not necessarily prove that the MCE test is the determining feature in these cases. It is possible, for example, that the presence of all cardinal elements is a necessary, but not sufficient, requirement for formation of leases. In other words, an agreement may be capable of becoming a lease if all cardinal elements are present, but may nonetheless fail to become a lease because of some other reason. The most obvious additional requirement would be exclusive possession, as suggested in *St Andrews Forest Lodges v Grieve*.⁸⁷⁵

It is difficult to ascertain whether exclusive possession or the presence of all the cardinal elements in these cases is the main reason for the courts' decisions that the agreements were leases in the aforementioned examples. That is because in all of the cases mentioned above, exclusive possession was found to exist in addition to the presence of all cardinal elements. Nonetheless, the author would argue that the presence of all cardinal elements was the determining feature, for the reasons explained below.

Most importantly, when all of the cardinal elements are present, the court seems willing to widen the meaning of exclusive possession, so that the agreement can be found to constitute a lease. Of course, not all cases required the meaning of exclusive possession to be stretched.⁸⁷⁶ Nonetheless, in many of the other cases, the courts do appear to seek to accommodate exclusive possession when all of the cardinal elements are present. Thus, in *Brador Properties* the agreement had been carefully drafted to include various terms to prevent exclusive possession.⁸⁷⁷ However, the terms such as the landlord being able to enter the property at will and to move the tenant from office to office were held not to be inconsistent with a finding

⁸⁷⁵ *St Andrews Forest Lodges v Grieve* (2017) DUN 25.

⁸⁷⁶ For example, in *St Andrews Forest Lodges v Grieve* (2017) DUN 25, the occupiers used the property as their main home, so clearly had exclusive possession.

⁸⁷⁷ *Brador Properties v BT* 1992 SC 12.

of exclusive possession. Similarly, in *South Lanarkshire Council v Taylor*, the tenant was required to temporarily remove from the property on just 24 hours' notice.⁸⁷⁸ It is difficult to justify on any rational basis that a landlord who can enter the property at will or remove the tenant at such short notice has truly given exclusive possession to the occupier.

Other cases have involved the sharing of use. In *Cameron v Alexander*, exclusive possession was found to exist notwithstanding the fact that the landlord was sharing the property with the tenant by reserving the right to keep two or three cows.⁸⁷⁹ Similarly, in *Devon Angling Association v Scottish Water*, the right to fish was entirely shared with the landlord. In both cases, all cardinal elements of a lease were present, and the court concluded that there was exclusive possession.⁸⁸⁰ Again it is difficult to justify an argument that sharing the land with the tenant, particularly for the same use, can nonetheless confer exclusive possession.

The only arguable cases where there were the cardinal elements of a lease present and the court held that there was not a lease are ratings cases such as *Broomhill Motor Co v Assessor for Glasgow*.⁸⁸¹ Although it has been argued that this case was decided on the basis of a lack of exclusive possession, the judges at no point mention exclusive possession in their judgments.⁸⁸² The true purpose of these cases was not to establish a lease or a licence, but to correctly identify the arrangement under the Valuation Acts, and so they are limited in their usefulness on the issue of the lease or licence distinction. Nonetheless, as will be illustrated below, these cases could be rationalised in line with the MCE test by considering the cardinal element of property in more detail.

Overall, it is clear that the courts are willing to find exclusive possession to exist, even when this stretches the concept's meaning, if all cardinal elements are present.

⁸⁷⁸ *South Lanarkshire Council v Taylor* (2005) CSIH 6.

⁸⁷⁹ *Cameron v Alexander* 2012 SLCR 50.

⁸⁸⁰ *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7.

⁸⁸¹ *Broomhill Motor Co v Assessor for Glasgow* 1927 SC 447. See also, *Perth Burgh Council v Assessor for Perth and Kinross* 1937 SC 549, where arguably rent was not certain either.

⁸⁸² Rennie, 2.12.

The converse is also true: in the cases where the court has been unwilling to stretch the meaning of exclusive possession to accommodate a particular factual scenario, a cardinal element has been missing. This suggests that it is the presence or otherwise of the cardinal elements that influences whether the courts are willing to find exclusive possession.

When exclusive possession is thought to be missing, there seems to be one of two main problems with the property requirement. The first is that the subject matter is not considered to be competent heritable property. The second is that the property has not been adequately defined.

An early example which illustrates both in a commercial setting is *United Kingdom Advertising Co v Glasgow Bag-Wash Laundry*.⁸⁸³ When discussing whether or not the right to display advertisements amounted to a lease of heritable property, Lord President Clyde explained (and it is worth quoting in full):

“[the] contract bears no resemblance to a lease of heritable property. It is not a contract by which possession is given, as to a tenant, of any of the post-offices or of any part of them. At first reading it seems to be no more than a hiring of the right to display certain advertisements in one or more of a certain class of buildings in Glasgow. Presumably the advertisements are to be displayed on the walls, or in the windows, of the post-offices; but the right of enjoyment of so much wall or window space for the purpose of advertisement seems to be in the nature of a licence so to use the wall or window, rather than in the nature of a lease of the wall or of the window. It was said in the course of the argument, and said quite truly, that it is not enough to make a contract a lease of heritage that the execution of it involves the use of heritage in one way or another.”⁸⁸⁴

⁸⁸³ *United Kingdom Advertising Co v Glasgow Bag-Wash Laundry* 1926 SC 303.

⁸⁸⁴ *Ibid*, 307.

Therefore, it was central to the decision that no heritable property formed the basis of the contract.⁸⁸⁵ Just because the agreement involved the use of heritable property in some way, that did not mean it was a lease of the heritable property. Additionally, even if part of a post office had been allocated to the occupier, the lack of identification as to which part was fatal to the agreement being held to be a lease. Likewise, in *Broomhill Motor Co v Assessor for Glasgow*, Lord Morison explained that the owner of the garage was offering the members of the public that “We shall keep your car for you in the garage which we possess, provided that you pay £2 a month, give us one month's notice of your leaving, and keep your car insured while it is in ‘our garage’.”⁸⁸⁶ Again, this does not seem to be akin to a lease of a heritable property.

The so-called hostel cases also illustrate this point. In *Conway v Glasgow City Council*, the judgment makes several references to the fact that the occupier had the right to use a *bed* in a two-bedded room.⁸⁸⁷ A bed, being moveable property, is not a competent subject-matter for a lease. Furthermore, in *Denovan v Blue Triangle (Glasgow) Housing Association Ltd*, the judge highlighted three problems with the property requirement.⁸⁸⁸ First, the judge explained that nowhere in the agreement was the room “identified or defined”.⁸⁸⁹ For instance, the occupant was “not even given a room number”.⁸⁹⁰ Secondly, although the space occupied could be impliedly defined as “a room in a building”, this was not sufficiently precise as to meet the certainty requirement.⁸⁹¹ Finally, the judge emphasised that the room “could be exchanged at any time”, which also prevented fulfilment of the certainty requirement.⁸⁹²

⁸⁸⁵ C.f. *Glasgow Tramways and Omnibus Co v Glasgow Corporation* (1897) 24 R 628.

⁸⁸⁶ *Broomhill Motor Co v Assessor for Glasgow* 1927 SC 447, 57.

⁸⁸⁷ *Conway v Glasgow City Council* 2001 SLT 1472 (Note).

⁸⁸⁸ *Denovan v Blue Triangle (Glasgow) Housing Association Ltd* 1999 Hous LR 97.

⁸⁸⁹ *Ibid.*, 108.

⁸⁹⁰ *Ibid.*

⁸⁹¹ *Ibid.*

⁸⁹² *Ibid.*

The scenario in *Denovan* can be contrasted with the agreement in *Brador*. There, the allocated office space could also be changed by the landlord at any time, with 14 days' notice.⁸⁹³ The landlord argued that this prevented there being sufficiently certain subjects for the purposes of creating a lease.⁸⁹⁴ Nonetheless, the court concluded that the premises let were sufficiently identified and ultimately held that there was a lease.⁸⁹⁵ The judge explained that in his view, the subjects need not remain the same throughout the lease, so long as there was some agreed mechanism for determining the space to be occupied.⁸⁹⁶ The judge held that even an agreement allowing the landlord to unilaterally change the subjects fulfilled the requirement.⁸⁹⁷ On the face of it, it is difficult to see how the judges' positions on this point in *Denovan* and *Brador* can be reconciled. In one case, the fact that the room is undefined and can change prevents there being a lease, and in the other, it does not. What seems to be the crucial difference, however, is whether or not the initial property is identified in the agreement. Whilst in *Brador*, a particular office was specified in the agreement, there was no such specification in *Denovan*. The judge in *Brador* explained that it was no bar to the creation of the lease that the subjects be changed by the grantor, so long as "initial subjects have been identified".⁸⁹⁸

Whilst most "exclusive possession" cases can be rationalised by identifying a problem with the property requirement, other cases can be rationalised by another cardinal element being missing. For example, in *East Lothian Angling Association v Haddington Town Council*, it was noted that rent was not consistently paid.⁸⁹⁹ In *Commercial Components v Young*, there was also an issue with the rent.⁹⁰⁰ It could not be established that the sum paid represented an annual rent. This was significant

⁸⁹³ *Brador Properties v BT* 1992 SC 12, 21.

⁸⁹⁴ *Ibid*, 17.

⁸⁹⁵ *Ibid*, 21.

⁸⁹⁶ *Ibid*.

⁸⁹⁷ *Ibid*.

⁸⁹⁸ *Ibid*.

⁸⁹⁹ *East Lothian Angling Association v Haddington Town Council* 1980 SLT 213.

⁹⁰⁰ *Commercial Components v Young* 1993 SLT (Sh Ct) 15.

as the occupier was claiming that they did not have a series of seasonal grazing lets, but a tenancy under the Agricultural Holdings (Scotland) Act 1949.

Other examples demonstrate a problem with the duration requirement. For example, in *Conway*, as well as the problems with the property requirement, there was no ish agreed. This too contributed to the fact the agreement could not be a lease.⁹⁰¹

It is also telling that, as far as the author can tell, no case has been decided on lack of exclusive possession alone – the agreements in which it has been found that no exclusive possession exists always have a missing cardinal element too. However, many cases have been decided on the basis of a lack of a missing cardinal element alone. This evidences that the missing cardinal element test has significant weight in Scots law. Indeed, it suggests that Scots law need not adopt exclusive possession as a distinguishing test at all.

8.3.4 Conclusion

In conclusion, the MCE test appears to explain the vast majority of the current cases distinguishing between the lease and the licence to occupy, even those which have not been previously explained on this basis. It is, however, possible that the presence of all cardinal elements is, under the current law, a necessary but not sufficient feature or a lease, and that exclusive possession also needs to be shown. This is because courts have held exclusive possession to be present when all cardinal elements are present. However, the fact that the meaning of exclusive possession has had to be stretched in these cases, coupled with the fact that no cases have been found to be licences because of lacking exclusive possession alone, suggests that the MCE test has more weight as a distinguishing feature. If the MCE test can explain the current cases, then exclusive possession could be abandoned as a test, avoiding the difficulties surrounding that term.

⁹⁰¹ *Conway v Glasgow City Council* 2001 SLT 1472 (Note).

8.4 Conclusion on Distinguishing the Lease from the Licence to Occupy in Scots Law

This and the preceding chapter have examined the three main methods for distinguishing between the lease and the licence to occupy under Scots law. It has illustrated that the current methods are unclear either as to the precise meaning of the test, such as with the exclusive possession test, or as to whether they apply at all, such as with the intention test. The law underpinning these areas is based on illogical reasoning and unsound readings of previous case law, and is in need of reform. The current method for distinguishing between the lease and the licence to occupy in Scots law which appears to explain most of the decided cases is the Missing Cardinal Element test. Nonetheless, the test's usefulness has thus far been understated by the courts. Its application is also complicated by possible presumptions in favour of a lease and implied cardinal elements. These issues are explored in the next chapter.

Chapter 9: Presumptions in Favour of a Lease, and Implied Cardinal Elements

9.1 Introduction

This part examines two related but distinct aspects of the formation of leases. The first is whether Scots law recognises a presumption in favour of a lease when someone occupies the property of another. The second is when a lease's cardinal elements, such as duration, can be implied into an agreement.⁹⁰² This agreement is then treated as a lease. The implying of cardinal elements into an agreement means that an agreement which is missing a cardinal element is therefore not always treated as a licence to occupy. This does not fit well with the Missing Cardinal Element (MCE) test which can be used to distinguish a lease from a licence to occupy, discussed in the previous chapter. The MCE test should mean that if parties fail to agree a cardinal element, such as the duration or rent, then the agreement should constitute a licence.

Presumptions and implied cardinal elements are considered together in this chapter, as the first leads naturally to the second. A presumption in favour of a lease, if recognised by Scots law, would impact both implied and express agreements. A presumption in favour of a lease would mean that in the absence of intention to the contrary, where someone occupies property, this would be treated as a lease. However, to allow the agreement to function as a lease should, the law would need to imply other cardinal elements such as rent and duration. Therefore, a presumption in favour of a lease leads logically to the conclusion that implied cardinal elements are necessary.

This chapter has three main parts. The first considers whether Scots law recognises a presumption in favour of a lease. If so, it considers under which circumstances the presumption may arise. The second part considers when terms are implied into a contract, and if the position is reconcilable with the law surrounding presumptions in

⁹⁰² *Gray v University of Edinburgh* 1962 SC 157.

favour of a lease. The third section considers whether Scots law *should* recognise a presumption in favour of a lease.

9.2 Does Scots Law Recognise a Presumption in Favour of a Lease?

9.2.1 Glen v Roy

It is commonly stated that anyone who occupies the property of another is presumed to occupy as a tenant.⁹⁰³ In other words, there is a presumption in favour of a lease in Scots law, arising from the simple occupation of the land of another. This view is ascribed to a statement by Lord Justice Clerk Moncreiff in *Glen v Roy* who stated:

“The presumption of law is that he occupie[s] as tenant, whether he actually paid rent or not, and whether there was a written lease or not.”⁹⁰⁴

Subsequent cases have treated *Glen v Roy* as authority for the presumption that one who occupies the property of another does so under a lease.⁹⁰⁵ However, despite this seemingly clear statement in favour of a presumption in favour of a lease, the case must be treated with caution. The central issue in the case was whether the occupier was “an occupant under no obligation to pay rent”.⁹⁰⁶ By holding him to be a tenant, he was obliged to pay rent. It is significant that the case was decided in 1882. At that time, the lease was the main type of occupancy agreement recognised by law. Other agreements, such as the licence to occupy, had not yet been introduced or readily accepted into Scots law.⁹⁰⁷ In these circumstances, it is unsurprising that a lease was implied.

Furthermore, the decision in *Glen v Roy* is capable of multiple interpretations.⁹⁰⁸ Whilst the payment could be justified on the basis of an implied contract, it could also

⁹⁰³ Gloag and Henderson, *The Law of Scotland*, 35.02.

⁹⁰⁴ *Glen v Roy* (1882) 10 R 239, 240.

⁹⁰⁵ *Crawford v Bruce* 1992 SLT 524, at 529; *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25.

⁹⁰⁶ *Glen v Roy* (1882) 10 R 239, 241.

⁹⁰⁷ See Chapter 6.

⁹⁰⁸ *Shetland Islands Council v British Petroleum* 1990 SLT 82, 92.

be explained on the basis of unjustified enrichment.⁹⁰⁹ Indeed, the case has subsequently been interpreted not as creating a lease, but rather for the proposition that someone who occupies a property does not do so for free. This would be akin to the presumption against donation recognised by Scots law.⁹¹⁰ For example, Rankine observes that it may not be strictly accurate to describe the payment granted by the court in *Glen v Roy* as “rent”.⁹¹¹ Likewise, it was argued by the pursuers in *G W Tait & Sons v Taylor* that the “Occupation of premises was a ‘benefit’ for which in the normal case the occupier is liable to pay”.⁹¹² An occupier of another’s land is unjustifiably enriched through their occupation. As such the landowner is entitled to seek recompense for the period of occupation.⁹¹³

That the case was decided on the basis of unjustified enrichment and does not create a presumption in favour of a lease is the interpretation which is most coherent with Scots law. As Paton and Cameron explain, the decision should be treated as a “special circumstance”, not as creating any general principles.⁹¹⁴ Indeed, it seems illogical that a formalised arrangement of lease should come into being when only two of the cardinal elements of a lease can be shown: the property; and the parties. This is especially true when the parties cannot be considered to have agreed to enter into any agreement from the act of occupation alone. The occupation may, for example, take place without the landowner’s knowledge. Thus, a presumption in favour of a lease does not arise in Scots law from the mere fact that someone occupies the land of another.

⁹⁰⁹ *Ibid.*

⁹¹⁰ Stair I,8,2; Bankton I,9,20; Erskine III,3,92. See also *Grant’s Trustees v M’Donald* 1939 SC 448.

⁹¹¹ Rankine, 310.

⁹¹² *G W Tait & Sons v Taylor* 2002 SLT 1285 at 14; see also: *Secretary of State for Defence v Johnstone* 1997 SLT (Sh Ct) 37.

⁹¹³ E.g. *Rochester Poster Services Ltd v AG Barr Plc* 1994 SLT (Sh Ct) 2; *GTW Holdings Ltd v Toet* 1994 SLT (Sh Ct) 16; *West Dunbartonshire Council v McGougan* 1998 Hous LR 15; c.f. *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82; *Renfrewshire Council v McGinlay* 2001 SLT (Sh Ct) 79.

⁹¹⁴ Paton and Cameron, 12.

9.2.2 *Morrison-Low v Paterson*⁹¹⁵

Even if it is accepted that *Glen v Roy* does not create a presumption in favour of a lease, other cases may be cited in favour of that proposition. In the more recent case of *Morrison-Low v Paterson*, Lord Keith explained:

“[W]here a proprietor admits someone into possession of an agricultural holding, ... and regularly accepts rent from him, there is an inescapable inference that a tenancy has been brought into existence, and it is of no moment that no particular occasion can be pointed to upon which the parties agreed to the one granting and the other taking a tenancy.”⁹¹⁶

Although *Morrison-Low v Paterson* and *Glen v Roy* are often stated as authority for the same proposition,⁹¹⁷ the presumption advanced in each is different. In *Glen v Roy*, it is suggested that the only requirements for a presumption in favour of a lease to operate is the occupation of the property of another. However, in *Morrison-Low*, the position is that a lease is presumed only where there is occupation of another's property, *and* rent has also been paid. Thus, *Morrison-Low* anticipates a more formalised relationship between the parties before a lease is presumed to exist.

As a case decided in the House of Lords, *Morrison-Low* provides strong judicial authority for the existence of a presumption in favour of a lease. Furthermore, subsequent cases have confirmed that it was correctly decided.⁹¹⁸ This confirmation is not universal however, and there have been clear judicial statements to the effect that *Morrison-Low* does not create a presumption in favour of a lease.

One such case is *Strachan v Robertson-Coupar*.⁹¹⁹ In this Inner House decision, Lord Emslie, when discussing *Morrison-Low*, commented that:

⁹¹⁵ *Morrison-Low v Paterson* 1985 SC (HL) 49.

⁹¹⁶ *Ibid*, 78.

⁹¹⁷ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 26.

⁹¹⁸ *Martin v McMillan* [2019] CSIH 26.

⁹¹⁹ *Strachan v Robertson-Coupar* 1989 SC 130.

“in *certain circumstances*, possession of agricultural land by a person who farms it as a tenant would, and who pays rent to the proprietor in respect of his occupation *may* give rise to an irresistible inference that he occupies as a tenant under a lease from year to year.” ⁹²⁰

This explanation differs from the position advanced in *Morrison-Low* in two key respects. First, it limits the application of *Morrison-Low* to “certain circumstances” only. The wording of *Morrison-Low* suggested that the doctrine was to apply universally. The second point of significance is Lord Emslie’s use of the word “may”. This is noteworthy because Lord Emslie is not stating that in certain circumstances, the presumption may be rebutted. He is stating that in certain circumstances, the presumption does not arise at all.

The eradication of the presumption in *Morrison-Low* is continued when Lord Emslie explains:

“the inquiry must always be, where there is no direct evidence of a contract of lease entered into at a particular time, whether the whole circumstances are *only* to be explained upon the basis that both parties must have agreed to the creation of the essential relationship of landlord and tenant in respect of defined subjects”. ⁹²¹

To paraphrase the above, Lord Emslie is explaining that a lease is only to be implied when that is the *only* possible explanation of the arrangement between the parties. If a party has to establish that the only way to explain the arrangement is that a lease exists,⁹²² then there cannot be said to be a presumption in favour of a lease in Scots law.

⁹²⁰ *Ibid*, 134. Emphasis added.

⁹²¹ *Ibid*. Emphasis added.

⁹²² *Knapdale (Nominees) Ltd v Donald* 2001 SLT 617 held that it was for the party seeking to create a lease to prove, not for the other party to disprove.

Taking this a step further, it is difficult to see how under the modern law, a lease could ever be implied under Lord Emslie's formulation. The licence is now a well-established concept in Scots law⁹²³ and thus could be as justifiable an explanation of the occupation as a lease. If there are two occupation agreements which could apply equally to an arrangement, then the lease can never be the "only" explanation.

It does not seem possible to reconcile *Strachan v Robertson-Coupar* with *Morrison-Low v Paterson*. However, with *Morrison-Low* being decided in the House of Lords, and *Strachan v Robertson-Coupar* being decided in the Inner House, *Morrison-Low v Paterson* must be viewed as the binding precedent. Therefore, it must be concluded that Scots law does recognise a presumption in favour of a lease. This presumption arises when the cardinal elements of rent, parties and property can be identified. Of course, presumptions can be rebutted.⁹²⁴ Examples of scenarios which would appear to rebut the presumption include if the agreement can be explained on the basis of some other agreement⁹²⁵ or if the occupation has followed from some incomplete agreement.⁹²⁶

9.3 Implied Cardinal Elements

If Scots law recognises a presumption in favour of a lease which arises upon occupation of the property of another and the payment of rent, then it is unsurprising that the law must be able to imply cardinal elements into lease agreements. A lease is by its very nature of limited duration.⁹²⁷ If the law deems a lease to have arisen without agreement on that duration, then it is necessary to imply a duration. Scots law implies a duration of one year.⁹²⁸

⁹²³ See Chapter 6.

⁹²⁴ *Commercial Components (Int) Ltd v Young* 1993 SLT (Sh Ct) 15.

⁹²⁵ *Bell v Inkersall Investments* 2006 SC 507.

⁹²⁶ *Sinclair v Sinclair* 2010 SCLR 109.

⁹²⁷ See Chapters 3 and 4.

⁹²⁸ *Gray v University of Edinburgh* 1962 SC 157, on which, see below. The one-year implied duration is also the maximum period of a lease extended by tacit relocation: see Rankine, 60; Richardson and

On the other hand, if the law did not recognise a presumption in favour of a lease arising upon occupation and payment of rent, there would be no need for implied cardinal elements. If a presumption in favour of a lease only arose when all four cardinal elements were present, then there would be no cardinal elements left to imply.

9.3.1 Implied Duration

There is evidence that Scots law goes further than the position in *Morrison-Low v Paterson* with regards to implying cardinal elements. *Morrison-Low* suggests an arrangement where parties have not expressly agreed any terms. It is argued therefore that the lease exists on the basis of conduct alone. However, other cases, like *Gray* discussed below, suggest that duration can also be implied in situations where parties have expressly agreed the other cardinal elements of a lease, but not duration. This is significant because if parties have taken steps to expressly negotiate a contract, silence as to one of the cardinal terms may indicate dissensus.⁹²⁹ Of course, the implication of a duration may solve errors, such as where a duration has been omitted by accident.⁹³⁰ However, whether omission is accidental is difficult to prove.

The case of *Gray v University of Edinburgh*⁹³¹ is often identified as authority for the proposition that if parties enter into an agreement to create a lease, with the parties, property and rent agreed and possession taken, then the law will imply a duration of one year.⁹³² In the case, the parties entered into negotiations to lease a property. The parties agreed that a fair and reasonable market rent would be paid. The court held that rent was not sufficiently agreed, and thus no lease had been created.

Anderson, 10.19ff. It further aligns with the maximum duration of a lease which can be created without writing: Requirements of Writing (Scotland) Act 1995, s1(7).

⁹²⁹ W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007), 5.11.

⁹³⁰ Richardson and Anderson, 2.28.

