THE RELATIONSHIP OF TENANT AND SUCCESSOR LANDLORD IN SCOTS LAW

Peter Webster

Ph D
The University of Edinburgh
2008

CONTENTS

PREFACE ..... **vi**

DECLARATION ..... **viii**

ABSTRACT ..... **ix**

TABLE OF ABBREVIATIONS ..... **x**

CHAPTER ONE
INTRODUCTION **1**

A. A CONTRACT WHICH RUNS WITH THE LAND 1
1. Scots law 1
2. Comparative law 3
(a) Overview 3
(b) Justification 5
B. AN UNANSWERED QUESTION: IS LEASE A REAL RIGHT? 7
C. MAP 9

CHAPTER TWO
ON THE THEME OF VARIATIONS **11**

A. UNREGISTERED LEASES 12
1. Variations 12
(a) Scottish authorities 12
(b) Publicity 18
(c) Constituting a variation 20
(d) Comparative law 24
2. Back-letters 26
3. Terms in missives 29
B. REGISTERED LEASES 30
1. Landlord's title in General Register of Sasines 31
2. Landlord's title in Land Register 34

CHAPTER THREE
DISTINGUISHING REAL AND PERSONAL CONDITIONS: EXPOSITION **40**

A. INTRODUCTION: BACKGROUND TO THE DISTINCTION 41
B. MISTAKEN ORTHODOXY: 'INTER NATURALIA' 48
C. 'REFERABLE TO THE GENERAL RELATION OF LANDLORD AND TENANT' 55
1. Scottish cases 55
2. The position in other jurisdictions 63
D. FLESHING OUT THE PROPOSED TEST 66

1. Burdened qua landlord and benefited qua tenant 66
2. An independent analysis of benefit and burden? 69
(a) The substance of the term 70
(b) Terms expressed to be personal 71
3. Policy concerns: term must not be contrary to the nature of the lease or to another rule of law 73
4. 'Customary and usual' terms: an automatic exception? 74
5. Registered leases 76
E. INTENTION AND INTERPRETATION 77
1. General approach 77
2. Back-letters 80
F. CONCLUSION 81

CHAPTER FOUR
DISTINGUISHING REAL AND PERSONAL CONDITIONS: POLICY ANALYSIS 84

A. SOME TRADITIONAL POINTS 85
B. THE AMERICAN RESTATEMENT OF SERVITUDES 88
C. HOME-GROWN PROBLEMS 95
D. MODELS FOR LAW REFORM 97

CHAPTER FIVE
RENEWALS AND BREAK OPTIONS 100

A. UNREGISTERED LEASES 101
1. Extending the lease 101
(a) Terminology 101
(b) New lease to commence at ish: protection postponed 103
(c) New lease to commence at once: immediate protection 107
(d) Varying the ish 109
(e) Supervening options 114
2. Terms of the original lease relating to duration 118
(a) Consecutive Leases 118
(b) Options to renew 119
(c) Options to extend 126
(d) Break options 127
3. Assessment of the rules for unregistered leases 129
B. REGISTERED LEASES 132
1. Two overarching issues 132
2. Extending the lease 133
(a) Registration of Title Practice Book 133
(b) New lease to commence at ish 134
(c) New lease to commence at once 135
(d) Varying the ish 135
3. Terms of the original lease relating to duration 136
(a) Consecutive leases 136
(b) Options to renew 136

(c) Break options 136
C. CONCLUSION 137

CHAPTER SIX
FURTHER SPECIFIC INSTANCES 139

A. OPTIONS TO PURCHASE 139
1. The rule 139
2. The justification 141
3. Other legal systems 147
B. RETENTION OF RENT IN SATISFACTION OF DEBT OWED BY LANDLORD TO TENANT 149
C. DISCHARGE OF RENT 153
D. COMPENSATION FOR IMPROVEMENTS 155
E. LANDLORD'S OBLIGATION TO IMPROVE THE SUBJECTS 158
F. ARBITRATION CLAUSES 160

CHAPTER SEVEN
CONDITIONS WHICH RELATE TO OTHER PROPERTY 162

A. 'LEASEHOLD PERTINENTS' 163
1. Introduction 163
2. Classification and enforceability 165
3. Criteria for being a 'pertinent' 171
B. AFFIRMATIVE OR NEGATIVE OBLIGATIONS IN RESPECT OF OTHER LAND 172
1. Affirmative obligations 173
2. Negative obligations 174
(a) Exclusivity clauses 174
(b) Building restrictions 179
C. CONCLUSION 180

CHAPTER EIGHT
OBLIGATIONS INCUMBENT UPON THE GRANTOR OF AN OPTION 182

A. PRELIMINARY POINTS 183
1. Two types of option 183
2. The analysis of options 185
3. Revocation prior to exercise of the option 185
4. Result of exercise of option 187
5. Vicarious performance 187
B. BREACH PRIOR TO EXERCISE OF THE OPTION 187
1. Introduction 187
2. The existence of a contractual fetter upon transfer 190
(a) Common Law 190
(b) French law 191
(c) South African law 192

(d) Conclusion....193
3. A rejected juridical basis: implied term....193
4. Anticipatory breach....196
5. A particular rule for options in leases?....203
(a) Intention....204
(b) Rule of law: do personal conditions bind the original landlord after transfer?....206
C. CONCLUSION....208

CHAPTER NINE
THE (IR)RELEVANCE OF KNOWLEDGE....209

A. THE REQUIREMENTS OF THE OFFSIDE GOALS RULE....209
B. DOES THE RULE APPLY TO THE TERMS OF LEASES?....213
C. SPECIFIC TERMS....217
1. Options to purchase....217
(a) A right to which the offside goals rule applies?....217
(b) A problem of remedies....222
2. New lease to commence at the ish of current lease....223
3. Options to renew....225
4. Other uses of the offside goals rule....226
D. CONCLUSION....228

BIBLIOGRAPHY....229

PREFACE

The date when I would finish my thesis has been the cause of speculation amongst some of my friends. Now it is finished; or, at least, I have stopped working on it. I am reminded of the passage in *Breakfast at Tiffany's* when Holly Golightly invites the narrator, a would-be writer, to read her something that he has written. He accepts, enthusiastically. 'It was a new story', he says; 'I'd finished it the day before, and that inevitable sense of shortcoming had not had time to develop'.[1]

I owe two great intellectual debts: to Professors George Gretton and Kenneth Reid. I have been fortunate enough to have had both as my primary supervisor. The switch took place in spring 2006, when Professor Reid returned from the Scottish Law Commission and Professor Gretton took up post there. Both were unfailingly generous and patient. I could not have wished for more as far as supervision is concerned and I cannot adequately express my gratitude to them.

There are many others who have assisted me whilst I have been working on this thesis and whom I also wish to thank. Professor Reinhard Zimmermann provided me with the opportunity to spend an enjoyable autumn in Hamburg as a Wissenschaftlicher Mitarbeiter at the Max Planck Institute for Foreign and International Private Law. Laura Macgregor was my second supervisor and her husband, Denis Garrity, provided practical insight on some points. The Law Librarians of Edinburgh University were a frequent source of help. Many of my friends proof-read individual chapters: Pierre Harcourt, Helen Fyfe, Alison Struthers, Rebecca Macleod, Dr Ross Anderson, David Massaro, Barney Ross, Gillian Black and David Clark. Dr Andrew Steven and John Macleod were spared that chore, but nevertheless deserve thanks, in particular Andrew Steven for having done so much to encourage me to undertake postgraduate research in the first place. Daniel Carr sent materials which were not available in Edinburgh, and, more importantly, often raised my spirits when this thesis was doing the opposite.

I am grateful to those who funded my study: financial support was provided initially by the Edinburgh Legal Education Trust, and – from my second year onwards – by the Arts and Humanities Research Council.

I dedicate the thesis to my parents.

Edinburgh
October 2008

[1] Truman Capote *Breakfast at Tiffany's* (1958, Penguin Classics Reprint 2000) 24.

There is regret. Always, there is regret.
But it is better that our lives unloose,
As two tall ships, wind-mastered, wet with light,
Break from an estuary with their courses set,
And waving part, and waving drop from sight.

Philip Larkin, The North Ship, X

This thesis has been composed by me and the work is my own. It has not been submitted for any other degree or professional qualification.

THE UNIVERSITY OF EDINBURGH

ABSTRACT OF THESIS

Regulation 3.1.14 of the Postgraduate Assessment Regulations for Research Degrees refers These regulations are available via:- http://www.aaps.ed.ac.uk/regulations/exam.htm

Name of Candidate: Peter Webster

Address :

Postal Code:

Degree: Ph D

Title of Thesis: The relationship of tenant and successor landlord in Scots law

No. of words in the main text of Thesis: 99 000

This thesis provides the first detailed study of the relationship in Scots law between a tenant and a singular successor of the landlord. It considers both the rules which apply to short (unregistered) leases and those which apply to long (registered) leases. The primary aim of the thesis is to set out and analyse the current Scots law. Where relevant, however, reference is made to the rules of other legal systems, such as English, German and South African law.

The thesis focuses on three distinct areas. The first part considers the prevalent view that singular successors are affected only by terms which appear in a document of lease. The potential for successor landlords to be affected by variations to the initial lease, side-letters and unimplemented terms of missives is considered.

The second, and largest, part of the thesis considers the rules for determining whether particular conditions of a lease are 'personal' (in the sense of binding only the original landlord) or 'real' (in the sense of binding the landlord's successors). This distinction is based on the content of the relevant condition. The thesis locates the distinction in property and contract law doctrine and reveals it to be a mandatory one, which parties to a lease cannot circumvent by intention. It considers the accepted test for distinguishing real and personal conditions (the '*inter naturalia*' test) and identifies problems with it. A revised test is proposed and then applied, in the following chapters, to particular types of lease term. Terms which are analysed include break options, renewal options, options to purchase, terms permitting the retention of rent, and terms relating to land other than the subjects of the lease, such as access rights and exclusivity obligations. Criticisms of the distinction from the perspective of legal policy are evaluated.

The third, and final, part of the thesis considers whether the fact that the successor acquired gratuitously or with knowledge of the terms of the lease results in his being bound by terms which would otherwise be personal. That is to say, it considers the 'offside goals' rule. The requirements of that rule are clarified and then its application to an obligation or option to renew the lease and to an option to purchase is considered. This includes a detailed consideration of the obligations to which the grant of an option gives rise.

ABBREVIATIONS

AC	Law Reports, Appeal Cases (Third Series), 1891 –
AcP	Archiv für die civilistische Praxis
AD	Supreme Court, Appellate Division Reports, 1910 – 1946); Appellate Division of the Supreme Court of South Africa
AJ	Acta Juridica
ALJ	Australian Law Journal, 1927 –
B & Ald	Barnewall & Alderson's King's Bench Reports, 1817 – 1822; 106 ER
B & C	Barnewall & Cresswell's King's Bench Reports, 1822 – 1830; 107 – 109 ER
B & S	Best and Smith's Queen's Bench Reports, 1861 – 1869; 121 – 122 ER
Bankton *Institute*	A McDouall (Lord Bankton) *An Institute of the Laws of Scotland in Civil Rights, with Observations upon the Agreement or Diversity between them and the Laws of England* (1751; reprinted 1993 – 1995)
Bell App	Bell's House of Lords Appeal Cases (Scotland), 1842 – 1850.
Bell *Commentaries*	J McLaren (ed) GJ Bell *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (7th edn 1870; 1990 reprint) [references are to the current pagination and not to pagination of previous editions, which is maintained in brackets.]
Bell *Leases*	R Bell *A Treatise on Leases* (4th edn 1825 revised and enlarged by W Bell)
Bell's Octavo Cases	R Bell's Octavo Cases, 1790 – 1792
Bell *Principles*	W Guthrie (ed) GJ Bell *Principles of the Law of Scotland* (10th edn 1899)
BGB	*Bürgerliches Gesetzbuch*
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
Br Sup	Brown's Supplement to Morison's Dictionary of Decisions, 1622 – 1794
CA	Court of Appeal, England & Wales

CB (NS)	Common Bench Reports, New Series, 1856 – 1865; 140 – 144 ER
Ch	Law Reports, Chancery Division, 1890 –
Ch D	Chancery Division, England & Wales
Chp	chapter
Cl	clause
CLJ	Cambridge Law Journal, 1921 –
CLR	Commonwealth Law Reports, 1903 –
Cmnd	Command Papers 1956 – 1986.
Cockburn *Commercial Leases*	DW Cockburn *Commercial Leases* (2002)
Conv	The Conveyancer and Property Lawyer, 1936 –
Cooper *Landlord & Tenant*	WE Cooper *Landlord and Tenant* (2nd edn 1994)
CP	Consultation Paper
CPD	Cape Provincial Division Reports, 1910 – 1946; Cape Provincial Division
CSOH	Court of Session, Outer House
CSIH	Court of Session, Inner House
Craig *Jus Feudale*	Lord Clyde (tr) T Craig *The Jus Feudale* (1934)
d	on the demise of
D	Dunlop's Session Cases, Second Series 1838 – 1862; *Recueil Dalloz*; Digest
DP	Discussion Paper
East	East's Term Reports, King's Bench 1800 – 1812; 102 – 104 ER
ed	editor
Edin LR	Edinburgh Law Review, 1996 –
edn	edition
EGLR	Estates Gazette Law Reports, 1985 –
El & Bl	Ellis & Blackburn's Queen's Bench Reports, 1852 – 1858; 118 – 120 ER
ER	English Reports, 1220 – 1865
Erskine *Institute*	JB Nicolson (ed) J Erskine *An Institute of the Law of Scotland* (8th edn 1871; 1989 reprint)

Erskine *Principles*	J Rankine (ed) J Erskine *Principles of the Law of Scotland* (21st edn 1911)
EWCA Civ	England and Wales Court of Appeal (Civil Divison)
EWHC	England and Wales High Court
Ex	Exchequer Reports, 1847 – 1856; 154 – 156 ER
Exr	Executor
F	Fraser's Session Cases, Fifth Series, 1898 – 1906
FC	Faculty Collection, 1752 – 1825
Gloag *Contract*	WM Gloag *The Law of Contract* (2nd edn 1929; 1985 reprint)
Gordon *Land Law*	WM Gordon *Scottish Land Law* (2nd edn 1999)
Gray & Gray *Elements*	K Gray & S Gray *Elements of Land Law* (4th edn 2005)
GRS	General Register of Sasines
GWD	Green's Weekly Digest, 1986 –
Halliday *Conveyancing*	IJS Talman (ed) JM Halliday *Conveyancing Law and Practice in Scotland* vol II *Heritable Conveyancing* (2nd edn 1997)
HCA	High Court of Australia
HL	House of Lords
Hume	Hume's Decisions 1781 – 1822
Hume *Lectures IV*	GCH Paton (ed) *Baron David Hume's Lectures 1786 – 1822* vol IV (1955)
Hunter	R Hunter *A Treatise on the Law of Landlord and Tenant* (4th edn Bell & Bradfute Edinburgh 1876) [references are to the current pagination, and not to the pagination of the third edition, which is maintained in brackets].
ICLQ	International and Comparative Law Quarterly, 1952 –
IH	Inner House, Court of Session
Ir Rep	Irish Reports, 1894 –
JLSS	Journal of the Law Society of Scotland, 1956 –
JR	Juridical Review, 1889 –

Kerr *Sale & Lease*	AJ Kerr *The Law of Sale and Lease* (3rd edn 2004)
KB	Law Reports, King's Bench, 1901 – 1952
LAWSA	*The Law of South Africa*
Land Ct	Scottish Land Court
LC	Law Commission, England and Wales
LJ	Law Journal
LJC	Lord Justice Clerk
LP	Lord President
LQR	Law Quarterly Review, 1885 –
L Rev	Law Review
LRC	Law Reform Commission of Ireland
L & TR	Landlord and Tenant Reports, 1998 –
LR Ex	Law Reports, Exchequer Cases, 1865 – 1875
LT	Law Times Reports, New Series, 1859 – 1947
M	Macpherson's Session Cases, Third Series, 1862 – 1873
McAllister *Leases*	A McAllister *Scottish Law of Leases* (3rd edn Butterworths Edinburgh 2002)
McBryde *Contract*	WW McBryde *The Law of Contract in Scotland* (3rd edn 2007)
McDonald *Manual*	DA Brand, AJM Steven & S Wortley *Professor McDonald's Conveyancing Manual* (7th edn 2004)
Mackenzie *Observations*	G Mackenzie *Observations on the Acts of Parliament* (Edinburgh 1687)
Mass	Massachusetts Reports, 1867 –
Megarry & Wade *Real Property*	C Harpum (ed) R Megarry & W Wade *The Law of Real Property* (6th edn 2000)
Mor	Morison's Dictionary
My & K	Mylne & Keen's Chancery Reports, 1832 – 1835; 39 – 40 ER
Münchener Kommentar	§566 in M Häublein '§§566 – 567b' in W Krüger & HP Westermann (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 3 Schuldrecht, Besonderer Teil I* (4th edn 2004)

n	footnote
NE	North Eastern Reporter, 1884 – 1936
NE 2d	North Eastern Reporter, Second Series, 1936 –
NPD	Natal Provincial Division Reports, 1933 – 1946; Natal Provincial Division
NW 2d	North Western Reporter, Second Series, 1942 –
NZLR	New Zealand Law Reports, 1883 –
obs	obsveration (to a French case)
OH	Outer House, Court of Session
Or	Oregon Reports, 1853 –
P 2d	Pacific Reporter, Second Series, 1931 –
Paton & Cameron	GCH Paton & JGS Cameron *The Law of Landlord and Tenant in Scotland* (1967)
PC	Judicial Committee of the Privy Council
pt	part
QB	Law Reports, Queen's Bench (Third Series) 1891 – 1901, 1952 – ; Queen's Bench Reports (Adolphus & Ellis, New Series, 1841 – 1852 (113 – 118 ER)
QBD	Law Reports, Queen's Bench Division, 1875 – 1890
QCA	Queensland Court of Appeal
QSC	Queensland Supreme Court
R	Rettie's Session Cases, Fourth Series, 1873 – 1898
Rankine	J Rankine *A Treatise on the Law of Leases in Scotland* (3rd edn 1916)
Reid *Property*	KGC Reid and others *The Law of Property in Scotland* (1996, being a reprint of Vol 18 of the *Stair Memorial Encyclopaedia*)
Restatement *Landlord & Tenant*	American Law Institute *Restatement of the Law Property 2nd Landlord and Tenant* (1977)
rev'd	reversed
Rn	Randnummer
Robin	Robinson's Scotch Appeal Cases, 1840 – 1841
Ross *Lectures*	W Ross *Lectures on the History and Practice of the*

	Law of Scotland (2nd edn 1822)
RoS Legal Manual	Registers of Scotland, Legal Manual, available at: www.ros.gov.uk/foi/legal/frame~home.htm
ROTPB	*Registration of Title Practice Book* (2nd edn 2000)
Rpt	Report
S	Shaw's Session Cases, First Series, 1821 – 1838
SA	South African Law Reports 1947 –
SC	Session Cases, Sixth Series, 1907 –
SCLR	Scottish Civil Law Reports, 1987 –
Sch	Schedule
Sh App	Shaw's Appeal Cases, 1821 – 1824
Sh Ct	Sheriff Court
Sh Ct Rep	Sheriff Court Reports, 1885 – 1963
Sh Pr	Sheriff Principal
SLC	Scottish Law Commission
SLCR	Scottish Land Court Reports, 1912 – 1963
SLCR App	Appendices to Scottish Land Court Reports
SLPQ	Scottish Law and Practice Quarterly, 1995 – 2003
SLR	Scottish Law Reporter, 1865 – 1925
SLT	Scots Law Times, 1893 –
SLT (Lands Tr)	Scots Law Times, Scottish Land Court and Lands Tribunal Reports, 1964 –
SME vol 13	JGS Cameron *et al* 'Landlord and Tenant' in R Black (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XIII (1992)
Stair *Institutions*	JS More (ed) Viscount Stair *The Institutions of the Law of Scotland* (5th edn 1832)
Staudingers Kommentar	§566 in V Emmerich & C Rolfs *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 2 – Recht des Schuldverhältnisse §§563 – 580a* (2003)
Somm	*Sommaire*
Supreme Court Reports	Juta's Supreme Court Reports, Cape of Good Hope, 1880 – 1910
SW 2d	South Western Reporter, Second Series, 1928 –

TPD	Transvaal Provincial Division Decisions, 1910 – 1946; Transvaal Provincial Division
tr	translator
UKHL	United Kingdom House of Lords
W & S	Wilson & Shaw's Appeal Cases, House of Lords, 1825 – 1835
WLR	Weekly Law Reports, 1953 –
Woodfall *Landlord & Tenant*	The Hon Mr Justice Lewison (ed) *Woodfall's Law of Landland and Tenant* (looseleaf)

CHAPTER ONE
INTRODUCTION

A. A CONTRACT WHICH RUNS WITH THE LAND 1
1. Scots law 1
2. Comparative law 3
(a) Overview 3
(b) Justification 5
B. AN UNANSWERED QUESTION: IS LEASE A REAL RIGHT? 7
C. MAP 9

A. A CONTRACT WHICH RUNS WITH THE LAND

1. Scots law

At common law, a lease is a contract.[1] Were this all it could be, the tenant's position would be precarious. He would be exposed to the danger of transfer by the landlord: a contractual right to possession binds only the original landlord and would provide no defence against a new owner, should he seek to evict him. Scots law, like many other legal systems, protects the tenant against such a possibility. Since the coming into force of the Leases Act 1449, statute has provided that in certain circumstances, and contrary to the common law rule, a singular successor of the landlord is bound by the lease.