⁹³¹ *Gray v University of Edinburgh* 1962 SC 157.

⁹³² Richardson and Anderson, 2.28; G Gretton and A Steven, *Property, Trusts and Succession*, (3rd edn, 2017), 20.7.

However, the court went on to make obiter comments as to when a duration of one year would be implied, if a rent been agreed.⁹³³

The decision in *Gray* is often misquoted. It is *not* authority for the fact that when rent, parties, and property are agreed and possession taken, the court *will* imply a lease.⁹³⁴ Indeed, the court in *Gray* was very clear that the view expressed on the issue of implying a duration of a year was not a “concluded opinion”.⁹³⁵ Therefore, the case is only authority for the fact that there is no lease without sufficient agreement on at least the rent, parties and property.

More fundamentally, the case does not stand as an authority for a rule that a duration of one year *will* be implied if the other cardinal elements are agreed and possession taken. Much like the presumption in favour of a lease as phrased in *Strachan v Robertson-Coupar*, the court in *Gray* noted that only in certain circumstances would a duration of one year be implied. It is not, therefore, automatic. Some texts do acknowledge this more expressly. For example, Paton and Cameron explain that the court discusses situations where a duration of a year “might” be implied.⁹³⁶

The decision in *Gray* makes clear that a one-year duration may only be implied where parties have already entered into the relationship of landlord and tenant.⁹³⁷ Lord Mackintosh suggested that the taking of possession may indicate that parties have indeed entered this relationship.⁹³⁸ This is consistent with the presumption in favour of a lease advanced in *Morrison-Low v Paterson*, where possession of another’s property and payment of rent would create the presumption that a lease existed, necessitating the implication of a duration.⁹³⁹

⁹³³ *Gray v University of Edinburgh* 1962 SC 157, 166.

⁹³⁴ Note specifically the use of the term “will” in formulations of the test by Richardson and Anderson at 2.28.

⁹³⁵ *Gray v University of Edinburgh* 1962 SC 157, 166.

⁹³⁶ Paton and Cameron, 7.

⁹³⁷ *Gray v University of Edinburgh* 1962 SC 157, 166.

⁹³⁸ *Ibid.*

⁹³⁹ *Morrison-Low v Paterson* 1985 SC (HL) 49.

However, it is difficult to justify why the entering into possession alone should be deemed to create a relationship of landlord and tenant. As noted above in relation to *Strachan v Robertson-Coupar*, there are other explanations for the taking of possession, not least that the parties could intend to create a licence to occupy.⁹⁴⁰ Furthermore, as the court in *Gray* note, it is important to consider the origins of the rule that a duration of one year can be implied.⁹⁴¹ The pursuer in *Gray* sought to invoke what the sheriff called the “old rule” as stated by Rankine that a duration of one year can be implied.⁹⁴² However, as the court in *Gray* highlights, it is not enough to consider this phrase alone when a few sentences later, Rankine acknowledges that “The absence of an ish may, however have another result; it may go far to show that the transaction was never intended as an assurance, but only as a revocable lease or licence.”⁹⁴³

The two statements by Rankine are difficult to reconcile: if the lack of duration indicates that the parties wish to enter into a licence rather than a lease, how can the parties be considered to have entered the relationship of landlord and tenant without agreement on a duration? This indicates a significant flaw with a presumption in favour of a lease arising when only three cardinal elements are agreed. It should not be logically possible when the law recognises the missing cardinal element test as a method of distinguishing between leases and licences to occupy. That test indicates that if a cardinal element is missing, then the agreement will only amount to a licence to occupy.

The MCE test could be explained on the basis that it only applies to missing rent, parties or property. The MCE test may therefore be better expressed as the “missing rent test”, as party and property will nearly always be capable of being inferred from the circumstances, and the test in *Gray* indicates a duration of one year can be implied. However, there are cases where the cardinal element of duration has

⁹⁴⁰ *Strachan v Robertson-Coupar* 1989 SC 130, 134.

⁹⁴¹ *Gray v University of Edinburgh* 1962 SC 157, 167.

⁹⁴² Rankine, 115.

⁹⁴³ *Ibid.*

prevented the creation of a lease. One such example is *Scottish Residential Estates v Henderson*.⁹⁴⁴ In that case, there was a non-permissible duration agreed: until one of the parties needed the property back. Therefore, it seems the MCE test does apply to duration, but it is a positive requirement: parties must explicitly agree in their contracts that there is to be no specified duration. Simple omission of duration is a risky method of creating a licence, as the duration may then be implied.

Notwithstanding the difficulties with the rule that duration can be implied to perfect a lease agreement, it has been followed and applied by subsequent cases.⁹⁴⁵

Therefore, despite its problems, it is correct to say that want of an ish is not fatal to the creation of a lease.

9.3.2 Implied Rent

Whilst there is strong authority for the ability to imply duration into an agreement, there is less certainty about whether other cardinal elements can be implied. A particularly difficult case is *Shetland Isles v BP*.⁹⁴⁶ In that case, the parties agreed all cardinal elements of a long lease with the exception of rent. An argument was advanced that if all three cardinal elements were present, then the fourth could be implied. It was argued that it did not matter which cardinal element was implied. Therefore, the parties sought to expand the scope of the rule in *Gray* to cover all cardinal elements. However, the court held that they could not fix the rent in *Shetland Isles* because the lease was a long lease. The court did suggest that they may perfect the lease by creating an annual tenancy as opposed to a long lease, and fix a rent for that annual tenancy. As Richardson and Anderson note, the ratio of the case is “not entirely clear”.⁹⁴⁷ They suggest that it is authority for a rule which

⁹⁴⁴ *Scottish Residential Estates Development Co v Henderson* 1991 SLT 490.

⁹⁴⁵ For example, *Cinema Bingo Club v Ward* 1976 SLT (Sh Ct) 90.

⁹⁴⁶ *Shetland Isles Council v BP* 1990 SLT 82.

⁹⁴⁷ Richardson and Anderson, 2.28.

states that “where rent is the only essential element not agreed, a lease for a year may be created irrespective of the proposed duration, at a rent fixed by the court”.⁹⁴⁸

Several conclusions may be drawn from the case if that is indeed the ratio. First, it suggests that courts will imply a rent, but only for durations of a year. Therefore, in the case of an annual lease, where parties agree all elements except rent, courts can perfect the lease by implying a rent. However, as Richardson and Anderson note, the case goes further than this and suggests that courts may be able to *change* the duration to a year and imply a rent for that year.⁹⁴⁹ This suggests that, as the parties argued in *Shetland Isles Council v BP*, parties need to agree only three of the four cardinal elements to create a lease.

If the ratio of *Shetland Isles v BP* is correct, it represents a significant change in approach by the courts. For example, in *Gray*, the court had held that they could not imply a rent to an agreement. The two cases could be reconciled, however, by considering that in *Gray*, although parties agreed there was to be a rent, they had not decided the amount. Furthermore, the duration was uncertain. Thus, two cardinal elements, not one, were missing in *Gray*.

9.3.3 Conclusion on Implied Cardinal Elements

In summary, the law as it stands seems to confirm that only three of the four cardinal elements are needed to create valid contracts of lease and real rights of lease, so long as possession is taken. This is only the case, however, if parties can show that there was an intention to create a relationship of landlord and tenant. Other options such as the licence to occupy are now readily available as a method of justifying occupation of the property of another. It is therefore difficult to see how the tests in *Gray* and *Shetland Isles* could ever be fulfilled.

⁹⁴⁸ *Ibid.*

⁹⁴⁹ *Ibid.*

9.4 Should Scots Law Recognise a Presumption in Favour of a Lease and Imply Cardinal Elements?

Thus far, this section has considered whether a presumption in favour of a lease exists and whether cardinal elements can be implied into incomplete agreements. It has not considered whether or not such a presumption should exist and whether cardinal elements should be implied.

The argument in favour of recognising a presumption in favour of a lease and implying cardinal elements when three of the four have been agreed upon is practicality.⁹⁵⁰ Particularly in the case of duration, it provides parties with certainty as to the duration of their agreement, and means parties can make decisions on that assumption.

This argument may justify implying a duration into an occupation agreement, but it does not follow that the agreement created should be a lease. As has already been discussed, a lease is an onerous agreement with many implied terms regulating the agreement. More important, however, is the fact that by implying a duration of one year, the courts are not just creating a contract of lease. They are often creating a real right in favour of the tenant. Leases for less than a year are not required to be in writing,⁹⁵¹ and short leases provide tenants with real rights through possession. If possession is necessary to imply a cardinal element, then this requirement will be automatically fulfilled. It seems counterintuitive that parties should have such an onerous agreement imposed upon them without a clear intention to become a landlord and tenant, demonstrated by agreeing (as a minimum)⁹⁵² all of the cardinal elements. It is therefore submitted that Scots law should *not* create a presumption in favour of a *lease*, nor should it imply terms to create a *lease*, when only three cardinal elements can be shown to have been agreed by the parties. The law should

⁹⁵⁰ Rennie, 1.22.

⁹⁵¹ C.f. Requirements of Writing (Scotland) Act 1995 s1(2)(7); *Caterleisure Ltd v Glasgow Prestwick International Airport Ltd* 2006 SC 602.

⁹⁵² See Chapter 11.

instead imply a licence to occupy. This would fit with the existence of the MCE test to distinguish between leases and licences.

Should the position be different if all four cardinal elements of a lease have been agreed between the parties? This will depend on whether it is thought that agreeing the cardinal elements alone is sufficient to create a lease, or whether something else also needs to be shown.⁹⁵³ If agreement on the cardinal elements creates a lease, then there is no need for a presumption in favour of a lease. However, if something else is needed, such as intention, or exclusive possession, then it could be possible to have the presumption in favour of a lease arising when all of the cardinal elements of a lease have been created. It is still nonetheless argued that a presumption in favour of a lease should not arise in these scenarios, for the same reasoning as advanced above. A lease generates onerous obligations, and thus parties should show clear intention to create one before a lease comes into being. The default position in the commercial sector should be that unless proof can be shown to the contrary, an agreement is a licence to occupy.⁹⁵⁴

9.5 Conclusion

Scots law purports to recognise a presumption in favour of a lease when three cardinal elements are present. However, as demonstrated, it no longer seems possible to fulfil the requirement of clear intention to create a relationship of landlord and tenant. Parties may omit a cardinal element from their agreement because they intend to create a licence to occupy instead. Nonetheless, parties would be wise to state explicitly that there is no rent, or no duration, or they risk the court finding that a lease has been created under the present law and then implying the missing cardinal elements into that agreement. If there is a working presumption in favour of a lease under Scots law, it has been argued that this should no longer be the case. It is

⁹⁵³ *Ibid.*

⁹⁵⁴ Of course, the position may be different in other sectors which are deemed to require more protection, such as the residential sector – see Chapter 11.

illogical to impose the more onerous agreement onto the parties in cases where they have not taken clear steps to fulfil the essential requirements of that agreement.

Chapter 10: The Licence to Occupy in Action

10.1. Introduction

So far, this thesis has sought to explain how a lease is defined and created. It has then considered the current methods of distinguishing a lease from a licence to occupy and concluded that the current methods are insufficient. To date, the current approach to distinguishing between leases and licences to occupy has been to contrast the two agreements, determining which better explains the scenario at hand. This short chapter starts from the opposite end. Rather than contrasting leases and licences, it examines licences to occupy as a homogenous group to identify whether they have any common characteristics. If so, this could form a useful starting point for a reformed test to distinguish the lease from the licence to occupy, considered in Chapter 12.

As such, this part seeks to answer the question, “do licences to occupy have a distinct character”? To answer this question, current definitions of the licence and how the licence is used in practice are analysed. As Cook highlights in a recent book on commercial contracts, most contract law scholarship considers cases alone, and therefore considers only the cases resulting in dispute.⁹⁵⁵ Contract law scholarship rarely considers the agreements which do not result in a dispute before a court. It is vital that scholarship considers how the law is used in practice so that it accurately reflects how it is used day-to-day. Cases focusing primarily on the distinction between leases and licences are not discussed in this chapter as the unifying factor in those cases was discussed at length in the previous chapters.⁹⁵⁶ This chapter instead analyses descriptions of leases and licences by academics and law firms, giving an alternative perspective. This part concludes that whilst a unifying factor of “being less than a lease” can be identified from the definitions of a licence, this is not

⁹⁵⁵ J Cook, “The Contents of Commercial Contracts: Terms Affecting Freedoms – A Response” in P Davies and M Raczynska, *Contents of Commercial Contracts: Terms Affecting Freedoms* (2020), as explained by L Richardson, “Paul Davies and Magda Raczynska *Contents of Commercial Contracts: Terms Affecting Freedoms*” (2021) 25(2) EdinLR 263.

⁹⁵⁶ Chapters 7 and 8.

useful for distinguishing the lease from the licence to occupy. It seems only to illustrate the parties desire to create something that looks like a lease but has none of the consequences of one.

10.2 Defining the Licence to Occupy

10.2.1 The Idea of “Falling Short of a Lease”

The most striking observation regarding the definitions of a licence to occupy is a reluctance to give a standalone definition of a licence. Some refuse to define the licence at all, preferring instead to list examples of when a licence would be found.⁹⁵⁷ From these examples, the licence appears to be a disparate group. However, a disparate group may nonetheless have a unifying factor, even if it is not immediately obvious.

Often, if the licence is defined at all, it is defined negatively, by comparison to a lease. In other words, a licence is “not a lease”. This is well illustrated by the introductory joke in a law firm’s article about the lease and the licence:

Question - When is a licence not a licence?

Answer - When it's a lease.⁹⁵⁸

This approach is evident throughout the academic texts which discuss the licence to occupy in Scots law. Richardson and Anderson, for instance, describe the licence as an agreement which “falls short of being a lease”.⁹⁵⁹ Likewise, Rennie terms the

⁹⁵⁷ G Gretton and A Steven, *Property, Trusts and Succession*, (3rd edn, 2017), 20.8. See also T Aldridge and P Butt, *Aldridge Leasehold Law* (122nd edn, 2021), 1.067 for a similar approach to defining the concept by giving examples in English law.

⁹⁵⁸ C Sturrock, “When is a licence a lease?”, 8 September 2015, available: www.morton-fraser.com/knowledge-hub/when-licence-lease.

⁹⁵⁹ Richardson and Anderson 2.51. See also their description at 2.50 of a licence being the name given to a contract of occupation “where there is no lease”, and their adoption of Paton and

licence a “lesser right” than a lease. Paton and Cameron note the licence “fall[s] short of a lease”.⁹⁶⁰ Rankine described the licence as a contract which is “denied the name of lease”⁹⁶¹ whilst Gloag and Henderson call the contract a “mere” licence to occupy.⁹⁶² This approach alone, however, is unhelpful because does not give us any criterion by which to determine what is meant by “falling short” of a lease.

10.2.2 Defining “Falling Short” – Assessing the Point of Formation of Contract

Some texts do, however, go further in explaining what “falling short” means. The most useful explanations illustrate what “lesser than a lease” looks like at the point of formation of the contract. For instance, a licence will lack a cardinal element of a lease.⁹⁶³ This seems to be the best explanation of how the cases have been decided to date.⁹⁶⁴ Alternatively, the agreement may lack exclusive possession, or have intermittent possession.⁹⁶⁵ The sharing of possession seems to be a key feature of a licence in the view of the Property Standardisation Group.⁹⁶⁶ Exclusive possession, or lack thereof, is the determining factor between leases and licences in English law.⁹⁶⁷ These definitions are useful because it gives a clear criterion by which “lesser” can be ascertained.

However, is this definition of “falling short” borne out in practice? To answer this question, a useful document can be referred to, which was produced to assist the Finance Committee of the Scottish Parliament in its consideration of the Land and Buildings Transaction Tax (Scotland) Bill, and specifically whether it should apply to

Cameron’s definition at 2.52. See also, the Stair Memorial Encyclopaedia “Landlord and Tenant”, paras 2 and 20.

⁹⁶⁰ Paton and Cameron 12.

⁹⁶¹ Rankine, 2.

⁹⁶² Gloag and Henderson, *The Law of Scotland* (14th edn, 2017), 35.02.

⁹⁶³ Stair Memorial Encyclopaedia “Landlord and Tenant”, paras 20; Gretton and Steven, *Property, Trusts and Succession*, 20.8. Note also that the Property Standardisation Group, *Licence to Occupy – Guidance Notes (v2)*”, para 1, suggests this is the best way to ensure there is no accidental lease created.

⁹⁶⁴ See Chapter 8.

⁹⁶⁵ *Ibid.*

⁹⁶⁶ Property Standardisation Group, “Licence to Occupy – Guidance Notes (v2)”, para 1.

⁹⁶⁷ *Street v Mountford* [1985] UKHL 4.

licences to occupy.⁹⁶⁸ It provides an extensive list of examples of the situations where licences are used in practice, split by industry sector.⁹⁶⁹ The list is not exhaustive, and it is noted that the possibilities of where a licence is used are almost endless.⁹⁷⁰

Indeed, some of the examples listed could be rationalised on the above basis. For instance, a one-off fee may fail to qualify as rent. This could explain why the right to either host, or to attend a concert or sporting event may constitute a licence to occupy only. Others may not have any rent paid at all: for example, when a company agrees to fit out a shop, they may be granted a licence to enter the shop. However, they are unlikely be paying rent to do so, and in fact will be paid themselves for being on the premises.

Other examples could be rationalised on the basis of being insufficient for the purposes of the property requirement. For instance, the right to set up a stall in a shopping centre foyer may not be in an adequately defined part of the shop floor. However, if it is adequately defined, then this would not prevent it being a lease: leases of very small areas are permissible in Scots law, such as of advertising hoardings.⁹⁷¹

Some agreements may also fall short if exclusive possession was a necessary feature of a lease. One such example would be a shared telecommunications mast.

Nonetheless, it is clear when analysing the list that many of the examples are incapable of being rationalised by the analysis of “falling short of a lease” in the

⁹⁶⁸ Tax and Property Committee, Scottish Parliament, “Further Evidence in Relation to Licences of Land/Buildings” (undated).

⁹⁶⁹ *Ibid*, para 3.

⁹⁷⁰ *Ibid*, para 4. See also Gretton and Steven, *Property, Trusts and Succession*, 20.8.

⁹⁷¹ *AJ Wilson & Co v Assessor for Kincardineshire* 1913 SC 704.

sense of looking different to a lease at the point of formation of contract. Many examples share all the features of a lease.⁹⁷²

For instance, a licence to occupy often precedes a lease, so as to allow the future tenant to occupy the property immediately whilst the specifics of the formal lease are being agreed.⁹⁷³ In that case, there is likely to be exclusive possession of the subjects (as otherwise the future lease would be impossible),⁹⁷⁴ the owner will be unlikely to grant this occupation rent free, and he will also want the agreement to be a defined time in case negotiations fall through. Another example is the pop-up shop. These often use the entirety of a building, and so have exclusive possession.⁹⁷⁵ The occupier will want a specified duration so they know how much stock to purchase, for instance, and cannot have the agreement terminated at will by the owner of the land. Of course, again, the owner of the building will want to be paid. Similar analysis can be applied to further examples including serviced offices, or the exclusive use of a site for erection of a telecommunications mast, for instance. Therefore, if these are valid licences, then what is meant by “lesser than a lease” must encompass something other than simply a missing a cardinal element.

10.2.3 Defining “Falling Short” – The Consequence of the Agreement

An alternative line of explanation is particularly common in the definitions given by law firms and those in practice. The reference to “falling short” means simply that the rights conferred by the licence are lesser than a lease. For example, Morton Fraser note that the licence “*grants only a personal right*”.⁹⁷⁶ Lindsays explain that the licence “*gives a limited right of occupation*”.⁹⁷⁷ This approach is commonly taken in

⁹⁷² Richardson and Anderson, 2.51.

⁹⁷³ Aldridge and Butt, *Aldridge Leasehold Law*, 1.066.

⁹⁷⁴ Chapter 7.

⁹⁷⁵ See for example, Fore Play Crazy Golf pop-up venue: <https://foreplaycrazygolf.co.uk/edinburgh/>.

⁹⁷⁶ Sturrock, “When is a licence a lease?” (emphasis added). See also Revenue Scotland, “LBTT Legislation Guidance, LBTT6001 – Leases” (undated), available: <https://revenue.scot/taxes/land-buildings-transaction-tax/lbtt-legislation-guidance/lbtt6001-leases>.

⁹⁷⁷ Lindsays, “A licence may not always be what it seems... it might be a lease” (undated), available: <https://www.lindsays.co.uk/news-and-insights/insights/a-licence-may-not-always-be-what-it-seems-it-might-be-a-lease> (emphasis added).

some of the English explanations too.⁹⁷⁸ These are not definitions in the true sense of the term, but rather a statement of the consequences of an agreement.

The Scottish academic texts provide better definitions. Paton and Cameron, for example, explain a licence occurs “where not the heritage itself but the right to use a particular part of it or to put a particular part of it to some use is granted”.⁹⁷⁹ This is also adopted by *McAllister’s Scottish Law of Leases*,⁹⁸⁰ as well as the Stair Memorial Encyclopaedia,⁹⁸¹ and a LexisNexis Practice Note on the topic.⁹⁸² These are more useful than the definitions given by law firms as they illustrate more fully what the content of the “limited right of occupation” is. Nonetheless, they fall short by still focusing on the consequences of the agreement: that a licence does not provide a right to the “heritage”.

This approach of defining the lease by its consequences better accounts for how licences are used in practice. It explains why licences, which look like leases and share the same formational features as a lease, are treated as licences to occupy. It can account for the pre-lease licence, the pop-up shop, and the exclusive use of a telecommunications mast explained above. This approach suggests it is not enough to consider the hallmarks of the agreement; one must also consider the *purpose* of the agreement, and how substantial were the rights that were intended to be transferred.⁹⁸³

⁹⁷⁸ See, for example Shelter Legal England and Wales, “What is a licence?” (undated), available: http://england.shelter.org.uk/legal/security_of_tenure/basic_principles_security_of_tenure/what_is_a_licence#0.

⁹⁷⁹ Paton and Cameron, 12.

⁹⁸⁰ Richardson and Anderson, 2.52.

⁹⁸¹ Stair Memorial Encyclopaedia “Landlord and Tenant”, para 20.

⁹⁸² LexisNexis and M Davenport, “Licences to occupy commercial premises in Scotland – practice note” (undated), available: [https://www.lexisnexis.co.uk/legal/guidance/licences-to-occupy-commercial-premises-in-scotland#:~:text=A%20licence%20to%20occupy%20\(licence,Law%20of%20Leases%20%5B2.51%5D](https://www.lexisnexis.co.uk/legal/guidance/licences-to-occupy-commercial-premises-in-scotland#:~:text=A%20licence%20to%20occupy%20(licence,Law%20of%20Leases%20%5B2.51%5D). This is also reminiscent of the English approach, see S Ilyas and S Gwayne, *The Landlord and Tenant Factbook* (2021) 1-1.4, which states “In essence a licence is no more than the owner’s or occupier’s permission to enter on land”.

⁹⁸³ This idea is expanded upon further in Chapter 12.

10.2.4 The Problem with the Most Accurate Description of “Falling Short”

The problem with this understanding of licences is that the line between leases and licences becomes blurred. Licences are not used in a distinct set of situations, but instead are used simply *when it makes commercial sense for the parties to do so*. Parties choose licences because they confer more limited rights upon the licensee. This means that the way in which leases and licences are distinguished and operate in practice is simply however the parties wish them to do so. This idea is explored further in Chapter 12.

However, that is not to say that this analysis would hold up if these licences were disputed in court. As was analysed in the Chapters 7 and 8, the courts have attempted to draw an objective distinction between the two, emphasising exclusive possession or a missing cardinal element. This perhaps explains the academic texts which phrase “lesser than a lease” in the way they do. However, given the examples above, it is unlikely that the judicial and academic understanding reflects what is happening in practice.

10.3. A Coherent Commercial Reason for a Licence?

A different approach to the issue of distinguishing the lease and licence in practice could be to consider the rationale parties have for entering into a licence as opposed to a lease. When does it make commercial sense for the parties to do so? Can factors be identified that mean parties will choose a licence over a lease? If so, could they form the basis of a theoretical distinction between the lease and licence?

Lindsays highlights the fact that a licence may often be used when a particular or limited purpose is intended to be granted.⁹⁸⁴ This is also reflected in the Property

⁹⁸⁴ Lindsays, “A licence may not always be what it seems... it might be a lease”.

Standardisation Group's sample Licence to Occupy, at section 5.⁹⁸⁵ Examples may include the bare right to park a vehicle on a piece of land. However, this does not seem an accurate characterisation as there is no reason why this use of land could not be granted as a lease for a specific purpose. Indeed, the Property Standardisation Group's includes a similar permitted use clause in their sample leases.⁹⁸⁶ Conversely, there are multiple examples of licences being granted not for one particular and limited purpose. Again, the best example would be the pre-lease licence.

Morton Fraser highlights two common features of a licence. The first is that licences are often intended to be "informal".⁹⁸⁷ Again, this is echoed in the Property Standardisation Group's sample Licence, which is much shorter than their sample leases.⁹⁸⁸ It also explains scenarios such as the pre-lease licence, which is intended to operate whilst the formal lease is being negotiated. However, again this explanation is insufficient. It is not true to say that all leases are formal – indeed, they can be constituted orally, which can hardly be said to be "formal". Furthermore, some licences are intended to be formal arrangements, hence entering into a written licence agreement in the first place.

Another common explanation of when licences are used in preference to a lease is when the agreement is intended to operate only for a short period of time.⁹⁸⁹ This can be criticised in the same way as the previous two factors. Firstly, not all leases are for a long period of time – indeed, leases are getting shorter.⁹⁹⁰ Secondly,

⁹⁸⁵ Property Standardisation Group, "Licence to Occupy- v5" (February 2021), section 5.

⁹⁸⁶ See, for example, Property Standardisation Group, "Lease (based on the Model Commercial Lease of a Retail Unit in a Shopping Centre (MCL-RETAIL-07) Version 1.4a) – v3" (March 2020), 4.14.

⁹⁸⁷ Sturrock, "When is a licence a lease?"

⁹⁸⁸ Property Standardisation Group, "Licence to Occupy- v5".

⁹⁸⁹ See Sturrock, "When is a licence a lease?"; Shepherd and Wedderburn, "Your Guide to English and Scottish Property Law Terms", (November 2019) available: https://shepwedd.com/sites/default/files/Your_Guide_to_English_and_Scottish_Property_Law_Terms_Scots_Counsel.pdf, p8.

⁹⁹⁰ See, for example, DLA Piper "Length of Leases" (February 2021), available: <https://www.dlapiperrealworld.com/law/index.html?t=commercial-leases&s=legal-characteristics-of-a-lease&q=length-of-leases&c=GB-SCT>, noting most leases are now between 5-15 years.

licences to occupy may be for a very long period e.g. for the siting of telecommunications masts.

As such, whilst these factors may be suggestive of a licence as opposed to a lease, the presence of leases with these features, and licences without these features, means they do not adequately explain the difference between leases and licences to occupy. These factors are not definitive.

10.4 Conclusion

From the preceding discussion, it has been demonstrated that there *is* a unifying principle underpinning the licence to occupy. This is the idea that a licence “falls short” of a lease or is a “lesser right” than a lease. The more difficult question, however, is how this concept of falling short is defined. The more principled way to visualise this concept is that the licence falls short of a lease in some clearly identifiable way – for example, that it fails to fulfil the cardinal elements of a lease, whatever they may be. However, this is not how the licence is used in practice. Many examples of licences in practice can be identified which seemingly meet all the requirements of a lease. The meaning of “falling short” therefore seems to be something less tangible. The only distinction which can account for how the licence is used in practice is the idea that it is the extent of rights granted and therefore the consequences of the arrangement that are important. Put simply, the licence operates as such when the parties intend to grant lesser rights. Whether such agreements should be permissible, or should be struck down as shams, is considered in the following chapter.

Chapter 11: Sham Licences

11.1 Introduction

Rennie notes that the intention displayed in a contract to create a lease or a licence can be displaced if the agreement is deemed to be a “mere sham or pretence”.⁹⁹¹ It is therefore important that there are some criteria by which a “sham” can be ascertained. In Scots law and specifically in the lease/licence context, shams have not been the subject of much academic attention. This can be contrasted with English law, which has received extensive literature on the topic, particularly in the residential tenancy context.

Generally, the way in which shams should be treated by the law is controversial and views span the whole spectrum.⁹⁹² Some believe rules against shams are the “principal weapon which a court can use to thwart avoidance”.⁹⁹³ Others, however, view the treatment of shams as an abuse of courts’ power – it permits courts to substitute their own views for the agreement of the parties on no other basis than the court dislikes the result.⁹⁹⁴

This part considers in which circumstances the Scottish courts should be able to strike down licence agreements as shams. It argues that, particularly in the commercial sphere, the doctrine should be kept narrow. In particular, and contrary to English literature, it suggests that the traditional *Snook* sham doctrine can prove a useful tool to strike down agreements as shams. This means that a wider concept of a sham is less necessary. As such, it suggests that Scots law should not follow the

⁹⁹¹ Rennie, 2.15.

⁹⁹² P Donahue “The Rule of *Sheldon v Commissioner*: Is it An Economically Efficient Evolution of the Sham Transaction Doctrine?” (1993) 13 *Virginia Tax Review* 165, 165.

⁹⁹³ B McFarlane and E Simpson “Tackling Avoidance” in J Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003) 135, 135.

⁹⁹⁴ J Isenbergh, “Musings on Form and Substance in Taxation”, (1982) 49 *U Chi L Rev* 859; G Cooper, “The Taming of the Shrewd: Identifying and Controlling Income Tax Avoidance”, (1985) 85 *Colum L Rev*, 657.

English approach of permitting evidence of the non-enforcement of terms as an indication of genuine intention.

11.2 Defining “Sham”

The Oxford English Dictionary defines a sham as “A thing that is not what it is purported to be” or a “pretence”. However, in the legal context, the term “sham” does not have a specific meaning or application.⁹⁹⁵ Indeed, it was not widely recognised as a distinct legal concept⁹⁹⁶ prior to the leading case of *Snook v London and West Riding Investments Ltd.*⁹⁹⁷ Ironically, even in that case, Diplock LJ (whose formulation of a sham went on to become the leading legal definition) was reluctant to recognise “sham” as its own concept.⁹⁹⁸

Providing a definition of a sham in the lease/licence context is particularly difficult. As this part demonstrates, the “Snook sham”, readily accepted as the legal definition of a sham, does not cover many of the situations which have been held to be shams in the lease/licence context. Instead, it appears that the doctrine of sham is much wider in the lease/licence context.

In the lease/licence context, two situations are often referred to as “shams”: mislabelling – where the content of an agreement is that of a lease, but the document is termed a licence; and, avoidance cases, where documents are drafted in such a way that they do not meet the cardinal elements required to create a lease.

The first scenario is not a true sham – it is not an agreement masquerading as something different. It is simply an agreement with the wrong title, which is not

⁹⁹⁵ M Gammie “Sham and Reality: the Taxation of Composite Transactions” [2006] 3 BTR 294, 311.

⁹⁹⁶ F Quan, “The Concept of Sham and its Limited Effectiveness in the Tax Field” (LLM Research Paper, Victoria University of Wellington, 2007), 14.

⁹⁹⁷ *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. The parameters of the sham doctrine delineated in *Snook* are explored in detail below at 11.5.1.1.

⁹⁹⁸ “it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word” per Diplock in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802.

determinative of its nature.⁹⁹⁹ An evocative example was provided by Lord Templeman in *Street v Mountford* and discussed in Chapter 8: a five-pronged implement for digging is a fork, regardless of whether it is called a “spade” by the manufacturer.¹⁰⁰⁰ There is no need to consider the reasons for the wrong title.

By contrast, avoidance cases may be called “true shams”. These are cases where, using Lord Templeman’s analogy, parties have indeed created a spade, but have only done so for reasons deemed reprehensible by the court, such as to avoid some law providing protection or rights to the other party. The question is then when can the courts disregard what has been created by the parties and decide that the agreement is in fact something different. Each of these scenarios is dealt with in turn below.

11.3 The Prominence of Shams

There are many reasons why a party may wish to hide their true intentions. For example, a landlord may wish to minimise the rights conferred upon their occupier by granting a licence rather than a lease. If a tenant wishes to grant a sublease, but their lease contains a prohibition on subletting, they may try to organise it as a licence instead.¹⁰⁰¹ There are also tax implications that may mean a licence is preferable to a lease.¹⁰⁰² Similarly, licences are used to try to avoid payment of rates.¹⁰⁰³

Sham agreements are more common when the chosen agreement is difficult to create in law. For example, if a licence requires non-exclusive occupation, but the

⁹⁹⁹ See Chapter 8.

¹⁰⁰⁰ *Street v Mountford* [1985] UKHL 4.

¹⁰⁰¹ As was the case in *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12.

¹⁰⁰² Land and Buildings Transaction Tax (Scotland) Act 2013, s52, 53. It is therefore important for Revenue Scotland to determine whether an agreement is “truly a licence”: D Lovell, “Land, Leases, and LBTT” 60(9) *The Law Society of Scotland: The Journal* (14 September 2015), available: <https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-09/land-leases-and-lbtt/>.

¹⁰⁰³ For a recent English case on this issue, see *Isle Investments Ltd v Leeds City Council* [2021] EWHC 345 (Admin).

parties desire a licence but with exclusive occupation, parties may use a sham arrangement where a non-genuine non-exclusive possession clause is inserted into the agreement in an attempt to achieve that aim. If the licence to occupy was easy to create, such as through a simple expression of intention in the contract, then there would be less need for parties to create sham agreements to reach their desired outcome.

11.4 Mislabelling

In Scots law, the leading case on shams in the lease/licence context is *Brador Properties v BT*.¹⁰⁰⁴ Indeed, it is the only case that Rennie cites as authority for his claim that courts will not give effect to sham licence agreements.¹⁰⁰⁵ Paradoxically, however, although the court was clearly influenced by the fact the agreement was a sham,¹⁰⁰⁶ it did not resort to treating the agreement as a sham in order to find that it was really a licence rather than a lease.

As it will be recalled from Chapters 7 and 8, the case concerned a tenant attempting to subvert a prohibition against subletting in his lease by granting a licence to occupy to a third party. The licence agreement included various terms which attempted to avoid the agreement fulfilling the essential elements of a lease. The court held that the agreement was nonetheless a lease. However, the court in this case held that all the requirements of a lease were present.¹⁰⁰⁷ Therefore, using a *content* approach to determining the agreement's nature, they held that it was a lease.

This sham was, therefore, simply an example of a "false label" and the attempted licence could be easily dismissed by the courts, because the requirements of a lease had been fulfilled.¹⁰⁰⁸ Cases of mislabelling require no additional analysis of the

¹⁰⁰⁴ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12.

¹⁰⁰⁵ Rennie, 2.15.

¹⁰⁰⁶ *Brador Properties Ltd v British Telecom Plc* 1992 SC 12, 20-21: Lord Justice Clerk Ross, for example, noted in his judgement that the court must be "alive" to collusive devices.

¹⁰⁰⁷ *Ibid*, 21.

¹⁰⁰⁸ To use the terminology in *R v Rent Officer For Camden LBC Ex p Plant* (1981) 7 HLR 15.

genuineness of the transaction. Instead, the court simply determines what the substance of the contract is and gives effect to that, *regardless* of whether there is a sham.

However, the approach taken by the court in *Brador* has had unintended consequences. It has contributed to a complicated understanding of what precisely is meant by exclusive possession if none of the terms prevented it from being found present in the agreement.¹⁰⁰⁹ Additionally, the court had to extend the previously very limited exception regarding mechanisms of calculating rent to calculating the cardinal element of property. It held that so long as there was a method of determining the property let, then the property requirement was satisfied. There was no requirement to identify the specific property to be let for the duration of the lease at the outset. It would have been preferable for overall clarity in this area for the court to have instead said that these terms *were* inconsistent with a lease, and then attempted to strike the provisions down as a sham.

The difficulty is that it is challenging to find any coherent legal basis to explain shams which have been struck down and which are not simple cases of mislabelling. This is explained further in the following section. If, then, the court found that there had not been exclusive possession, Rennie questions whether the court would still have found there to be a lease notwithstanding the fact that it was contrary to the prohibition of subletting and a sham.¹⁰¹⁰ The court in *Brador*, therefore, may have felt unable to reach the result it felt was morally correct using sham doctrine alone.

11.5 Avoidance Cases

Bright et al refer to what might be called “true shams” as “avoidance” cases.¹⁰¹¹ They note that in English lease law “The cases that fall within this category generally

¹⁰⁰⁹ See Chapter 7.

¹⁰¹⁰ Rennie, 2.15.

¹⁰¹¹ S Bright, H Glover and J Prassl, “Tenancy Agreements”, in E Simpson and M Stewart (eds) *Sham Transactions* (2013) (hereafter “Bright et al”), 6.19.

exhibit two common features: there is, first, a term of the contract which denies the right to exclusive possession, and this term is, second, contradicted by the de facto exercise of exclusive occupation.”¹⁰¹² To translate this into Scots law, the cases involve an agreement where there is purportedly a missing cardinal element preventing it from being a lease, but in reality, the cardinal element is present.¹⁰¹³ A true sham, therefore, is where there is a disparity between what the contract says, and the way in which things are intended to work in reality.

11.5.1 Dealing with Avoidance Cases in English Law

11.5.1.1 *Snook Sham*

The leading case setting out the test for determining whether or not an agreement is a sham and can thus be disregarded is *Snook v London and West Riding Investments Ltd.*¹⁰¹⁴ The test in *Snook* has been approved in the context of landlord and tenant in Scotland.¹⁰¹⁵

Diplock LJ explained that a relevant sham agreement is one which

“give[s] to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.”¹⁰¹⁶

Furthermore, a sham is only relevant if all of the parties to the agreement act with a “common intention” as to its effect.¹⁰¹⁷ The requirement for common intention has led

¹⁰¹² *Ibid.*

¹⁰¹³ As with English law, exclusive possession may now be a requirement of a lease in Scots law, alongside the rent, parties, property and duration.

¹⁰¹⁴ *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

¹⁰¹⁵ *Bolton v Aberdeen City Council* 2002 Hous LR 40.

¹⁰¹⁶ *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12 802. Note, however, that if third parties have relied on the outward appearance, then the parties may not be able to argue it does not reflect the true state of affairs: S Bright, “Avoiding tenancy legislation: sham and contracting out revisited” (2001) 61(1) CLJ 146, 157, citing *National Westminster Bank plc v Jones* [2001] 1 BCLC 98.

¹⁰¹⁷ *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802, citing *Yorkshire Railway Wagon Co v Maclure* (1882) 21 ChD 309 (CA) and *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537.

the *Snook* sham to be described as “narrow”.¹⁰¹⁸ There is said, therefore, to be a very strong presumption against holding a document to be a sham.¹⁰¹⁹ However, this has been subsequently criticised and instead the burden has said to be simple balance of probabilities.¹⁰²⁰

It has been noted that in English law, “It is rare that either of these criteria is satisfied in the residential tenancy context.”¹⁰²¹ Unlike shams in other contexts, in the residential tenancy context there is unlikely to be common intention to deceive.¹⁰²² This is often because there is an imbalance in power between the parties.

Thus, the *Snook* sham has generally been dismissed as irrelevant in determining whether a licence agreement is a sham.

11.5.1.2 Alternatives to the Snook Doctrine

Notwithstanding the lack of collusion, and despite not fitting into the *Snook* sham, the English courts have often nonetheless held licence agreements to be shams and thus be leases in reality. There are suggestions that convincing the courts to look at the true nature of the arrangement is a low bar. Once a party avers that an agreement is a sham, then the court is bound to investigate the true nature of the agreement.¹⁰²³

¹⁰¹⁸ E Simpson and M Stewart, “Introduction”, in E Simpson and M Stewart (eds), *Sham Transactions* (2013), 1.

¹⁰¹⁹ *National Westminster Bank Plc v Jones* [2001] 1 B.C.L.C. 98, 115-116, 119 per Neuberger J; affirmed [2002] 1 BCLC 55.

¹⁰²⁰ *Broxfield Ltd v Sheffield City Council* [2019] EWHC 1946 (Admin), endorsing the approach of Lady Hale in *B (Children) (Sexual Abuse: Standard of Proof)*, Re [2009] 1 AC 11. For a good summary of this case, see “Remedies: Sham Transactions” (2019) 40(5) PLB 36.

¹⁰²¹ Bright et al, 6.19.

¹⁰²² D Brodie, “Sham contracts and contracting out” (2009) 91 Emp LB 6, 7.

¹⁰²³ A Arden (ed), *Encyclopaedia of Housing Law and Practice* (2012), S -010.

How these cases are to be explained has been the subject of extensive judicial and academic analysis. However, Bright et al emphasise that none of the current explanations are adequate.¹⁰²⁴ Two main approaches can be identified.

The first is what Gardner has called “the human story on the ground”.¹⁰²⁵ This approach starts by looking at the factual circumstances as they present themselves. If the facts appear to give rise to a lease, then the court should find a lease to exist. Any contractual provisions that deny the existence of a lease are to be ignored.

An example of this approach in a residential context is the case of *Antoniades v Villiers*.¹⁰²⁶ Two licences to occupy a flat were granted to an unmarried couple. The agreements each contained a clause that the owner reserved a right for himself or a third party to use the property with the couple. However, the flat only had one bedroom, and the court held that it was thus “not suitable” for more people, especially strangers, to share the property.¹⁰²⁷ Therefore, the couple were exclusively possessing the property. Thus, the agreement was held to be a lease, and the sharing terms disregarded.

Another explanation is “excluding the non-genuine”. The main way in which this differs from the story-on-the-ground approach is that the starting point is the terms of the contract, as opposed to the situation in reality. There is also a strong presumption against terms being held to be a sham. However, if the occupier can show that certain terms are not genuine, then they will be disappplied. To do so, the occupier can lead evidence as to the situation in reality.

This is a better explanation because it seems to explain more of the English cases.¹⁰²⁸ The courts have usually found that a term is not genuine for one of three reasons: impossibility, implausibility, or non-enforcement.¹⁰²⁹ Impossibility has often

¹⁰²⁴ Bright et al, 6.17.

¹⁰²⁵ S Gardner and E MacKenzie, *An Introduction to Land Law* (3rd edn, 2012), 221.

¹⁰²⁶ *AG Securities v Vaughan*, *Antoniades v Villiers* [1990] 1 AC 417.

¹⁰²⁷ *Ibid*, 463.

¹⁰²⁸ Bright et al, 6.31.

¹⁰²⁹ *Ibid*, 6.27.

referred to the size of the accommodation provided - if another person would not realistically be able to share the property with the current occupier, then the term is ignored.¹⁰³⁰ Implausibility concerns a term which is possible, but which a reasonable person would not have considered to be part of the genuine agreement between the parties. An example would be where there is a provision requiring someone to vacate the property they lived in for certain hours each day.¹⁰³¹ Non-enforcement can be used to explain terms which are neither impossible nor implausible, but which nonetheless do not seem genuine. Often these are terms which have been commonly used to thwart a finding of exclusive possession such as sharing provisions. Another route is needed to avoid these terms because in certain cases the term would be entirely possible. This was the case, for example, in *Duke v Wynne* where a family occupied a three-bedroom house.¹⁰³² It would thus have been possible to share the home with another occupant. However, the landlord “did not disclose any immediate intention [to make use of the sharing provision] and she *never in fact did so*”.¹⁰³³ Therefore, the term was ignored.

11.5.2 Dealing with Avoidance Cases in Scots Law

The above section has demonstrated that in English law, the doctrine of sham has been widened from that of the Snook sham to ensure that more agreements can be held to be leases. This section analyses what the approach should be to avoidance cases in Scots law. With no avoidance cases in the commercial context in Scots law, the courts will have a choice if the issue arises. It is argued here that the English approach should not be adopted.

¹⁰³⁰ *Aslan v Murphy* [1990] 1 WLR 766.

¹⁰³¹ *Crancour Ltd v da Silva* (1986) 18 HLR 265.

¹⁰³² *Duke v Wynne* was a conjoined hearing alongside *Aslan v Murphy* [1990] 1 WLR 766.

¹⁰³³ Bright et al, 6.30.

11.5.2.1 The Policy Problem

Davies suggests why departing from the Snook doctrine of sham is appropriate in the lease context.¹⁰³⁴ First, she argues that courts seem unwilling to believe that a tenant would willingly choose a licence rather than a lease as a way of obtaining housing. A licence does not appear to give the tenant any advantages, instead putting her in a very precarious position. This can be contrasted with, for example, the employment context. In the employment context, if there is no contract of employment, then the default position is that the person is self-employed. This is the preferred method of working for many individuals, due to the autonomy or tax advantages it may provide.

These are valid arguments in the residential context, but that is the extent of their application. In the commercial sphere, there are many reasons why a *tenant* too may desire a licence rather than a lease. There are tax advantages of a licence arrangement, and it provides flexibility for certain types of business.¹⁰³⁵ This distinction is important to appreciate. Scots law endorses rules against shams in the commercial lease/licence context.¹⁰³⁶ However, with no Scottish cases on avoidance issues, it would be easy to look to the leading English cases. These cases are residential in nature. Courts must be aware that the policy rationale behind those cases does not hold in a commercial context.

That is not to say that a wider doctrine of sham may not be appropriate in the residential context in Scots law too, but it should not form the basis of the common law of shams in the lease/licence context, applicable to commercial agreements.

¹⁰³⁴ A Davies, 'Sensible thinking about sham transactions' (2009) 38 ILJ 318, 325.

¹⁰³⁵ E.g. the pop-up shop.

¹⁰³⁶ Rennie, 2.15.

11.5.2.2 *The Doctrinal Problem*

Bright et al are highly critical of the current approach to avoidance cases in English law.¹⁰³⁷ Their arguments are persuasive and provide a good reason why the approach should not be adopted in Scots law.

Impossibility, implausibility, and non-enforcement in practice all seek to justify the disregard of a term included in a contract which has not been used. Impossibility and implausibility seek to explain *why* the term has not been used. Non-enforcement in practice is an even broader category which gives the courts the ability to disregard terms which are entirely possible, but which the court nonetheless wishes to displace. Whilst these have often led to what is the intuitively correct result in the cases (giving the occupier a tenancy), they are difficult to justify in any principled way.

The problem with using subsequent conduct to determine whether a term is genuine or not is well illustrated by comparing the two English cases of *Antoniades v Villiers* and *Mikeover v Brady*.¹⁰³⁸ In each case a couple was granted a separate licence agreement. However, both properties concerned were only big enough for a couple to share comfortably. As noted above, in *Antoniades v Villiers*, the agreement was held to be a lease. Conversely, in *Mikeover v Brady*, the agreements were upheld as valid licences. As Bright et al explain, the only adequate way to explain the different outcomes is to look at “how the story unfolded”.¹⁰³⁹ In *Mikeover v Brady*, the couple separated, and the woman vacated the property. The remaining occupier, Brady, offered to pay his former partner’s share of the rent so that he could have sole occupation of the property. The owner refused to accept this offer, and continued to collect only the fee due under the remaining occupier’s licence agreement. This demonstrates that the owner truly intended the agreements to be separate, rather than interdependent.

¹⁰³⁷ Bright et al, 6.31ff.

¹⁰³⁸ *Ibid*, 6.33ff.

¹⁰³⁹ *Ibid*, 6.34.

In *Antoniades v Villiers*, however, the couple did not separate, and so the term was not “put to the test”. The court could therefore reason that because no one other than the couple could feasibly share the property, the sharing provision must be “non genuine”. This hardly seems a satisfactory result. Indeed, it seems inherently unjust. In *Antoniades v Villiers*, the grantor of the agreement was held to have included a non-genuine sharing provision, simply because he had not yet been faced with a scenario necessitating the enforcement of the term.

This illustrates the fundamental problem with using the non-enforcement of terms to determine their genuineness. It is not possible to tell whether a term which is not “impossible”, but which has not yet required enforcement, is genuine. Sham connotes a level of dishonesty. The fact that a term has not been enforced does not tell us anything about whether parties’ intentions are dishonest. Indeed, even if parties have had a chance to enforce a term and have chosen not to, this does not mean it is not genuine. As Aldous LJ explained in *Burdis v Livesey*:

‘Commercial parties may, and often do, choose not to enforce their strict legal rights without intending to create or demonstrate some different state of affairs.’¹⁰⁴⁰

This is compounded by the fact that often, contractual terms are introduced as a protective last resort.¹⁰⁴¹ This is different to, for example, the employment situation, where the agreement is meant to regulate the day-to-day conduct between the parties. The fact that in the lease/licence context terms are often a last resort means that in the general course of things, certain terms may never be used, but parties may wish to use them if necessary. For example, if A owned a property in Edinburgh, but was considering moving their business to Glasgow, they may decide to occupy properties in Glasgow and in the meantime allow B to occupy their Edinburgh property. A may include a term that requires B to share the space with A if A demands it. A may not

¹⁰⁴⁰ *Burdis v Livesey* [2003] QB 36, 44. See also *Bell v Inkersall Investments* [2006] CSIH 16, discussed below.