Modern Scots law provides two ways in which a tenant can obtain a right binding upon a singular successor of the landlord. Which is available to a tenant depends upon whether his lease is short or long: the boundary between the two is drawn at twenty years. If a lease exceeds twenty years' duration (or contains a provision obliging the landlord, on the tenant's request, to renew the lease so that the total duration of the original and renewed leases exceeds twenty years), then it is a long lease.[2] Protection for short leases continues to derive from the 1449 Act. The requirements for its application are:[3]

---

1 Stair *Institutions* I xv 4, II ix 1 – 2; Mackenzie *Observations* 188; Bankton *Institute* II ix 1; Erskine *Institute* II vi 23; Erskine *Principles* II vi 9; Bell *Commentaries* I 64; Bell *Principles* §1177; JS More (J McLaren (ed)) *Lectures on the Law of Scotland* vol II (1864) 1 – 2; GCH Paton (ed) *Baron David Hume's Lectures 1786 – 1822* vol II (1949) 56; Hume *Lectures IV* 73; Hunter vol I 360; Rankine 1 & 133.

2 Land Registration (Scotland) Act 1979 s28(1).

3 Rankine Chp V; Paton & Cameron Chp VII; McAllister *Leases* [2.21] – [2.29].

(i) if the lease is for more than one year, it must be in formal writing;[4]

(ii) the lease must have an ish;

(iii) the subjects of the lease must be land;

(iv) the tenant must possess the subjects by virtue of the lease;

(v) there must be a rent which is not merely elusory;

(vi) the grantor of the lease must have title to grant it.[5]

Long leases, on the other hand, require registration in order to bind a successor.[6] The possibility of registration was introduced by the Registration of Leases (Scotland) Act 1857. The criteria which a lease must meet in order to be registrable have varied over the years, and differ from those which must be met in order for the 1449 Act to apply.[7] In terms of the 1857 Act, and until the advent of Land Register, registration of leases was optional:[8] if a lease was not registered, the 1449 Act could still apply to it. As the Land Register was brought into operation county by county, so county by county registration became the only way of protecting a lease against transfer by the landlord.[9] Long leases which were protected by the 1449 Act prior to the Land Register becoming operational do, however, continue to affect the land as overriding interests.[10]

This thesis does not consider in any more detail the requirements for a lease to be protected by those statutes. Instead its focus is upon the contractual relationship which subsists between the new owner and the tenant after transfer by the landlord. A system in which there is no such relationship is imaginable.[11] The model would be this: a tenant in possession under a lease complying with the requirements of the

---

4 That is to say, it must comply with ss 1 & 2 of the Requirements of Writing (Scotland) Act 1995. This is a tightening of the previous rule, but is the safest view of the law after *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [1] – [36]. See Chp 2, text to n62 – n78.

5 This is not listed by Rankine or Paton & Cameron as a requirement for a lease to bind successors, but rather as a requirement for the conclusion of a valid lease: Rankine Chp II; Paton & Cameron Chp IV. It is more logically viewed as a requirement for a lease to become real, not as a requirement for the conclusion of a valid contract of lease. See, generally, Stair *Institutions* I x 13.

6 Land Registration (Scotland) Act 1979 s3(3).

7 See, eg, Rankine Chp V.

8 Registration of Leases (Scotland) Act 1857 s2.

9 Land Registration (Scotland) Act 1979 s3(3).

10 Land Registration (Scotland) Act 1979 s28(1).

11 KGC Reid 'Obligations and Property: Exploring the Border' 1997 AJ 225, 239, noting that this model was said to be South African law by JG Lotz 'Lease' in WA Joubert (ed) *The Law of South Africa* vol XIV (1981). See also G Griolet & C Vergé *Nouveau Code civil annoté et expliqué d'après la jurisprudence et la doctrine* vol IV, Pt I (1905-1907) Art 1743 [42] – [49].

1449 Act or which has been registered is both party to a contract of lease (which binds only the original landlord) and holder of a real right of lease (which is enforceable *erga omnes*). If the landlord transfers ownership of the subjects, the tenant is able to remain in possession because of his prior-ranking real right. The transfer has, however, no effect on the contract of lease, which remains between the tenant and the original landlord. Most likely the landlord would assign the right to rent to his successor, but in order for the successor to be bound by the landlord's obligations, there would have to be a delegation, and that would require the tenant's consent.[12]

Scots law has not adopted that approach. Instead, the successor of the landlord becomes a party to the contract of lease: he is vested in the landlord's rights and bound by his obligations. In respect of obligations, that has been clear certainly since *Arbuthnot v Colquhoun* in 1772.[13] If there was any doubt in respect of the landlord's rights, it was removed by Lord Cockburn in 1847 in *Hall v M'Gill*:[14] '[t]he singular successor is entitled, without any special assignation, to enforce the contract'. *Hall* is one of three mid-nineteenth century Inner House decisions which make clear that the successor becomes party to the contract of lease.[15] When protected by the 1449 Act or by registration, a lease, as the phrase goes, 'runs with the lands'.[16] In *Barr v Cochrane*, Lord Ormidale – albeit in a dissenting opinion – stated:[17]

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

2. Comparative law

(a) Overview

When Scots law holds that the landlord's successor steps into the contract of lease, it adopts a position common to many other legal systems. In them, the rule is often summarised by a catchy maxim. Reference is made throughout this thesis to rules of

---

12 Stair *Institutions* III i 2; Gloag *Contract* 258; RG Anderson *Assignation* (2008) [3-04] – [3-05].
13 (1772) Mor 10 424.
14 (1847) 9 D 1557 (IH) 1566.
15 *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH) 1102 – 1103; *Hall v M'Gill* ibid; *Barr v Cochrane* (1878) 5 R 877 (IH) 883.
16 Rankine 475; Paton & Cameron 94.
17 (1878) 5 R 877 (IH) 883.

English, French, German and South African law, so the general approach of those systems is set out here. The South African maxim, derived from Roman-Dutch law, is *huur gaat voor koop*: hire goes before sale.[18] It is now recognised that, upon transfer, the new owner of leased property is substituted *ex lege* for the original lessor in the contract of lease.[19]

The German equivalent is *Kauf bricht nicht Miete* – sale does not break lease. The relevant provision of the BGB is §566 I, which makes clear that the successor of the landlord acquires his predecessor's personal rights and is bound by his obligations:[20]

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

The relevant provision of the French civil code, Art 1743 *Code civil*, certainly provides that the tenant may remain in the subjects after sale by the landlord, but it is not explicit as to the behaviour of the contract on transfer:[21]

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

After initial debate about whether the successor should become party to the contract of lease,[22] the prevailing view is that Art 1743 has a similar effect on those contracts of lease to which it applies as do South African, German and Scots law: 'l'acquéreur est substitué dans les droits et obligations du vendeur'.[23]

---

18 See, generally, Cooper *Landlord & Tenant* Chp 19; Kerr *Sale & Lease* Chp 21; LAWSA vol 14 [43] – [46].

19 *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (AD) 939A-C.

20 [If the leased land is transferred by the lessor to a third party after delivery to the lessee, the acquirer takes the place of the lessor in the rights and obligations arising from the lease during the period when he is owner.] (Here, as at all other points in the thesis unless otherwise indicated, the translation is mine.)

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

22 Eg, G Griolet & C Vergé *Nouveau Code civil annoté et expliqué d'après la jurisprudence et la doctrine* vol IV, Pt I (1905-1907) Art 1743 [42] – [49].

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

In English law the chess pieces are different, but the result the same.[24] Although a lease is a contract, it usually also results in the creation of an estate in land.[25] That estate binds those acquiring the reversion. The benefit and burden of certain covenants of the lease run with the reversion and so benefit and burden an assignee of the reversion. The fact that leases could be used to impose positive obligations upon successors in title is one of the reasons why leasehold title is as prevalent in England as it is.[26]

In German law there has been considerable discussion of exactly what happens to the contract of lease upon transfer by the landlord: is the contract transferred to the successor or is there a contractual novation, so that the lease is constituted anew between the successor and the tenant? The second approach is the received view in German law.[27] This is an issue which Scots law might consider once the basic rules of lease law in the field are better understood and once there has been more discussion of the general approach to the transfer of contracts.[28]

(b) Justification

The recourse made in this thesis to the law of jurisdictions other than Scotland should be explained. This is a work on Scots law. It is not the product of a comparative lawyer; it draws no system-neutral conclusions. It does, however, make considerable reference to the law of other legal systems. Why? Scots lease law is radically underdeveloped. Although since an early date it has benefited from four detailed textbooks,[29] it has been immune from the increased academic attention from

---

24 See, generally, Megarry & Wade *Real Property* Chps 14 & 15; Gray & Gray *Elements* [7.68] – [7.87] & [14.208] – [14.310]; TM Fancourt *The Enforceability of Landlord and Tenant Covenants* (2006), Chp 1 of which provides an overview.

25 *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 (HL) 415B.

26 Gray & Gray *Elements* [13.55].

27 *Münchener Kommentar* [23].

28 For a start, see RG Anderson *Assignation* (2008) [3-28] – [3-37]. For French law, see J Ghestin, C Jamin & M Billiau *Traité de droit civil: les effets du contrat* (3rd edn 2001) [1024] – [1082], and for German, KW Norr, R Scheyhing & W Pöggeler *Sukzessionen: Forderungszession, Vertragsübernahme, Schuldübernahme* (2nd edn 1999) Pt II.

29 R Bell *A Treatise on Leases* (1st edn 1803; 2nd edn 1805; 3rd edn 1820, edited by W Bell; 4th edn 1825, revised by W Bell); R Hunter *A Treatise on the Law of Landlord and Tenant* (1st edn 1833; 2nd edn 1845; 3rd edn 1860; 4th edn 1876, edited by W Guthrie); J Rankine *The Law of Leases in Scotland* (1st edn 1887; 2nd edn 1893; 3rd edn 1916); GCH Paton & JGS Cameron *The Law of Landlord and Tenant in Scotland* (1967). A shorter, more modern text is A McAllister *Scottish Law of Leases* (3rd edn 2002). There are also texts on specific types of leases, such as agricultural, commercial and residential tenancies: B Gill *The Law of Agricultural Holdings in Scotland* (3rd edn 1997), DW Cockburn *Commercial Leases* (2002), MJ Ross & DJ McKichan

which Scots law has recently begun to profit.[30] There is, therefore, much that can be taken from other legal systems which have considered similar issues to those which face us. The results reached in other systems need not be accepted; indeed it is doubtful whether the fact that one system adopts a particular position is even of persuasive value. What are valuable are the arguments which have been made. In short, comparative law is a source of ideas for how Scots law can be developed. I diagnose myself as a 'system builder'.[31] Such an approach has a considerable heritage. In a recent article, Lord Reed commented:[32]

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

What goes for judicial reasoning should also go for academic.

Why refer to English, French, German and South African law in particular? English law has traditionally not exerted the influence in this area of lease law which it has in other areas of Scots law. It is a common feature of mixed legal systems that property law remain one of the fields least affected by English influence.[33] The use made of English law in this thesis will hopefully show that, in fact, it can serve as a useful comparator if used sensibly. This is particularly because the English rules have been the subject of recent reform.[34] French and German law demand attention

---

Drafting and Negotiating Commercial Leases in Scotland (2nd edn 1993), PW Robson & S Halliday *Residential Tenancies* (1998).

30 On which, see KGC Reid 'The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland' in HL MacQueen (ed) *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (1996) 39, 43 – 46; R Zimmermann 'Double Cross: Comparing Scots and South African Law' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 1, 28 – 31.

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

32 R Reed 'Foreign Precedents and Judicial Reasoning: The American Debate and British Practice' (2008) 124 LQR 252, 261. See also TM Bingham '"There is a world elsewhere": the changing perspectives of English law' (1992) 41 ICLQ 513, especially 527 *et seq*; JM Smits 'Comparative Law and its Influence on National Legal Systems' in M Reimann & R Zimmermann (eds) *Oxford Handbook of Comparative Law* (2006) 513, 525 in particular.

33 VV Palmer 'A Descriptive & Comparative Overview' in VV Palmer (ed) *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 17, 57. In Scotland, lease law is seen as part of property law, whereas in Civilian systems, it is seen as part of contract law.

34 Landlord and Tenant (Covenants) Act 1995.

as the parent systems of the two main legal traditions within the Civilian legal family. Finally, South African law offers the experience of a fellow mixed legal system. It has been more exposed than Scots law to systematising continental influence, and boasts materials written in English.

Engaging in any comparative study entails the risk of misunderstanding foreign materials, whether due to linguistic or broader difficulties. A work which focuses on one system whilst making reference to various others is particularly vulnerable to that danger. Such a work is also open to the further charge, which a detailed comparative study would not be, that its approach is illogical: why refer to one writer rather than another; German law on one point, but French on another?[35] The fact that the reference is made to foreign law as a source of ideas rather than as a persuasive authority in its own right, makes both of those difficulties less serious than they would otherwise be. Were more foreign law to have been considered, then less Scots law could have been. If that results in what some would see as an imperfect product, then, in my view, that is a price worth paying.

B. AN UNANSWERED QUESTION: IS LEASE A REAL RIGHT?

The question whether a lease which binds a singular successor of the landlord is a real right has given rise to considerable academic discussion in Civil law systems.[36] Common law systems have recently debated a similar point, although from a different starting point: some argued – unsuccessfully – that contractual doctrines

---

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

[36] J Derruppé *La nature juridique du droit du preneur à bail et la distinction des droits réels et des droits de créance* (1952) reviews the early French debate. See also J Dainow *La nature juridique du droit du preneur à bail dans la loi française et dans la loi de Québec* (1932). The name which is more than any other associated with what is termed the 'realist' theory that Art 1743 *Code civil* had converted lease into a real right is that of Troplong. But his argument was unsuccessful. It was rejected by the *Chambre des Requêtes* of the *Cour de Cassation* when Troplong was himself President of the Court: Req 6 mars 1861, D 1861 I 417, 419. As for Germany, see: C Crome 'Die juristische Natur der Miethe nach dem Deutschen Bürgerlichen Gesetzbuch' (1897) 37 Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1; H Weiß *Ist die Grundstücksmiete ein dingliches Recht?* (1932); G Otte 'Die dingliche Rechtsstellung des Mieters nach ALR und BGB' in O Behrends *et al* (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (1978) 463; C Möller 'Die Rechtsstellung des Mieters in Rom und Karlsruhe' (1997) 197 AcP 537; H Wieling 'Die Grundstücksmiete als dingliches Recht' in J Jickeli, P Kreutz & D Reuter (eds) *Gedächtnisschrift für Jürgen Sonnenschein* (2003) 201. Two historical works are B Jüttner *Zur Geschichte des Grundsatzes 'Kauf Bricht Nicht Miete'* (1960) and K Genius *Der Bestandschutz des Mietverhältnisses in seiner historischen Entwicklung bis zu den Naturrechtskodifikationen* (1972). There is also an article in English: TJR Stadnik 'The Doctrinal Origins of the Juridical Nature of Lease in the Civil Law' (1980) 54 Tulane L Rev 1094.

such as frustration and repudiation did not apply to leases because a lease is an estate in land and not a contract.[37] Binding singular successors of the grantor and surviving insolvency are often said to be the hallmarks of a real right. A lease can do both.[38] But it can also do so in France[39] and Germany,[40] and the view of both modern French[41] and modern German law[42] is that leases confer personal rights only, albeit privileged ones. In Scottish authorities, there are statements to the effect that that leases are fully fledged real rights;[43] and statements which refuse to go that far, acknowledging only that leases are contracts which have, by statute, been given some of the characteristics of a real right.[44] While Gordon carefully states that lease has 'in certain cases been given a real character by legislation',[45] Reid is of the view that 'sufficient time has now elapsed [since 1449] for leases to be fully assimilated to other real rights'.[46] A plausible position is that a lease can be both a contract and a real right:[47] lease is a contract; in certain circumstances the tenant obtains a real right, but this is in addition to and not in substitution for the contract.

Whether a tenant does, in fact, obtain a real right is not a point which this thesis considers. The behaviour of the contract of lease upon transfer by the landlord and the question whether a tenant has a real right are not logically connected. Scots law is clear that, when a lease is protected by the 1449 Act or by registration, a successor of the landlord becomes party to the contract of lease. There is no need to resort to the tenant having a real right to explain this. And, because the successor is bound by the contract, one need not rely on the tenant having a real right in order to explain the

---

37 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) 690E (frustration); *Hussein v Mehlman* [1992] 2 EGLR 87 (County Court) 88H – 90J (repudiation); *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 (HCA) 29, 51 – 53.

38 Paton & Cameron 104 & 192.

39 Derruppé (n36) 175.

40 Gesetz über die Zwangsversteigerung und die Zwangsverwaltung §57; Insolvenzordnung §111. There are, however, particular rules about the termination of leases in the event of the landlord's insolvency.

41 One of the best summaries, albeit now a little dated, is M de Juglart in H Mazeaud, L Mazeaud & J Mazeaud (eds) *Leçons de droit civil Tome III* vol II *Principaux contrats* (3rd edn 1968) 294 – 307. More recently, see P Malaurie, L Aynès & P-Y Gauthier *Les contrats spéciaux* (2nd edn 2005) [621], who view the debate as futile.

42 *Münchener Kommentar* [3]; *Staudingers Kommentar* [4] – [6]; JF Baur & R Stürner *Sachenrecht* (17th edn 1999) 28.

43 Most significantly, in modern times: Land Registration (Scotland) Act 1979 s3(3) & s28(1).

44 A good overview is provided by W Guy 'Registration of Leases' (1908 – 1909) 20 JR 234.

45 Gordon *Land Law* [19-119].

46 Reid *Property* [5].

47 The position in Louisiana: VV Palmer *The Civil Law of Lease in Louisiana* (1997) § 1-2. This was advocated by some French writers: *la théorie mixte*. See Derruppé (n36) [11] – [13].

fact that he can continue to possess the subjects after transfer.[48] Equally, however, the tenant having a real right is no impediment to the successor landlord becoming party to the contract of lease.[49] The test for ascertaining whether the tenant does indeed have a real right is how he can protect his possession against persons who are not bound by the contract of lease, namely third persons such as encroaching neighbours or trespassers. That is a different matter entirely from the matters under consideration here.

The issue which this thesis analyses, namely the contractual relationship between the tenant and the successor landlord, arises regardless of whether or not one chooses to conceive of the contract of lease as also conferring upon the tenant a real right (as do the South Africans, and the English – albeit in different terms) or as amounting simply to a contract which behaves in a particular fashion upon transfer by the landlord (as do the French and Germans). The characterisation of the tenant's right does not seem to influence the decisions which one would reach in respect of matters considered in this thesis. I therefore proceed in the same way as other writers in this area of Scots law have done: using the term 'real right' to describe the tenant's position when his right is enforceable against a successor landlord, but in the knowledge that the tenant may not have a real right in the full sense of the term.[50]

C. MAP

From omission to commission: what does this thesis consider? It is in three, unequal parts. The first, consisting solely of Chapter Two, considers whether the law limits the terms which can run with the land to those which are detailed in a document of lease, or whether a successor may also be affected by terms (such as variations) which do not feature in such a document. The treatment of registered leases in this regard receives special consideration. In short, this chapter considers which terms are 'available for transmission'.

---

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

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

50 Eg Rankine 132.

The second part of the thesis, comprising Chapters Three to Seven, considers the substantive controls over which among the terms available for transmission actually do transmit to a singular successor of the landlord. In other words, this part considers how one determines which terms of a lease are 'real conditions' and which are 'personal conditions'. In Chapter Three, the reasons for drawing such a distinction are explained and the general test adopted in Scots law explored. Chapter Four considers whether, as a matter of legal policy, the distinction is one which the law should continue to draw. Chapters Five to Seven then consider, in light of the general test in Chapter Three, the treatment of specific types of term: Chapter Five, those relating to the duration of the lease; Chapter Six, a mixture of terms, including options to purchase and provisions dealing with the retention of rent; and Chapter Seven, terms which relate to property other than the subjects of the lease, such as access rights and exclusivity clauses.