¹⁰⁴¹ Bright et al, 6.35.

plan to use that term, as they will be hoping their Glasgow venture goes well. However, it gives them security that if the Glasgow venture fails, they will be able to move back to Edinburgh.

A different example would be an agreement which included a rent, but where that rent was not paid in practice. For instance, the rent may have been waived as an act of goodwill. The fact that rent was not paid in practice does not mean that it was not a genuine term or legally due. Conversely, there may be an agreement with no rent included. If rent was paid in practice, it is unlikely that this would transform the agreement from a licence into a lease. Indeed, there are many ways in which parties can arrange their agreements which include substitutes for rents, such as with grassums. These are permitted methods of avoiding creation of a lease.¹⁰⁴²

The problems in this area are particularly acute if exclusive possession is cemented as a cardinal element of a lease in Scots law. Whilst rent is an obvious outward action, exclusive possession is not. Exclusive possession cannot be determined by what happens in practice. Instead, it is about what intangible rights have been granted under the agreement. To put it another way, the extent of possession permitted cannot be “seen” from the facts on the ground. Consider the following example: A stores stock in a small storage facility. What is the extent of A’s right to possession? It is impossible to tell from the facts on the ground. It may be possible to tell the extent of A’s current possession, but that is a different question. For example, the agreement may state that the space is to be used non-exclusively, and may require to be shared with another party as and when required. If the storage facility is filled with A’s stock, then A may have possession of the whole facility. That does not mean that A is entitled to do so. Even if sharing the space looks impossible, or at least implausible, this is irrelevant. The provision is about the rights granted. The provision, should it be enforced, would require A to remove half its stock, enabling the room to be shared. This is a key reason why possession should not be used as a determining distinction

¹⁰⁴² S Warwick, “Closing Loopholes: Taking Commercial Considerations Too Far?” (2021) 25(2) EdinLR 226, 229.

between a lease and licence. It becomes a choice for the parties, when it is intended to operate as an externally objective test.¹⁰⁴³

As Bright et al also explain, there is a more fundamental problem with using future actings to ascertain intention: subsequent conduct is generally inadmissible when interpreting contracts.¹⁰⁴⁴ This is the case in Scots law too.¹⁰⁴⁵ It seems incongruous to permit subsequent conduct as evidence which helps to determine the intentions in a clear contract, when it is not even permissible to use such conduct to interpret an ambiguous contract. This leads us to the following point.

11.5.2.3 The Emphasis on the Terms of the Contract in the Commercial Context

Scottish commercial law shows a strong tendency to give effect to the terms of the agreement. One such example is the so-called “sham sales” or “sale-as-security” arrangements.¹⁰⁴⁶ Because in Scots Law there are no true securities over corporeal moveable property without giving up possession, parties use alternative methods to acquire functional securities. The “sale-as security” device involves the buyer lending money to the seller. As security, the seller will “sell” an item, such as a car, to the buyer, but with the agreement being that the seller will keep possession of the car. Once the buyer has had his loan repaid, he will transfer ownership of the car back to the seller. The real intention behind the transaction is the creation of a security, rather than a true sale.

Of particular importance in this context is s62(4) of the Sale of goods Act 1979.¹⁰⁴⁷ This provision states that if a transaction in the form of a sale is really intended as a security, then the Sale of Goods Act 1979 will not apply. The result of the

¹⁰⁴³ This is explored further in Chapter 12.

¹⁰⁴⁴ Bright et al, 4.61.

¹⁰⁴⁵ W McBryde, *The Law of Contract in Scotland*, (3rd edn, 2007); 8.30 H MacQueen, *MacQueen and Thomson Contract Law in Scotland*, (5th edn, 2020) 3.44.

¹⁰⁴⁶ See generally, L Macgregor et al, *Commercial Law in Scotland* (6th edn, 2020) 1.5.

¹⁰⁴⁷ See also, s3(3) of the Consumer Rights Act 2015. S62(4) Sale of Goods Act 1979 is notoriously complex: see generally G Gretton, “The Concept of Security”, in D Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J. M. Halliday* (1987), 126, 135ff.

disapplication of the Act is that the common law rules of sale apply. In Scots law, this means that for a valid contract of sale to exist, there must be delivery of the item from the seller to the buyer. If no such delivery has taken place, then the sale is invalid.¹⁰⁴⁸ The practical effect of this is that the buyer has never become owner of the item. Thus, if the seller goes bankrupt, the item is part of the seller's, and not the buyer's, patrimony.

It is important, therefore, that the courts determine whether or not the sale is genuine, or a "sham". In doing so, as in the lease/licence context, the courts consider the substance of the agreement.¹⁰⁴⁹ However, Atiyah notes that the courts normally take written documents at face value.¹⁰⁵⁰ This is true even when there are clear indications of the arrangement functioning as a security, such as the "sale" price being the same as that of the loan.¹⁰⁵¹ Therefore, it is not enough to show that the documents do not align with the "real intention" of the parties. Instead, these arrangements will only be held to be a "sham" when they meet the high test as set out in *Snook*. That requires, as we have seen, the collusion of both parties. This demonstrates the strong preference of the courts to take written documents at face value in commercial scenarios, even if something different is occurring in reality.

This is a trend not only evident in other parts of Scots law, such as the "sale-as-security", but also in the lease context. One such example can be found in the agricultural leasing sector. In *Bell v Inkersall Investments Ltd*,¹⁰⁵² the tenant of a series of seasonal grazing leases argued that he in fact had an agricultural lease. This is significant because an agricultural lease gives additional rights. He argued that the written agreements should be displaced by what had occurred in reality: he had continued to pay rent and had not removed himself from the properties between

¹⁰⁴⁸ e.g. *G and C Finance Corp v Brown* 1961 SLT 408; *Ladbroke Leasing Ltd v Reekie Plant Ltd* 1983 SLT 155.

¹⁰⁴⁹ *Scottish Transit Trust Ltd v Scottish Land Cultivators Ltd* 1955 SC 254.

¹⁰⁵⁰ C Twigg-Flesner and R Canavan (eds), *Atiyah and Adam's Sale of Goods* (14th edn, 2021) 20.

¹⁰⁵¹ *Ibid.*

¹⁰⁵² *Bell v Inkersall Investments Ltd* [2006] CSIH 16.

the seasonal lets. The Inner House held that no agricultural lease had been established.

Fox suggests that *Bell* is a development of the principle established in cases such as *Macfarlane v Falfield Investments Ltd*¹⁰⁵³: it is a further example of the courts' reluctance to permit parties to establish by acting alone a relationship which is different to that indicated in written documents.¹⁰⁵⁴ However, Fox does acknowledge that *Bell* does not preclude the court finding a full agricultural lease was created if the seasonal leases could be shown to be a sham.¹⁰⁵⁵ Nonetheless, *Bell* does suggest that simply demonstrating that parties have acted in a way different to their written agreements is not enough to establish a sham, particularly when there is no policy rationale or legal principle suggesting that such an arrangement is "in any way objectionable".¹⁰⁵⁶ The doctrine of sham must therefore be a high bar. Should a more lax doctrine of sham be adopted in the lease/licence context generally, this would be out of step with the way in which the doctrine of sham is currently used in areas of lease law,¹⁰⁵⁷ as well as in other areas of Scots commercial law.

11.5.2.4 The Unexpected Usefulness of the Snook Doctrine in the Lease/Licence Context

Outside of the residential context, the *Snook* sham may be of more use than it first appears. To return to the Scottish case of *Brador*, the limited *Snook* sham principle could have applied. There was clearly an intention to deceive a third party in *Brador* – namely the original landlord – fulfilling the first strand of the *Snook* test. Whether

¹⁰⁵³ *Macfarlane v Falfield Investments Ltd* 1998 SLT 145.

¹⁰⁵⁴ A Fox, "A reprieve for Landlords?" (2006) 51(12) JLSS, 42. Contrast *Fyffe v Esslemont*, Scottish Land Court, 28 March 2018, SLC 67/15 where to maintain security of tenure under the Agricultural Holdings (Scotland) Act 1991, a tenant must continue to use the subjects for agricultural purposes – i.e. the state of affairs must be continuing.

¹⁰⁵⁵ Fox, "A reprieve for Landlords?", 42.

¹⁰⁵⁶ C Anderson, "Possession by the tenant following the expiry of a seasonal let: *Bell v Inkersall Investments Ltd*", 2006 SLT (News), 223.

¹⁰⁵⁷ For an example of strong weight being given to the terms of the agreement in the residential lease context, see *Campbell v Western Isles Islands Council* 1989 SLT 602.

the second arm has been fulfilled is less clear. It will ultimately depend on whether the third party was aware of the prohibitions on subletting and agreed to the licence in an attempt to avoid it. However, Lord Justice Clerk Ross' references to a "collusive device" implies that perhaps the tenant was aware and involved in the sham.¹⁰⁵⁸ If that were true, the agreement could have been struck down on the basis of the *Snook* sham. If they were not aware, then it is questionable whether the agreement should have been struck down on policy reasons: why should an occupier who perhaps chooses the licence for the advantages it gives, and who has no knowledge of the immoral intentions of the granter, be held to a more onerous agreement simply because the other party was dishonest?

In other cases concerning the avoidance of sub-letting such as *Hatton v McLay and McLuckie*, the requirement of collusion would have certainly been met had the case been heard today.¹⁰⁵⁹ Indeed, in that case, the court found that the licence-type agreement was "resorted to and adopted by [the tenant and third party] as a collusive device to defeat the condition of the ... lease excluding subtenants and assignees".¹⁰⁶⁰ Likewise, in *Somerville v Hamilton*, the tenant entered into missives with a third party to sub-let a farm to him.¹⁰⁶¹ When the landlord refused to agree to the sublet to the third party, the tenant cancelled the missives and entered instead into a non-descript arrangement of something less than a lease. It would be hard for the third party to claim they were not conspiring with the original tenant given the cancelled missives and the different agreement being provided instead. Thus, it would be possible to have struck down the agreement as a sham using the *Snook* doctrine.

It will be remembered, however, that collusion is not the only arm of the *Snook* test. It must also be shown that there is the "appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations"

¹⁰⁵⁸ *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12, 20.

¹⁰⁵⁹ *Hatton v Clay & McLuckie* (1865) 4 Macph 263.

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ *Hamilton v Somerville* (1855) 17 D. 344.

which are intended.¹⁰⁶² The question arises of how this disparity should be proven. It is submitted that even in these cases where collusion can be shown, subsequent conduct should not be used to determine the genuineness of a term. This is in line with current rules on contractual interpretation. However, courts should be able to consider admissible surrounding circumstances as they can when interpreting a contract.¹⁰⁶³ This means that the factual matrix that existed when the parties entered into the contract can be examined.¹⁰⁶⁴

11.5.2.5 A Brief Note on the Residential and Agricultural Sectors

As has already been acknowledged, where adopting a narrow sham doctrine may present the most problems is in the residential context. Various statutory schemes have been introduced to protect tenants.¹⁰⁶⁵ The position is similar in the agricultural context.¹⁰⁶⁶ To avoid frustrating the intention of Parliament, the granting of licences where there was really a lease should not be permissible in these instances.

It is outwith the scope of this thesis to consider the residential tenancies scheme in detail. However, one problem with the operation of the new private residential tenancy is, as Skilling explains, that “The statutory definition of a PRT requires that the property be ‘let,’ i.e. that the contract creating the tenancy be a lease.”¹⁰⁶⁷

Arguably, the traditional understanding of a lease has been extended by the removal of the requirement that the agreement has a definite term.¹⁰⁶⁸ However, the wording of

¹⁰⁶² *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802.

¹⁰⁶³ McBryde, *The Law of Contract in Scotland*, 8.23.

¹⁰⁶⁴ *Ibid.* See also *Prenn v Simmonds* [1971] 1 WLR 1381.

¹⁰⁶⁵ The Private Housing (Tenancies) (Scotland) Act 2016 introduced the Private Residential Tenancy (PRT) for new residential tenancies commencing on or after 1 December 2017. It replaced the short assured and assured tenancies introduced by the Housing (Scotland) Act 1988, although any which commenced before the introduction of the PRT will continue until brought to an end.

¹⁰⁶⁶ Agricultural tenants have always been given special protections: see Rennie, *Leases*, 30.06ff. Most of the current legislation is found in the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003.

¹⁰⁶⁷ M Skilling, “Redefining the Scots law of leases in light of the Private Housing (Tenancies) (Scotland) Act 2016” (LLMR Thesis, 2019, University of Aberdeen), 129.

¹⁰⁶⁸ Private Housing (Tenancies) (Scotland) Act 2016, s4. Although, whether this is a requirement at common law is debateable.

that section suggests that this is the only requirement of a lease that can be omitted for there to still be a valid PRT.¹⁰⁶⁹ It follows, therefore, that if exclusive possession has become a cardinal element of a lease, then it too must be present to create a PRT.¹⁰⁷⁰ It also means that any common law distinction between leases and licences will inadvertently apply in the residential context: this may be unintended, but it is a consequence, and “as long as the word [let] remains, it will be.”¹⁰⁷¹

The position is similar in the agricultural sector. The statutory definition of an “agricultural holding” requires agricultural land to be the subject of a “lease”.¹⁰⁷² “Lease” is only further defined as “lettings” of various terms.¹⁰⁷³ Thus, before the agricultural legislative scheme applies, there must be a lease at common law. Again, any distinction between leases and licences at common law will also unintentionally apply to the agricultural context.

It is submitted, contrary to what Bright et al propose,¹⁰⁷⁴ that the law should be more flexible with regards to shams in residential cases, such that the requirement of collusion in the *Snook* sham test is abandoned. It should likewise be more flexible in the agricultural context. Nonetheless, the rules should not be as lax as under current English law. Subsequent conduct should still be prohibited from being used as evidence to demonstrate that a term is non-genuine. Instead, only information surrounding the moment of agreement should be used. Admittedly, it may be more difficult to prove that the arrangement or term was non-genuine. But difficult does not mean impossible. To give an example, there is a current controversy surrounding the use of holiday letting agreements to avoid tenants being giving statutory protections under a residential tenancy.¹⁰⁷⁵ Recently, a landlord was fined £7,500 when it was

¹⁰⁶⁹ Note the use of the phrase “but for” in s4: Skilling, “Redefining the Scots law of leases”, 129.

¹⁰⁷⁰ *Ibid.*

¹⁰⁷¹ *Ibid.*

¹⁰⁷² Agricultural Holdings (Scotland) Act 1991, s1. See also Agricultural Holdings (Scotland) Act 2003, s4, 5A, 5C.

¹⁰⁷³ Agricultural Holdings (Scotland) Act 1991, s85. “Lease” is undefined in the Agricultural Holdings (Scotland) Act 2003.

¹⁰⁷⁴ Bright et al, 6.38ff.

¹⁰⁷⁵ Living Rent, “Sham ‘Holiday Lets’ Undermining Security for Scotland’s Tenants” (May 2019), available:

shown that he had used a holiday let agreement to avoid correctly depositing the tenants' deposits as required for residential tenancies.¹⁰⁷⁶ It was shown that the landlord had advertised the property as suitable for students, which demonstrated his ulterior intentions. This, for example, is a clear method of using circumstances available at the time of contracting to show the landlord's intentions were different to what was agreed. One can also foresee other scenarios which would demonstrate such intention. Where the let is advertised may help to indicate intention.

Furthermore, a landlord may advertise a property at market value but include clauses in the agreement which permitted either the landlord or another to occupy the property with them (in an attempt to prevent exclusive possession). The full market value would suggest that this is unlikely to ever be done. If the landlord reserved the right to include a second person and had reduced the rent accordingly, then it could demonstrate that the intentions were genuine. In certain circumstances, impossibility may also be relevant at the time the contract was entered into - if a term is truly impossible, it is likely to be impossible from the outset: an example of a sharing provision in a studio flat comes to mind.

Fortunately, as noted above, this approach seems to have already been adopted in the agricultural sector.¹⁰⁷⁷ Cases such as *Bell v Inkersall Investments*¹⁰⁷⁸ and *O'Donnell v McDonald*¹⁰⁷⁹ demonstrate that courts do not look at what has happened in practice to determine the existence of a sham.¹⁰⁸⁰ This emphasis on the circumstances at the time of entering the contract should be maintained.

https://d3n8a8pro7vhmx.cloudfront.net/livingrent/pages/214/attachments/original/1556784880/Sham_Holiday_Lets_-_Final.pdf?1556784880.

¹⁰⁷⁶ *Reichel v Forsyth*, First-tier Tribunal for Scotland (Housing and Property Chamber), 7 August 2019.

¹⁰⁷⁷ See the discussion at 11.5.2.3 above.

¹⁰⁷⁸ *Bell v Inkersall Investments Ltd* [2006] CSIH 16.

¹⁰⁷⁹ *O'Donnell v McDonald*, Airdrie Sheriff Court, 24 August 2006, A1135/04.

¹⁰⁸⁰ Fox, "A reprieve for landlords?".

11.6 Conclusion

The doctrine of sham in the lease/licence context in English law has widened from the narrow *Snook* sham. Scots law, however, should decline to follow English law in the commercial sector. The reasons for a wider doctrine of sham simply do not hold true in the commercial, as opposed to in the residential or agricultural, sector. The trend of looking at subsequent conduct to ascertain intention poses various problems and does not sit well with methods of contractual interpretation which do not use evidence of subsequent conduct as part of the interpretative process. Furthermore, contrary to other opinions on the issue, it is argued that the *Snook* sham does catch enough arrangements to be of use in distinguishing leases and licences. This narrow concept of sham is not only in keeping with the way in which shams are dealt with in other areas of Scots law, but is already the case in the other areas of lease law specifically.

PART 3: THE FUTURE OF LEASES AND LICENCES IN SCOTS LAW

Chapter 12: Options for Reform of the Lease/Licence Distinction

12.1 Introduction

Part 2 of this thesis illustrated that the law surrounding the way in which leases are distinguished from licences to occupy is far from clear. The aim of this third and final part of the thesis is to analyse the way in which this area of law should be reformed.

This chapter has two unequal sections. The first, shorter section analyses which general principles should underpin the difference between leases and licences in Scots law. Whilst the current law distinguishing between occupation agreements is generally unclear, it appears to take a substantive approach to determining which agreement has been created. A substantive approach means that the type of agreement is to be determined objectively by key terms agreed upon by the parties. For example, courts generally consider whether the agreement confers exclusive possession on the occupier, and whether all cardinal elements are present. The law has largely avoided an intention-based approach to determine which agreement has been created. However, these cases have not been based on a sound application of the earlier law. Therefore, there remain different options for reform. The law could continue to take a substantive approach to the distinction, or instead could choose to leave the type of agreement created to the parties' discretion. Whichever approach is adopted, however, should be consistent with the principles of Scots law generally. The first part therefore considers which type of test – substantive or intention-based – is generally used in other areas of Scottish private law. Because landlord and tenant law sits at the juncture between property and contract law, examples from each of these areas are considered in turn.

Having considered the basic principles, this chapter then considers specific options for reform in turn. Three main options will be proposed, and their merits and demerits will be analysed.

12.2 General Principles for the Lease/Licence Distinction

As explained in the introduction to this chapter, there are two main approaches underpinning the current methods of distinguishing between the lease and the licence in Scots law. The first takes a substantive approach, determining the nature of the agreement by its content. The second is an intention-based approach. That is to say, notwithstanding the content of the agreement, parties are free to determine its nature by making clear their intention. It is important for the consistency of Scots law that any test for distinguishing between the lease and the licence is based on the same principles as other areas of law. This section therefore considers to what extent contract and property law take a substantive or intention-based approach to distinguishing between different arrangements.

12.2.1 Analogies from Contract Law

It is often stated that whether a contract has been formed in Scots law is determined objectively.¹⁰⁸¹ In the words of Lord President Dunedin, “Commercial contracts cannot be arranged by what people think in their innermost minds. Commercial contracts are made by what people say.”¹⁰⁸² However, objectivity must not be conflated with the concepts of intention and the substantive approach discussed in this section. Where intention is relevant in contract formation, it too is decided on an objective basis.¹⁰⁸³ For example, before any contract can come into being, there must be evidence that the parties intended to enter into legal relations.¹⁰⁸⁴ That is why, for example, in the case of *Karoulias SA v The Drambuie Liqueur Co*, a seemingly complete contract was not enforced by the court.¹⁰⁸⁵ In that case, it was objectively clear that parties only intended to be bound once their agreement had

¹⁰⁸¹W Gloag, *The Law of Contract* (2nd edn, 1999), 7; G Black, *Woolman on Contract* (6th ed), 2.02; H MacQueen and J Thomson, *Contract Law in Scotland*, 2.5.

¹⁰⁸² *Muirhead and Turnbull v Dickson* (1905) 7 F 686, 694.

¹⁰⁸³ W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007), 5.02.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ *Karoulias SA v The Drambuie Liqueur Co* 2005 SLT 813.

been written and signed. As that had not taken place, there was no enforceable contract. Likewise, what constitutes the substance of the agreement is also decided objectively – parties cannot have a price listed in their agreement, and then claim that they did not agree a price.

The question that this section is answering is whether, using an objective approach, the type of contract created is decided by the parties' intention, or by its substance. For example, parties may be objectively very clear that their intention is to create a licence to occupy rather than a lease. They may, for example, label their agreement a "lease" or a "licence". The question is whether Scots law allows the parties to have freedom over which type of agreement they are creating, regardless of its content.

Generally, Scots contract law does not permit parties to claim their agreement is something other than the type that the content of that agreement alone would create. For example, if parties agree to transfer ownership of an item of property for a price, then in law, the arrangement would be called a sale. It would not be possible for the parties to agree that such an agreement was *not* a sale.

This can be illustrated by contrasting the similar contracts of sale and barter. A agrees to give B ownership of his television, in exchange for B giving him a £50 pound note. A wants the contract to be deemed a barter, because he believes that would give B fewer implied protections compared with a contract of sale. B does not have a preference, so agrees to call it barter. The parties write a contract, which is clearly labelled a barter. The contract even includes the clause "Under no circumstances does this arrangement constitute a contract of sale." A dispute arises, and B now argues that the agreement is a contract of sale, as this gives rise to different presumptions surrounding issues such as risk.¹⁰⁸⁶ A argues that it is a contract of barter. In support of his argument, he points to the name and terms of the

¹⁰⁸⁶ E.g. in barter, risk only passes when both items are delivered, whereas with sale, risk passes on delivery of the item, regardless of whether the price has been paid in consumer contracts: Consumer Rights Act 2015, s29; see also Stair Memorial Encyclopaedia, *Consumer Protection* (Reissue), 41. In non-consumer sales, risk passes on transfer of ownership, unless the contract states otherwise: Sale of Goods Act 1979, s20.

agreement, and argues that because he wanted a physical £50 note and would not have accepted a bank transfer, that this satisfied the definition of a barter being the exchange of items. It seems unlikely that the court would classify this arrangement as barter, just because the parties had agreed to do so. There is the transfer of ownership of goods for a money price, and thus, in law, a sale.¹⁰⁸⁷

However, sale and barter have different essential terms, and thus any attempt to give an inaccurate label to the agreement would be obviously incorrect. Sale requires transfer of goods for a price, whilst barter requires the exchange of one item for another.¹⁰⁸⁸ The position is more difficult when agreements with identical or similar essential terms are compared, or when there is an incomplete agreement. Consider the contracts of lease and sale. The two agreements are very similar, with the exception that the lease is only for a limited duration. It will be recalled, however, that Scots law often permits a duration of one year to be implied if the agreement is silent as to the matter.¹⁰⁸⁹ How, then, would the law differentiate between the two agreements in the following scenario? A and B agree that a sum of £500 will be paid for a house. The agreement contains the essentials of sale: the parties, the price and the subject matter. However, it also contains the essentials of a lease: the parties, the rent, and the property (with duration capable of being implied). Various arguments could be made in support of the agreement being either a lease or a sale. For example, the parties may argue that they have only agreed a one-off amount, and as such this must constitute a sale.¹⁰⁹⁰ Conversely, the extremely low value may indicate that the parties intended the figure to represent a rental figure and only a temporary transfer of rights to the property.