In its third part, the thesis turns away from lease law to consider whether what is known as the 'offside goals' rule can produce a different result to the rules considered in the second part of the work. Does this rule apply to render a personal condition binding upon a successor who acquired gratuitously or with knowledge of the terms of the lease? Because of the requirements of the offside goals rule (considered in Chapter Nine), the focus is on obligations to confer a real right upon the tenant and, more particularly, upon options. The obligations to which the grant of an option gives rise are considered in detail in Chapter Eight. In light of that, Chapter Nine then considers whether the offside goals rule can apply to the terms of leases and considers the results which it would produce in respect of options to purchase and of terms concerning the renewal of the lease.

CHAPTER TWO
ON THE THEME OF VARIATIONS

A. UNREGISTERED LEASES 12
1. Variations 12
(a) Scottish authorities 12
(b) Publicity 18
(c) Constituting a variation 20
(d) Comparative law 24
2. Back-letters 26
3. Terms in missives 29
B. REGISTERED LEASES 30
1. Landlord's title in General Register of Sasines 31
2. Landlord's title in Land Register 34

There are persistent suggestions that the landlord's singular successor is bound only by terms contained in the actual document of lease. Gloag's formulation is typical: 'singular successors are not bound by private agreements between landlord and tenant which do not appear in the lease'.[1] Clearly terms which are implied in fact[2] or in law[3] into the contract may transmit although they are not written in the contract of lease. This, however, is obviously not an exception to a rule that the term must be in the lease document to transmit, for an implied term is part of the contract, even although it is not expressed therein. The real concern is with terms which are recorded in separate documents.[4] A rule that such terms do not transmit is different to one that certain terms do not transmit because of their content. Scots law certainly has a rule of the latter type: it is the focus of Chapters Three to Seven. The subject of this chapter is the potential existence of the former type of rule. It concentrates on variations to leases, but also considers back-letters and the fate of terms of missives of let which are not repeated in the lease which is subsequently executed.

---

1 Gloag *Contract* 233. There are similar passages in Rankine 267 (cf 478) and Paton & Cameron 94.

2 Whether from necessity or custom. *Bell v Lamont* (14 June 1814 FC 645 (IH)) is a well-known example of the latter. A purchaser was held bound by an obligation to reimburse the tenant the value of the houses built on the property because this was customary in the locality.

3 The default rules of the nominate contract of lease.

4 The vast majority of leases will be in writing. See Requirements of Writing (Scotland) Act 1995 s1 for the exact rules. There is some discussion of this section at n62 below.

A. UNREGISTERED LEASES

1. Variations

(a) Scottish authorities

Here the Scottish authorities are analysed in order to assess whether the general rule is as Gloag *et al* formulate it. An important early case is *Thomson v Terney*.[5] Burns let to Terney for 19 years with entry at Michaelmas.[6] As Terney did not receive entry until closer to Martinmas, Burns granted a signed and tested missive to Terney stating that 'he cannot be obliged to remove before the said term [Martinmas], notwithstanding the tenor of his tack'.[7] This was held by the Inner House to have become an article of the tack and to be effectual against Thomson, the purchaser of the lands, whose attempt to remove Terney at Michaelmas therefore failed. Hume's report contains a detailed commentary. He notes that tacks are unlike feudal rights, in that they may be qualified by separate and latent writings. This is true both in questions with assignees of the tack and with singular successors of the landlord. The passage is sufficiently important to be quoted at length.[8]

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

---

5 (1791) Hume 780 (IH).

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

7 The native Scots term for 'lease'.

8 (1791) Hume 780 (IH) 780.

such a writing becomes consolidated with the original tack, and is effectual in a question with a purchaser of the lands.

Two other decisions reported by Hume[9] considered whether rent abatements granted by a previous landlord could be enforced against his singular successor. The answer in both cases was in the negative. This was due to the nature of the abatements involved, which were viewed as *ad hoc* arrangements, and not because of some general principle that variations of a lease do not transmit against a successor.[10] At first instance in *M'Neil v Sinclair*,[11] however, just such a principle was expounded. The tenant sought to have a successor landlord held bound by a separate missive granted by the original landlord, whereby he gave the tenant permission to erect various buildings and undertook to pay for them upon his removing. The Lord Ordinary held that the obligations did not bind the successor as they did not appear *ex facie* of any lease and 'a purchaser or singular successor cannot be bound by any latent agreement between the tenant and the former proprietor'.[12] The Lord Ordinary's decision was reversed by the Inner House, which accepted the tenant's argument that the two missives 'effectually qualified and became parts of the tack' and so held the successor bound.[13]

Despite the Inner House's rejection of the Lord Ordinary's position, it is echoed in at least two other decisions: *Bruce v McLeod*[14] and *Turner v Nicolson.*[15] These are the cases which are typically cited in support of a general prohibition against the transmission of latent agreements and so they must be considered in detail.

Bruce concerned the transmissibility of an obligation upon the landlord to reimburse one particular tenant of an estate for improvements made to the leased property. The lease provided that the tenant was to be paid the value of the meliorations up to a cap of £200. In a subsequent letter the landlord agreed to increase that amount. When it emerged that the tenant's claim would exceed £1600

---

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

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

11 (1807) Hume 834 (IH).

12 ibid.

13 ibid.

14 (1822) 1 Sh App 213.

15 (1835) 13 S 633 (IH).

the purchaser disputed his liability for this sum. The House of Lords, restoring on this point the decision of the Sheriff Depute and reversing that of the Inner House, held that the purchaser was liable to the tenant only to the extent of the £200 mentioned in the tack. The seller remained personally liable to the tenant for the remaining sum.[16] Unfortunately, the reports do not contain the judgments or speeches and so one has to rely solely on the interlocutor and the head-note to determine the case's *ratio*. The head-note states that 'a singular successor or purchaser is not liable to implement in favour of a tenant an obligation for payment of meliorations granted by the former proprietor, *not contained in his tack or title of possession*, but that the obligation is effectual only against the former proprietor'.[17] A head-note, however, is a slender foundation for what would, at the time, have amounted to a considerable change in the law. The interlocutor simply states that the obligation in the letter was 'not obligatory' on the purchaser.[18] This was also the phrasing of the Sheriff Depute[19] and it is broad enough to sustain an alternative explanation, namely that the successor was not bound because the terms of the letter were such that only the granter was to be bound. Written in the first person, it stated:[20]

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

Turner v Nicolson[21] is susceptible to an identical alternative explanation. In that case, the original landlord's heir wrote to the tenant permitting him to make further improvements and promising to pay more than the £45 which the lease originally provided. He did so in these terms:

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

A trustee for creditors appointed on the landlord's estate refused to permit any deduction over and above that mentioned in the lease. He argued that he was not bound as the obligation did not form part of the tenant's 'title of possession'.[22] This argument seems clearly to have been influenced by *Bruce v McLeod*, and the Second

---

16 As it happened the contract of sale gave the seller a right of relief against the buyer, so the liability was transferred to the buyer by this means.

17 (emphasis added). This is the proposition for which Hunter cites the case: Hunter vol II 238.

18 *Bruce v McLeod*(1822) 1 Sh App 213, 219.

19 ibid 216.

20 ibid 215.

21 (1835) 13 S 633 (IH).

22 ibid 634.

Division upheld his stance. However, the case is not the authority which one might imagine for the proposition that agreements not in the document of lease do not transmit. The report of the judges' opinions is brief. Both LJC Boyle and Lord Glenlee stated that the letter did not bind the trustee because it was extrinsic to the lease.[23] The Lord Justice Clerk added that the letter was no part of the tack under which the tenant was in possession, Lord Glenlee that the letter was not by the grantor of the tack. But Lord Medwyn, with whom Lord Meadowbank concurred, confessed to doubts: 'if there had been added to it [the letter] the words, "and on the same conditions therein contained"', he would have had great difficulty not holding the trustee to be bound.[24] *Turner* is best viewed as a decision reached due to the particular terms of the letter in question, and not due to a general rule that only terms in the document of lease transfer.

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

- terms expressed in a document separate from the written contract of lease may transmit;[25]
- terms expressed in a document separate from the written contract of lease may transmit only if the successor is aware of them (they are not 'latent');[26]
- terms expressed in a document separate from the written contract of lease cannot transmit.[27]

---

23 ibid 635.

24 ibid 635. I have assumed that 'extrinsic' was being used in the sense of physically extrinsic, but another meaning is possible. It might denote a type of term which for *substantive* reasons was viewed as 'personal' and so 'extrinsic' to the contract of lease. If 'extrinsic' was being used in this second sense then *Turner* is not authority for a rule that variations do not transmit. 'Extrinsic' was used in that second sense in eg *Montgomerie v Carrick* ((1848) 10 D 1387 (IH) 1395); see Chp 3 Pt C.1. This is unlikely to have been the objection to the term in *Turner*: there was, at that time, no *substantive* objection to the transmission of terms binding the landlord to pay for meliorations. *Arbuthnot v Colquhoun* ((1772) Mor 10 424) established that such liability could transmit and has been followed ever since. See Chp 6 Pt D.

25 Rankine 478.

26 Rankine 267. See also the concession to this effect by the respondent in *Fraser v Maitland* (1824) 2 Sh App 37, 42 and Lord Curriehill's discussion in *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH) 1105. His reasoning in that decision is criticised below: Chp 3 text to n104. Lord Deas also mentioned *Bruce* in *M'Gillivray's Exrs*, but he viewed it as an example of a purchaser not being bound by an extrinsic agreement even although he knew of it: 1107.

27 Gloag *Contract* 233; Paton & Cameron 94. Paton & Cameron cite *Turner* as authority for the proposition that 'singular successors are not generally bound by private agreements between the original landlord and tenant not appearing in the lease itself'. They cite only one decision (*Page v Strains* (1892) 30 SLR 69 (IH)) going in the opposite direction, ignoring the many others and the

All three cannot be the law.

The case law since *Bruce* and *Turner* is now considered. It reveals that variations to written leases have been held to bind singular successors and that transmission is not dependent upon the successor's knowledge. This suggests that the first formulation is correct. When Gloag states that 'singular successors are not bound by private agreements between landlord and tenant which do not appear in the lease',[28] the emphasis should be on the word 'private' and not on the fact that the agreement is not in the lease. Or, in other words, *Bruce* and *Turner* are decisions reached due to the terms of the letters in question, which were intended only to bind the grantors. A difficulty with this view is that generally a lenient approach to interpretation is adopted when determining whether parties intend a term to bind successors: in order for a term to be held to be personal to the original parties because they intended it to be such, their intention must be very clear.[29] If the approach to these cases proposed here is not accepted, then it is submitted that they must simply be rejected as inconsistent with the vast majority of case law.

Even in the interlude between *Bruce* and *Turner* variations to leases were held to bind the landlord's singular successors.[30] This trend continued after *Turner*. In *Lindsay v Webster*[31] the landlord instructed his factor to give the tenants a 20% deduction of rent, which was to continue during the currency of their leases. His trustee in sequestration sued for the full rent, citing *Bruce* in support of his position. He was unsuccessful before the Second Division and was held bound by the reduction granted by the landlord. The reasoning is brief, but Lord Moncreiff does indicate that the decision did not depend upon some speciality relating to trustees in sequestration, who take property *tantum et tale*.[32]

One of the issues facing the Second Division in *Hall v McGill*[33] was whether a successor landlord was prevented from suing the tenant for damage resulting from

---

text contains no real attempt to reconcile the conflicting authorities or to indicate which should be followed.

28 Gloag *Contract* 233.

29 Chp 3 Pt E.

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

31 (1841) 4 D 231 (IH).

32 ibid 234. The letter was written in the first person. If *Bruce* and *Turner* are rightly analysed as cases where the successor was not bound because of the personal phrasing of the variation, the same result should also have been reached in *Lindsay*.

33 (1847) 9 D 1557 (IH).

miscropping because of the predecessor landlord's acquiescence.[34] Lord Cockburn said:[35]

> The singular successor is entitled, without any special assignation, to enforce the contract. Not absolutely to enforce the original lease; because undoubtedly an original lease may be changed during its currency by the parties; and if it be, this altered lease becomes the contract between them, and is the one that the singular successor acquires. If anything, therefore, had occurred which bound the seller to submit to the infringement of the tack, the acquirer of his right might be bound also. But no such permanent obligation is implied in the original landlord's merely acquiescing ...

In *Baillie v Fraser*[36] a purchaser was entitled to claim the rent as varied from the tenant. The variation operated in the landlord's favour. The focus was upon whether there had been variation of the contract. Allowing a deviation from a written contract, it was remarked, is always a hazardous proceeding, but here there was sufficient proof to do so.

The case which definitively put paid to suggestions that extrinsic variations of leases may not bind successors, or that they are not binding without knowledge, is *Page v Strains*.[37] Here, a document granting a reduction of rent was not shown to the purchaser, who pursued the tenant for the full rent stipulated in the lease, citing *Bruce*[38] and *Turner*.[39] The Second Division distinguished those cases and held the successor entitled only to the rent as varied. The only issue was seen as being whether the document was part of the contract of lease at the time of sale.[40] There was no dispute that, if the lease had been varied, the successor was bound.[41] The court held that it had been varied. This is an important decision. It clearly holds that a successor could be bound by a latent variation. That the purchaser was not aware of

---

34 See Pt A.1(c) on the distinction between variation and acquiescence.

35 (1847) 9 D 1557 (IH) 1566. Lord Moncreiff offered no opinion on the effect of a written discharge of one of the conditions of the lease: 1568. The Lord Ordinary (Cunninghame) thought that such a discharge would affect a successor: 1563.

36 (1853) 15 D 747 (IH).

37 (1892) 30 SLR 69 (IH).

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

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

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

41 Lord Rutherfurd Clark states that if the lease was varied there could be no claim for the higher rent on the simple ground that 'the contract upon which the pursuer is basing his claim had ceased to exist': (1892) 30 SLR 69 (IH) 70. This is consistent with variation effecting a contractual novation. If the previous contract does cease to exist, what are the consequences for registered leases?

the variation was 'a matter entirely between him and the seller'.[42] The determining factor is whether there has, in fact, been a variation of the contract.

Finally, in *Mackenzie v Imlay's Trs*[43] bondholders who entered into possession were held not to be bound by an exclusivity clause in letters granted by the landlord after the constitution of the security. The Sheriff Substitute opined, *obiter*, that had the conveyance to the bank been after the letters, they would have been enforceable against the bondholders.[44] Two modern cases, *BP Oil Ltd v Caledonian Heritable Estates Ltd*[45] and *Optical Express (Gyle) Ltd v Marks and Spencer plc*,[46] are underlain by the assumption that a singular successor becomes party to the lease as varied by his predecessor.[47]

Some terms may be subject to special rules. Chapter Five discusses whether the ish can be varied or whether the lease must be renounced and a new one granted.[48] Similarly, there is doubt about whether the subjects can be varied or whether a renunciation and re-grant, or simply an extra lease, is required.[49]

(b) Publicity

One point which has not been an issue in any of the cases, but which requires consideration, is what the publicity principle requires in respect of variations. In Professor Gretton's formulation, '[w]hat is sometimes called the "publicity principle" lays down that where a private law right is to have third-party effect it should be accorded some degree of publicity'.[50] The public act which the law requires in respect of short leases is that the tenant be in possession. This alerts

---

42 *Page v Strains* (1892) 30 SLR 69 (IH) 70. 'If there be no special warrandice, such of them [ie the real conditions of the lease] transmit against [the landlord's] singular successors without involving a claim of relief against him': Rankine 478, citing *Murray v Selkrig* 26 Jan 1815 FC 176.

43 1912 SC 685 (IH).

44 ibid 689.

45 1990 SLT 114 (OH).

46 2000 SLT 644 (OH) 650F.

47 In *BP Oil Ltd* the successor landlord conceded as much: 1990 SLT 114 (OH) 116A

48 Chp 5 Pt A.1(d).

49 RoS Legal Manual [19.12].

50 GL Gretton 'Registration of Company Charges' (2002) 6 Edin LR 146, 146. Gretton accepts that the principle's demands are rather vague. This is the *Publizitätsprinzip* in German law, on which see, eg, KH Gursky *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Drittes Buch Einleitung zum Sachenrecht §§ 854 – 882* (2000) Rn [56] – [59] and JT Füller *Eigenständiges Sachenrecht?* (2006) Chp 4. The principle is also recognised in South Africa: CG van der Merwe 'Things' in *The Law of South Africa: First Reissue* vol XXVII (2002) [200]. For (partial) Scottish judicial expression of the principle, see *Kemp v Magistrates of Largs* 1939 SC (HL) 6, 13.

potential acquirers to the existence of a lease; the prudent purchaser will then enquire of its terms.[51] It is not, however, sufficient that the tenant be in possession. Rather the rule is that 'the possession which shall serve to validate a tack must be possession upon the particular title or very tack which is in question between the parties'.[52] The details of the rule have been worked out in cases concerning agreements to extend leases (discussed in detail in Chapter Five[53]). A lease can be extended in various ways. The key distinction is between a contract which is to take effect in the future (a new lease to commence at the ish of the current one) and a contract which is to take effect immediately (a new lease to commence immediately). If the subjects of the lease are transferred before the existing lease expires, the question arises whether the landlord's singular successor is bound by the new lease. The rule is that he is not bound by a lease to commence at some point after he becomes owner, for the tenant is not in possession by virtue of that lease at the time of transfer. If, however, there is a new lease to commence immediately, the successor will be bound if the tenant possessed the subjects at the time of transfer by virtue of that new lease. The issue is: how may the tenant make clear that his possession is by virtue of the new lease and not the original one? Express renunciation is obviously the clearest way. Failing that, it is commonly said that there must be a change in rent paid in order to make it clear that the tenant is in possession by virtue of the new lease.[54] It is argued in Chapter Five that in fact no such rule exists and that, because the conclusion of a new lease to commence immediately amounts to the implied renunciation of the existing lease, only the new lease provides a basis for possession from its date of entry.

How does the rule that a successor is bound only by the very lease by virtue of which a tenant possesses apply to variations? Obviously, in order for the contract as varied to bind a successor, the tenant must possess by virtue of the contract as varied. The question is whether in order to bind a successor the variation must result in some change in the tenant's behaviour which makes it clear that his possession is attributable to the varied lease and not to the original one. In some cases, such as a variation of rent, or perhaps to a use clause, the variation results in an immediate

---

51 Hume *Lectures IV* 79.

52 Hume *Lectures IV* 81.

53 Chp 5 Pt A.1(b) & (c).

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

change in the manner of performance and so any such rule would be satisfied. It is not difficult, however, to conceive of circumstances in which this will not be the case. Consider this variant to the facts of *BP Oil Ltd v Caledonian Heritable Estates Ltd.*[55] A lease provides that the tenant may use the subjects for the sole purpose of erecting a petrol filling station. Some years into the lease the tenant wishes to use part of the premises as a sales forecourt, and so the parties vary the user clause. Before the tenant begins to use the premises in a different way, the landlord goes into liquidation and the property is transferred. Is the purchaser bound by the varied user clause or the original one? There has been nothing to demonstrate that the possession was attributable to the lease as varied.

It is thought that there is no requirement that a variation must result in some observable change in the nature of the tenant's possession in order to affect a singular successor. From the date on which the variation becomes contractually effective, it is the lease as varied which is the basis for the tenant's possession, for the original lease has ceased to exist. That may explain why the point is not made in variations cases.[56] The rule that only the contract by which the tenant is in possession binds a successor may, however, be of more importance in respect of other terms which are not recorded in the lease document, such as unimplemented terms of missives.

(c) Constituting a variation

The position, then, is that subject to the substantive controls discussed in the second part of this thesis, terms which do not appear in the lease document may transmit, regardless of whether they are 'latent', provided that they amount to variations of the contract of lease: the successor becomes party to the whole contract of lease and not only to the legal relationship recorded in one particular document. This means that it is important to identify what amounts to a variation. That is not an issue specific to

---

55 1990 SLT 114 (OH).

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

singular successors, and so it is not it discussed in detail here.[57] The main question is whether the agreement is intended as a variation or simply as permission for a temporary departure from the terms of the lease, which would not even bind the parties to it for the future.[58] In particular, variation is to be distinguished from acquiescence in past breaches, which does not imply that future breaches will also be tolerated. There is recent authority to the effect that where one party has acquiesced in conduct which is not in compliance with the terms of the contract, he cannot insist on strict compliance without giving the other party a reasonable opportunity to bring his behaviour back into compliance with the contract.[59] As the authorities stand, when ownership of leased subjects is transferred, the rights of the tenant and successor landlord are governed by the terms of the lease and any acquiescence by the previous landlord is irrelevant.[60] Adopting the approach of that recent case, one may say that the transfer is notice to the tenant that the new landlord may insist on strict compliance with the terms of the lease.[61]

It is possible, indeed probable, that the Requirements of Writing (Scotland) Act 1995 has tightened the way in which a variation can be constituted. Previously, just as a lease could be constituted by informal writing followed by acts amounting to *rei interventus*, and this lease would bind a successor,[62] so could a variation.[63] Rankine went as far as to say that proof of a verbal innovation on the lease followed by *rei*

---

57 See McBryde *Contract* Chp 25. The main cases concerning leases are summarised in J Rankine *A Treatise on the Law of Personal Bar in Scotland* (1921) 78 – 81.

58 Rankine 336, discussing rent abatement. Most of the discussion distinguishes between 'temporary eases', which do not bind even the parties to the agreement for the future, and 'permanent' amendments, which are to apply to the whole future of the lease. It is unclear whether there may be a binding amendment which is to endure for, say, ten years of a twenty year lease. There seems no logical reason why not.

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

60 *What Every Woman Wants (1971) Ltd v Wholesale Paint and Wallpaper Co. Ltd* 1983 SLT 133 (OH) 134. JM Halliday 'Acquiescence, Singular Successors and the Baby Linnet' 1977 JR 89, 93. It is not clear why the analogy has not been drawn with real burdens in feus, where acquiescence did affect successors. That is also discussed in Halliday's article and, more recently, in S Wortley 'Real Burdens and Personal Bar' in R Rennie (ed) *The Promised Land: Property Law Reform* (2008) 25, 52 – 56. In English law, doctrines similar to personal bar do affect acquirers of the landlord's or tenant's interest in a lease: *Brikom Investments Ltd v Carr* [1979] 1 QB 467 (CA).

61 Except insofar as breach of them is necessitated by something to which the previous landlord consented: *Hall v McGill* (1847) 9 D 1557 (IH) 1567 & 1570.

62 Rankine 134, referring to 116 – 131; Paton & Cameron 107; *Wilson v Mann* (1876) 3 R 527; *Buchanan v Harris & Sheldon* (1900) 2 F 935. See also A Macallan (ed) J Erskine *Institute* (7th edn) II vi 24, n1.

63 *Lindsay v Webster* (1841) 4 D 231 (IH) is an example.

interventus would vary the contract and bind a successor,[64] but Hume,[65] Gloag[66] and Paton and Cameron[67] took the opposite position. Under the new rules for the constitution of rights and obligations, it is less certain that an improperly constituted variation may be 'cured'. The difficulty arises because insufficient thought was given to leases when section 1 of the Requirements of Writing (Scotland) Act 1995 was drafted.[68] Section 1(2) lists the circumstances in which writing complying with the Act is required. A variation of a lease clearly does require to be in writing, but it is unclear under which limb of section 1(2) it falls. It is more naturally covered by section 1(2)(b) (a variation of a real right in land) than by section 1(2)(a)(i) (a contract ... for the variation of a real right in land). That is especially so when one bears in mind that 'real right in land' does not mean what it says: a contract to occupy land (such a licence or a lease which has not been made real) is a 'real right in land' as that term is defined by the statute.[69] So even the variation of a pure contract of lease is covered by section 1(2)(b). The point is of significance because the statutory personal bar provisions of sections 1(3) and 1(4) apply only to section 1(2)(a) and do not cure deficiencies in the execution of deeds which require to be in writing because of section 1(2)(b). The prevailing view,[70] which is in line with what seems to have been the Commission's intention,[71] is that sections 1(3) and 1(4) completely replace the common law of *rei interventus*. This is despite the terms of section 1(5), which states that the rules of *rei interventus* and homologation are replaced by sections 1(3) and 1(4) only in relation to the constitution of any contract,

---

64 Rankine 478 citing *Baillie v Fraser* (1853) 15 D 747 (IH).

65 *Lectures IV* 77.

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

67 Paton & Cameron 107, citing Hume *Lectures IV* 77.

68 The Act was the fruit of Scottish Law Commission proposals: *Report on Requirements of Writing* (SLC Rpt 112, 1988). See KGC Reid Annotations to the Requirements of Writing (Scotland) Act 1995 in *Current Law Statutes*; R Rennie 'Requirements of Writing: Problems in Practice' (1996) 1 SLPQ 187, 191 – 2; McAllister *Leases* [2.3] – [2.12]; *The Advice Centre for Mortgages Ltd v McNicoll* [2006] CSOH 58, 2006 SLT 591. This aspect of the *Advice Centre* decision is discussed in: A McAllister 'Leases and the requirements of writing' 2006 SLT (News) 254; EC Reid 'Personal Bar: Three Cases' (2006) 10 Edin LR 437; KGC Reid & GL Gretton *Conveyancing 2006* (2007) 106 – 109.

69 This could be seen more clearly in the Act's initial form, which referred to 'interests in land'. The term 'real rights in land' was substituted during the process of feudal abolition as a 'minor and consequential amendment': Abolition of Feudal Tenure etc (Scotland) Act 2000 Sch 12.

70 KGC Reid (n68) 7-7; R Black (ed) 'Obligations' in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XV (1996) [669]; *The Advice Centre for Mortgages Ltd v McNicoll* [2006] CSOH 58, 2006 SLT 591 [22]. cf Rennie (n68) 192.

71 *Report on Requirements of Writing* (n68) [2.40].

obligation or trust mentioned in section 1(2)(a). The consequence of this view is that if a variation of a lease falls under section 1(2)(b) and not section 1(2)(a), then defects in its constitution cannot be cured by personal bar. There is no trace in the materials preceding the 1995 Act of an intention to make such a radical change from the previous common law. There are many cases in which a lease perfected by *rei interventus* was held binding upon a successor.[72] The intention of the Scottish Law Commission was that the rules of *rei interventus* were to be broadly preserved, and in some respects loosened.[73]

Failing legislative amendment, which is presumably unlikely, this writer's view is that leases and variations should be held to require writing because of section 1(2)(a)(i). That is a possible reading of the statute. It is the most consistent with the previous common law rules of *rei interventus* which there was apparently no intention to alter in a fundamental manner.[74] It would mean that variations benefit from the statutory personal bar provisions of sections 1(3) and 1(4). This was the approach adopted at first instance in *Ashford & Thistle Securities LLP v Kerr*,[75] but in *Advice Centre for Mortgages* Lord Drummond Young's instinct was exactly the opposite: given the simple requirements of the 1995 Act, he held that there is no need to strive to give the statutory personal bar provisions a wide application.[76] A separate question is whether a variation (or, indeed, a lease) constituted in this way affects a successor. In *Advice Centre for Mortgages* it was said that rights and obligations set up by personal bar were personal only and could not affect a successor.[77] In McAllister's words, 'it is submitted that, in any future cases, his [Lord Drummond Young's] approach should not be followed without a more extensive examination of authority'.[78]

---

72 McAllister (n68) 260; EC Reid (n68) 439.

73 *Report on Requirements of Writing* (n68) [2.42].

74 It is a general principle of statutory interpretation that the law should not be subject to casual change: FAR Bennion with K Goodall & G Morris (eds) *Statutory Interpretation: A Code* (5th edn 2007) §269.

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

76 *The Advice Centre for Mortgages Ltd v McNicoll* [2006] CSOH 58, 2006 SLT 591 [21].

77 ibid [23]. In *Ashford & Thistle Securities LLP v Kerr* (Edinburgh Sheriff Court, 19 December 2005) it was held that, even if an oral variation did benefit from the statutory personal bar provisions, it did not bind a successor landlord.

78 McAllister (n68) 260.

Although a variation is subject to the rules just described, if the lease provides for something to be permissible so long as the landlord gives consent, the successor landlord is bound by his predecessor's consent,[79] even if that has been given orally (although good practice dictates that it will be recorded in writing).

(d) Comparative law

Other legal systems also recognise that the transferee of the subjects of the lease becomes party to the agreement as constituted at the moment of transfer. That is the rule, for example, in South African law.[80] Specifically, there is there no requirement that the transferee have knowledge of the variation. In *Essop Ebrahim & Sons v Hoosen Cassim*[81] a purchaser argued that he was not bound by an oral variation of a lease because he had no knowledge of it. This was Dove-Wilson JP's response:[82]

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

Although, as has just been discussed, Scots law adopts a different approach to South African in respect of oral variations, the general force of Dove Wilson JP's argument applies equally to Scots law: there is no requirement that a purchaser have

---

79 *Carnegie v Guthrie* (1866) 5 M 253 (IH).

80 Cooper *Landlord & Tenant* 298; Kerr *Sale & Lease* 278 – 279.

81 1920 NPD 73.

82 ibid 78 – 79. On Dove Wilson, see SD Girvin 'An evaluation of the career of a Scots colonial judge: John Dove Wilson of Natal' 1990 JR 35.

knowledge of the terms of the lease in order to be bound by them,[83] although the law does take certain steps to alert the purchaser to the existence of a lease.[84] The South African view is that the purchaser should:[85]

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

German law similarly holds the successor landlord affected by alterations and amendments: 'der Erweber muß den Mietvertrag in dem Zustand hinnehmen, in dem er sich im Augenblick des Eigentumswechsels befindet'.[86] The approach of English law is similar. In *System Floors Ltd v Ruralpride Ltd*[87] a purchaser was held bound by the terms of a side-letter, which differed from those of the lease, but of which the purchaser was unaware. The letter had been executed on the same day as the lease. In respect of leases granted on or after 1st January 1996 ('new tenancies' in terms of the Landlord and Tenant (Covenants) Act 1995), landlord or tenant covenants in a 'collateral agreement' will transmit to successors.[88] As Fancourt puts it: 'terms, conditions and obligations contained in any agreement supplemental to or qualifying the terms of the tenancy agreement, and whether made before or after the tenancy was created, may be "covenants" within the meaning of the Act'.[89]

The Law Reform Commission of Ireland has expressed its dissatisfaction with the English rule.[90] It suggests that agreements entered into 'outside' of the lease should only bind successors who have notice of them. To the present writer, the reasoning in the South African case of *Essop*[91] is more persuasive.

---

83 *Bell v Lamont* 14 June 1814 FC 645 (IH) is but one example of a successor being bound by a term of which he had no knowledge. See Chp 4 text at n8 and Chp 9.

84 Pt A.1(b) & Pt B.

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

86 *Staudingers Kommentar* §566 Rn [38]. [The acquirer must accept the contract of lease in the condition in which is exists at the moment of the transfer of ownership.]

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

88 Landlord and Tenant (Covenants) Act s28(1).

89 TM Fancourt *Enforceability of Landlord and Tenant Covenants* (2006) [11.02].

90 Law Reform Commission of Ireland *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28, 2003) [3.05] and *Report on the Law of Landlord and Tenant* (LRC 85, 2007), Appendix B, Draft Bill, s 16(2)(b).

91 Discussed at n81.

2. Back-letters

Until now, the focus of discussion has been variations made to a contract of lease after it has been concluded. Sometimes, however, terms are recorded in separate documents from the outset of the lease. Such back-letters are common.[92] Situations in which they might be used are to grant a concession such as a rent-free period, a relaxation of a use restriction or an exclusivity clause to a particular tenant. There may be many reasons for their use. One is that 'landlords prefer that concessions extracted for individual tenants in specific market conditions should remain out of the public gaze, in respect of negotiations for either future lettings or on rent reviews'.[93] Typically they are granted at the start of the lease. Often the landlord will undertake in a back-letter to secure that his successor will grant a letter in identical terms to the tenant. Such a 'chain clause' is, however, only as strong as its weakest link and exposes the tenant to the risk of breach by the landlord or the landlord's insolvency. A standard security would protect against that risk, but is cumbersome. Are the terms of such a letter real conditions, so that they bind a successor of the landlord automatically? That question arose in *Optical Express (Gyle) Ltd v Marks and Spencer plc*,[94] where a tenant of a unit in a shopping centre sought to enforce an exclusivity clause contained in a back letter against a successor landlord. Lord Macfadyen approached the issue in two stages. He asked first whether the letter amounted to a variation of the lease and secondly whether the nature of the obligation was such that it could transmit against a singular successor. The second point is considered later.[95]

It might be thought that there is something odd in asking whether a document executed virtually contemporaneously with the main lease document amounts to a variation of the contract of lease. Part of the confusion is the use of the word 'contract' in two senses, to mean both a legal agreement and the document in which such an agreement is recorded. The terms of a contract will typically all be recorded in one document. They may, though, equally be recorded in two (or more)

---

92 Side-letter is the equivalent English term.

93 Cockburn *Commercial Leases* [2.11.3].

94 2000 SLT 644 (OH). Rather oddly it does not appear that *Bruce* was cited. *Turner* was cited, but was not relied upon to make the simple point for which it seems to be taken as authority, namely that any term not contained in the document of lease could not bind a successor.

95 Chp 3 (generally) & Chp 7 B.2.(a) (specifically).

documents. In that event, it is not so much that one document varies the other, as that all of the documents – taken together – detail the terms of the contract. Because of the rule that a contract of lease requires to be in writing, however, use of the terminology of 'variation' can be supported. Where the contract concerned is a lease, no contract comes into existence until the document of lease is executed, and that contract does not contain the term which will feature in the back-letter. The contract is then varied by the subsequent back-letter.

Whatever terminology is used must not obscure the fact that the real issue in *Optical Express* was not whether the terms of both documents regulated the relationship of the original landlord and tenant for the future, which, as was seen in part A.1, is the issue in typical variation cases. The original landlord was clearly bound by the terms of both documents. Rather, the issue was whether the exclusivity clause should be held not to transmit[96] because the parties chose to detail it in a back-letter separate from the lease document. There is discussion in the next chapter of how parties can, within limits, make personal a term which would otherwise transmit.[97] It is submitted that what Lord Macfadyen in fact considered, under the guise of asking whether the contract of lease was varied, was whether the parties intended the exclusivity clause to be personal to the original landlord. That can be seen by considering some of the factors which led him to the conclusion that the tenant had an 'arguable but not strong case' that the back-letter amounted to a variation of the lease.[98] The use of a back-letter was said to 'point fairly strongly to a desire to maintain a distinction between the terms of the lease and the obligation constituted in the back letter, and to present that back letter as separate from and collateral to the lease rather than as an integral part of the same contract'. The lease was registered in the Books of Council and Session whereas the back-letter was not. It was common for the transmissibility of the burden of such exclusivity clauses to be addressed expressly, by providing for the landlord to take successors bound by the obligation. That had not been done. All of these factors point not to a conclusion about whether the agreement between the original landlord and tenant contained this

---

96 Lord Macfadyen held that such a term could not be a real condition. Chp 7 Pt B.2(a) argues that such a clause is a real condition.

97 Chp 3 Pt E.

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

term, for it undoubtedly did, but rather to whether the term was intended to be 'personal' to the original landlord.

Although use of a back-letter will usually indicate that the parties intend the benefit of its term to be personal to the original tenant (or perhaps to a group of permitted assignees, such as companies in a group), it is not thought that it necessarily indicates an intention that the burden be personal to the original landlord. There are a variety of reasons for using a back-letter and so one cannot say that use of a back-letter always reveals one intention. Often, such a letter is used precisely because the parties wish to ensure that a particularly important term binds a successor landlord, but, because of the uncertain state of the law, they cannot be sure that it will count as a real condition of the lease. The tenant therefore seeks additional protection in the form of a back-letter containing the core obligation on the landlord and also obligation to ensure that, if the landlord's interest is transferred, the successor will abide by the terms of the letter or, better, grant the tenant a further letter in identical terms. If that is the reason for using a back-letter, and in fact the term used would otherwise bind a successor as a real condition, then it should not cease to do so simply because it is constituted in a back-letter.

It is also possible for a back-letter to be executed before the lease. In that case, it is more difficult to view it as varying the contract of lease (although English law recognises the concept of pre-contractual variation[99]). In this case, it is appropriate to view the back-letter and main lease document together as constituting the contract of lease. The statutory presumption that a written document which appears to comprise all the express terms of a contract does in fact do so[100] will require to be overcome, but that will not be difficult. The approach of the English Court of Appeal in *Weg Motors Ltd v Hales*[101] commends itself. It viewed a lease and an option to take a further lease (executed shortly before the lease) as aspects of a single agreement which the parties merely chose to record in two documents. The burden of the option could, therefore, run with the reversion. If that view is accepted, it should satisfy the

---

99 *Brikom Investments Ltd v Carr* [1979] 1 QB 467 (CA). E Peel *Treitel: The Law of Contract* (12th edn 2007) [3-065]; HG Beale (ed) *Chitty on Contracts* (29th edn 2004) [3-080] and S Wilken *Wilken & Villiers The Law of Waiver, Variation and Estoppel* (2nd edn 2002) [2.10] – [2.13] all take the view that this creates a 'collateral contract'.

100 Contract (Scotland) Act 1997 s1.

101 [1962] Ch 49 (CA) 71.

requirement that possession has to be by virtue of the contract of lease which is said to bind a successor.[102]

So *Optical Express* adds a new dimension to the analysis. Although a term being in a collateral document is not an absolute bar to its transmission, the fact that the parties have chosen to record a term in a back-letter instead of in the lease itself should be taken into account when considering whether they intended the benefit and burden of it to be personal. By contrast, in the cases considered in part 1, the parties' decision to vary the lease by means of a separate agreement does not typically indicate a desire that the term inserted be personal, for this is the only practical means available for achieving the desired end, other than executing an entirely new lease.

3. Terms in missives

The final variant to be considered is terms which were present in original missives of let but which are not repeated in the lease executed in terms of these missives. Such facts gave rise to litigation in *Davidson v Zani*[103] and *Allan v Armstrong*,[104] but in neither did the issue of whether unimplemented terms of missives of let transfer as part of the lease receive attention. It is submitted that they may do:[105] as was discussed above, what transmits is the contract of lease in the sense of the agreement, and not of the agreement as expressed in one particular document. Providing that the missives of let contain the essentials of a lease, and are properly executed, they create a binding contract of lease.[106] The effect of section 2(1) of the Contract (Scotland) Act 1997 is that unimplemented terms of missives remain contractually binding despite their omission from a deed executed in implement of the contract, unless the parties have derogated from this rule. That they might do by using an 'entire agreement' clause in the subsequently executed lease.[107] Professor MacQueen views this section merely implementing the usual rule that obligations are discharged

---

102 See Pt A.1(b).

103 1992 SCLR 1001 (Sh Pr).

104 2004 GWD 37-768 (OH).

105 cf KGC Reid & GL Gretton *Conveyancing 2004* (2005) 106.

106 Stair *Institutions* II ix 6; Rankine 100 – 102.

107 This type of clause is discussed in *Macdonald Estates plc v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123, 2007 SLT 791 [126] – [131]. As well as expressly derogating from s2(1), it might be argued that the formal lease amounts to a novation of the original contract, extinguishing unimplemented terms of the missives. But that would reintroduce the old supersession rule which s2(1) was meant to replace, so this is surely not the law.

only by performance.[108] And if unimplemented terms of missives subsist, of what contract do they form part but the lease? Unless, therefore, the document of lease states that it contains all of the terms of the parties' agreement, it is suggested that it is wrong to view terms agreed in previous missives as intransmissible for the sole reason that they feature only in the missives and not in the formal lease. The rule that the tenant must possess by virtue of the lease which he alleges binds a successor is satisfied, for the term in the missives is part of the contract of lease, even if it is not repeated in the formal lease document. The fact that the parties omit the term from the formal lease is, however, of relevance when assessing whether they intended it to be personal to the original parties. A positive choice to omit such a term surely does indicate an intention that the term be personal. Accidental omission, though, reveals no intention that the term should not be real. *Allan v Armstrong*[109] is a recent case along these lines. Missives of let contained a break option, but this was omitted from the lease which was executed in implement of the missives. When the omission was spotted, the landlord acknowledged the continued existence of the option. It is submitted that, in those circumstances, the term in the missives should transmit as a real condition of the lease.