What the above discussion illustrates however, is that it is not enough to consider the essentials of the agreement alone when determining its nature. Instead, the parties' intentions as to the contract's effect are extremely relevant. In the above

¹⁰⁸⁷ Stair Memorial Encyclopaedia, *Sale and Exchange* (Vol 20), 1.

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ Chapter 8.

¹⁰⁹⁰ Grassums, or one off payments cannot fulfil the rent requirement: see Chapter 8.

example, it is important to ascertain whether a permanent or temporary transfer of the property is intended. Only then can the true nature of the agreement be ascertained.

This point is even more acute where agreements have identical essential terms. One such example is a sale with the price being paid in instalments, and hire purchase. The case of *Muirhead and Turnbull v Dickson* provides an example.¹⁰⁹¹ In that case, Dickson concluded an oral agreement with a piano shop to take from them a piano for the price of £26 to be paid in monthly instalments. The piano was delivered to him, and he started to pay the instalments. However, after a number of months, he stopped paying. The piano shop sought to have the piano returned to them. They argued that the arrangement was a hire-purchase agreement, which meant that ownership of the piano did not transfer until the full price had been paid. Dickson argued that he had purchased the piano on credit, and thus, ownership had already transferred, and the piano shop could not recover the piano. The court held that by looking at the evidence objectively, the piano had indeed been purchased on credit, so the piano shop's only recourse was to seek payment of the price. Black notes that it was of importance to the court that the contract of hire-purchase was "relatively novel".¹⁰⁹² Therefore, it was for the piano shop to prove that this more unusual agreement had been concluded.

What the above example illustrates again, however, is that the court is seeking to give effect to the intention of the parties as to the type of agreement they have created. The court in that case did not state that parties could not have created a novel contract of hire purchase, simply that the intention to do so had not been adequately proved. Furthermore, if there are two similar contracts and intention is not clear, then the law will presume the more well-known agreement to have been created. Parties must be clear if they intend their agreement to have a different effect

¹⁰⁹¹ *Muirhead and Turnbull v Dickson* (1905) 7 F 686.

¹⁰⁹² G Black, *Woolman on Contract*, 2.03. Hire-purchase was introduced by *Helby v Matthews* [1895] AC 471, which also concerned a piano! The first legislative treatment of hire-purchase was in the Hire Purchase Act 1938.

from the more well-known contract. In this example, parties should have been clearer about whether the agreement automatically transferred ownership (sale), or gave an option to purchase at the end of the agreement (hire purchase).

Furthermore, the sale/hire purchase distinction also suggests that contract law is not fixed in the types of agreement which it recognises.¹⁰⁹³ This can be contrasted with property law, discussed below. It suggests that the law can give effect to the parties' intentions, even if that creates a new type of agreement. For example, before hire purchase was recognised in Scots law, the arrangement would be classified as either sale or hire. However, when parties sought to create a contract which was a mix of the two, this was permissible, and effect was given to that intention. This is notwithstanding the fact that both sale and hire were nominate contracts with clear essentials for creation.

The implications of the above discussion are three-fold. First, parties must fulfil the essential elements of a particular nominate contract in order for it to be categorised as such. However, secondly, an analysis of the cardinal elements of a contract alone is not sufficient. It is also important to consider what the intended effect of that contract is. If parties make clear that the intended effect of a contract is different to that of a nominate contract, courts will give effect to that intention. Finally, the discussion of the sale/hire purchase scenario demonstrates that courts are willing to recognise new contracts so long as they have a distinct legal purpose.

Applying this to the lease/licence context, this means that the distinction between leases and licences to occupy depends on whether the contracts have different purposes. If there are no differing purposes, then, if the cardinal elements of a lease are agreed, then no distinction between the two agreements is possible. The situation would be akin to the first example discussed above. Just as parties who agree to transfer ownership of an item of property for a price create a sale, so too would parties who agree to allow one to use the property of the other for a specific

¹⁰⁹³ Although some authors are critical of the acceptance of hire-purchase into Scots law: J Gow, *The Mercantile and Industrial Law of Scotland* (1964), 249.

term, for a rent, create a lease. However, if there is a difference in purpose, then that purpose can be used to differentiate between the two agreements in addition to the presence of the cardinal elements.

Nonetheless, it was demonstrated that, under the current law, there are no clear different purposes for leases and licences.¹⁰⁹⁴ Any reform based on different purposes of the lease and the licence would therefore have to create a clearly different purpose.

12.2.2 Analogies from Property Law

The previous section demonstrated that contract law provides parties with significant freedom to categorise their agreements. This part considers the extent to which the same flexibility for parties as to which types of agreement can be created in property law.

Unlike in contract law, property law does not provide parties with unlimited freedom to create their own agreements. Instead, under the *numerus clausus* principle, parties can only create real rights which are recognised by law.¹⁰⁹⁵ As Gretton and Steven describe it, “a choice can be made from a short menu: people cannot create their own.”¹⁰⁹⁶

These nominate real rights have specific requirements for their formation, akin to the essentials for creating different types of contract. Once the essentials of that particular agreement have been met, parties are not free to claim that they have created a different type of real right altogether. As with contract law, however, these

¹⁰⁹⁴ Chapter 10.

¹⁰⁹⁵ For a list of real rights recognised by Scots law, see Reid, *The Law of Property in Scotland* (1996), para 4. For a detailed comparative study of the *numerus clausus* principle, see B Akkermans, *The Principle of Numerus Clausus in European Property Law* (2008).

¹⁰⁹⁶ G Gretton and A Steven, *Property, Trusts and Succession*, (3rd edn, 2017), 2.8.

essentials include not only core terms which must be agreed, but also the effect of the agreement.

Consider, for instance the servitude, which can be defined as “a real right that allows a landowner to enter to make use of neighbouring land”.¹⁰⁹⁷ The most obvious example is a right of access over land. A servitude has several requirements for constitution:¹⁰⁹⁸ it must identify a benefited and burdened property,¹⁰⁹⁹ and must be granted to owner of the benefited land in their capacity as owner. The necessary purpose of the agreement is that it must confer “praedial benefit”.¹¹⁰⁰ Furthermore, the servitude must be registered.¹¹⁰¹ Once the requirements for the creation of a servitude have been fulfilled, then a servitude will have been created. Parties would not be free to claim that what they had created was some other sort of real right, such as a real burden or a lease. The type of real right in this case is determined by the content of what has been agreed between the parties.

Because of the *numerus clausus* principle, parties have less freedom in their creation of real rights. Parties cannot create whatever type of agreement they wish. Nonetheless, parties do have some freedom as to the effect of any arrangement. For example, they could choose not to create a real right at all by not completing formalities such as registration, or, in the example of the servitude, by granting the right to the owner of the benefited property in their personal capacity, rather than in their capacity as owner of the land. In the case of leases, however, parties often do not have this same freedom. Real rights of lease are the only subordinate real rights which are made real simply by exercising the rights granted under the initial contract.¹¹⁰² In other words, the purpose of a lease is to allow person A to use

¹⁰⁹⁷ *Ibid.*

¹⁰⁹⁸ See generally, D Cusine and R Paisley, *Servitudes and Rights of Way* (1998), ch1.

¹⁰⁹⁹ *Patrick v Napier* (1867) 5 M 683; W Gordon and S Wortley, *Scottish Land Law* (3rd edn, Vol 2, 2020), 25.12, 2.18; Gretton and Steven, *Property, Trusts and Succession*, 13.2.

¹¹⁰⁰ Gordon and Wortley, *Scottish Land Law*, 25.22; Gretton and Steven, *Property, Trusts and Succession* 13.6.

¹¹⁰¹ Requirements of Writing (Scotland) Act 1995 s1(2)(b); Title Conditions Scotland Act 2003 s75(2) - with the exception of implied servitudes, or those created by prescription.

¹¹⁰² This can be contrasted with real rights created by prescription, which require possession but need no contract: e.g. prescriptive servitudes: Gordon and Wortley, *Scottish Land Law* (vol 2), 25.51. For a

person B's property. However, leases of up to 20 years' duration are made real by entering into possession. Thus in the case of short leases, parties are denied the possibility of avoiding the creation of a real right, as they become real when A uses B's land. This can be contrasted with other real rights also made real by possession, such as rights of security over moveables. There, possession is not essential to the smooth operation of any underlying contract.¹¹⁰³ This is expanded upon further below. This inability to prevent creation of a real right has also contributed to the desire of parties to attempt to create a licence to occupy, rather than a lease.

12.2.3 Conclusion on General Principles

This part has demonstrated that Scots law generally takes a substantive approach to determining the nature of both contracts and property rights. Therefore, parties are not free to claim to have created a different type of contract to the one that the law concludes has arisen from the terms that they have agreed. However, this part has illustrated that, particularly in the contractual context, it is not sufficient to simply consider the cardinal elements of the arrangement. Instead, other factors, such the *purpose* of the agreement must also be considered. Applying this to the lease/licence context, any reform of the law must be based upon whether any difference between the purpose of the lease and the licence can be created. The first option for reform proceeds on the basis that there is no fundamental difference in purpose between the lease and the licence to occupy. The second and third options proposed proceed on the basis that a clear difference in purpose can be created.

detailed treatment of the possession require in prescriptive servitudes, see, generally, A Peterson, *Prescriptive Servitudes* (2020).

¹¹⁰³ See 12.6.

12.3 Options for Reform

Part 2 of this thesis demonstrated that Scots law currently recognises three main approaches to distinguishing the lease from the licence to occupy.¹¹⁰⁴ However, it was illustrated that the current methods do not adequately distinguish between the two types of agreements.¹¹⁰⁵ Exclusive possession, for example, is difficult to define and therefore to use in practice. Likewise, the Missing Cardinal Element test is complicated by presumptions and implied cardinal elements.

The preceding part of this chapter demonstrated that Scots law generally takes an objective and substantive approach to distinguishing between different agreements. This part suggests options for reform, indicating what the content of an objective, substantive test should be. The three tests proposed in this section are modified forms of the current methods for distinguishing the lease from the licence to occupy. Despite being based on the current law, each of the three tests would provide a clearer distinction between the two agreements than exists at present.

In assessing the suitability of these tests, issues of legal certainty and coherency of the law are considered. Contrary to most commentators, the present author argues that a distinction between a lease and a licence based on the extent of control ceded to the occupier should be abandoned.¹¹⁰⁶ Instead, a return to emphasising the four cardinal elements of a lease is the preferred approach, or else the adoption of a new purpose-based test.

The options discussed are the Missing Cardinal Element test, the Sufficient Use test, and the Intention test, and each is considered in turn.

¹¹⁰⁴ Richardson and Anderson, 2.52; Rennie, 2.15, and see generally, Chapter 7 and 8.

¹¹⁰⁵ See Chapters 7 and 8.

¹¹⁰⁶ See, for instance, M Blair, "The Scots Law of Leases - A brief commentary and restatement of the necessary characteristics of a Lease", (6th November 2020) unpublished and M Skilling, "The Fifth Element: Should Exclusive Possession Be Considered an Essential Requirement for the Constitution of a Contract of Lease in Scots Law?" (2017) 7 ASLR 1.

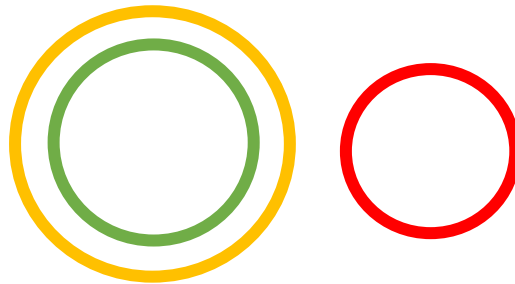
12.4 The Missing Cardinal Element Test

12.4.1 Summary of MCE Test

Green = Real Right of Lease

Orange = Contract of Lease

Red = Licence to Occupy



Perhaps the simplest option for distinguishing between the lease and the licence to occupy is a return to the Missing Cardinal Element (MCE) Test. Put simply, this test provides that if all of the cardinal elements of a lease are present in an agreement, then that agreement is a lease. If one or more of the cardinal elements are missing, then the agreement is a licence to occupy. This test proceeds on the basis that there is no ascertainable difference between the lease and the licence to occupy in terms of the purpose of the arrangement. Both contracts have the same purpose of allowing someone other than the owner to use a piece of property. Of course, the extent of use may differ, but the core purpose – the right to use – is the same. As the previous section identified, parties are not free to decide the type of agreement created once it meets the requisites to fall into a particular category. Thus, the only way for parties to avoid creating a lease is to omit a cardinal element altogether.

Were this test adopted, there would be no overlap between leases and licences to occupy; a clear distinction between leases and licences to occupy would be created. This is represented by the above diagram. Some contractual leases could become real rights of lease if the requisite criteria (possession or registration) were met. However, licences would be a distinct category of agreements which could never amount to leases, due to a missing cardinal element.

The MCE test would need to take into account the earlier findings of this thesis regarding the different meanings of the different cardinal elements depending on the type of lease being created. For example, it demonstrated that the cardinal elements of the contracts of lease and real rights of lease created by registration are interpreted more widely than the cardinal elements for real rights of lease under the 1449 Act. For example, contracts of lease and real leases created by registration can both be validly created with an elusory rent. Likewise, indefinite durations can exist in contracts of lease, but not real rights of lease under the Leases Act 1449.¹¹⁰⁷ These differences must be kept in mind when applying the MCE test.

12.4.2 Benefits

The MCE test has three significant advantages. Firstly, the MCE test is incredibly simple. Parties and courts alike are accustomed to determining what constitutes the cardinal elements of a lease. One-off payments (grassums), for example, would not fulfil the requirement of rent.¹¹⁰⁸ A duration of “until I require the property back” would be insufficient for the creation of a lease. Parties, therefore, would be clear from the outset whether or not their agreement met the requirements of a lease, increasing legal certainty. Parties would avoid dealing with difficult concepts such as the extent of use granted, as illustrated in the context of the Sufficient Use test discussed below.

Secondly, the MCE test better reflects the historical development of the concept of a lease. The oft-quoted passage by Rankine notes that the Scottish concept of a lease is much wider than its English counterpart.¹¹⁰⁹ Of all the options proposed in this section, the MCE test creates the widest doctrine of a lease in Scotland. All agreements for the use of another’s property, provided that all cardinal elements of a lease were present, would be a lease under the law – the extent of use or

¹¹⁰⁷ See Chapters 3 and 4.

¹¹⁰⁸ *Mann v Houston* 1957 SLT 89; *Whillock v Henderson* 2007 SLT 1222; *Gloag v Hamilton* 2004 Hous LR 91.

¹¹⁰⁹ Rankine, 2.

possession by the tenant would be irrelevant. This test would continue to recognise arrangements such as the drawing of water from a pit as capable of amounting to a lease.¹¹¹⁰

Similarly, the MCE test adequately explains the way in which the courts determine whether a lease or licence has been created in Scots law at present, and would require the least adjustment of the status quo. This is beneficial for reasons of legal continuity and certainty. As was more fully explained in Chapter 8, in almost all of the current cases where the court has found that a lease exists, all of the cardinal elements of a lease have been present. In those cases where the courts have held that no lease existed, a cardinal element is usually missing.¹¹¹¹ This suggests that the presence or otherwise of the cardinal elements is given more weight by the courts than the existence or not of factors such as “exclusive possession”. Contrary to what may be expected, therefore, adopting the MCE test would not require significant adaptation of the court’s current approach to the distinction between leases and licences to occupy.

12.4.3 Drawbacks

However, adopting the MCE test is not without its criticisms. For example, the MCE test would create a divergence between the law and the position in practice. As explained in Chapter 10, many licences currently used in practice are indistinguishable from a lease – often, all of the cardinal elements of a lease are present.¹¹¹² Under the MCE test, these “licences” would be held to be leases. This may, however, already be the current law. Current guidance from the Property Standardisation Group suggests that the only way to be certain that the agreement parties have created is a licence, rather than a lease, is to ensure that one of the

¹¹¹⁰ This was the situation in *Dunlop & Co v Steel Co of Scotland* 1979 7 R 283. However, on the facts of this case, it may fail to meet the MCE test, for want of duration.

¹¹¹¹ E.g. in *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490, there was no ish. In *Ali v Serco* [2019] CSIH 54, there was no rent. See also Chapter 8.

¹¹¹² Property Standardisation Group, “Licence to Occupy Guidance Notes (v2)”, para 1.

cardinal elements is not present.¹¹¹³ Parties may ignore this advice and attempt to create licences with all cardinal elements of a lease present. It does not follow, however, that these agreements would not be held to be leases if a dispute as to their nature reached court.¹¹¹⁴

Despite the views of the Property Standardisation Group, there are many others who argue that other factors, such as exclusive possession, must be considered when distinguishing between a lease and a licence to occupy.¹¹¹⁵ They argue that looking at the presence or absence of the cardinal elements is not sufficient to create a lease. If these views are correct, then the MCE test would be a significant change to the current law. Parties would have less freedom than at present to create licences to occupy. Parties would have to omit a cardinal element to create a lease. They could not instead omit something such as exclusive possession. It is difficult to justify why parties should be limited in their ability to create licences to occupy. There seems no policy reason against recognising licences in the commercial context.¹¹¹⁶

Furthermore, the fact that the MCE restricts the freedom of contracting parties must be balanced against the coherency and clarity that the MCE test would provide. Parties may be more limited in their methods of creating a licence to occupy under the MCE test. However, this does not mean that it is impossible. Parties can, for example, include a grassum rather than a rent. Indeed, any legal change necessitates that parties adapt to it. Alternatively, if the advantages of a licence, such as avoiding tacit relocation, notice requirements, or the creation of a real right, are desired, then there are other ways that the MCE test can accommodate this. For instance, the parts of lease law that parties seek to avoid by using a licence to

¹¹¹³ *Ibid.*

¹¹¹⁴ E.g. *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12.

¹¹¹⁵ Rennie, 2.15.

¹¹¹⁶ See below at 12.5.

occupy could be contracted out of.¹¹¹⁷ The option of contracting out is explored in more detail below.¹¹¹⁸

A related concern is that the MCE approach would lead to a vast increase in the number of leases. This is because many licences used in practice currently satisfy the cardinal elements of a lease. This is not problematic by itself, but it would have various knock-on consequences. One such example would be the tax implications. If every scenario where another's property was used could constitute a lease, regardless of the extent of the use, then Land and Buildings Transaction Tax (LBTT) would be due on many more transactions.¹¹¹⁹ LBTT must be paid on leases,¹¹²⁰ but not on licences to occupy.¹¹²¹ Of course, HMRC may well welcome this outcome resulting in increased revenue. However, on the other hand, HMRC would be inundated with many more agreements that required payment of tax. Consequently, HMRC would need to greatly expand its operations to deal with the increased number of transactions. This alone, however, is not a reason to abandon the MCE test. Indeed, there are various other methods to overcome these challenges. HMRC could, for instance, introduce a *de minimis* test to filter out small transactions, by considering their value or timescale, or the new changes could be phased in, with transitional periods to allow people to get ready for the new approach.

Furthermore, the MCE test may result in leases which are created in scenarios where it is seemingly illogical to have a lease. One such example would be where the extent of use or possession granted to the tenant is minimal. For instance, Blair notes that under a MCE test "a lodger in a room in a house could perfectly well be a tenant".¹¹²² Blair disapproves of this outcome, noting that "This is not the way the

¹¹¹⁷ See for example, *Scottish Law Commission, Discussion Paper on Aspects of Leases: Termination* (Discussion Paper No 165, 2018), 2.51 for the suggestion that parties could be allowed to contract out of tacit relocation, and 4.32ff for the suggestion that parties could be allowed to contract out of the notice requirements.

¹¹¹⁸ See 12.5.

¹¹¹⁹ Land and Buildings Transaction Tax (Scotland) Act 2013, s52.

¹¹²⁰ *Ibid.*

¹¹²¹ *Ibid.*, s53.

¹¹²² Blair, "The Scots Law of Leases", 11.

Rent Acts have worked in the past.”¹¹²³ This reason alone does not justify abandoning the MCE test. As noted in the introduction to this section, because the current law on the distinction between leases and licences is in such a state of confusion, there is no test which will adequately account for every decided case of leases and licences. It is likely that there will be a need to specify certain exceptions to whichever test is adopted. This is not surprising. Even the more developed English law of licences has numerous exceptions to the general lease/licence distinction.¹¹²⁴ If a policy decision is made that no lease should be created in a situation where a landlord permits a lodger to stay in the landlord’s property whilst the landlord also occupies the space, then a particular exception could be created to that effect. This would be akin to the exception in the Private Housing (Tenancies) (Scotland) Act 2016 for residential tenancies.¹¹²⁵

Blair also highlights a further concern posed by the MCE test – the issue of competing rights. If exclusive possession is not necessary for creation of a lease, then there may be two parties entitled to the same right over the property. From the perspective of contract law, this is not problematic. Identical contracts can be granted to multiple parties. For instance, goods can be sold multiple times. Of course, where the subject of the contract is a unique object rather than generic goods, only one party will receive the goods. This does not affect the validity of the other contracts, which will give the unhappy purchasers remedies against the seller. Indeed, the contractual licence to occupy provides a further example: allowing multiple people to use the same property.¹¹²⁶

However, the problem is arguably more acute in the case of real rights. Blair questions: “How could one determine which of two parties is entitled to [a real right]

¹¹²³ *Ibid.*

¹¹²⁴ Indeed, even in *Street v Mountford* [1985] UKHL 4, Lord Templeman gives examples of exceptions to his general rule, including where there is no intention to create legal relations, or in family relationships.

¹¹²⁵ Private Housing (Tenancies) (Scotland) Act 2016, sch 1, para 7ff.

¹¹²⁶ For example, in *Conway v Glasgow City Council* 1999 Hous LR 20, a room was shared by two unrelated occupants under licences to occupy.

to occupy a house, office or whatever has priority, where one is the owner but has himself also granted an *ex facie* effective right to occupy to someone else?”¹¹²⁷

There are a number of responses to this query. Firstly, the law already applies methods of dealing with competing real rights. One such as example is *prior tempore potior jure*.¹¹²⁸ This could assist, for example, in the case where the same right is granted to multiple tenants. The tenant who took possession of the right first (in the case of short leases) or who registered first (in the case of long leases) would be the sole acquirer of the real right. In scenarios where the dispute is not which tenant acquires the real right, but who takes priority in a question between a tenant and a landlord, the same reasoning could be applied. Because the landlord had the right first, they take priority.

A different, simpler approach could be taken for short leases. The Stair Memorial Encyclopaedia explains that “The possession founded on for the purpose of the Leases Act 1449 must be exclusive”.¹¹²⁹ Thus, if the right to use the property was shared, possession too would be shared, and so creation of a real right is not possible in such a scenario. This would limit the issue of competing real rights to long leases only. Admittedly, this approach would necessitate the issue of exclusive possession being fully explored in the context of real rights. For the reasons highlighted in Chapter 7 on exclusive possession and below, determining the extent of possession is undesirable.

Nonetheless, even if short leases were capable of becoming real, the competing real rights issue may be a fallacy. Indeed, Scots law already recognises multiple real rights over the same property with the same substance. This is most clearly evidenced by considering the example of a servitude. Consider the scenario where A owns a piece of land and grants B a servitude to park a car on A’s land.¹¹³⁰ In this

¹¹²⁷ Blair, “The Scots Law of Leases”, 11.

¹¹²⁸ This means “earlier by time, stronger by right”: Gretton and Steven, *Property, Trusts and Succession*, 4.45.

¹¹²⁹ Stair Memorial Encyclopaedia, ‘Landlord and Tenant’, s255.