B. REGISTERED LEASES

A requirement of registration is the paradigm example of a rule supported by the publicity principle. A system of registration might choose simply to record the fact that a lease has been granted, echoing the publicity function performed by possession at common law and leaving it to the prospective purchaser to enquire as to the terms of the lease. Alternatively, the register could provide details of terms of the lease. That is the approach adopted both by the Registration of Leases (Scotland) Act 1857 and the Land Registration (Scotland) Act 1979. This section deals with the 'publicity' aspects of the rules. The discussion above of what amounts to a variation, and whether the use of a particular type of deed reveals an intention that a term be personal, remains relevant but it is not considered afresh. The focus here is solely on whether a term requires to be registered in order to bind a singular successor. In other

---

[108] HL MacQueen *Annotations to The Contract (Scotland) Act 1997* in *Current Law Statutes* 34-4. The Act gave effect to Scottish Law Commission recommendations: *Report on Three Bad Rules in Contract Law* (SLC Rpt 152, 1996) Pt III.

[109] 2004 GWD 37-768 (OH).

words, may a prospective purchaser rely on the details provided by the register, or must he make further enquiries to ascertain whether the terms of the lease are different from those registered, as will be the case if there has been an unregistered variation of a lease or an unregistered back-letter? An example illustrates the issue. L grants T a twenty-five year lease. It is registered. Six months later L agrees that T is to have the option of terminating the lease after five years, but this variation is not registered. In year three L transfers to S. In year five T seeks to exercise the break option. S refuses to accept his termination, arguing that the option is not disclosed by the register and he is bound only by registered terms. The introduction of registration of title, as opposed to registration of deeds, introduces another possibility: some terms of the original lease may be erroneously omitted from the register by the staff of Register House. Definite conclusions are difficult to come by given the complete lack of authority.

The contemporaneous operation of two systems of registration means that there are four possibilities to consider. Both the landlord's and the tenant's title may be on the Land Register; or they may both be recorded in the GRS. Alternatively, the landlord may be on the GRS, and the tenant on the Land Register,[110] or vice versa.[111]

1. Landlord's title in General Register of Sasines

The Sasines Register is a register of deeds. Where the lease was recorded in the Sasines Register, the deed itself was registered. There seems to be no case which considers whether the transmission of lease terms against a landlord's singular successor is dependent upon their being registered. Indeed, there is a curious lack of authority on the 1857 Act in general. In the absence of a case involving leases, reference may be made to decisions concerning the transmission of feudal conditions.[112] Prior to feudal abolition, feus were sometimes used in a similar way to leases, e.g. in structuring the relationship between parties to a construction project. There are many examples of cross-pollination in lease and feudal decisions.[113] Stair

---

110 The lease having been granted after the area became operational by one whose title remains in the GRS.

111 The lease having been granted before the area became operational and the property since having been transferred.

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

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

famously described a feu as a perpetual location.[114] The tendency to cross-refer seems to have increased in the later stages of feudalism when the idea of the feudal contract was at its strongest. This conceptual tool has been the subject of some debate. It entailed the view that a feu was a contract which ran with the land, just as we now view lease.[115] This analysis was criticised by Reid[116] but Gordon was more sympathetic.[117] It is not necessary to debate here the utility of the concept. What may be said is that various decisions were justified on this basis and may serve as useful indicators of how the parallel issue in lease law might be decided. This potential is best brought out by treatments such as Gloag's and Gordon's, which discuss feudal and non-feudal real burdens separately, than by a work such as Reid's, which attempts to assimilate feudal and non-feudal burdens, to only limited success.[118]

In *Stewart v Duke of Montrose*[119] and *Hope v Hope*,[120] two important nineteenth-century cases, it was made clear that a singular successor of a superior could be bound by an obligation which could not be discovered from the register. Both cases concerned an obligation to relieve the vassal from increases in burdens. Thus Lord Deas in *Stewart*:[121]

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

Lord Curriehill in *Hope* stated the position even more adamantly:[122]

> It was stated with great force for the defender,[123] that these two conditions do not appear in the record of sasines, not even in the registration of the sasine on the original feu charter; and that, therefore, they are not binding on a singular

---

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

115 Gloag *Contract* 226 – 227.

116 Reid *Property* [382] & [393].

117 Gordon *Land Law* [22-01].

118 Reid's approach provided no theoretical basis for conditions binding upon the superior, as he conceded. Such conditions were viewed as anomalous: Reid *Property* [394].

119 (1860) 22 D 755 (IH: Whole Court), aff'd (1863) 1 M (HL) 25.

120 (1864) 2 M 670 (IH).

121 (1860) 22 D 755 (IH) 804.

122 (1864) 2 M 670 (IH) 675. For another instance of the contractual approach see *Robertson v North British Railway Co* (1874) 1 R 1213 (IH) 1219 where the suggestion is that the right to enforce feudal conditions is carried by the assignation of writs clause.

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

> successor of the original superior. That undoubtedly is a hardship; but such is the law. It is in the original contract of feu itself, and both parties here are assignees of the contract, and the party founding on it must give effect to it. This is just one of the considerable number of hardships against which our records, admirable as they are, do not afford protection.

Gloag[124] and Walker[125] accept that this is an authoritative statement of the law. It has been said that the principle that a successor should be able to rely on the position as disclosed by the GRS is relatively weak when it comes to the terms of feudal grants. According to Halliday, '[i]t has always been recognised that in matters which affect obligations or conditions of title the doctrine of sanctity of the register is much more vulnerable to equitable considerations'.[126] Bankton had, however, taken a different approach to that in *Stewart* and *Hope*: unless the purchaser of a superiority could have been 'certiorated by the records' of a provision in a feudal grant qualifying or renouncing feudal casualties, he was not concerned by it.[127] That is more consistent with a system of property law which insists upon some 'real act' in order for rights to be made effectual against third parties and generally abides by the publicity principle. Had further cases arisen it is not impossible that the rule described by Bankton would have been reverted to. A similar *volte-face* was executed in a late-nineteenth century decision concerning burdens on the vassal's right.[128] The death of feudalism means that we shall never know. As matters stand, *Stewart* and *Hope* are authoritative expositions of the law on this point.

Some points may be made to detract from the force of the analogy between *Stewart* and *Hope* and the transmission of terms of leases. Whereas the whole of a registered lease was recorded, until 1858 the whole of a feudal contract was not recorded.[129] Prior to that year what was recorded was an instrument of sasine, which summarised the provisions of the charter of sasine. Also, these cases concerned terms of the original feudal grant, which could not be discovered from the register, not

---

124 Gloag *Contract* 226.

125 DM Walker *Principles of Scottish Private Law* vol III Property (4th edn 1988) 58.

126 JM Halliday 'Acquiescence, Singular Successors and the Baby Linnet' 1977 JR 89, 96.

127 Bankton *Institute* II iii 11.

128 It was suggested in *Robertson v North British Railway Co* (1874) 1 R 1213 (IH) 1219 that a vassal's successor could be bound by an unregistered condition, but this was rejected in *Liddal v Duncan* (1898) 25 R 1119 (IH) 1131.

129 Titles to Land (Scotland) Act 1858 s1 changed the law and introduced direct recording of the deed itself. See Halliday *Conveyancing* [31-57] and DA Brand AJM Steven & S Wortley *Professor McDonald's Conveyancing Manual* (7th edn 2004) [6.9].

variations. The fact remains, however, that the rule in respect of feus was that a successor to the superior could be bound by an obligation which the register did not disclose. This was an instance in which the publicity principle was not adhered to. And the reasoning adopted in these two cases could equally apply to leases: just as the term transmitted against the superior's successor because he was an 'assignee' of the liabilities under the feudal contract, so a successor landlord would be liable in obligations undertaken by the original landlord regardless of whether they had been registered. To concretise the discussion: the successor landlord would be bound by an unregistered variation or back-letter (provided that this was intended to bind a successor). The opposite conclusion would lead to the odd result that, when registration of long leases was optional and a tenant who chose not to register could still obtain a real right by possession, registration would worsen the tenant's position in respect of variations.

Where the landlord's title is in the GRS but the lease is registered in the Land Register, the terms of section 3(3) Land Registration (Scotland) Act 1979 must be considered. It states that registration shall be the only way of making rights and obligations into real rights and obligations. But, as is discussed below, it may be that this is qualified by other provisions of the 1979 Act.

2. Landlord's title in Land Register

Whereas the Register of Sasines is a register of deeds, the Land Register is a register of title. Such a register of title seeks to record the legal effect of deeds instead of deeds themselves. The two types of register are underlain by completely different principles. In the terms of Theodore Ruoff, the three principles of a system of registration of title are the 'mirror', 'curtain' and 'insurance' principles.[130] The first two prescribe respectively that the register is a complete and accurate repository of all rights and burdens which affect the property,[131] and, furthermore, that the proprietor is entitled to rely upon the register as such, for he can be affected by no

---

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

131 'In any system of registration of title the holy grail is that the title as recorded in the register should precisely reflect the legal position in relation to that title': *Kaur v Singh* 1999 SC 180 (IH) 182B (LP Rodger).

rights other than those disclosed on the title sheet of his interest.[132] Both principles are qualified to a certain extent. Some rights are effective without registration: these are 'overriding interests'.[133] In other circumstances it may be that the reflection provided by the register is inaccurate and that it can be rectified. This possibility creates the need for the third principle: Land Register titles come with a state guarantee. The guarantee has two variants.[134] It may be either that the position will remain as is stated on the register (i.e. that the register will not be rectified)[135] or that the register may be rectified, but that, if it is, the party losing rights as a result will be indemnified for any resulting loss.[136]

Certainly a registered tenant has the protection of these principles[137] so a variation to the tenant's disadvantage must be registered in order for a landlord to be able to enforce it against an assignee of the lease. The issue here is how these principles apply to land which is subject to a lease. Must a right or obligation be on the register in order for it to affect a successor landlord? There is no clear answer: there is no case law and the legislation, generally acknowledged to be of poor quality,[138] sends mixed signals.

Section 3(1) details the effect of registration and provides the statutory curtain. Unfortunately it is ambivalent as to whether the terms of a long lease must be registered in order to affect a successor. In order for a right to bind a registered owner, it must either be entered on his title sheet or be an overriding interest:

> s3(1) Registration shall have the effect of –
> (a) vesting in the person registered as entitled to the registered interest in land a real right in and to the interest and in and to any right, pertinent or servitude, express or implied, forming part of the interest, subject only to the effect of any matter entered in the title sheet of that interest under section 6 of this Act so far

---

132 Land Registration (Scotland) Act 1979 s3(1)(a).

133 Land Registration (Scotland) Act 1979 s28(1).

134 Scottish Law Commission *Discussion Paper on Land Registration: Void and Voidable Titles* (SLC DP 125, 2004) [3.13]. The holder of a registered right obtains either 'money' or 'mud', as it was put by TW Mapp *Torrens' Elusive Title* (1978) [4.24].

135 This is the case if the holder of a registered interest is a 'proprietor in possession': Land Registration (Scotland) Act 1979 s9. The disappointed applicant for rectification is indemnified: s12.

136 Land Registration (Scotland) Act 1979 s12.

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

138 *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14, 26I: 'Nobody could accuse the Act of being well drafted' (Lord Jauncey). Or, more exotically, '[t]he Land Registration (Scotland) Act 1979 has all the intellectual sharpness of mashed potato': GL Gretton, commentary to *Kaur v Singh* 1997 SCLR 1075 (OH) 1085.

as adverse to the interest or that person's entitlement to it and to any overriding interest whether noted under that section or not; ...

A long lease[139] is not an overriding interest as that is defined in section 28(1), nor are its terms: for an owner to be bound by a lease, it must be detailed on his title sheet. Section 6(1)(e) provides for a real right to be entered on a title sheet, and this is the basis for entering long leases. Land Register practice is simply to record on the landlord's title sheet that a lease has been granted and then to provide a cross-reference, either to the tenant's title sheet (if the lease is registered) or to the lease itself (if the lease is registered in the GRS). If the lease is exceptionally complex, the tenant's title sheet may simply make reference to the lease, which will be included in the land certificate.[140] The terms of the lease are, therefore, not all entered onto the landlord's title sheet. Instead, the bare details of the lease are entered into a schedule of leases in Part A (the property section) of the landlord's title sheet. This details the subjects, tenant, date of recording or registration, term and rent of any long leases over the property. Part D (the burdens section) states that 'the rights of the tenants under Leases specified in the Schedule of Leases in the Property Section are burdens on the subjects in this title'.[141] Section 3(1), and Land Register practice, are not conclusive as to whether the landlord is bound only by terms which are entered onto the tenant's title sheet. Section 3(1) states simply that the owner is subject to the effect of any matter entered in his title sheet. All that is noted in his title sheet is the existence of the lease and its essential terms. That is equally consistent with the landlord being bound or not being bound by off-register terms.

Section 3(3), however, insists upon registration in order to make the lease and its terms real. It is the clearest indication that a term must appear on the register (albeit on the tenant's title sheet) in order to bind a successor. The section reads as follows:

s3(3) A
(a) lessee under a long lease ...
shall obtain a real right in and to his interest as such only by registration; and registration shall be the only means of making rights and obligations relating to the registered interest in land of such a person real rights or obligations or of affecting such real rights or obligations.

---

139 Other than one made real by possession prior to the Land Register becoming operational.

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

141 RoS Legal Manual [19.15.4(g)].

It is on this provision that a court would most likely fix were the issue to arise. (It applies, though, only to long leases created after the Land Register became operational. It is not relevant where the lease is registered in the GRS but the landlord's title is on the Land Register.)

The provisions relating to the state guarantee of title must also be considered, as – on one view – they suggest a different rule to that which section 3(3) supports. Section 12(3)(m) states that:

> s12(3) There shall be no entitlement to indemnity under this section in respect of loss where -
> (m) the claimant is a landlord under a long lease and the claim relates to any information –
> (i) contained in the lease and
> (ii) omitted from the title sheet of the interest of the landlord,
> (except insofar as the claim may relate to the constitution or amount of the rent and adequate information has been made available to the Keeper to enable him to make an entry in the register in respect of such constitution or amount or to the description of the land in respect of which the rent is payable.

A narrow interpretation is that this is concerned only with the way in which information is entered into the register.[142] It does nothing more than provide that the Keeper is not liable in indemnity if he does not repeat on the landlord's title sheet the terms of the lease which are detailed on the tenant's. It provides no guidance as to whether a term must appear on the register in order to affect a successor. A broader view, however, is that this provision was intended to give effect to a rule that a landlord can be affected by terms which do not appear on the register. When the Henry Committee discussed the application of its proposed scheme of land registration to the landlord's interest in leased land, it suggested that no guarantee be offered in respect of the terms of leases other than rent. This was the explanation:[143]

> The detailed information ... (other than in respect of the constitution and amount of Feuduties which are basically important) should only be guaranteed in the discretion of the Keeper because such information will be of the nature found in a Collection list.[144] It might be impossible to guarantee it and might in any event impose too formidable a burden of investigation on the Keeper in time and labour.

---

142 This is the Scottish Law Commission's view: *Discussion Paper on Land Registration* (SLC DP 128, 2005) [8.15] & [8.18]. The Commission proposes to dispense with the exception.

143 *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (Cmnd 4137, 1969) 33 – 34. See also the discussion of indemnification: 48 – 50.

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

Given that the same information is guaranteed in respect of the tenant's right, this reasoning is not convincing. Quite possibly the authors of the Henry Report thought that the result of excluding the terms of leases (except the rent) from the state guarantee would be that successors could be bound by terms which did not appear on the register. In Ruoff's terms, not only was the information on the register not guaranteed, but the 'mirror' and 'curtain' principles did not apply to the terms of leases. That had been – as was noted above – the position in the GRS in respect of obligations on superiors.[145] Professor Halliday's annotation to section 12(3)(m) reveals that this was his understanding:[146]

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

If this was indeed the intention, section 12(3)(m) is ill-suited to achieve the desired results. For one, section 3(3) is absolute: terms must be registered in order to become real. The argument based on section 12(3)(m) is more indirect. Further, indemnity is but one aspect of the state guarantee. The guarantee is that either the rightholder's position will remain as stated on the register (he is protected against rectification[147]) or that his legal position is vulnerable to rectification but that he will be indemnified for any loss resulting from it. Excluding indemnity excludes only part of that guarantee. The other aspect of the guarantee remains intact.[148]

---

145 *Stewart v Duke of Montrose* (1860) 22 D 755 (IH), aff'd (1863) 1 M (HL) 25; *Hope v Hope* (1864) 2 M 670 (IH), both discussed at text following n119.

146 JM Halliday Annotations to *The Land Registration (Scotland) Act 1979* in *Current Law Statutes Annotated.* (The amendments reflect the removal of feudal terminology.) The Registration of Title Practice Book explains matters in very similar terms: ROTPB [7.29].

147 Ie the process by which the register is amended so as to remove an inaccuracy and ensure that the register represents the actual legal position.

148 It is not yet settled whether a landlord's civil possession qualifies him as a 'proprietor in possession' for the purposes of s9(3) Land Registration (Scotland) Act 1979 so as to provide him with this aspect of the state guarantee. *Kaur v Singh* 1999 SC 180 (IH) 191 makes clear that he is a proprietor, but specifically did not address whether he is a 'proprietor in possession'. There is academic support for the view that civil possession would suffice: DA Brand AJM Steven & S Wortley *Professor McDonald's Conveyancing Manual* (7th edn 2004) [11.33]. GL Gretton & KGC Reid *Conveyancing* (3rd edn 2004) inaccurately states that this is the result of *Kaur v Singh*: [8-15].

The unsatisfying and unsatisfactory conclusion which can be drawn from this discussion is that the law is unclear. Section 3(3) is the clearest indication that registration is a constitutive requirement of a real condition of a registered lease, but there are indications that this was not the intention of the framers of the land registration scheme. An argument can be made on the basis of section 12(3)(m) that, because most terms of leases are excluded from the state guarantee, a successor may be bound by terms which the register does not disclose. A tenant will be well advised to register any variation which it is intended to bind a successor. [149] A purchaser of land subject to a lease will be well advised to request that the seller provide details of the lease and any variations to it. One would hope that this issue will be addressed by the Scottish Law Commission in its ongoing review of land registration,[150] but the point has not been considered in the discussion papers issued to date.[151] Given that practice is to register variations, and the terms of a lease are guaranteed at the tenant's end in any event, a rule that a successor becomes party to the lease as disclosed by the register has much to commend it.

---

149 That is the orthodox practice: Halliday *Conveyancing* [46-36]. It is difficult, however, to fit a variation of a lease into any of the categories of registrable act listed in s2 Land Registration (Scotland) Act 1979. Presumably registration of a variation proceeds on the basis of s2(4)(c), but in fact a variation does not affect the 'title' to a registered interest

150 Proceeding as part of the Scottish Law Commission's Sixth Programme of Law Reform: Scottish Law Commission *Sixth Programme of Law Reform* (SLC Rpt 176, 2000) [2.13] – [2.17] and *Seventh Programme of Law Reform* (SLC Rpt 198, 2005) [2.7] – [2.11].

151 Scottish Law Commission *Discussion Paper on Land Registration: Void and Voidable Titles* (SLC DP 125, 2004); *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (SLC DP 128, 2005) (where s12(3)(m) is mentioned only briefly: [8.15] & [8.18]); *Discussion Paper on Land Registration: Miscellaneous Issues* (SLC DP 130, 2005).

CHAPTER THREE
DISTINGUISHING REAL AND PERSONAL CONDITIONS: EXPOSITION

A. INTRODUCTION: BACKGROUND TO THE DISTINCTION 41
B. MISTAKEN ORTHODOXY: 'INTER NATURALIA' 48
C. 'REFERABLE TO THE GENERAL RELATION OF LANDLORD AND TENANT' ... 55
1. Scottish cases 55
2. The position in other jurisdictions 63
D. FLESHING OUT THE PROPOSED TEST 66
1. Burdened *qua* landlord and benefited *qua* tenant 66
2. An independent analysis of benefit and burden? 69
(a) The substance of the term 70
(b) Terms expressed to be personal 71
3. Policy concerns: term must not be contrary to the nature of the lease or to another rule of law 73
4. 'Customary and usual' terms: an automatic exception? 74
5. Registered leases 76
E. INTENTION AND INTERPRETATION 77
1. General approach 77
2. Back-letters 80
F. CONCLUSION 81

Although a successor of the landlord becomes a party to the contract of lease concluded by his predecessor, he is not bound by nor does he take the benefit of all aspects of the agreement between the original landlord and tenant. The contractual transfer (if that is what it is) consequent upon transfer by the landlord of the subjects of the lease is limited in effect. At least since the early seventeenth century, Scots law has distinguished between those terms which transmit against and in favour of singular successors of the landlord and those which do not.[1] In 1838 this was expressed in terms of a distinction between 'real conditions' and 'personal conditions',[2] which is the familiar modern language.[3] In drawing such a distinction, the law exercises a *substantive* control over the rights and obligations which transmit to and against successor landlords. This is a control based on the *content* of the agreement, rather than, say, on the intention of the parties involved or on where the term is documented.[4] Nor does it matter that the term in question is economically connected to other terms of the agreement which are clearly real. Generally the cases

1 The earliest case which the writer has found is *Ross v Blair* (1627) Mor 15 167.
2 *Ross v Duchess-Countess of Sutherland* (1838) 16 S 1179 (IH).
3 Rankine 475 – 479; Paton & Cameron 95; McAllister *Leases* [2.31].
4 In *Ross v Duchess-Countess of Sutherland* (1838) 16 S 1179 (IH) the tenant argued that the term was *in gremio* of the lease and was therefore a real condition. This was unsuccessful.

have considered whether the successor landlord is bound by a particular obligation which bound the original landlord, but logically the question may also arise as to whether a particular right vests in him.[5]

This chapter considers how the test for distinguishing real from personal conditions may best be formulated. Chapter Four then considers the justifications for drawing such a distinction and asks, in light of the English experience in particular, whether the distinction should continue to be made. Chapters Five to Seven give detailed consideration to specific examples of terms, such as options to purchase and agreements relating to the duration of the lease.

A. INTRODUCTION: BACKGROUND TO THE DISTINCTION

Although there are various early cases, duly noted by the institutional writers, the institutional sources contain little general discussion of the contrast between real and personal conditions. Bankton does state that 'personal' provisions are 'binding upon the heritor and his heirs but not effectual against his onerous singular successors',[6] but he does not explain how it is to be determined when a term is 'personal'. Almost all the case law in this area is post-institutional.[7] It was not until Rankine wrote that the notion of 'real' and 'personal' conditions was treated in a unified manner.[8]

Some brief points may nevertheless be made about the institutional treatment. Instead of providing a unified discussion of the basis of the distinction between transmissible and non-transmissible conditions, the institutional writers, where they considered the issue at all, justified specific instances of non-transmission. One common explanation was that its transmission would be inconsistent with some rule, be it of lease law or of another area of law. So, for example, an obligation to renew

---

5 Eg the cases considering whether a break clause is enforceable by a successor landlord: see Chp 5 Pt A.2(d). Such cases are rare: most of the authorities listed by the texts under this heading in fact consider not substantive objections to transmission, but issues such as whether an accrued right transmits to a successor. See, eg, Paton & Cameron 97.

6 Bankton *Institute* II ix 25.

7 *Montgomerie v Carrick* (1848) 10 D 1387 (IH) is the first case in which a real effort is made to provide a definition of which terms transmit and which will not: discussed at n86. Lord Rodger has remarked upon the fact that in some areas of law the institutional writers provide little meaningful guidance: A Rodger 'Developing the law today: national and international influences' 2002 Tydskrif vir die Suid-Afrikaanse Reg 1, 2.

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

the lease at its ish did not transmit[9] because that was inconsistent with the rule that a lease must have a definite duration.[10] Another frequent example was the use of a lease as a means of secured payment. A debtor would lease land to his creditor and provide that the tenant could retain from the rent the amount due to him under the contract of loan. If such clauses of retention were sustained against singular successors of the debtor/landlord, the creditor/tenant was guaranteed repayment of the debt (albeit by payment in kind). The judicial approach to the transmission of such clauses vacillated, but it was finally held[11] that they did not bind a singular successor of the debtor/landlord who was instead entitled to the full rent stipulated in the lease. This decision was sometimes justified on the basis that sustaining such clauses would allow parties to circumvent the rules of constitution of wadsets (then the normal form of heritable security), in particular the requirement of registration.[12] Another explanation was that the 1449 Act provides that tenants are entitled to remain upon the lands upon their paying 'siklike maill as they tooke them for', which was taken to require that the tenant pay the full rent, and not some reduced sum.[13] The weakness of this second line of reasoning is clear, for there are many cases in which the tenant is allowed to retain rent in a question with a singular successor of the landlord.[14] These early attempts at explanation were obviously insufficient. Their spirit, however, is reflected in the rule proposed below that a term cannot be a real condition if it is inconsistent with the nature of a lease.[15]

A final rationalisation attempted in two of the later institutional texts is more promising. Again it arises in discussion of cases permitting the tenant to retain rent. The question facing Erskine and Bell was how to reconcile those decisions which held that a tenant could not retain his rent in a question with a successor landlord[16] with those which permitted him to do so.[17] Erskine suggested that retention was only possible against a singular successor when it was claimed *qua* tenant, but not when it

---

9 *Dalrymple v Hepburn* (1737) Mor 9444.

10 Eg Mackenzie *Observations* 189; JS More's Notes to Stair's *Institutions* vol I (1832) ccxlvi.

11 *Auchinbreck v Maclaughlan* (1748) Mor 15 248. See Chp 6 Pt B for more detailed discussion.

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

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

14 Eg in satisfaction of the landlord's obligation to compensate the tenant for the value of improvements to the property (Chp 6 Pt D).

15 Pt D.4 below.

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

17 Primarily at that time the cases regarding the tenant's meliorations (Chp 6 Pt D).

was claimed in the character of creditor of the landlord.[18] So also Bell, who stated that a right of retention on account of a debt *unconnected with the lease* would not transmit.[19] The solution they advocate is to consider the underlying obligation which provides the basis for the tenant's retention of rent. Only if that obligation is connected to the lease, so that the tenant can be said to be claiming *qua* tenant, is the incoming landlord bound by it. This approach is attractive and will be expanded upon below. It provides at once a convincing doctrinal justification for distinguishing between real and personal conditions, and an indication as to how in practice that distinction is to be drawn.

The rule that only certain terms of the contract between the original landlord and tenant are 'real' and transmit to successors of the landlord is at once an instance of one fundamental tenet of private law doctrine and an exception to another. It is an instance of the *numerus clausus* principle.[20] This provides that there are only a limited number of real rights (hence '*numerus clausus*') and that the characteristics of such rights are pre-determined by the law and may only be varied within prescribed parameters.[21] It is that second aspect of the principle which is relevant

---

18 Erskine *Institute* II vi 29.

19 Bell *Principles* §1202.

20 It is so characterised in K Reid & CG van der Merwe 'Property Law: Some Themes and Variations' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 637, 656 – 7. For further recent discussion of this principle from a Scottish perspective: RRM Paisley 'Real Rights: Practical Problems and Dogmatic Rigidity' (2005) 9 Edin LR 267 and S Farran & D Cabrelli 'Exploring the Interfaces Between Contract Law and Property Law: A UK Comparative Approach' (2006) 13 *Maastricht Journal of European and Comparative Law* 403, 409 – 410. Three important contributions to the international debate about the justifications for the *numerus clausus* principle are: B Rudden 'Economic Theory v. Property Law: The *Numerus Clausus* Problem' in J Eekelaar & J Bell (eds) *Oxford Essays in Jurisprudence: 3rd Series* (1987) 239; TW Merrill & HE Smith 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 Yale LJ 1 and W Wiegand 'Numerus clausus der dinglichen Rechte. Zur Entstehung und Bedeutung eines zentralen zivilrechtlichen Dogmas' in G Köbler (ed) *Wege europäischer Rechtsgeschichte* (1987) 623. That debate cannot, and need not, be entered into here. However, Wiegand's argument is flagged because, to the writer's knowledge, it has not previously been made in English. He argues that the *numerus clausus* doctrine is inherent in the system which was adopted by the BGB ie a system which distinguishes between personal and real rights and in which property law is separate and abstracted from the law of obligations. Scots law probably displays those character traits, although there has been debate about the extent to which it adheres to the principle of abstraction: Reid *Property* [608] – [612]; DL Carey Miller with D Irvine *Corporeal Moveables in Scots Law* (2nd edn 2005)[8-06] – [8-10].

21 Some elements of German doctrine distinguish these two elements as *Typenzwang* (limit on the number of real rights) and *Typenfixierung* (limit on their content): eg JF Baur & R Stürner *Sachenrecht* (17th edn 1999) I, §1 7. But not all are agreed that this is useful: HH Seiler *J Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Einleitung zum Sachenrecht* (2000) Rn 38.

here. Obviously, if a legal system recognises the existence of hybrid rights which – although personal – share some of the characteristics of real rights, then a *numerus clausus* must also apply to them.[22] Parties who wish to create rights with real effect may only do so if the law permits them, and then by making use of recognised property rights. There is no 'freedom of property' as there is 'freedom of contract'. As it was put by the draftsmen of the BGB:[23]

> Der Grundsatz der Vertragsfreiheit, welcher das Obligationenrecht beherrscht, hat für das Sachenrecht keine Geltung. Hier gilt der umgekehrte Grundsatz: Die Betheiligten können nur solche Rechte begründen, deren Begründung das Gesetz zuläßt. Die Zahl der dinglichen Rechte ist daher nothwendig eine geschlossene.

The principle to which real conditions are an exception is the relativity of contracts i.e. the principle that contracts bind only the parties to them.[24] Rights may, of course, be transferred, by assignation;[25] but a contract imposes obligations only upon the parties to it, and they cannot free themselves of these without the creditor's consent.[26] However, there is a category of personal right which is so connected to particular property that when that property is transferred, the transferee becomes party to the personal rights and obligations relating to it. Being vested in a particular real right makes one the creditor and debtor of particular rights and obligations. The focus having been on the latter,[27] these have been varyingly called 'real conditions'[28] or 'real obligations'.[29] The classic example in Scots law is the real burden, which

---

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

23 *Motive zu dem Entwurf eines Bürgerlichen Gesetzbuchs für das Deutsche Reich* vol III: Sachenrecht (1888, 1997 reprint) 3. [The principle of freedom of contract, which governs the law of obligations, is not valid for property law. There, the opposite principle applies: parties can only create such rights as are permitted by law. The number of real rights is therefore necessarily a closed one.]

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

25 A contract may also confer a right upon a third party: *jus quaesitum tertio.*

26 Stair *Institutions* III i 2. On the discharge of obligations, see Gloag *Contract* Chp 39. Obligations may be discharged by delegation or there may be the possibility of a transfer of a debt or of an entire contract: see RG Anderson *Assignation* (2008) [3-04] – [3-11] (delegation) & [3-28] – [3-37] (transfer of debts & contracts).

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

28 KGC Reid 'Defining Real Conditions' 1989 JR 69 and Reid *Property* [344].

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

exists between the owners of two plots of land. But in a pioneering study Professor Reid noted that this was not the only type of real obligation which Scots law recognises. Initially Reid labelled this second class 'non-neighbourhood real conditions', that is to say conditions 'the dominant and servient properties [of which] are different estates or interests in respect of the same area of land'.[30] Examples are real conditions in a standard security and servitude conditions.[31] Later his terminology changed, as, subtly, did the definition. He now refers to 'non-autonomous obligations', which exist where 'real obligations are found as a component part of some other right – in practice usually a limited real right'.[32] In distinction to the previous definition, which covered only rights and obligations running between the holders of two real rights in the same land, now the creditor's right need not always be real. As he notes:[33]

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

Some might quarrel with the view that lease is a real right in Scots law,[34] but the analysis adopted does not alter what happens to the contract of lease upon transfer of ownership of the property subject to it. The important point to make is that this type of automatic transfer of rights and obligations is exceptional in terms of contract law and to consider why the law makes this exception to the general principle. In understanding that, one gets closer to grasping the purpose of the real condition/personal condition distinction in leases.

In the case of real burdens, the justification for the deviation from normal contractual principle is that the rights and obligations are so closely related to the land that it is appropriate that they run with it. The law grants perpetual effect to the parties' own regulation of their relationship as landowners. But it only does so in respect of their relationship as landowners, hence the praediality test.[35] As it was put

---

30 Reid *Defining Real Conditions* (n28) 78. This is similar to what in German law is referred to as a 'Gesetzlicher Vertrag' or 'Legalschuldverhältnis': JF Baur & R Stürner *Sachenrecht* (17th edn 2006) II §5 26.

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

32 Reid (n29) 41.

33 Reid (n29) 43.

34 Chp 1, Pt B.

35 Now given a statutory footing: Title Conditions (Scotland) Act 2003 s3(1) – (4).

by the Scottish Law Commission: 'a real burden runs with the land only because it has something to do with the land'.[36]

A similar argument may be advanced about leases. The rule that one who acquires leased property does so subject to the contract of lease, and acquires the rights and obligations thereunder, is an exception to general contractual principle. It is justified on the basis that it is more practical and efficient that the acquirer may sue and be sued on the contract of lease directly, if he is to be bound by the tenant's right of possession, than that only the original landlord is bound by the contract.[37] The crucial point is that this justification extends only to terms of the contract of lease, but not to other agreements between the same parties.[38] So if every lease contained only the default rules (i.e. those which the law would in any event imply) the position would be straightforward: the acquirer would simply be bound by those. However, parties often prefer to amend the default rules and provide their own terms to regulate their relationship of landlord and tenant. It is suggested that the aim of the distinction between real and personal conditions is to differentiate between those terms and such other terms as the parties may agree but which have no reference to their relationship as landlord and tenant or are even inconsistent with it. In a sense, therefore, the law attempts to identify the contract of lease, as modified by the parties to suit their own needs. This ties in with the explanation offered by Erskine that the 1449 Act applied only to render the tenant's rights *qua* tenant binding upon the successor.[39]

Reichmann's analysis of the early role of real covenants in the United States is interesting in this regard. He states that these served to bind successors to variations made to the default rules in proprietary relationships:[40]

---

36 Scottish Law Commission *Discussion Paper on Real Burdens* (SLC DP 106, 1998) [7.42]. The (English) Law Commission accepted the Scottish Law Commission's arguments: Law Commission *Easements, Covenants and Profits à prendre* (LC CP 186, 2008) [8.73].

37 This argument is advanced in South Africa in Cooper *Landlord & Tenant* 296 – 7. cf JG Lotz 'Lease' in WA Joubert (ed) *The Law of South Africa* vol XIV (1981) [182].

38 See also, eg, in respect of English law, Megarry & Wade *Real Property* [15-084]: 'covenants which do not relate to the land are not enforceable under this head, for they have nothing to do with the relationship of landlord and tenant on which the right to enforce covenants against third parties is founded'.

39 Erskine *Institute* II vi 29.

40 U Reichmann 'Towards a Unified Concept of Servitudes' (1982) 55 Southern California L Rev 1177, 1218 (footnotes omitted). The logic, of course, would still hold even if one were not to view a lease as a real right.

> In England, horizontal privity[41] of estate was traditionally limited to the landlord-tenant relationship. In the United States, however, the privity concept was extended during the first half of the nineteenth century to other situations where a property interest in the land of another was granted, whether by easement, ground-rent, or mortgage. In those situations, the same piece of land was shared, for use purposes, investment, or security interest, by at least two people, usually for a relatively long period of time. Because the value of each party's property right was affected by the land's exploitation, the conduct of the parties clearly required regulation. Although the common law defined the initial scope of property rights and thus regulated the behaviour of the sharing parties, the parties often consented to modification of these rights due to specific needs, physical conditions of the land, price, and bargaining power. These consensually created rights are similar to the original common law entitlements which they replaced, and thus should "run with the land". To hold otherwise would have resulted in overly rigid patterns of property rights, patterns which would have prevented the transacting parties from structuring their relationship as they wished.

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

In light of this introduction, this chapter now turns to consider how the distinction between real and personal conditions has been articulated in the Scottish case law. It will be suggested that the cases support the proposition that, in distinguishing between real and personal conditions, one is attempting to distinguish between those rights and duties which regulate the parties' relationship as landlord and tenant and those which do not and are, in a sense, 'collateral' or 'extrinsic' to that relationship. This gains weight from cases considering the parallel issue of the transmission of feudal conditions. But this is not the only test which the authorities are capable of yielding. Indeed, it is not the current orthodoxy, which instead states that only those terms which are *inter naturalia* of a real right of lease transmit. More than usual, there are conflicting voices in the authorities. This is because there has been at best only partial debate as to the appropriate test for controlling transmission, despite the issue having been litigated on numerous occasions. Unfortunately, many decisions contain little in the way of reasoning, and those which are reasoned often proceed with little reference to prior formulations, hindering the development of an

---

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

accepted test. The issue has also not been the subject of detailed academic analysis. This has allowed the *inter naturalia* test to emerge, and it is to that we now turn.

B. MISTAKEN ORTHODOXY: 'INTER NATURALIA'

The prevailing approach is that a term transmits to a successor of the landlord when it is *inter naturalia* of the real right of lease.[42] If that test is taken literally, it is singularly unsuited to the task of distinguishing real from personal conditions. If, on the other hand, it is not to be taken literally, as appears to be the case, the invocation of the Latin phrase *inter naturalia* is superfluous.

This test seems almost to have been arrived at by accident. *Bisset v Magistrates of Aberdeen*[43] is the case usually cited as the *fons et origo* of this test, but in fact the phrase '*inter naturalia*' appears in the context of transmission of terms in *Mackenzie v Mackenzie*[44] some fifty years earlier. In *Mackenzie* part of Lord Jeffrey's reasoning in holding an heir of entail not to be bound by the obligation of his author was that the obligation in question was not '*inter naturalia* of any ordinary contract of location'.[45] It is not clear that he proposed this as a general test to regulate transmission, especially in view of the fact that only one year earlier, in *Montgomerie v Carrick*,[46] he had asked whether an arbitration clause was referable to the *essentialia* of the lease and to the general relation of landlord and tenant in order to determine whether a successor landlord was bound by the obligation to refer a dispute to an arbiter.

The only mention of *inter naturalia* in the context of the transmission of lease terms in the period between *Mackenzie* and *Bisset* appears to be *Waterston v Stewart*,[47] which considered the issue only tangentially.[48] The use in *Bisset* is fairly

---

42 Eg *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH) 650G; *Allan v Armstrong* 2004 GWD 37-768 (OH); *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142 [16]; *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [37]; Gloag *Contract* 234; Paton & Cameron 95; SME vol 13 [240]; Gordon *Land Law* [23-22]; McAllister *Leases* [2.31].

43 (1898) 1 F 87 (IH).

44 (1849) 11 D 596 (IH). The case is further discussed below at n99.

45 ibid 601.

46 (1848) 10 D 1387 (IH) 1396. Also discussed below: n86.

47 (1881) 9 R 155 (IH). It is not mentioned in, eg, *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH); *Campbell v M'Kinnon* (1867) 5 M 636 (IH), (1870) 8 M (HL) 40; *Davie v Stark* (1876) 3 R 1114 (IH); *Harkness v Rattray* (1878) 16 SLR 117 (IH); or *Swan & Sons v Fairholme* (1894) 2 SLT 74 (OH), all of which concerned the extent of the landlord's successor's liability.

48 The issue was whether a discharge by the tenant of claims under the lease was effective only against the current heir of entail in possession, to whom the discharge had been given, or whether

equivocal in itself. A tenant sought declarator that the landlord was bound by his predecessor's obligation to grant a feu charter. The successor landlord advanced two arguments: (i) the phrasing of the lease was such that the obligation to grant the feu charter was personal to the original landlord and did not extend to a singular successor; (ii) in the event of the clause not being interpreted as personal to the original landlord, the obligation was, in any event, not *inter essentialia* (*sic*) of the lease and therefore could not bind a successor.[49] Despite the terms of the argument, the Lord Ordinary (Kyllachy) justified his conclusion that the obligation did not transmit on the alternative basis that it could not be said to be '*inter naturalia* of a lease, or otherwise than a collateral obligation binding only on the lessors and their representatives'.[50]

The Second Division upheld the decision of the Outer House. One of the judges, Lord Trayner, makes no mention of the phrase '*inter naturalia*'. Instead he places weight on the interpretative point and argues that the nature of the obligation (to replace a mere right of use with an absolute right of property) meant that it was personal to the granter of the obligation.[51] It is, however, Lord Moncreiff's opinion which is usually cited and there *inter naturalia* is a determinative factor: [52]

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

There are three comments to make in respect of this passage. The first is that it only allows one to say that a clause being *inter naturalia* is a necessary condition for it to be a real condition of a lease. It does not support the proposition that it is a sufficient condition: if not A, then not B does not equate to if A then B. Yet the current view of the law is that a term being *inter naturalia* of a lease is both a necessary *and* a sufficient condition for transmission: there is no suggestion that there is another test which the term must pass before it transmits. The rule is not seen to be 'if a term is

---

it also operated so as to prevent the tenant claiming against the original landlord. The point was not addressed, for it was held that the claim against the previous heir was barred by *mora* and taciturnity.

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

50 ibid 89.

51 ibid 89 – 90. He does, however, state that he 'agrees with the Lord Ordinary' who, of course, argued that the obligation was personal because it was not *inter naturalia*.