¹¹³⁰ *Moncrieff v Jamieson* 2008 SC (HL) 1.

scenario, A has not lost his own right to park on the land simply by granting B the same right.¹¹³¹ Instead, both have the right to park on the land, stemming from their respective real rights in the land. The owner could also grant the right to park to Party C. Nonetheless, A, B and C would continue to have a real right to park on the land, notwithstanding the other parties' real rights. The same could apply to the multiple lease scenario. Consider a farm lease. If A owns the land and lets to B the right to graze sheep on A's land, but with the reservation that A can also graze sheep in his land, there is no priority. Both, on the basis of their respective real rights, are entitled to graze sheep on the land, and cannot prevent the other from doing so.¹¹³²

A significant complication with the MCE test is that it does not appear to deal well with the current law in which certain cardinal elements of a lease can be implied. For example, if no duration is included in the lease agreement, then a duration of one year can be implied.¹¹³³ Recently, there has also been a suggestion that under certain circumstances, rent can be implied.¹¹³⁴ It is difficult to reconcile the implication of terms to perfect a lease with the MCE test. The MCE test means that if any cardinal element is missing, then a lease cannot be created. The implication of terms means that if a cardinal element is missing, then a lease can nonetheless be created. It was argued in a previous chapter that this area was in need of reform. However, even in its present form, this is not as significant an issue as first appears. Terms are only implied in limited circumstances. For instance, duration is only implied in situations where the agreement is silent on the issue.¹¹³⁵ If an agreement states explicitly that there is to be no duration, or is to be of a non-qualifying duration such as an uncertain duration, then no duration would be implied.¹¹³⁶ Therefore, the

¹¹³¹ Unless the servitude granted is an exclusive servitude, or if the owner's parking interferes with exercise of the servitude, see W Gordon and S Wortley, *Scottish Land Law*, vol 2 (3rd edn, 2020), 25.71.

¹¹³² Although there is the caveat that the owner's use must not derogate from the grant: see generally Rennie, 14.03.

¹¹³³ *Gray v Edinburgh University* 1962 SC 157; *P v O* 2014 Hous LR 44, Sh Ct.

¹¹³⁴ *Shetland Isles Council v BP Petroleum Development Ltd* 1990 SLT 82.

¹¹³⁵ *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490.

¹¹³⁶ *Ibid.*

MCE test may need to be viewed differently. It is not simply a negative test, where omissions are considered. Instead, it places a positive obligation on the parties to state that a cardinal element such as duration or rent is deliberately omitted.¹¹³⁷

12.4.4 Conclusion on MCE Test

The MCE test has obvious advantages. These include simplicity and thus certainty, respect for the history of the Scottish lease, and the fact that it aligns with the court's current approach to the distinction between leases and licences. It could therefore be adopted simply through case law, rather than requiring legislation. The MCE test, however, is not without its flaws. Nonetheless, as this section has demonstrated, many of these flaws are not as acute as first appears, whilst others can be overcome in other ways. The MCE test would represent a significant improvement on the current law in distinguishing between leases and licences to occupy. That does not, however, mean that it is the most appropriate choice for Scots law. As such, two further options are explored below.

12.5 Enhancing the MCE Test: Contracting Out

12.5.1 Introduction

The previous section demonstrated that the MCE would provide several advantages if adopted in Scots law as the test for distinguishing between the lease and the licence. However, one of the most significant drawbacks of the test is the lack of flexibility it provides parties with when determining the nature of their agreement. Once parties have fulfilled the cardinal elements of a lease, then under the MCE test, that will be the contract they have created, no matter what name they give the agreement. Notwithstanding the substantive approach, parties are usually given

¹¹³⁷ Regarding duration, see: *Scottish Residential Estates Development Co Ltd v Henderson* 1991 SLT 490, c.f. *Gray v Edinburgh University* 1962 SC 157. Regarding rent, see: *Mann v Houston* 1957 SLT 89, c.f. *Shetland Isles Council v BP Petroleum Development Ltd* 1990 SLT 82.

extensive freedom to modify the effects of their agreements. This section analyses the extent to which parties should be permitted to contract out of the consequences attached to creating a lease. Should, for instance, parties be able to provide that their agreement does not create a real right? This section analyses the competing rationales for permitting parties to contract out of specific contractual terms, and concludes that there is no compelling reason why parties should not be able to contract out of lease terms, including the creation of a real right.

12.5.2 The Starting Point: Freedom of Contract

The protection of weaker parties must be balanced in contract law with the doctrine of freedom of contract. This doctrine is highly regarded in Scots law.¹¹³⁸ Indeed, some view the doctrine as significantly more important than fairness in contract law.¹¹³⁹ Thomson has described freedom of contract as “a fundamental tenet of Western democracies”.¹¹⁴⁰ This is despite the fact that freedom to create contractual obligations is often “abused”,¹¹⁴¹ and does not take into account “social and economic conditions or pressures”.¹¹⁴² As explained by the Scottish Law Commission:

¹¹³⁸ See generally M Hogg, “Perspectives on Contract Theory from a Mixed Legal System”, (2009) 29(4) Oxford Journal of Legal Studies, 643, 650ff.

¹¹³⁹ Pinsent Masons, in a response to the Scottish Law Commission’s consultation on various aspects of contract law, commented that the law of contract “is not in principle concerned with fairness but starts from a proposition of freedom to contract”: Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (March 2018), 11.29.

¹¹⁴⁰ J Thomson, “Good Faith in Contracting: A Sceptical View” in A Forte (ed), *Good Faith in Contract and Property* (1999) 63, at 64.

¹¹⁴¹ Hogg, “Perspectives on Contract Theory from a Mixed Legal System”, 650.

¹¹⁴² D Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd edn, 1995) 1.26.

“The freedom to contract as people wish is quite extensive. Even where contract law lays down rules, contracting parties may usually vary or exclude their application to the contract.”¹¹⁴³

With such a strong emphasis on the right of parties to create contracts as they wish, any restrictions on the principle must be especially justified.

12.5.3 The Need for Protection of Vulnerable Parties in Leases

The main argument against allowing parties to contract out of certain terms is the protection that a particular term provides.¹¹⁴⁴ Gladstone summarised the reasoning clearly:

“I value *freedom of contract* very much, but in my opinion it should be a real freedom - it should be between parties who meet upon a footing”.¹¹⁴⁵

Indeed, the protection provided by a real right is important. It means tenants cannot be evicted for the entirety of their tenancy, even if the landlord sells the property. Thus, allowing parties to contract out could prejudice vulnerable parties. Generally, it is presumed that the tenant – who benefits from the real right’s protection – is the weaker party. Lord Simon of Glaisdale summarised the position well in an oft-cited passage from the English case of *Johnson v Moreton*:

“Generally, a man became a tenant rather than an owner-occupier because his circumstances compelled him to live hand-to-mouth; the landlord’s purse

¹¹⁴³ Scottish Law Commission, “Submission of the Scottish Law Commission on the Contract (Third Party Rights) (Scotland) Bill” (undated), 1, available:

https://archive2021.parliament.scot/S5_Delegated_Powers/1._Scottish_Law_Commission.pdf

¹¹⁴⁴ See for example, the Faculty of Advocates response regarding contracting out of minimum notice periods to the Scottish Law Commission’s consultation on aspects of leases: Scottish Law Commission, “Collated responses to Discussion Paper on Aspects of Leases: Termination (DP No 165)” (2018), 110.

¹¹⁴⁵ W Gladstone, *Political Speeches in Scotland*, Vol 2 (1880), 86.

was generally longer and his command of knowledge and counsel far greater than the tenant's."¹¹⁴⁶

Indeed, if the landlord is the more powerful party, then they may well seek to prevent a real right being created. The sale of an untenanted property may have a much bigger market, for example. Some practical issues would also be simpler, such as allowing people to view the property. This unequal bargaining power between the parties necessitated the introduction of legislation to protect the tenant in English law, such as the Rent Acts.¹¹⁴⁷

Of course, Lord Simon's statement is specifically discussing the situation with regards to residential tenants. By contrast, the traditional view is that commercial contracts are generally made between parties who have similar bargaining power.¹¹⁴⁸ Nonetheless, landlords are often vilified regardless of whether they are commercial or residential.¹¹⁴⁹ As the Scottish Law Commission have noted, inequality of bargaining power also exists in the commercial sector.¹¹⁵⁰ Particularly, small businesses may be in a weaker position, and they are more likely to be the tenant.¹¹⁵¹ For example, the business may be the tenant's livelihood.

12.5.4 The Lack of Protection for Commercial Tenants in Scots Law

Notwithstanding the potential need for protection of commercial tenants as well as residential tenants, this is not a route which Scots law has taken. Whilst Scotland has introduced extensive protection for residential tenants and also agricultural

¹¹⁴⁶ *Johnson v Moreton* [1980] AC 37.

¹¹⁴⁷ See, e.g. Landlord and Tenant Act 1954.

¹¹⁴⁸ Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (March 2018), 14.14.

¹¹⁴⁹ A Smith, *The Wealth of Nations* (1776) Book I, ch 6.

¹¹⁵⁰ Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses*, 14.15.

¹¹⁵¹ *Ibid.* Of course, in some instances, the landlord may be the weaker party, such as when seeking "anchor" tenants in shopping malls.

tenants,¹¹⁵² it has not done so with commercial tenants.¹¹⁵³ This is in stark contrast to English law, which has extended great protection to commercial tenants too. For instance, the Landlord and Tenant Act 1954 entitles all commercial tenants to request security of tenure for a further 15 years.¹¹⁵⁴

12.5.4.1 Tenancy of Shops (Scotland) Act 1949

By contrast, the only protections afforded to a commercial tenant in Scots Law are those which stem from a lease which has become a real right, and a limited protection under the “little-known” Tenancy of Shops (Scotland) Act 1949.¹¹⁵⁵ In stark contrast to the English equivalent, the protection provided under the Tenancy of Shops (Scotland) Act 1949 permits tenants to seek an extension of their lease for just one further year.¹¹⁵⁶ Furthermore, it only applies to shops, rather than all commercial lease agreements.¹¹⁵⁷ Whilst the definition of a shop is quite wide,¹¹⁵⁸ various categories of business have been excluded from the Act’s scope.

*McAllister’s Scottish Law of Leases*¹¹⁵⁹ gives examples of premises that have been excluded which include a blacksmith’s,¹¹⁶⁰ a travel agent¹¹⁶¹ and a dry cleaner.¹¹⁶²

¹¹⁵² Rennie, 35.09. Regarding contracting out and agricultural tenancies, see B Gill, *The Law of Agricultural Holdings in Scotland*, (3rd edn 1997) 1.03.

¹¹⁵³ See, for instance the Private Housing (Tenancies) (Scotland) Act 2016, which applies only to residential tenants. This protection for residential tenants is akin to the growing protection for consumers generally in Scots law: W C H Irvine, *Consumer Law in Scotland* (5th edn 2015) 1.01, citing G Borrie, *The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls* (1984), 2.

¹¹⁵⁴ Landlord and Tenant Act 1954, s33.

¹¹⁵⁵ C Stewart, “Tenancy of Shops” (2018) 152 Prop. L.B. 6, 6.

¹¹⁵⁶ Tenancy of Shops (Scotland) Act 1949, s 1(2).

¹¹⁵⁷ *Ibid*, s1(1).

¹¹⁵⁸ See Shops Act 1950 s74(1) (Although this Act is repealed, no replacement definition has been provided. It is therefore assumed that this definition continues to apply: Richardson and Anderson, 14.1). Other premises which have been held covered by the Act include post offices (*King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79; opticians (*Craig v Saunders & Connor Ltd* 1962 SLT (sh ct) 85; premises generally used for services, but where items are also offered for sale (e.g. *Oakes v Knowles* 1966 SLT (Sh Ct) 33; *Thom v British Transport Commission* 1954 SLT (Sh Ct) 21; *Grosvenor Garages (Glasgow) Ltd v St Mungo Property Co Ltd* (1995) 71 Sh Ct Rep 155).

¹¹⁵⁹ Richardson and Anderson, 14.4.

¹¹⁶⁰ *Golder v Thomas Johnston’s (Bakers) Ltd* 1950 SLT (Sh Ct) 50.

¹¹⁶¹ *Wright v St Mung Property Co Ltd* (1955) 71 Sh Ct Rep 152.

¹¹⁶² *Boyd v A Bell & Sons* 1970 JC 1.

The Tenancy of Shops (Scotland) Act 1949 was initially a temporary piece of legislation, although it was later made permanent.¹¹⁶³ Its primary aim was to provide protection to shop owners in the post-war era, where it was feared that “unscrupulous property speculators” may have seen “an opportunity for profit at the expense of community welfare”.¹¹⁶⁴ Therefore, the Act was created for a very particular purpose, and not just because it was felt that tenants of shops required general protection. Indeed, the lack of relevance of the reason for the Act’s introduction to the modern day was a key reason for an application in 2013 being disallowed.¹¹⁶⁵ Stewart argues that this case, and other recent applications which were refused, demonstrate that the Act is no longer relevant today.¹¹⁶⁶ Indeed, many of those applying for extensions to their leases under the Act do not appear to be parties in need of any particular protection as they are large businesses.¹¹⁶⁷ The Scottish Law Commission has suggested that the Act be repealed,¹¹⁶⁸ and this was met with general approval from consultees.¹¹⁶⁹

12.5.4.2 *The Leases Act 1449*

It is, of course, possible that the reason that no further protection has been afforded to commercial tenants is because it is presumed that the existing law provides sufficient protection. This protection may come from the 1449 Act itself, providing that tenants cannot be evicted even if the landlord sells the property. Indeed, the Act was introduced for the very purpose of protecting “poverty stricken agricultural tenants”.¹¹⁷⁰ However, this argument does not seem to hold strong when various additional protections were considered necessary in other areas of lease law, such

¹¹⁶³ Tenancy of Shops (Scotland) Act 1964.

¹¹⁶⁴ *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh. Ct.) 141 at [28].

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ Stewart, “Tenancy of Shops” 7.

¹¹⁶⁷ *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh. Ct.) 141; *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.

¹¹⁶⁸ See generally, Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination*, (May 2018), ch6.

¹¹⁶⁹ Scottish Law Commission, “Collated responses”.

¹¹⁷⁰ Rennie, 1.10.

as for agricultural and residential tenants. Furthermore, other jurisdictions have seen the need to introduce protections for commercial tenants in addition to any real right.¹¹⁷¹

12.5.4.3 The Trend towards further Freedom of Contract in Commercial Leases

It appears to be the case, therefore, that Scots law has made a conscious choice to provide limited protection to commercial tenants and uphold the freedom of contract of the parties. Indeed, this is in keeping with other contracts between commercial parties. Take, for example, the law of sale. There, parties are generally free to contract out of the implied terms included in the Sale of Goods Act when the sale is between two businesses.¹¹⁷² This can be contrasted with the position under consumer sales.¹¹⁷³

Furthermore, it seems that the Scottish law of leases is moving towards even less protection for commercial tenants. The Scottish Law Commission is currently researching aspects of termination of leases. It is evident in both the Discussion Paper¹¹⁷⁴ and the responses to it¹¹⁷⁵ that there is a trend towards, and a desire for, permitting parties to contract out of onerous lease terms.

One such example is tacit relocation. Tacit relocation provides that if parties do not give notice of their intention to bring the agreement to an end, or if notice is not correctly given (e.g. the notice period is too short), then the lease will continue for a further year.¹¹⁷⁶ The rationale for tacit relocation is the presumed intention of the parties.¹¹⁷⁷ Therefore, as the Scottish Law Commission¹¹⁷⁸ and writers such as

¹¹⁷¹ E.g. English law, as highlighted above.

¹¹⁷² Sale of Goods Act 1979, s55.

¹¹⁷³ See, for instance, Consumer Rights Act 2015, s31.

¹¹⁷⁴ Scottish Law Commission, *Aspects of Leases: Termination*.

¹¹⁷⁵ Scottish Law Commission, "Collated responses".

¹¹⁷⁶ *Cinema Bingo Club v Ward* 1976 SLT (Sh Ct) 90.

¹¹⁷⁷ W Gloag, *The Law of Contract* (2nd edn, 1929), 734.

¹¹⁷⁸ Scottish Law Commission, *Aspects of Leases: Termination*, 2.1.

Rennie¹¹⁷⁹ correctly highlight, there appears to be no reason why parties could agree that tacit relocation would not apply. Whether it is indeed possible to contract out of tacit relocation, however, is far from settled. Several texts suggest it is not possible.¹¹⁸⁰ Nonetheless, there is judicial authority that it may be possible in the commercial sector, albeit not in the agricultural sector.¹¹⁸¹

If Scots law does not allow contracting out of tacit relocation, it would be an outlier. Where other jurisdictions recognise tacit relocation, they allow parties to contract out of it.¹¹⁸² Therefore, it is unsurprising that one of the options proposed by the Scottish Law Commission for reform of the law of tacit relocation was allowing contracting out.¹¹⁸³ The vast majority of respondents to the consultation supported this proposition.¹¹⁸⁴

Another example is notice periods. The law regarding notice periods for leases is notoriously complex.¹¹⁸⁵ Given the particular uncertainty regarding the effect of the Sheriff Courts (Scotland) Act 1907, some solicitors advise their clients that large commercial properties need to give a full year's notice to prevent tacit relocation occurring.¹¹⁸⁶ The Scottish Law Commission proposed allowing parties to contractually alter the length of notice periods required for leases.¹¹⁸⁷ Generally, consultees agreed that parties should be able to contract out of the notice periods.¹¹⁸⁸ However, there was less agreement on whether parties should be able to shorten notice periods.¹¹⁸⁹

¹¹⁷⁹ Rennie, 149.

¹¹⁸⁰ Rankine, 556; Paton and Cameron, 223.

¹¹⁸¹ *MacDougall v Guidi* 1992 SCLR 167

¹¹⁸² Scottish Law Commission, *Aspects of Leases: Termination*, 2.39.

¹¹⁸³ *Ibid*, 2.51.

¹¹⁸⁴ Scottish Law Commission, "Collated responses". However, it should be noted that many preferred the alternative proposal of disapplying tacit relocation to commercial leases.

¹¹⁸⁵ Scottish Law Commission, *Aspects of Leases: Termination*, 3.1.

¹¹⁸⁶ *Ibid*, 3.27.

¹¹⁸⁷ *Ibid*, ch 4.

¹¹⁸⁸ See generally, Scottish Law Commission, "Collated responses".

¹¹⁸⁹ *Ibid*.

Taken together, the above examples illustrate that Scots Law has not sought to provide protection to commercial tenants generally. Instead, Scots law favours freedom of contract in this area. Indeed, the recent Scottish Law Commission Discussion Paper and the responses to it demonstrate a desire for even more flexibility when contracting out of implied lease terms.

12.5.5 Contracting Out of the Real Right of Lease

Given the strong preference for allowing freedom of contract for commercial parties, is there any reason why parties should not be able to contract out of the creation of a real right in favour of a tenant under a lease? For the reasons outlined below, it is argued that there is no compelling reason why parties should not be able to contract out of the real right of lease.

Indeed, permitting parties to contract out of creating a real right would put lease law on an equal footing with other areas of both property and contract law. The previous example of the contract of sale provides a good illustration. In that, parties are free to prevent ownership from passing with their agreement, by, for example, inserting retention of title clauses into their agreement.¹¹⁹⁰ Such clauses mean that the real right of ownership in the good “sold” does not transfer unless and until the full price is paid. Indeed, all-sums retention of title clauses can operate such that ownership of goods never transfers: for example, if goods are paid for retroactively on a monthly basis and goods are delivered on a weekly basis.¹¹⁹¹ Notwithstanding the effect that these terms may have on the real rights concerned, they have been upheld as valid in Scots law.¹¹⁹² In property law, again the example of servitudes can provide an illustration of the point. If parties do not wish to create a real right of servitude, they

¹¹⁹⁰ For general discussions of retention of title clauses, see: G Gretton and K Reid, “All Sums Retention of Title”, 1989 SLT (News) 185; A Clark, “All Sums Retention of Title”, 1991 SLT (News) 155.

¹¹⁹¹ *Armour v Thyssen* 1990 SLT 891; *Archivent Sales and Development Ltd v Strathclyde RC* 1985 SLT 154; *Zahnrad Fabrik Passau GmbH v Terex Ltd* 1985 SC 364.

¹¹⁹² Sale of Goods Act 1979, s19; *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339; *Clark Taylor v Quality Site Development (Edinburgh) Ltd* 1981 SC 111.

can agree not to register their agreement. However, there is evidence that the law goes further than this. If parties demonstrate their intention is to avoid creating a real right, then the law appears to give effect to this in the servitude context.¹¹⁹³

Of course, there exists the possibility of not registering a long lease in Scots law, thereby not creating a valid real right of lease and avoiding its consequences. However, this is a risky strategy, as either party could register the agreement and then perfect the real right. It is unlikely that parties would be willing to avoid a written agreement to prevent this, as that leaves their other rights and obligations difficult to prove, if it is possible at all.

For short leases, the problem is even more acute. Unlike other real rights over heritable property, short leases do not require registration. Instead, the real right is perfected when the tenant takes possession.¹¹⁹⁴ Thus, in theory, the real right could be avoided by the tenant not entering into possession. However, as discussed above, this is impractical when the sole purpose of a lease is to allow the tenant to use the land. Contracting out of the Leases Act 1449 or real rights of lease created for tenants by registration would provide parties with a clear and practically possible way of avoiding the creation of a real right. There is evidence that parties do wish to avoid onerous and complicated implied terms in leases and the real right for the tenant that they can create. This appears to contribute to parties choosing to create licences rather than leases.¹¹⁹⁵ Whilst undoubtedly this may be at the landlord's will for the reasons stated above, such as the marketability of an untenanted property, a tenant may also benefit from an agreement that does not create a real right. For example, they likewise are not tied into the agreement, or may have benefitted from a reduced rent in exchange for the instability the agreement provides.

¹¹⁹³ *Moss Bros Group plc v Scottish Mutual Assurance plc* 2001 SC 779. This also seems to be the case in English law, with the lease/licence distinction (to protect vulnerable parties) being an exception to the general rule that parties can state their agreement is not to have real effect: see generally, J Hill, "Intention and the creation of proprietary rights: are leases different?" (1996) 16(2) *Legal Studies* (Society of Legal Scholars) 200.

¹¹⁹⁴ Leases Act 1449.

¹¹⁹⁵ See Chapter 12.

Although contracting out of the real right of lease may seem like a radical suggestion, it is permitted in other jurisdictions. One such example is South Africa. There, the principle of *huur gaat voor koop* generally applies.¹¹⁹⁶ This is loosely translated as “existing lease trumps later sale”. However, under the section 4(5)(c) of the Rental Housing Act 50 of 1999, parties can contract out of this rule, so long as it is not an “unfair practice”. Ejecting a tenant because of an anticipated sale is recognised as a valid reason to terminate a lease early. In effect, this eradicates any benefit that the maxim brings to the tenant. This is balanced by the need for the term to be expressly included in the contract itself.¹¹⁹⁷

Even in Scots law, parties rarely get security for the entirety of the term agreed upon in the lease. This is particularly true in commercial leases, where break clauses are regularly included. Although these are often exercisable on a specific date,¹¹⁹⁸ it is possible for parties to simply provide a specified notice period.¹¹⁹⁹ In theory, break clauses could therefore be utilised to achieve similar aims as contracting out of the real effect of leases. This too provides a strong argument in favour of allowing parties to contract out of the real right of lease generally. Overall, permitting the contracting out of a real right is perhaps not as radical a suggestion as first appears.

12.5.6 The Role of the Licence to Occupy in the MCE Test and Contracting Out

Permitting contracting out of onerous lease terms, including the real right of lease, would alleviate one of the main disadvantages of the MCE test: it would allow parties to regulate the effect of their agreement, notwithstanding the inflexibility they would have as to the type of agreement created. They could, in other words, create a lease which operated in a manner which is identical to that of the licence to occupy. Nonetheless, the contracting out approach is not without its own disadvantages.

¹¹⁹⁶ G Muller et al (eds), *Silberberg and Schoeman's The Law of Property* (6th edn, 2019), 18.6.

¹¹⁹⁷ S4(5)(c) Rental Housing Act 50 of 1999.

¹¹⁹⁸ Richardson and Anderson, 10.2.

¹¹⁹⁹ K Gerber, *Commercial Leases in Scotland* (4th edn, 2021) 35.02.

Contracting out is an incredibly cumbersome way of reaching the same result as that which the licence to occupy provides. If there is no reason why parties should not be able to contract out of lease terms, why should they not be able to easily create an agreement with none of these terms implied in the first instance? The licence to occupy provides a different starting point for the parties: if they want a limited agreement, regulated only by the terms of that particular agreement, without onerous implied terms that need to be contracted out of, then the licence is the most suitable agreement. It means the agreement can be created more easily, without extensive negotiation of which particular terms they wish to exclude from their agreement. Instead, parties simply *opt-in* to any specific terms they wish to include.