52 ibid 90 (emphasis added). The interpretative point was also relied upon.

not *inter naturalia* of a lease it will not transmit to a successor' but rather 'if a term is *inter naturalia*, it will bind a successor'.[53]

A second point is that Lord Moncreiff's opinion proceeds without reference to decisions such as *Montgomerie v Carrick*[54] and *Stewart v Duke of Montrose*,[55] despite these having been cited to the court. As we shall see shortly, both of these authorities take a different approach to determining which terms transmit to successors, and the second – albeit a feudal case – is specifically critical of the use of *inter naturalia* to determine transmission.

The third comment is that it is only since relatively recently that *Bisset* has been seen as the leading case in this area, and *inter naturalia* as the governing test. That seems not to have been the position in the period immediately following the decision. Within ten years of *Bisset* a dispute concerning the transmission of terms reached the House of Lords in *Gillespie v Riddell*.[56] The tenant argued in the Outer and Inner Houses that the succeeding heir of entail was bound as the obligation was *inter naturalia* of the lease.[57] Yet the decision that this condition did not transmit was not explained in these terms. Nor does the term appear in *Purves' Tr v Traill's Tr*[58] or *Younger v Traill's Tr*,[59] two other decisions on the matter dating from the early twentieth century, when *Bisset* would still have been fresh in the legal consciousness.[60] After these decisions there was no litigation concerning the transmission of terms until the 1990s. Rankine did not use the phrase in his attempt to provide a general test for distinguishing real and personal conditions, although he did mention it in his discussion of whether specific terms were real or personal.[61]

---

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

54 (1848) 10 D 1387 (IH).

55 (1860) 22 D 755 (IH), aff'd (1863) 1 M (HL) 25.

56 1908 SC 628 (IH), aff'd 1909 SC (HL) 3.

57 ibid (IH) 630, 631, 635.

58 1914 2 SLT 425 (OH).

59 1916 2 SLT 397 (OH).

60 The term does appear in Lord Anderson's judgment in *Marshall's Trs v Banks* 1934 SC 405 (IH) 413, a case which considered whether a tenant could set-off sums owed to him by the landlord against creditors entitled to the rents.

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

Gloag[62] and Paton and Cameron,[63] however, gave the phrase a much more prominent position and treated it as the determinative principle. Thus Gloag:[64]

> While the ordinary obligations in a lease run with the lands, obligations may be undertaken by landlord or tenant in a lease which are purely personal, and by which only the contracting parties and their heirs are affected. The rule is usually stated that those obligations only which are *inter naturalia* of the lease are binding upon singular successors.

Doubtless under this influence, when the matter did arise again in several cases in the closing decade of the twentieth century and the opening years of the twenty-first, it was *inter naturalia* which was treated as controlling the transmission of lease terms.[65]

What does the phrase '*inter naturalia*' mean? Its literal meaning is 'among the default rules of the lease'. '*Naturalia*' denotes the default rules of a nominate contract. The concept is part of the Civilian trichotomy of *essentialia, naturalia* and *accidentalia*, discovered by the medieval jurist Baldus in the Roman texts.[66] Here Pothier's definition will suffice:[67]

> Cujas ne distinguait dans les contrats, que les choses qui sont de l'essence du contrat, et celles qui lui sont accidentelles.
> La distinction qu'ont faite plusieurs jurisconsultes du dix-septième siècle, est beaucoup plus exacte: ils distinguent trois différentes choses dans chaque contrat; celles qui sont *de l'essence* du contrat; celles qui sont seulement de *la nature* du contrat; et celles qui sont purement *accidentelles* au contrat.
> 1. Les choses qui sont de l'*essence* du contrat, sont celles sans lesquelles ce contrat ne peut subsister. Faute de l'une de ces choses, ou il n'y a point du tout de contrat, ou c'est une autre espèce de contrat. ...
> 2. Les choses qui sont seulement de la *nature* du contrat, sont celles qui, sans être de l'essence du contrat, font partie du contrat, quoique les parties

---

62 Gloag *Contract* 234.

63 Paton & Cameron 95, but cf the less absolute wording at 104.

64 Gloag *Contract* 234.

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

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

67 RJ Pothier *Traité des obligations* (1761 – 1764) in M Bugnet (ed) *Œuvres de Pothier* vol II (1861) Chp 1, Sect 1, Art 1, sIII.

> contractantes ne s'en soient point expliquées, étant de la nature du contrat que ces choses y soient renfermées et sous-entendues. ...
> 3. Les choses qui sont *accidentelles* au contrat, sont celles qui, n'étant pas de la nature du contrat, n'y sont renfermées que par quelque clause particulière ajoutée au contrat.

In Evans's translation, Pothier states:[68]

> With respect to contracts, Cujas makes no other distinctions than of those things which are of the essence of the contract and those which are accidental to it. The distinction made by many lawyers of the seventeenth century is much more accurate; they distinguish three different things in each contract – Things which are of the essence of the contract, things which are only of the nature of the contract, and things which are merely accidental to it.
> 1st. Things which are of the essence of a contract are those without which such contract cannot subsist, and for want of which there is either no contract at all, or a contract of a different kind. ...
> 2d. Things which are only of the nature of the contract are those which, without being of the essence, form a part of it, though not expressly mentioned; it being of the nature of the contract that they shall be included and understood.[69] ...
> 3d. Those things which are accidental to a contract are such as, not being of the nature of the contract, are only included in it by express agreement.

This distinction is recognised by Scots law,[70] although it seems not to have found the hold in Scots general contract law that it has, say, in South African law.[71] The concept of 'default terms' or those 'implied at law' into nominate contracts is, however, clearly recognised.[72]

It was suggested above that the aim of a distinction between 'real' and 'personal' conditions is to permit the parties' variation of the default rules of the lease relationship to bind successors.[73] If '*inter naturalia*' bears its literal meaning, it is singularly unsuited to this task. Furthermore, the focus on *naturalia* detracts from the fact that the incoming landlord must also be bound by and benefit from the

---

68 WD Evans (tr) M Pothier *A Treatise on the Law of Obligations, or Contracts* vol I (1806) [5] – [8]

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

70 G Watson *Bell's Dictionary and Digest of the Law of Scotland* (7th edn 1890) 406, see 'essentialia'. The trichotomy is not discussed in those sections of the institutional writers discussing the general part of contract law. Rather it is mentioned only when discussing the terms of a feudal grant: Bankton *Institute* II iii 12; Erskine *Institute* II iii 11; H McKechnie 'Superior and Vassal' in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol XIV (1933) [630]; Gordon *Land Law* [2-27]. The following paragraphs give details of which rights fall under which category. See also the definition of *inter naturalia* in *Trayner's Latin Maxims and Phrases* (4th edn 1894, 1986 reprint) 285.

71 S van der Merwe *et al Contract: General Principles* (3rd edn 2007) 282 – 285. But see the reference to South African material in McBryde *Contract* [9-08].

72 Eg McBryde *Contract* [9-02] & [9-08].

73 Text following n38.

essentialia of the lease (such as its rent and duration). Bankton was clear that the fact that a term was not *inter naturalia* did not automatically prevent it from being a real condition, (although it did make it less likely):[74]

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

The unsuitability of the *inter naturalia* test was presumably the reason for the treatment of the concept in discussions of the transmission of feudal conditions. In *Stewart v Duke of Montrose*[75] in 1860 a superior argued that the obligation to indemnify the vassal against minister's stipend, and augmentations thereof, did not bind him as a singular successor because it was not *inter naturalia* of the feudal relation. The court's response was clear:[76]

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

So also Bell, albeit in the context of obligations which were binding upon successors of the vassal, stated – in respect of obligations not to sub-feu – that:[77]

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

So, shortly after *inter naturalia* first started to be mentioned in the context of the transmission of lease terms,[78] it was criticised in the decision of the whole court on the analogous point in feudal law, presumably because it was clear that it was too narrow a test. Despite this, and despite *Stewart* having been cited in *Bisset*, it still formed the basis of Lord Moncreiff's opinion in that case. It is surprising that this contrast between its treatment in the areas of lease and feudal conditions has not been noticed before, especially in light of the unified treatment of lease and feudal conditions in Gloag's text.[79]

---

74 Bankton *Institute* II ix 25 (emphasis added).

75 (1860) 22 D 755 (IH), aff'd (1863) 1 M (HL) 25. See (IH) 773.

76 ibid (IH) 791. See also *Earl of Zetland v Hislop* (1882) 9 R (HL) 40, 43 (in respect of an obligation on the vassal).

77 Bell *Principles* §861.

78 Ie in *Mackenzie v Mackenzie* (1849) 11 D 596 (IH), which is discussed at nn 44 & 99.

79 Both are discussed in Chapter 13 'Title to Sue'.

The above discussion proceeds upon the assumption that the term *inter naturalia* bears its literal meaning. Yet that is not how it is always treated. Both Gloag and Paton and Cameron viewed *inter naturalia* as simply expressing an insistence that a condition be 'of common occurrence in that particular class of lease' in order to be a real condition.[80] That might be said to have the merit of guaranteeing to a purchaser that he will not be bound by any unexpected obligations, but it is unsuitable as a test for two reasons. First, it is possible for a clause to be commonly incorporated into leases, but for it nevertheless to be collateral to the landlord-tenant relationship. The very first cases in this field, concerning agreements that the tenant could set-off rent against a personal debt owed to the tenant by the landlord, showed this. Secondly, the inverse might be true: a clause which is uncommon may nevertheless be referable to the lease. Gloag and Paton & Cameron's approach was criticised in *Optical Express* as too narrow, and not even a proper interpretation of Lord Moncreiff's opinion in *Bisset*.[81] Lord Moncreiff states only that if it is established that the obligation was customary and usual in leases of such a duration, 'it would have materially aided the pursuer's contention'.[82] He does not state that if this is established it would necessarily result in the successor being bound. In *Optical Express* Lord Macfadyen's conclusion was that whether a condition is a real condition is 'primarily a question of the nature of the obligation'.[83] This is welcome: that is exactly where the focus should be, but it does not indicate what it is about their nature which makes some conditions 'personal' and others 'real'.

Inter naturalia, then, is a concept which requires further definition. It has no independent value and merely describes a result which has been reached in accordance with other reasoning. The chain of reasoning which the law currently requires is this: a term transmits to a singular successor of the landlord if it is a real condition; it is a real condition if it is *inter naturalia* of the lease; it is *inter naturalia*

---

80 Gloag *Contract* 234; Paton & Cameron 95. See also SME vol 13 [240]. That the meaning of inter naturalia was not understood is also clear in the pleadings in *Gillespie v Riddell* (1908) SC 628 (IH) 635: the respondent argued that the obligation in question 'was an obligation *inter naturalia* of the lease, and was indeed inserted there *ex necessitate*'.

81 *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH) 650I. Despite this criticism, the same definition was used in *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142 [16]. It is also the paraphrase used by D Bell & R Rennie 'Property Options in Leases' 2006 (May) JLSS 49.

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

83 *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH) 650I.

of the lease if ... . The middle stage is superfluous. As long as this is appreciated, its continued use poses no difficulties. Nevertheless, a more logical approach is to miss out the middle stage and simply to state: a term transmits to a successor landlord if the term is a real condition, and it is a real condition if ... .

The chapter now considers how one may complete the ellipsis. To do so, it reviews the case law to consider what tests apart from '*inter naturalia*' it contains.

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

1. Scottish cases

Although there are various early cases such as *Arbuthnot*[84] and *Ross*,[85] it was really not until 1848 that the first detailed attempt was made to provide a reasoned distinction between real and personal conditions. The case was *Montgomerie v Carrick*[86] and the clause in question an arbitration provision. The singular successor of the landlord sought declarator that he was not bound by the decree arbitral which the tenant had obtained, but he was unsuccessful. The decision is a good illustration of the difficulties in this area, for there are as many different formulations of the reasoning as there are opinions. The most promising is that of Lord Jeffrey, who asked whether the condition under consideration was a matter *referable to the general relation of landlord and tenant* and not to the private relation of the contracting parties.[87] Lord Jeffrey also asked whether the stipulation was referable to the *essentialia* of the contract of lease.[88] These are the parties, subjects, rent and duration.[89] This is different from what had been the focus of the parties' arguments, namely whether the arbitration clause was essential for or necessary to the contract.[90] Those arguments are reflected in the other opinions. Thus, the Lord Ordinary (Ivory)

---

84 *Arbuthnot v Colquhoun* (1772) Mor 10 424 where the Lord Ordinary's reason for refusing to hold a successor bound by an obligation to pay for the tenant's improvements to the subjects of the lease was that 'the clause in question, although contained in the contract of tack, is an obligation distinct from the contract of tack'. This decision was reversed on appeal. See also *Thomson v Reid* (1664) Mor 15 239 where Thomson, an appriser, argued that he was not bound by a clause of retention in a tack because it was 'but a personal provision, adjected in the tack and no part of the tack'.

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

86 (1848) 10 D 1387 (IH).

87 ibid 1396-7. Cited with approval in Hunter vol I 482 and Rankine 476.

88 (1848) 10 D 1387 (IH) 1396.

89 Stair *Institutions* II ix 5; Rankine 114.

90 (1848) 10 D 1387 (IH) 1394

held that the clause bound a successor because it did not have 'reference to any matter merely extrinsic, or which can be regarded as in any proper sense foreign to the proper object of the lease, but, on the contrary, constitut[ed] an express condition of the contract, and [was] necessary to its extrication'.[91] Slightly different again was Lord President Boyle, who stated, in a passage quoted in the recent *Advice Centre for Mortgages v McNicoll*[92] case:[93]

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

Later he reasoned simply that the clause 'formed an essential part of this contract, and was therefore transmitted against singular successors'.[94] Lord Fullerton likewise placed weight upon the fact that the clause was a necessary part of the lease, although he did state that he was not deciding any general principle of law.[95] Finally, Lord Mackenzie stated that '[n]o doubt there may be clauses separable from the contract, and not binding on singular successors; but this clause is not of that description. It is a reference forming a most proper and reasonable condition of the contract.'[96]

What to make of these various tests? Lord Jeffrey's consideration of whether the term is referable to the general relation of landlord and tenant as opposed to the private relation of the contracting parties appears the most promising. Although general, it coheres with what was suggested above to be the purpose of distinguishing real and personal conditions, and also with the explanations offered by Erskine and Bell for the non-transmission of terms in the 'lease as security' cases.[97] Part D considers how it might be fleshed out. The various references to a term being

---

91 ibid 1392. It is unclear why the fact that the arbitration clause was express was thought to be relevant. The purpose of the real condition/personal condition distinction is to distinguish between those express terms which do transmit and those which do not. Furthermore, there is no rule that a term must be express in order to bind a successor: default rules need not be expressed, but must surely affect a successor, as must terms which are implied in fact (although there is an argument that the successor should not be affected by an implied term arising from facts and circumstances of which he, as successor, could not have been aware).

92 [2006] CSOH 58, 2006 SLT 591 [38].

93 ibid 1395.

94 ibid.

95 ibid 1395.

96 (1848) 10 D 1387 (IH) 1395.

97 Discussed at n18.

'extrinsic' to the lease may be interpreted as serving the same purpose. That notion is frequently encountered in other cases considering the transmission of terms. On the other hand, the focus on whether a term is 'necessary' is troublesome. It is unclear (i) how it is to be ascertained whether a clause is 'necessary' to a contract and (ii) why the 'necessity' of a clause should determine its transmission. Were it to be properly applied, it is thought that a test based on necessity would be rather restrictive, for when can it be said that a clause is actually essential to a contract?[98] Necessity is not a test which has been adopted in other decisions. Nor does there appear to be support for a 'severability' test along the lines of that proposed by Lord Mackenzie. Although that would have the practical attraction that it would prevent a complex contract from being dissected upon transfer, it would not achieve the aims of the real condition/personal condition distinction set out above.

Shortly after *Montgomerie*, in *Mackenzie v Mackenzie*,[99] the Inner House again had to consider whether a particular obligation incumbent upon a landlord bound a successor owner of the leased property. It was held that an obligation on the landlord of a farm to improve and enclose adjoining woodland did not bind the successor of the landlord, but it is unclear whether this was because (i) the obligation was a personal condition or (ii) to hold the successor bound would have contravened the fetters of the entail.[100] The opinions do include statements such as 'it [the term] does not necessarily become [transmissible] by insertion into the lease';[101] and 'he [the tenant] can only hold the landlord to the lease, so far as it is a lease', and could not insist that the successor landlord perform 'an obligation over and above the lease'.[102] This suggests an approach similar to that of Lord Jeffrey in *Montgomerie*, which attempts to distinguish between those elements of the parties' agreement which are

---

98 Although arguably it would have produced a different result in *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH). There it was specifically argued that the clause was an essential part of the lease, but that did not suffice to establish that it was a real condition. (Such exclusivity agreements probably are real conditions, but not on the basis that they are essential to the lease: Chp 7 Pt B.2(a).) The term in dispute in *Gillespie v Riddell* 1909 SC 628 (IH) may well have been necessary, but that did not result in its transferring: 633 (Ld Ord).

99 (1849) 11 D 596 (IH).

100 Before rules of entail law need to be addressed, a prior question is whether the obligation could transmit, in any event, against the successor: *Gillespie v Riddell* 1908 SC 628 (IH) 638, aff'd 1909 SC (HL) 3. In *Gillespie*, *Mackenzie* was viewed as having been decided on the 'real conditions' and not the 'entail' point: 640. But the explanation of *Mackenzie* in *Gillespie* is too broad: see text to n117.

101 (1849) 11 D 596 (IH) 600 (Lord Fullerton).

102 ibid 599 (Lord Mackenzie).

attributable to the lease from those which are collateral to it. *Mackenzie* provides no guidance as to how this distinction is to be made.[103] Lord Jeffrey noted that, although the obligation was recorded in the document of lease, it was clearly completely separate from that lease. There was separate consideration given for it, for example.

The next Inner House case to consider the matter was *M'Gillivray's Exrs v Masson.*[104] This case is an important one but, although the decision is undoubtedly correct, some of the reasoning is less than satisfactory. An incoming tenant undertook to pay the outgoing tenant the sums to which he was entitled from the landlord as compensation for his improvements to the subjects and, in return, the landlord undertook to take the buildings at the end of the current lease and to reimburse the tenant, up to a certain value. The property was transferred and the executors of the original landlord sought declarator that they were free from liability to the tenant under this obligation. This was refused by majority (Lord Curriehill dissenting). Such a decision might be reached on two grounds: (i) the term was a real condition, but nevertheless the original landlord remained liable on it, or (ii) the term was a personal condition and so continued to bind the original landlord. The majority took the second approach. Lord Curriehill's view was that the term was a real condition and that the original landlord retained no subsidiary liability for real conditions. The opinions of all of the judges should, therefore, discuss whether the term was real or personal. And indeed they do, but all in different terms.

The Lord President (M'Neill), with whom Lord Ivory concurred, stated that a singular successor was bound only in regard to 'the proper matter of the lease' and 'proper stipulations as to land' (of which this obligation was not one, for it amounted simply to an obligation on the landlord to repay the tenant the sum which he had paid to the outgoing tenant in discharge of a personal liability of the landlord).[105] There is, however, no guidance as to how to identify 'the proper matter of the lease'. Both Lords Curriehill and Lord Deas referred to the non-transmission of terms extrinsic to the lease, but there are difficulties with each of their opinions. Lord Curriehill's

---

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

104 (1857) 19 D 1099 (IH).

105 ibid 1101.

conception of what was 'extrinsic' was narrow: the only example given is a term contained in a separate agreement which is unknown to the purchaser.[106] If that amounts to saying that any express condition of the parties' written agreement will transmit, this is obviously incorrect, otherwise there would be no substantive control on transmission at all.[107]

In a passage surely influenced by *Montgomerie*, Lord Deas stated:[108]

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

The reference to a term being 'extrinsic' is familiar, but question-begging. The issues with a test based on 'necessity' or a term being 'essential' were noted above.[109] Lord Deas failed to square his test with the existing case law. He insisted that an obligation to pay even for those meliorations executed by the tenant during his lease did not qualify as part of the 'proper and inherent subject matter of the tack' and so did not bind a singular successor of the landlord. But it is clear that the incoming landlord is bound by such obligations[110] and so Lord Deas was forced to rationalise those decisions which held otherwise as applications of *caveat emptor*:[111]

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

This analysis is problematic. Mere notice does not bind successors or the rules regarding the transmission of terms would cease to exist.[112] And if that is not Lord Deas' intention, we are left with two classes of term which transmit: (i) those which do so automatically and (ii) those which do so because they are deemed to be adopted by purchasers who are held to have notice of the conditions in question, which in turn would have to be distinguished from (iii) those terms which are not deemed to have been adopted by the purchaser, *even although* he had notice thereof,

---

106 ibid 1104-5. But knowledge does not determine transmission: Chp 4 text to n8 & Chp 9.