Of course, if the law does not go so far as to permit contracting out of the real right of lease, then parties may see more need for the licence to occupy. Given Scots law's preference for contractual freedom, having a less onerous agreement to choose from can only be a positive. Indeed, the arguments that have been provided in support of contracting out of the real right of lease are equally valid reasons to justify the existence of the licence to occupy in Scots law. The only justification to prevent parties from being able to choose a licence to occupy is protection of vulnerable parties. However, if Scots law has not sought to protect commercial occupiers generally, there is no reason why parties should not be free to create a licence rather than a lease if a licence better meets the parties' needs.

12.5.7 Conclusion

This section has demonstrated that there appears to be no strong reason in favour of preventing parties from contracting out of onerous lease terms, including whether the agreement creates a real right. This would be in keeping with the freedom parties have when they are creating other real rights. Although there is an argument that tenants require protection and thus contracting out should not be possible, Scots law has generally chosen not to provide extensive protection to the commercial tenants. Instead, there is a strong preference for prioritising freedom of contract in the commercial sphere. Permitting contracting out of onerous terms including the creation of a real right of lease would alleviate some of the concerns attached to a

strict MCE test, and would afford parties more flexibility. However, if contracting out of a lease's real right status is to be adopted Scots law, it would be a significant policy-based change to the status-quo. It is therefore likely to require legislative change. If the suggestions of the Scottish Law Commission to allow contracting out of other aspects of lease law are adopted in legislation, then this may pave the way for further legislation to increase the freedoms of commercial parties.¹²⁰⁰

Regardless, contracting out is cumbersome. A more easily accessible licence to occupy could achieve the same aim, and would be simpler for the parties to negotiate. The following two sections consider options for reform which would make the licence to occupy more easily available to parties.

12.6 The Sufficient Use Test

12.6.1 Summary of the Sufficient Use Test

It has already been established that the current test of exclusive possession is insufficient as a test for distinguishing between the lease and the licence to occupy.¹²⁰¹ Its terminology is misleading and its meaning is obscure.¹²⁰² Any test based on exclusive possession would therefore need to be reworked.

Various iterations of a revised exclusive possession test have been advanced. Skilling, for instance, suggests alternative tests based on the extent of control either given to the landlord or retained by the tenant.¹²⁰³ Crucially, the control tests differ from exclusive possession in that control tests are not litmus tests, and instead can be decided on a case by case basis.¹²⁰⁴ He argues that the advantages of such an approach would include “greater scope for creating reservations;... freedom of

¹²⁰⁰ For instance, contracting out of tacit relocation and notice periods as discussed in Scottish Law Commission, *Aspects of Leases: Termination*.

¹²⁰¹ Chapter 7.

¹²⁰² *Ibid.*

¹²⁰³ Skilling, “The Fifth Element”, 23ff.

¹²⁰⁴ *Ibid.*, 23.

contract [and] By accounting for the post-contract reality ... provide greater protection against 'sham' agreements".¹²⁰⁵

The first iteration of the test looks at the extent to which the landlord is deprived of his control of the property. Skilling terms this the "deprivation of use" test. If the landlord is "sufficiently deprived", then, provided that the contract fulfils all the other requirements of a lease, the contract will be a lease. Skilling provides an example to illustrate the way in which this test would operate. Consider a scenario where an owner granted the use of a garage to an occupier, but reserved the right to park his own car there and enter at will. Skilling suggests this would be classed a licence. In doing so, however, Skilling highlights the biggest problem with this approach: it lacks certainty. If cases are decided on a case by case basis, then parties will never be certain that their agreement "sufficiently deprives" the landlord of his use. Would, for instance, an owner reserving the right to park his own car there alone be enough to create a licence rather than a lease? Would reserving the right to enter at will be enough?¹²⁰⁶

As Skilling explains, however, focusing on the landlord's deprivation seems counterintuitive when it is often the tenant who is seeking to establish a lease.¹²⁰⁷ Furthermore, the landlord has ownership of the property. This means that the landlord is entitled to use her property in any way she wishes, unless she has specifically bound herself not to do so, through contract or granting subordinate real rights. Therefore, despite granting rights of use through an occupation agreement, it is likely that the landlord will still retain rights to use the property. A better approach could be to consider the extent of the tenant's control of the property. Specifically, it could be analysed whether the tenant has a right of exclusion – the "right to exclude" test. Skilling explains:

¹²⁰⁵ *Ibid.*

¹²⁰⁶ Note, this does not currently seem to be sufficient to prevent a finding of exclusive possession in Scots Law: *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12, 9.

¹²⁰⁷ Skilling, "The Fifth Element", 24.

If a tenant can positively establish the four essential requirements of a lease, and that they are themselves capable of preventing other people, including their landlord, from exercising the same right, there is very little room to conclude that their contract is something other than a lease.¹²⁰⁸

Skilling's "right to exclude" test would apply to whichever right of use had been granted to the occupier, and so would account for leases of fishing, agriculture and shooting. All of these could exist validly over the same piece of land. Although necessary to deal with multiple leases over the same piece of land, it seems odd to focus only on whether a sufficiently exclusive right to one use has been granted. A different use of the land may disrupt the tenant equally, or more so. For example, in *South Lanarkshire Council v Taylor*, the fact that the landlord reserved the right to eject the tenant for a purpose (hosting events) which differed from that which was granted under the lease was permitted (agriculture), despite necessitating the tenant's total removal from the property.¹²⁰⁹

The right to exclude test is very similar to Blair's understanding of what a test of exclusive possession should mean in Scots law.¹²¹⁰ It is not, as Skilling suggests when he introduces the idea, a flexible test.¹²¹¹ Indeed, it too is a litmus test: either you have the right to exclude, or you do not. Blair suggests that Scots law has taken a wrong turn with regard to the meaning of exclusive possession.¹²¹² He suggests that cases such as *Cameron v Alexander*¹²¹³ were decided on flawed reasoning.¹²¹⁴ In that case, the landlord reserved rights including the right to keep one or two cows in one of the byres and a stall in the stable. These reservations were of the same use of the property as the tenant. The court held that there was nonetheless exclusive possession by the tenant. Blair argues that the court should have found

¹²⁰⁸ *Ibid.*

¹²⁰⁹ *South Lanarkshire Council v Taylor* [2005] CSIH 6.

¹²¹⁰ Blair, "The Scots Law of Leases", 11.

¹²¹¹ Skilling, "The Fifth Element", 23.

¹²¹² Blair, "The Scots Law of Leases", 10ff.

¹²¹³ *Cameron v Alexander* 2012 SLR 50.

¹²¹⁴ Blair, "The Scots Law of Leases", 12.

these terms to be inconsistent with a finding of exclusive possession.¹²¹⁵ He does, however, suggest that the arrangement should have been regarded as a lease with the reservations being permitted as *de minimis*.¹²¹⁶

Because in all instances explained above, some reservations are permitted, it is perhaps more appropriate to recognise the possession or use needed as “sufficient” rather than exclusive. The author prefers the term “sufficient use” rather than “sufficient possession” to better account for the fact that it is possession of a right to particular use of the property, as opposed to possession of the property itself.

If the sufficient use test is adopted, it is also necessary to define what is meant by “use”. “Use” must not be defined too narrowly. Otherwise, one could claim that they have an exclusive right to do some small act on the land, and so have a lease. For example, if one party had the exclusive right to plant flowers on a piece of land, and another the exclusive right to plant crops, an ill-defined use test would provide that both had valid leases. Both parties could not exercise their exclusive right without interfering with the other’s right. Therefore, their use of the land as a whole is shared, despite their differing exclusive rights to uses of the land in a particular way. This scenario is what the sufficient use test seeks to avoid. It aims to grant a lease only to those with substantial rights to use the property.

“Use” must therefore be given a sufficiently broad definition. A broad definition would permit leases over a substantial class of rights. For example, it would permit leases of shooting, agriculture, fishing, or the occupation of a building. This would accord with the current law. The problem with a broad approach to defining “use” is that it makes identifying “sufficient use” difficult. A use of one of these types is unlikely to be unrestricted. For example, an owner who granted a right of occupation, may wish to reserve the right to occupy and access a locked room.¹²¹⁷ “Use” defined in such a broad way suggests that this should not be permissible as both are occupying the

¹²¹⁵ *Ibid*, 11.

¹²¹⁶ *Ibid*, 12.

¹²¹⁷ This would not amount to a derogation from the grant: *Miller v Wilson* 1919 1 SLT 223.

property. As will be explained more fully below, reservations such as this must be permitted in lease agreements, and are fatal to the sufficient use test operating well in practice.

12.6.2 Benefits

There are benefits of adopting a test based on “sufficient use” or similar. One advantage is that it seems increasingly accepted in Scots law that exclusive possession is a current requirement for a lease.¹²¹⁸ Any test which considered the extent of possession or use of the property by the tenant would therefore develop, rather than fundamentally alter, the current law. It would not require the principles in previous cases to be overturned. However, as has been established, despite seemingly being confirmed as necessary, exclusive possession only seems to add extra weight to the suggestion that an agreement is not a lease if some other requirement of a lease is also missing. If all cardinal elements of a lease are present, the courts tend to find exclusive possession to be present too.¹²¹⁹ Other routes, such as the MCE test, therefore, may not require a significant change of direction either.

Similarly, the need for exclusive possession in leases is settled in English law.¹²²⁰ The wealth of decisions provided by English law could be used to shape Scots law. This is particularly useful given that the Scottish licence to occupy has been heavily influenced by English law. However, the potential benefits English law could provide are undermined by the fact that exclusive possession and its precise definition are also disputed in English law.

A further advantage is that a test based on the extent of possession ceded by the landlord to the tenant goes some way to capturing the spirit of leases. It was

¹²¹⁸ *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25; see also the conclusion reached in Richardson and Anderson, 2.58.

¹²¹⁹ Thus, the large derogations in *South Lanarkshire Council v Taylor* [2005] CSIH 6, or the sharing of use in *Devon Angling Association v Scottish Water* [2018] SAC Civ 7 were not found to prevent a finding of exclusive possession, and thus a lease.

¹²²⁰ *Street v Mountford* [1985] UKHL 4.

established in Chapter 10 that a licence “falls short” of a lease in some way.¹²²¹ The sufficient use test suggests that the licence to occupy falls short by not providing the occupier with the ability to exclude the landlord or others from a particular use of the property.

A sufficient use test also has the benefit of appearing to prevent avoidance of other laws which apply to leases, such as tax legislation or the implied terms which give significant rights to the tenant such as preventing eviction without notice. This is because the test appears to be objective. It considers the extent of rights which have been granted to the tenant under the agreement. If sufficient rights have been granted, then the law considers it to be a lease, regardless of what the parties intended. However, this benefit is in fact non-existent. It would be possible for parties to avoid the apparent objectivity of the sufficient use test with careful drafting. Take, for instance, an open plan office block with three areas. If an agreement was drafted so that three occupiers shared the whole space, then there would not be exclusive possession. However, if agreements were drafted so that party A had exclusive use of defined space 1, party B had exclusive use of defined space 2, and so on, then there is no reason why these arrangements would not be sufficiently exclusive for the purposes of creating a lease. This is an illogical result from a supposed objective test applied to two factually identical situations.

12.6.3 Drawbacks

Despite the benefits highlighted above, of the three tests suggested in this section, a test based on the extent of use granted to the tenant has the most drawbacks. For example, it narrows the definition of a lease substantially, which does not accord well with the traditional Scottish understanding of a lease. The Scottish lease is much wider than its English counterpart, and has always encompassed agreements which would never constitute a lease in English law,¹²²² such as the seat in a place of

¹²²¹ See Chapter 10.

¹²²² Rankine, 2.

entertainment.¹²²³ That is not to say that these arrangements should still be regarded as leases today. Nonetheless, it seems to be a large step from recognising any use of land as a lease, to recognising only substantial grants of the use of land as leases in Scots law. Furthermore, from the perspective of the licence to occupy, a distinction based on the extent of possession ceded to the occupier does not make sense. Currently, licences are often used in such a way that they grant exclusive rights to use a property. One example is the pre-lease licence.¹²²⁴ Thus, the sufficient use test would create a test that was not compatible with the history, nor the current practice of Scots law.

The above issues aside, the most substantial disadvantage is that it creates uncertainty in the law. This is precisely what a revised test for distinguishing the lease from the licence seeks to avoid. Any test based on the extent of use does not create a clear distinction between the two agreements. It is not obvious where one would draw the line between sufficiently exclusive use and non-sufficiently exclusive use. To account for ability to have reservations, which are an important part of lease law, the test cannot be absolute.¹²²⁵ Parties could never be certain that they had, in fact, created a lease or a licence unless it was disputed in court.

Crucially, even if an agreement was disputed in court, then it is difficult to see in what way the court could decide whether the agreement did grant sufficient use for the purposes of finding that a lease existed. This is because, contrary to what one may expect, identifying the extent of use granted is indeterminable from the terms of the contract. Consider the following example:

- “You can keep two sheep on my land for six months if you pay me £100 a month”.

¹²²³ *Miller v Walker* 1872 3 R 242; c.f. *Joint Administrators of Rangers Football Club plc*, *Noters* 2012 SLT 599.

¹²²⁴ T Aldridge and P Butt, *Aldridge Leasehold Law* (122nd edn, 2021), 1.066.

¹²²⁵ D Cockburn and R Mitchell, *Commercial Leases* (2nd edn, 2011) at 3.13 explain that such clauses are so important that they are often repeated throughout the lease agreement.

In the above example it is unclear what extent of use has been granted to the occupier. There are two possible scenarios. First, it may be that all that has been granted is the right to keep sheep on the land – to use the land for one limited purpose. It may not guarantee that *only* the occupier will be able to keep sheep on the land. Alternatively, the opposite may be true: you exclusively may be entitled to keep two sheep on the land. That is to say, you alone have substantial rights to use the land, but you must only use it to keep two sheep – a restriction of use clause.

Ironically, whichever interpretation is preferred will depend on whether or not the occupier has been granted a lease or a licence to occupy. Consider the following examples:

- You can keep two sheep on my land for six months if you pay me £100 a month.
- I let you my land for the purpose of keeping two sheep on my land for six months for £100 a month.

It is suggested that whilst the first situation is still unclear, the second example does grant sufficient use. This is because the parties demonstrate a clear intention for the agreement to be a lease by using the term “let”. A lease includes the right to exclusive possession, except for those reservations included in the contract itself. To determine the existence of a lease from the extent of possession granted is therefore putting the cart before the horse.

Going further still, there may be terms in the contract of lease that make it look as if there are insufficient rights of use granted. Consider the following examples:

- You can keep two cows on my land alongside my cows for six months if you pay me £100 a month.
- I let you my land for the purpose of keeping two cows on my land for six months for £100 a month, but I reserve the right to keep my own cows there too.

Is there a difference between the above two situations? Both grant the right to keep two cows on the land alongside the owner’s cows for six months for a monthly payment. Nonetheless, it is suggested that the nature of the rights granted is

different. It is suggested that, in the first example, all that has been granted is the right to keep two cows on the land. The owner of the land has stated that they will keep their own cows there too. They need not have specified this, as they were not intending to grant anything other than a simple right of use to the occupier. It is intended to only grant a very limited right: a licence to occupy.

In the second scenario, the terminology used suggests a more formalised relationship with greater rights of use granted to the occupier, such that the parties have created a lease. Phrases such as “let” demonstrate an intention to grant to the occupier something more than a mere permission to use the land. Yet, the landlord wishes to reserve the right to keep his own cows on the property – a valid restriction in a lease.

The different interpretations result in significant differences in the owner’s rights to the land. In the first scenario, the owner of the land would have a right to keep cows on the land, consistent with the real right of ownership. In the second, the right to keep cows on the land is a personal reservation, subordinate to the lease. If the owner of the land exceeds the contractually agreed reservations, he will be liable to the tenant. It will be noted that even proponents of the exclusive possession test would class this as a valid reservation.¹²²⁶ Reservations are an important part of lease law, allowing owners of land to carve out the edges of their grant of lease.¹²²⁷

As with the previous examples, the difference between the two situations cannot be determined by the extent of possession or use granted to the occupier. In both situations, the occupier has the same extent of use. In both situations, the occupier shares occupation of the space with the owner of the land. The law views the fact that the landlord has retained the right to keep his own cows on the land differently depending on whether or not a lease has been granted. If there is a lease, then the shared use will be viewed as a reservation. If there is a licence, then the shared use will be viewed as a term preventing sufficient use being granted to the tenant. Thus,

¹²²⁶ Blair, “The Scots Law of Leases”, 12.

¹²²⁷ Richardson and Anderson, 2.57.

the distinguishing factor between the two agreements cannot be the extent of possession granted. It must be something else.

To further illustrate this point, it is useful to consider the way in which the law would deal with excessively large reservations in the law of leases. It could be argued that a large reservation, such as the complete sharing of use in the above example, should prevent there being a grant of sufficient use.¹²²⁸ Under the sufficient use test, it would follow that there could be no lease in the second example, notwithstanding the terminology used. This is incorrect. The interpretation most consistent with Scots law generally is that the large reservation is simply unenforceable in an otherwise valid lease.

To demonstrate this point, an analogy may be made with the contract of sale and the power to alienate the property. Is it truly a sale if you have not given the buyer the power to alienate the property? Consider a scenario where a mother purports to sell a car to her daughter for a very low price, on the condition that the daughter does not sell it on to anyone else. Could the daughter pass on good title to someone else? The answer to this question depends on whether there is a sale. If there is a sale, then ownership of the property will have passed from the seller to the buyer. With ownership, the buyer has the ability to alienate the property. Thus, the daughter could sell on the car. Of course, in doing so she will have breached a term of the contract with her mother not to sell the property. This term, however, will only be a personal obligation between the buyer and seller. Notwithstanding the term, the buyer has the ability to sell the goods to a third party. In doing so, there will be a breach of contract. This will entitle the original seller to sue the original buyer for damages or to use another contractual remedy. But, crucially, the original seller will not be able to prevent ownership passing to the third party.

¹²²⁸ *Ibid.* Although, note that this seems very unlikely to arise in practice given the large reservations currently permitted under the law: *South Lanarkshire Council v Taylor* [2005] CSIH 6; *Devon Angling Association v Scottish Water* [2018] SAC Civ 7.

This can be contrasted with a situation where a contract provides that the “buyer” is to be given the ability to use or consume the property but cannot sell it on. Taking the above example again, consider a mother who permitted her daughter to use her car for a one-off fee (representing the wear-and-tear that the mother would have to fix at a later date). However, the mother, knowing her daughter was in need of money, specified that she had no right to sell the property to a third party. As there is a key component of ownership missing - the ability to alienate the property - there cannot be a true “sale” taking place in this scenario. If no ownership is transferred from the buyer to the seller, then in law there is no sale. It could, however, be another contract. Nonetheless, it would seem odd to characterise a sale as requiring the transfer of the right to alienate the property. Indeed, it is *not* necessary. A true sale can include such a term, as illustrated above, but it would be personal right only between the buyer and the seller. This means that whether an agreement is determined to be a sale comes from something other than the ability to alienate the property: it comes from whether the parties intended to transfer ownership at all. This may be evidenced by the language used by the parties, such as whether terms such as “sell” and “buy” were used, or whether language suggesting less permanent transfer of the item was used.

Applying this reasoning to the lease context: if there is a lease, then by virtue of being a nominate contract, a package of rights will transfer to the tenant, regardless of whether they have been explicitly agreed in the contract. One of these rights is the tenant’s right to exclusive possession of the subjects let. This is subject to any reservations to the landlord. If the landlord infringes further than the agreed exceptions, then the tenant will have a remedy against the landlord. Thus, if the landlord omits to reserve certain rights, then the landlord is unable to exercise those rights.¹²²⁹ If the reservation is so large that it derogates from the grant, then it will be

¹²²⁹ *Baxter v Paterson* (1843) 5 D 1074; *Possfund Custodian Trustee Ltd v Kwik-Fit Properties Ltd* 2009 SLT 133. The extent of such reservations must also be clearly expressed: *William Collins & Sons v CGU Insurance plc* 2006 SC 674.

unenforceable, much like the sale with the contractual agreement not to sell the property on to a third party.¹²³⁰

By contrast, if there is an agreement where the occupier is only entitled to perform a specified act on the property then the occupier cannot be said to have sufficient use. They cannot prevent the landlord from using the land or allowing another to do so. The only exception would be if others using the land interfered with the tenant's use of the property. The right to exclusive use of the property is undoubtedly an important part of a lease agreement. However, whether you are entitled to exclusive possession in the first place is derived from whether the parties have created a lease or not. It therefore seems backwards to suggest that the extent of possession or use is what creates the lease. What creates a lease rather than a licence must be the result of something other than the grant or not of sufficient use.

The further irony is that under the current law, if an occupation agreement includes many reservations, then the law views these as the *only* rights of use reserved to the owner.¹²³¹ As such, the law presumes that all rights of use not specifically reserved to the owner are granted to the tenant. Under the sufficient use test, this interpretation would mean that a lease had been created, as substantial rights of use (everything that had not been specifically reserved) had been ceded to the tenant. Conversely, if the occupation agreement is silent and reserves nothing to the owner, then the agreement is more likely to be held to be a licence to occupy. This is because the law as it stands provides that the lack of reservations indicates that only a limited right to use the property has been granted.¹²³² The landlord felt no need to include reservations because so few rights had been granted in the first place. This result is incongruous. The situation at present can be summarised as the more rights reserved to the landlord, the more likely it is that a lease has been created. However, a sufficient use test points in the opposite direction: that the more reservations made

¹²³⁰ See generally Hunter, vol 2, 212.

¹²³¹ *Bradford Properties Ltd v British Telecom Plc* 1992 SC 12.

¹²³² *Ibid.*

in favour of the landlord, the more likely it is that sufficient use has not been granted to the tenant.

Resolving the Inability to Determine the Extent of Possession from the Terms of the Agreement

The previous section demonstrated that whether or not sufficient use has been granted to the tenant cannot be determined from the terms of the agreement alone. Reservations such as shared use can be interpreted as either compatible or incompatible with the finding of a lease under the sufficient use test. Whether they are deemed compatible or incompatible depends upon whether or not there is a lease in the first place.

As such, the only way to determine whether a term is compatible or incompatible with a lease using a test based on the extent of possession would be if the parties explicitly stated what extent of possession they intended to grant to the occupier. Therefore, in the preceding examples:

- You can keep two cows on my land alongside my cows for six months if you pay me £100 a month. This agreement does not grant the occupier sufficient use for the purpose of granting a lease.
- I grant you sufficient use of my land for the purposes of creating a lease to keep two cows on my land for six months for £100 a month, but I reserve the right to keep my own cows there too.

Herein lies the central problem with tests based on sufficient use. The use granted in the second example is said to be “sufficient” for the purpose of finding that a lease exists. However, it is no more extensive than the usage rights granted to the tenant in the first example. In both scenarios, possession is shared. This situation is illustrated by *Devon Angling Association v Scottish Water*.¹²³³ The landlord and

¹²³³ *Devon Angling Association v Scottish Water* [2018] SAC Civ 7.

tenant shared the right to possession, but the court nonetheless found that exclusive possession existed.¹²³⁴

If parties can determine whether sufficient use exists simply by stating so in their agreement, then exclusive possession has become a mere choice for the parties. In turn, defining the sufficient use test in this way erodes any of the supposed benefits that such a test would bring. For instance, it would no longer, as Skilling suggests, provide ample protection against shams.¹²³⁵ As has been demonstrated in Chapter 11, there is no way of disproving the extent of possession or use that has been granted to the tenant other than by considering the terms of the agreement. The extent of possession or use granted is intangible – just because a right to share the property with the occupier has not yet been used, for example, does not mean that it is not genuine, or will not be used in the future. It simply means that the occupier has no right to object if that specified event does occur.

If a functioning sufficient use test has become a simple word choice for the parties, and cannot be disproved, it raises the question of why focus on the extent of use at all? Why not simply allow parties to choose whether the agreement is a lease or a licence, instead of creating an artificial distinction? This is discussed further in the context of the discussion of The Purpose Test below.

Crucially, what this conclusion does not suggest is that exclusive, or substantial possession or use is not an important feature of a lease. Instead, it is suggested that it should not be the determining feature of a lease.

12.6.4 Conclusion on the Sufficient Use Test

In summary, a test based on sufficient use cannot work in practice. The primary reason for this is the issue of reservations. Many leases will include reservations,

¹²³⁴ Although this case is based on exclusive possession, it illustrates the same problem that would exist in a test based on sufficient possession.

¹²³⁵ Skilling, “The Fifth Element”, 23.

and any test distinguishing between a lease and licence should be able to account for them. Reservations can be viewed in one of two ways: either they prevent the tenant from having sufficient use of the property, or they are viewed as a valid reservation in a lease. It is impossible to tell simply by looking at the agreement and its reservations which of these interpretations is correct. The starting point for a whether an agreement is a lease or a licence must therefore be derived from something else. This could be whether the agreement states that it grants sufficient use for the purposes of creating a lease. However, this would be artificial. More importantly, it would create a simple choice for the parties. If a test based on the extent of possession is simply a choice masquerading as an objective test, then perhaps explicitly giving parties a choice should be considered. It is to that issue that this chapter now turns.

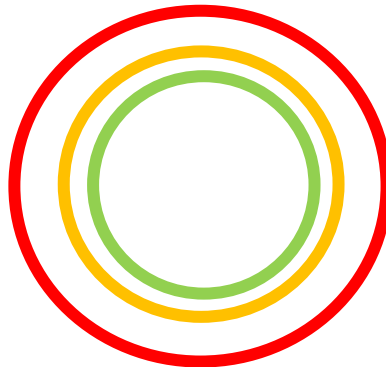
12.7 The Purpose Test

12.7.1 Summary of the Purpose Test

Green = Real Right of Lease

Orange = Contract of Lease

Red = Licence to Occupy



Put simply, the purpose test gives effect to the intention of the parties. If they intend to create a lease, then a lease is created. If they intend to create a licence, then a licence is created. Parties could use the terminology of “lease” or “licence” to describe their agreement and make their intention known.

The purpose test would not detract from the fact that a lease has minimum requirements. This is illustrated by the above diagram. There may be licences which are licences because a cardinal element of a lease is missing. However, once those basic requirements have been met, then the parties have a choice of whether there is a lease or a licence. If additional steps are taken, then an agreement that is a lease may become a real right of lease.

The test is called the “purpose test” rather than the intention test because what this test does is vest the word “lease” with more meaning than it currently has under the law. At present, the word “lease” is used to describe what the parties have created, once it is created. The phrase itself does not create any obligations. The purpose test changes this. It requires the lease to be viewed not only as a result, but as an action - the act of transferring the right(s) of lease from the landlord to the tenant.

To explain this concept further, the lease must be viewed in its entirety. It is a package of rights and obligations, such as the right to exclusive possession or the

right of the tenant not to be evicted without notice. When parties create a “lease” they intend to transfer this intangible bundle of rights and obligations from the landlord to the tenant, and in so doing, impose additional rights and obligations on the landlord. This may be illustrated by returning to the previous example:

- You can keep two sheep on my land for six months if you pay me £100 a month.
- I let you my land for the purpose of keeping two sheep on my land for six months for £100 a month.

The only substantial difference between the two agreements is the phrase “let”. It is this word which suggests that the *purpose* of the agreement is to transfer greater rights to the occupier in the second example, than in the first. As such, the second agreement would contain all the lease’s implied terms, unless they were specifically excluded. Therefore, meaning *must* be attached to the word “lease”.

The purpose test therefore creates a new theoretical difference between the lease and the licence. This difference cannot simply be reduced to concepts such as exclusive possession. As demonstrated above, leases are more than just the transfer of exclusive possession. Holding that a lease exists determines whether or not the occupier is entitled to exclusive possession in the first place. It also implies terms into the agreement, such as notice periods and tacit relocation. Whether these terms are implied depends on whether the *purpose* of the agreement was to transfer the right(s) of lease, evidenced by using a term such as “let” or “lease”. Transferring the rights of “lease” must be viewed in the same way as transferring other rights such as ownership, from which many other rights flow.

This new way of thinking about leases can find its basis in some of the leading texts. Paton and Cameron, for example, note that the term “lease” is used to describe both the contract itself, and the rights of the tenant created by it.¹²³⁶ A similar approach to contracts generally is taken in the Draft Common Frame of Reference, where it is

¹²³⁶ Paton and Cameron, 5.

noted that term “contract” is used in several different ways. For instance, the term “contract” refers not only to the “agreement” but also to the legal relationship created by that agreement.¹²³⁷ The purpose test simply reiterates that to have a contract of lease, one must intend to transfer the bundle of rights known as the rights of lease.

Again, an analogy can be drawn with the law of sale. Specifically, contracts of sale by instalments or contracts of hire purchase can be compared.¹²³⁸ As explained in section 11.1, if one looks at the “cardinal elements” of these agreements, they are identical. Both result in the transfer of ownership of the subject matter, in exchange for the payment of the price in instalments. The difference, therefore, is more nuanced. It is about the substance of the right transferred. The difference is whether ownership automatically transfers on full payment (sale), or whether there is an option to transfer ownership (hire purchase). Which of the two options applies to any given scenario will depend on the purpose of the contract. For example, did the parties intend for automatic transfer of ownership or not? Of course, they must fulfil the minimum requirements of each contract. For example, there could not be a sale without agreement on the subject matter. However, once these minimum requirements are met, parties are free to choose how to order their agreement.

In the above example, there is a clear theoretical difference between hire purchase and sale by instalment: whether ownership automatically transfers or not. For leases and licences, the difference is whether a bundle of implied rights of lease has been transferred, or whether only the specified rights in the contract have been transferred. In determining the purpose of the agreement, the parties’ word choice must be important. The purpose is to create a “lease” if they use that term. If they use the term “licence”, then the transfer of the rights of lease is not the purpose of the arrangement. This approach is in keeping with Rankine’s understanding of the difference between a lease and a licence to occupy, if indeed it exists: what has

¹²³⁷ C von Bar, E Clive and H Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (2012), II-1:102, comments.

¹²³⁸ See also the discussion above at 12.2.

been granted by the parties must be determinable from the express terms used by the parties.¹²³⁹

12.7.2 Benefits

The “purpose test” has a number of advantages over any test based on the extent of use. The purpose test is a simple test. Parties know that if they make the intended purpose of their arrangement clear, then that purpose will be given effect. This is particularly the case if, as argued above, this purpose can be demonstrated by simply using the phrase “lease” or “licence”. As such, it would be very straightforward for parties to use, increasing legal certainty.

Perhaps the most significant advantage of a simple intention-based test is that it reflects what happens in practice. It is the only test of the three advanced by this chapter which does so. As noted in the previous chapter, there does not seem to be any unifying principle underlying the different instances when licences are used other than the parties’ intentions to grant a right lesser than a lease. Parties demonstrate a desire for a simple choice based on what best suits their commercial intentions. The purpose test accounts for the disparate cases of leases and licences by allowing the creation of licences with the features of a lease - rent, parties, properties, and duration - as well as with different extents of possession or use. It creates a unifying principle.

Furthermore, as demonstrated in Chapter 8, there is a strong correlation between the terminology used in agreements and whether the court determines the agreement to be a lease or a licence.¹²⁴⁰ This suggests, in the absence of any ill-intentions of the parties, that the courts may be heavily influenced by the way that the parties intended their agreement to operate. This is also the case in the

¹²³⁹ Rankine, 2.

¹²⁴⁰ See Chapter 8.

commercial context in English law.¹²⁴¹ Explicitly recognising the purpose of the agreement as the fundamental difference between leases and licence would permit Scottish courts to give effect to that intention, without the need to do so under the guise of applying a different test. Furthermore, the fact that there is a strong correlation between intention and the agreements created suggests that courts are already able to discern and give effect to parties' intentions as demonstrated in their agreement. As such, this test would not require as significant a change in the court's current approach as may first be envisaged.

12.7.3 Drawbacks

Of course, no test is without its drawbacks. However, the drawbacks of the purpose test are less significant than those highlighted for the previous potential tests.

One criticism is that the purpose test does not create an objective distinction between the two in terms of their requirements for creation. This is the result of ensuring that the lease/licence reflects what is happening in reality. In practice, licences that display the features of leases, such as the four cardinal elements, are often created. It could be argued that the purpose test creates no principled or obvious difference between leases and licences, except the name attached to the agreement. This may be problematic for Scots law, which prides itself on being a coherent and principled system of law.

However, this only holds true if one does not consider the lease as a whole. As suggested above, this purpose test recognises that the lease perhaps should not simply be reduced to its cardinal elements. Instead, it should be viewed as the transfer of a bundle of rights, which flow from the term "lease". In this sense, the purpose test reflects the spirit of the lease/licence distinction very well. By attaching weight to the term "lease", charging it with the transition of a package of rights, the

¹²⁴¹ See, for example, *National Car Parks Ltd v Trinity Development Company (Banbury) Ltd* [2001] EWCA Civ 1686.

purpose test *creates* a principled distinction between the lease and the licence. Conversely, by calling your agreement a “licence”, you are indicating that all that has been transferred to the occupier are the specific rights included in the contract itself – no more, and no less.

A more significant concern surrounding the introduction of a purpose test are the policy implications. Under the purpose test, licences become very easy to create. Parties simply use the term “licence”. This gives parties a simple way in which to avoid the rules and regulations which the law has applied to leases. For example, parties may call all agreements licences to occupy to avoid paying LBTT.¹²⁴² This is the converse problem raised in relation to the MCE test. Here, HMRC’s revenue may drastically reduce. However, this may not be as problematic as first appears. Firstly, it presumes that the desire to avoid tax outweighs any benefits of having a lease. This may not always be the case. For example, many parties would wish to have security of tenure, so that their agreement was not terminated if the land was sold. Whether the parties agree that the agreement is a lease or a licence to occupy may actually be the result of a hard-fought commercial bargain. If, however, this concern was proven to be justified, it may not be the place of lease law to solve it. Instead, a simple change to tax law could see taxes such as LBTT being applied to licence transactions too. If this resulted in too many transactions for HMRC, then the scope could be narrowed again, as noted above.

Of course, the problem may be more acute in situations where there is an inequality of bargaining power. In these situations, a more powerful landlord may ensure that the agreement is a licence, so that the occupier has fewer rights. Again, there are several different responses to this. Presently, in FRI leases, landlords often attempt to pass most of their common law obligations on to the tenant.¹²⁴³ This means that a practically similar result is achieved under the current law, just by more onerous means. If it is possible to contract out of these obligations, why should the process

¹²⁴² Land and Buildings Transaction Tax (Scotland) Act 2013, s53.

¹²⁴³ See generally on this topic, D Garrity and L Richardson, *Dilapidations and Service Charge* (2019).

not be made simpler by allowing parties to state that their agreement is a licence? Secondly, there are very few additional protections afforded to commercial tenants under the current law. For example, there are only the very limited protections afforded by the Tenancy of Shops (Scotland) Acts of 1949 and 1964 which provide certain commercial tenants with the right to extend their lease beyond its expiry date.¹²⁴⁴ As argued above, the fact that so few protections exist for commercial tenants suggests that they are not a group in need of any particular protection. It follows that there is no strong argument against allowing licences to be more easily created.

More problematic, of course, are the residential and agricultural sectors. The particular problem in the residential sector is that the current formulation of a private residential tenancy is based on a “tenancy”, which is undefined in the 2016 Act.¹²⁴⁵ This suggests that the definition of a tenancy in the Act is based instead on the common law. Consequently, the way in which leases and licences are defined in the common law – the focus of this thesis - may inadvertently impact upon the residential sector. Likewise, in the agricultural sector, the definition of “agricultural holdings” centres upon agricultural land forming the subject of a “lease”.¹²⁴⁶ “Lease” is unhelpfully only further defined as a “letting” of various durations.¹²⁴⁷ This too means that to have an agreement to which the agricultural lease legislation applies, one must first fulfil the definition of lease at common law. It would allow landlords an easy method of avoidance if they could simply state that the agreement was a licence and have it treated as such.¹²⁴⁸ Unlike the commercial sector, the agricultural and residential sectors traditionally see an imbalance of power which the law has sought to redress. It may not, however, be for the common law of landlord and tenant to solve this problem. Residential and agricultural leases have recently been treated as

¹²⁴⁴ Tenancy of Shops (Scotland) Acts 1949 and 1964.

¹²⁴⁵ Private Residential Tenancy (Scotland) Act 2016, s4(a).

¹²⁴⁶ Agricultural Holdings (Scotland) Act 1991, s1 and Agricultural Holdings (Scotland) Act 2003, s4, 5A, 5C.

¹²⁴⁷ Agricultural Holdings (Scotland) Act 1991, s85. “Lease” is undefined in the Agricultural Holdings (Scotland) Act 2003.

¹²⁴⁸ Avoidance is already a significant problem in the agricultural context: Rennie, *Leases*, 30.12.

unique statutory creations, separate from the common law of leases. It is respectfully suggested that this particular problem could instead be addressed in that particular context, perhaps through legislative definitions.

A final concern with adopting a purpose test for distinguishing between leases and licences to occupy is that it does not clearly determine whether an ambiguous agreement is a lease or a licence to occupy. Consider the previously mentioned example:

- You can keep two sheep on my land for six months if you pay me £100 a month.

This statement does not clarify whether a lease or licence is intended. The law would have to specify whether the agreement created a lease or a licence. This problem would also arise under the sufficient use test. However, it would not be present under the MCE test. Under the MCE test, as all elements of a lease are present, the agreement would be a lease.

As explained in Chapter 9, under the current law, there would be a presumption that the agreement in the above example would create a lease. This result seems unusual when it is considered that the lease is the more onerous agreement. Why should the law impose a more onerous agreement on the parties in the absence of clear intention to do so? This is particularly so when a test such as the purpose test places significant emphasis on the intention of the parties. If the licence is to be adopted so readily into Scots law with the purpose test, this presumption should arguably be reversed. On the other hand, however, presumptions in other areas of contract law are in favour of the more onerous agreement. For example, the automatic transfer of ownership with a sale is more onerous than the option to purchase under hire purchase.¹²⁴⁹ Nonetheless, the sale is the presumed agreement. This is justified on the basis that the sale is the less novel agreement.

¹²⁴⁹ See the discussion of *Muirhead and Turnbull v Dickson* (1905) 7 F 686.

Parties should therefore be aware of the sale's existence, and thus demonstrate clear intention to create a different agreement. In landlord and tenant law, the lease is the agreement with longevity in Scots law. Therefore, perhaps the fact that leases are the default arrangement is not so unusual after all.

12.7.4 Conclusion on the Purpose Test

The purpose test requires a rethink of what it means to create a lease. It recognises that in creating a lease, the landlord transfers a bundle of implied terms to the tenant, subject to any which are explicitly contracted out of. This transfer of the rights of lease is the purpose of the contract. This purpose of a lease must be shown in addition to the cardinal elements of a lease. The licence, however, implies that it is only those terms specifically included in the contract which are to apply to the contract. The purpose test therefore confers meaning onto the terms "lease" and "licence". The purpose test means that by using the term "lease" or "licence", parties are demonstrating the intention to create agreements with different purposes. The law would then give effect to those different contracts.

Adoption of the purpose test would not necessarily require legislative input, and could be approved through case law. As noted above, leading texts already note that the term "lease" can refer to both the contract and the rights granted under it.¹²⁵⁰ Furthermore, Chapter 8 of this thesis illustrated that courts may already be placing significant emphasis on the intention of the parties as displayed by the terminology used in agreement itself.¹²⁵¹ The purpose test requires reemphasising aspects of the existing law, rather than requiring substantial change.¹²⁵²

¹²⁵⁰ Paton and Cameron, 5.

¹²⁵¹ See 8.2.3.

¹²⁵² One hurdle for adopting the purpose test through case law may be that it would require a divergence from English law, which emphasises exclusive possession. TB Smith criticised the courts for anglicizing Scots law: T B Smith, *British Justice: The Scottish Contribution (The Hamlyn Lectures)* (1961) 85. However, modern commentators suggest courts today are more willing to preserve the uniqueness of Scots law with anglicization "surely at an end": Lady Hale, "The Contribution of Scottish

12.8 Conclusion

This chapter has explored three possible tests for distinguishing between the lease and the licence to occupy. Of the options explored, the MCE and the intention test are a better fit for Scots law than any test based on sufficient use. They offer improved clarity of the law and certainty for the parties involved. When deciding which of these two tests is to be preferred, the law must make some stark choices. Should the distinction keep the scope of licences narrow, or should it instead make licences more readily available? Should the distinction be based on the traditional theory of lease law, or should the test reflect what is happening in practice?

Overall, this author suggests that the purpose test be adopted in Scots law. It has significant advantages over the other tests. It creates a clear theoretical distinction between the lease and the licence, whilst aligning with the way in which both the courts and those in practice use the licence to occupy at present. Although licences would be easier to create under this test, this should not be problematic. Scots landlord and tenant law has not traditionally provided additional protections for commercial parties. There is therefore no reason to keep the scope of licence to occupy limited. It is recognised that this method for distinguishing between leases and licences to occupy may have knock-on impacts in other areas of law, such as residential and agricultural tenancy law, or tax law. It is respectfully argued that these areas of law would be best placed to deal with these impacts and mitigate any unintended consequences resulting from the purpose test.

Chapter 13: Overall Conclusions

This thesis set out to examine which occupation agreements are recognised in Scots law and to delineate how they are created. In finding that the law did not sufficiently distinguish between leases and licences to occupy, this thesis then considered how the law could be improved.

13.1 Summary of Findings

13.1.1 Part 1

Part 1 of this thesis demonstrated that Scots law recognises both the real right of lease and the contract of lease. It is possible to create a contract of lease in two main ways. First, the agreement may be capable of becoming a real right, but for some reason failed to become one. For example, the agreement may not have been registered. Secondly, there are certain contracts of lease which cannot become real rights of lease. This may be because they contain, for example, a non-permitted rent, such as a nominal or elusory rent. This fact does not detract from the fact they are still a “lease”, and therefore benefit¹²⁵³ from the implied terms applied to all contracts of lease. As such, the term “lease” does not have unitary meaning and covers both real rights of lease and contracts of lease in Scots law.

Part 1 also sought to delineate the requirements of different types of lease in Scots law. It demonstrated that it is not sufficient to split leases into two categories: the real lease and the contract of lease. Instead, the real lease has different cardinal elements, depending on whether it is a short or long lease and thereby made real under the Leases Act 1449 or the Registration of Leases (Scotland) Act 1857. Confusingly, the requirements of real rights of lease under the 1857 Act share

¹²⁵³ Or are hindered by, depending on your point of view!

similarities with both the contract of lease and the real right of lease under the 1449 Act, making the distinctions between each category even less clear.

In summary, a real right of lease under the 1449 Act needs the parties and property to be agreed, alongside a non-nominal or non-elusory rent. If a duration is included, it must be for no more than 20 years. A duration of one year can be implied, but only if the agreement is silent as to the duration – this rule cannot be used to perfect an agreement which is to have no duration, or a disallowed duration, such as “until I need the property back”.

A real right of lease under the Registration of Leases (Scotland) Act 1857 requires a duration of over 20 years. It must also agree the parties, the property, and a rent, although this rent can be nominal or elusive.

The contract of lease must specify the parties and the property, include a rent (although again, this can be nominal or elusive), and a duration (although this can be for an uncertain period of time).

13.1.2 Part 2

Part 2 of this thesis demonstrated that the licence to occupy was not recognised as a distinct concept in Scots law until the early 1900s. It entered Scots law from English law, when decisions under UK-wide ratings statutes were challenged in court. Scots lawyers relied heavily on English case law to bolster their arguments when first arguing that no lease existed.

However, Scots law has since found it difficult to distinguish the lease from the licence to occupy. This research has shown that currently, three different methods are used to distinguish the lease from the licence: whether exclusive possession is present, whether a cardinal element of a lease is missing, and what the intentions of the parties were. Of the three, exclusive possession is becoming the most frequently used method of distinguishing the lease from the licence to occupy. This is problematic, as no definition of what is meant by exclusive possession has been previously attempted in Scots law. This thesis provided a definition of exclusive possession based on the current case law. That being said, the definition is not fit for

purpose. Perhaps ironically, the current test does not require “exclusive” possession, but rather “sufficient” possession, if it requires “possession” at all.

This part also sought to reconcile the role of presumptions of lease and implied cardinal elements in Scots law with the current methods of distinguishing a lease from a licence. This is, however, difficult to rationalise with the test which says a licence to occupy is created if a cardinal element of a lease is missing. Nevertheless, the thesis demonstrated that the presumption of lease is not as strong as some cases suggest, if indeed it actually exists at all.

13.1.3 Part 3

The third part of this thesis considered options for reform in this area. It was argued that whilst Scots law takes a substantive approach to determining the nature of contracts and property rights, it is not sufficient to consider the cardinal elements alone. Instead, courts must also consider the intended purpose of the agreement. Furthermore, using the example of the development and recognition of hire purchase, it was shown that courts are willing to recognise new types of agreements, so long as they have a clearly distinguishable purpose. Nonetheless, it was demonstrated that currently, there is no discernible difference in purpose, and licences and leases are often used in the same way, for the same purpose. The only real distinction between a lease and a licence is the different rights that parties intend to transfer.

Three reformed methods for distinguishing the lease from the licence were suggested. The sufficient use test was dismissed as unworkable in Scots law. It was demonstrated that the simplest option would be to reaffirm the Missing Cardinal Element (MCE) test as the sole distinction between leases and licences. This would confirm that there was no different purpose under each type of agreement. The drawbacks of the MCE test could be minimised by permitting contracting out of a lease’s implied terms in commercial contracts, including the possibility of creating a real right.

Alternatively, Scots law could create a different purpose for the lease and the licence to occupy. This would, in effect, permit parties to choose whether they were creating a lease or a licence by stating the purpose of their agreement, so long as they fulfilled the cardinal elements of a lease. It was suggested that the different purpose would be whether the parties wanted to transfer a right of “lease”. The word “lease” would be vested with a new meaning. It would be shorthand for the intention to grant rights to the property except those explicitly reserved in the contract itself, and for the intention to apply all of the implied terms of a lease to their agreement, except those explicitly contracted out of. Using the term “licence” would result in the opposite effect – that only those rights specifically granted by the agreement would be transferred, and no implied terms would apply.

Of the two feasible options, the purpose-based test is preferred. It protects parties’ freedom of contract, reflects the commercial purpose of licence agreements, and would be straightforward for parties to understand. With that in mind, a flowchart follows this chapter, which could be used by parties to determine which type of occupation agreement has been created using the purpose-based test.

13.2 Options for Future Research

This research has undertaken a detailed analysis of the formation requirements and how they differ for different occupation agreements. However, it has not considered what the effects of these different arrangements are in detail. For example, it has been presumed that all implied terms apply to both types of lease. Nonetheless, it is possible that the different types of lease create different rights and obligations for the parties. This is because at some point, leases cross the line from contract into property law.

Furthermore, this research has focused almost entirely on heritable property. There is scope for a much more detailed analysis of the law of hire as it applies to moveable property. Indeed, as hire has no real right equivalent like the lease, it could provide a starting point for consideration of the first issue, raised above.

Finally, this research has considered only the commercial context. The considerations in other contexts, such as the residential and agricultural spheres, could lead to a different recommendation for the best way to distinguish the lease from the licence to occupy in Scots law. Whether a purpose-based test would be appropriate in these circumstances would be an interesting comparison. Indeed, such a study could help ensure that the law of leases and licences remains coherent.

13.3 Flowchart

This flowchart can be used to assist parties with determining which occupation agreement they have created in Scots law, under the purpose-based test for distinguishing between leases and licences to occupy.

Flowchart:

Part 1: Is my agreement a lease or a licence to occupy?

1. Does your agreement specify the parties, the property, the rent?
 - a. Yes – go to Question 2.
 - b. No – Your agreement is a licence to occupy.
2. Does your agreement state that there is to be no determinable duration, e.g. until I need the property back?
 - a. Yes – Your agreement is a licence to occupy.
 - b. No – go to Question 3.
3. Does your agreement demonstrate the intention to transfer the rights of lease?
 - a. Yes – Your agreement is a lease. If no duration is included in your agreement, the law will imply a duration of one year. Go to Question 4 for further information.
 - b. No – Your agreement is a licence to occupy.

Part 2: Is my lease capable of becoming a real right?

4. Is your agreement for a period of more than 20 years?
 - a. Yes – Your agreement can create a real right of lease if registered under the Registration of Leases (Scotland) Act 1857.
 - b. No – go to Question 5.
5. Does your agreement contain a nominal or elusory rent?
 - a. Yes – Your agreement cannot create a real right.
 - b. No – Your agreement can create a real right under the Leases Act 1449 by the tenant taking possession.

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