107 Furthermore, as was argued in Chp 2, there is no absolute rule that a successor may not be bound by a term of an agreement documented separately from the lease.

108 (1857) 19 D 1099 (IH) 1106.

109 Text to n98.

110 *Arbuthnot v Colquhoun* (1772) Mor 10 424 established this and has been followed ever since: see Chp 6 Pt D.

111 *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH) 1106.

112 See Chp 4 text to n8 & Chp 9.

and so do not transmit. Given the difficulty of developing one test to distinguish 'real' and 'personal' conditions, a further distinction seems unhelpful.[113]

Gillespie v Riddell[114] again concerned entailed land. An heir of entail who succeeded to lands which were the subject of a lease was held not to be bound by the obligation to take over the outgoing tenant's sheep stock and to pay the tenant the same amount for the stock which he had paid on his entry. As noted above, the tenants pled that the successor was bound as this was a condition which was *inter naturalia* the lease, but the various courts' opinions do not refer to this. The First Division emphasised that this was a question of lease law and not one of entail law: before rules regarding entails could potentially be infringed, the condition would have to be capable of binding a successor under the rules of lease law.[115] At one point Lord Kinnear justified the decision on the basis that 'in its true character [the obligation] is, in my opinion, *a personal contract over and above the lease*, and therefore is ineffectual as against the defender, who does not represent the contracting owner'.[116] This supports the suggestion above that the key to identifying real conditions is to identify those aspects of the totality of the parties' agreement which are referable to the 'contract of lease'. But, as with Lord Deas' opinion in *M'Gillivray*, there are aspects of the decision which suggest a narrower approach to the topic. For example, the non-transmission of the obligation to improve farmland in *Mackenzie*[117] was explained as follows:[118]

> This was held to be a personal obligation which did not transmit against subsequent heirs of entail. It was not considered as a contravention [of the entail], because it neither was nor could have been made a real burden on the land, and it made no difference that it was inserted in a lease, because *the real right acquired under a lease is to possession of the land, and stipulations engrafted on the lease by which the landlord undertakes to pay money or perform an obligation are purely personal.*

This appears to suggest that a successor is not bound by any of the obligations of the lease, for all conditions incumbent on the landlord are either to pay money or to

---

113 Although it may be that a distinction between different real conditions is drawn when determining the scope of the original landlord's liability after transfer of the subjects. That was, of course, the main issue in *M'Gillivray's Exrs*. See Gloag *Contract* 264. That is not an issue which this thesis considers.

114 1908 SC 628 (IH), aff'd 1909 SC (HL) 3.

115 cf Paton & Cameron 96 who viewed the decision as flowing from a rule of entail law.

116 ibid (IH) 643 (emphasis added).

117 *Mackenzie v Mackenzie* (1849) 11 D 596 (IH).

118 *Gillespie v Riddell* 1908 SC 628 (IH) 640 (emphasis added).

perform an obligation. Although that might have been a tenable (if unlikely) approach to the 1449 Act, it is not that adopted by Scots law.[119] This case provides an example of the terminological confusion which Professor Reid has noted afflicts the term 'real burden'.[120] Lord McLaren[121] at least used 'real' in the sense of 'real liability', to indicate an obligation where in default of performance only particular objects (here the entailed estate) are liable, as opposed to an obligation which bound all of the debtor's estate, as is the case where liability is personal. This is not the usual use of 'real' and 'personal' to describe conditions of leases: liability for real conditions of leases is personal. Lord Kinnear[122] and Lord President Dunedin[123] both suggested that the rules about the constitution of real burdens laid down by Lord Corehouse in *Tailors of Aberdeen v Coutts*[124] apply also to terms of leases and would prevent this condition from being real, for it was an obligation to pay an uncertain amount of money. That is not the case: the rules for the constitution of real conditions in leases and real burdens differ, and an obligation in a lease to pay an uncertain sum of money can be real. An obligation to compensate a tenant for the cost of improving the property is a clear example.[125] Gordon notes that this rule applied only to real burdens in the strict sense in any event.[126] In other ways, too, Lord Corehouse's rules are inapplicable to leases: there is no need, for example, to use words which clearly express or plainly imply that the term is to be real.[127]

There appears to be no case between *Gillespie* and *Davidson v Zani*,[128] some eighty years later, in which the test for determining which terms of a lease are real and which personal is discussed. In *Davidson* those terms which transmit were described as those 'incident to the continuing relationship of landlord and tenant'.[129] The Sheriff Principal stated that the option in *Bisset* had not transmitted as it was not *inter naturalia*. This is therefore a case in which the two approaches fuse. As noted

---

119 See Chp 1 text to n11.
120 KGC Reid 'What is a Real Burden?' (1984) 29 JLSS 9; Gordon *Land Law* [21-04].
121 *Gillespie v Riddell* 1908 SC 628 (IH) 646.
122 ibid 643.
123 ibid 645.
124 (1840) 1 Robin 296 (HL).
125 Chp 6, Pt D.
126 Gordon *Land Law* [22-51].
127 Pt E.
128 1992 SCLR 1001.
129 ibid 1004 – 5. See text accompanying n135.

above,[130] cases since *Davidson* refer to *inter naturalia* as a test to determine whether a term is real.

What may be drawn from these cases? The picture is not a harmonious one. It is suggested, however, that they contain support for the proposition that a real condition is a term of the lease which is referable to the relationship of landlord and tenant, whereas a personal condition is one which is not, and which is – in other words – extrinsic or collateral to the lease.[131] As we have seen, this was not the approach adopted by Gloag[132] or by Paton and Cameron,[133] nor has it been the approach of more recent cases which have addressed the issue. They propound the view that whether a term of a lease is a 'real condition' depends upon whether the term is *inter naturalia* of the lease. The approach proposed here is, however, similar to Rankine's attempt at a general formulation.[134] It is also the approach of the editors of Gloag and Henderson. As noted above, the *inter naturalia* test requires to be glossed, and their gloss is this:[135]

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

This approach may also be supported by reference to decisions in feudal cases concerning the transmission of obligations against a successor of the superior. It is not correct to state that the law knew no rules as to the content of feudal conditions which could bind successors.[136] Even if this had been the position in earlier times, it

---

130 Text to n65.

131 It may be, therefore, that referring to a 'personal condition of the lease' is a taxonomic error. Such a term is not a condition of the contract of lease at all, for it is extrinsic to it. But the traditional language has been retained here for, in practice, even personal conditions will be viewed as terms of 'the lease', using that term to mean the entire contract embodied in a document known as the lease.

132 Gloag *Contract* 233 – 4.

133 Paton & Cameron 95.

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

135 Lord Coulsfield & HL MacQueen *Gloag & Henderson: The Law of Scotland* (12th edn 2007) [36.03]. This formulation has been present since the first edition: WM Gloag & RC Henderson *Introduction to the Law of Scotland* (1927) 141. Despite the fact that this is almost a verbatim quotation of Lord Jeffrey in *Montgomerie v Carrick* (1848) 10 D 1387 (IH), that decision is not cited until slightly later in the text.

136 As does Reid *Property* [393]. See Gordon *Land Law* [22-51] *et seq* & H McKechnie 'Superior and Vassal' in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol XIV (1933) 293

was not the law by the mid-nineteenth century. The leading feudal case is *Stewart v Duke of Montrose*.[137] There the court considered the transmissibility of an obligation by the superior to indemnify the vassal against minister's stipend and any augmentations of it.[138] The joint opinion of the Lord Justice Clerk (Inglis), Lord Benholme and Lord Neaves provides a useful summary of the competing submissions:[139]

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

2. The position in other jurisdictions

Further support for this approach can be gained from the approaches of other jurisdictions. Admittedly, just as this issue has proved difficult in Scotland, so it has elsewhere. It therefore cannot be said with confidence – and, in particular, an outsider may not say with confidence – that one particular approach represents the law of, say, England.[140] Also, although there are similarities in the general tests being applied, the results are not uniform in every jurisdiction.[141] In South African law, for

---

– 294. It is, however, fair to say that the contours of the limitations were not clearly articulated: see Gordon *Land Law* [22-51] *et seq.*

137 (1860) 22 D 755, aff'd (1863) 1 M (HL) 25. Reid does mention this decision: *Property* [393] n20. He portrays Lord Deas' judgment as an attempt to import rules limiting the content of non-feudal real burdens into a case concerning the transmission of feudal conditions, despite Lord Deas' explicit assertion that *Tailors of Aberdeen v Coutts* (1840) 1 Robin 296 did not apply in the same way to feudal and non-feudal conditions: 801.

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

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

140 Rabel warned comparatists that, in their explorations on foreign territory, they might come across 'natives lying in wait with spears': E Rabel 'Deutsches und Amerikanisches Recht' (1951) 16 Rabels Zeitschrift 341, 341.

141 A prominent example is a term permitting the tenant to set-off a debt due by the landlord against rent, which is held to affect a successor in South African and German law, with academic approval. South Africa: Cooper *Landlord & Tenant* 291 – 2, discussing *De Wet v Union Government* 1934 AD 59; Germany: *Staudingers Kommentar* §566 Rn 40: 'Im Regelfall [dürfte] eine Abrede über die Verrechnung eines Mieterdarlehens mit der Miete übergehen'. [As a rule an agreement concerning the set-off of a loan by the tenant against the rent should transmit.

example, an important case states that 'the purchaser acquires all the rights which the seller had in terms of the lease, except, of course, collateral rights unconnected with the lease'.[142] Another renders the aim as being to distinguish between the 'conditions on which the land is let' and 'collateral agreements'.[143] However, the approach adopted by Cooper, a leading commentator, is more permissive than that of Scots law. His formulation is that:[144]

> the lessor-lessee relationship between a new owner and the lessee is governed *mutatis mutandis* by all the terms of the agreement between the lessor-seller and the lessee–
> (a) except in the case of those terms in respect of which the lessee can be said to have a *delectus personae*;
> (b) except in the case of a composite agreement; and
> (c) unless the lease indicates a contrary intention, viz the term in question shall apply to the original lessor only.

He rejects the suggestion that the new landlord be affected only by those terms which are incident to the relationship of landlord and tenant, for there may be terms of the contract which, though not incident to that relationship, are nevertheless incident to the contract concluded by the original landlord and tenant. This is to adopt a test based on severability.

The test advanced here also bears a strong resemblance to the approach of the English common law and that of other systems of the Common Law tradition.[145] It is unclear whether this is the result of English influence[146] or simply an instance of the phenomenon of legal systems adopting similar solutions to identical problems.[147] Until English law was fundamentally changed by the Landlord and Tenant (Covenants) Act 1995,[148] the rule was that leasehold covenants transmitted if their benefit or burden was referable to the subject matter of the lease[149] or, in the Common Law terminology, 'touched and concerned' the reversion or the term of

---

142 *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042, 1051A.
143 *Shalala v Gelb* 1950 (1) SA 851, 864. See also Kerr *Sale & Lease* 440 – 442.
144 Cooper *Landlord & Tenant* 297 – 298.
145 Eg Australian law: PJ Butt *Land Law* (4th edn, 2001) [15108].
146 The concept of a contract 'running with the lands' seems to have been an English conceptual import: Rankine 475. The precise date of the import is unclear. The use of the terminology seemed to confuse counsel in *Marquis of Breadalbane v Sinclair* (1846) 5 Bell App 353, 372.
147 T Weir (tr) K Zweigert & H Kötz *Introduction to Comparative Law* (3rd edn, 1998) 39.
148 Section 3 changed the rule for leases granted on or after 1 January 1996. The touch and concern requirement has been replaced by a rule that all leasehold covenants transmit, except those which are expressed to be personal.
149 Law of Property Act 1925 ss 141 & 142.

years.[150] This has been glossed in various ways. In a passage approved by the Privy Council,[151] Cheshire and Burn's *Modern Law of Real Property* states that perhaps the clearest way of describing the test is 'if it [the covenant] affects the landlord in his normal capacity as landlord or tenant in his normal capacity as tenant, it may be said to touch and concern the land'.[152] Another useful formulation is that of Fancourt, who writes:[153]

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

Earlier, in *Woodall v Clifton*, [154] an option to purchase was held not to touch and concern the reversion because it was 'something wholly outside the relation of landlord and tenant'.

Recent German experience serves as a warning against adopting one particular formulation of the test for determining which terms bind a successor. §566 BGB is the provision which gives effect to the principle *Kauf bricht nicht Miete*. The acquirer is said to enter only the rights and duties *which arise from the contract of lease*: [155]

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

In interpreting this provision, the *Bundesgerichthof* has stated that an acquirer only becomes bound by such obligations as refer to the leased land and therefore can only be performed by the owner for the time being, particularly the obligation to hand over the object for use by the lessee and to maintain the object in a condition compliant with the contract.[156] This has been criticised as too narrow. Emmerich,[157]

---

150 For general discussion see Gray & Gray *Elements* [14.241] – [14.310]; Megarry & Wade *Real Property* Chp 15; Woodfall *Landlord & Tenant* [11.048.1] – [11.063].

151 *Hua Chiao Commercial Bank Ltd v Chiaphua Industies Ltd* [1987] AC 99 (PC) 107.

152 EH Burn *Cheshire and Burn's Modern Law of Real Property* (14th edn 1988) 425; in the current edition, EH Burn & J Cartwright *Cheshire and Burn's Modern Law of Real Property* (17th edn 2006) 295.

153 TM Fancourt *Enforceability of Landlord and Tenant Covenants* (2006) [4.09]

154 [1905] 2 Ch 257 (CA) 279.

155 §566 I BGB. [If the leased land is transferred by the lessor to a third party after delivery to the lessee, the acquirer takes the place of the lessor in *the rights and obligations arising from the lease* during the period when he is owner.] (emphasis added).

156 1999 BGHZ 141, 160 at 166: 'Nach Sinn und Zweck des §571 tritt der Erwerber jedoch nur hinsichtlich solcher Verpflichtungen an die Stelle des Veräußerers, die sich auf das Grundstück

for instance, has argued that §566 I BGB requires the successor to acquire and to be bound by all rights and duties which arise from the contract of lease; it does not allow a distinction to be drawn between those terms which can only be performed by the owner for the time being, and those which could not. One example given where the two tests would produce a different result is an arbitration clause. Chapter Eight considers how Scots law treats terms of leases the performance of which requires the lessor to have a right (be it ownership or some lesser right) in other land. In Scots law, such terms can transmit: the *Bundesgerichthof*'s test would also be too narrow here. German commentary also rejects a test based on the 'necessity' of a term or the fact that it is a typical term of a lease, as both creating legal uncertainty.[158]

D. FLESHING OUT THE PROPOSED TEST

1. Burdened *qua* landlord and benefited *qua* tenant

It has just been suggested that the general test for distinguishing which terms are real conditions and which personal is to ask which are 'referable to the relationship of landlord and tenant' and to distinguish these from terms which are 'extrinsic' or 'collateral' to that relationship. This section attempts to elucidate factors which may be applied in order to determine whether a term is referable to the landlord and tenant relationship.

When Erskine considered whether a successor landlord was bound by an obligation to allow the tenant to retain the rent, he asked whether the tenant was claiming *qua* tenant.[159] It is suggested that this remains crucial to the analysis.

How, then, is it to be determined whether the party is benefited or burdened *qua* landlord or *qua* tenant? When considering in *Stewart v Duke of Montrose*[160] whether the right to relief against stipend was an inherent condition of the feudal relationship, Lord Kinloch relied upon the fact that an assignation of the right to relief against

---

beziehen und deshalb regelmäßig auch nur von dessen jeweiligem Eigentümer erfüllt werden können, namentlich hinsichtlich der Pflicht zur Gebrauchsüberlassung und Erhaltung in vertragsgemäßem Zustand.' [According to the meaning and purpose of §571, the acquirer takes the place of the transferor only in respect of those obligations which relate to the land and which can therefore regularly be performed only by the owner for the time being, particularly the duty to allow the tenant to use the property and the duty to maintain it in a condition which complies with the contract.] The equivalent provision to §571 after the recent reforms of the BGB is §566.

157 *Staudingers Kommentar* §566 Rn [39] – [40].

158 *Münchener Kommentar* §566 Rn [33].

159 Erskine *Institute* II vi 29.

160 (1860) 22 D 755 (IH), aff'd (1863) 1 M (HL) 25.

stipend to anyone other than the proprietor of the lands would be 'little better than an absurdity'. He concluded that this term should run with the lands as part of the relationship between superior and vassal, reasoning as follows:[161]

> [O]nly the proprietor of the lands could be subjected to the burden [i.e. of the increase in stipend], and therefore it is only in his favour that a right of relief would have any practical effect. ... Construed as for the benefit of any other than the existing proprietor, the obligation would be comparatively meaningless.

That is similar to the English approach to determining whether the benefit of a covenant touches and concerns land or a reversion.[162] It is an absolute test: the benefit of a term runs with the land if it is *only* of use to the successor. There are, though, many terms which would remain of benefit to an original party after transfer and which would remain capable of performance by the original obligor after transfer, but which are rightly regarded as real. Such a test would be particularly problematic for terms obliging one party to pay the money, as the original landlord remains capable of primary performance even after he has transferred the leased property and one does not need to be a landlord or tenant to stand to benefit from a payment of cash. Also, it is too narrow to account for terms of the lease which are real but which relate to other property (discussed in Chapter Seven). Such terms are not solely capable of performance by a successor landlord: the owner of the other land would be able to perform; in fact, he might be able to perform more easily.

The test is better phrased in less demanding, relative terms. For example, the Restatement (Third) of Servitudes in the United States distinguishes between servitudes which are appurtenant to land and those which are in gross. The benefit of a servitude is appurtenant to an interest in property 'if it serves a purpose that would be more useful to a successor to a property interest held by the original beneficiary of

---

161 ibid (IH) 784 – 5. See also (1863) 1 M (HL) 25, 27: 'the nature of the obligation is such as was plainly intended to accompany and follow the feu in its transmissions, for it is an engagement which none but the actual vassal can claim the benefit of'. Lord Ivory ((IH) 789 – 790) described a result which separated the obligation (ie right to claim indemnity) and the ownership of the teinds as 'a solecism in law'. He specifically notes that by separating the ownership of the teinds from the entitlement to indemnity the right is refused to the only person with any interest in the matter. Of course, there were other definitions, such as Lord Deas's well-known statement that obligations had to have the 'qualities of permanency, immediate connection with the estate, natural relation to the objects of the grant, and so on, which indicate their character as inherent conditions of the right' in order to transmit: (IH) 803 – 804.

162 *Kumar v Dunning* [1989] 1 QB 193 (CA) 204C. See also *Vernon v Smith* 5 B & Ald 1, 10; 106 ER 1094, 1097 and *P & A Swift Investments v Combined English Stores Group plc* [1989] AC 632 (HL) 641 – 642.

the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of that interest to a successor'.[163] Similarly, the burden is appurtenant if 'it could more reasonably be performed by a successor to a property interest held by the original obligor at the time the servitude was created than by the original obligor after having transferred that interest to a successor'.[164] In the leases context, the question would be whether a term would be of more benefit to a successor landlord or tenant than to the original party. If so, it benefits him *qua* landlord or *qua* tenant. Similarly, if an obligation is more readily or reasonably performable by the successor landlord or tenant than by the original landlord or tenant then it binds him *qua* landlord or *qua* tenant. When considering an obligation to pay money, a distinction may be drawn according to what the payment is for. So an obligation to reimburse the cost of improvements carried out by the tenant will burden the landlord *qua* landlord, and a right to rent will benefit him *qua* landlord, whereas an undertaking simply to repay a loan which the tenant has made to the landlord will burden him only in a personal capacity.

A common objection to formulations which ask whether a party is bound or benefited in a particular capacity is that they are circular: a landlord is burdened *qua* landlord if the obligation is a real condition, and it is a real condition if he is burdened *qua* landlord.[165] Unsatisfactory as it may be, a certain level of circularity is inevitable. The approach proposed is not as circular as some variants[166] and seems not to be so radically deficient as to be unworkable.[167]

The discussion in the chapters which follow will indicate how such a test functions in respect of particular terms. As a preview, whereas an option to terminate a lease could be said to benefit only the tenant for the time being, the status of an option to purchase is less clear. It might be argued that such an option is equally

---

163 Restatement (Third) of Property: Servitudes (2000) §4.5(1)(a).

164 Restatement (Third) of Property: Servitudes (2000) §4.5(3)(a).

165 Provided that the tenant is benefited *qua* tenant. For criticisms of the circularity of such tests: eg *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] AC 99 (PC) 112F; HA Bigelow 'The Contents of Covenants in Leases' (1914) 30 LQR 319, 319; L Berger 'A Policy Analysis of Promises Respecting the Use of Land' (1970) 50 Minnesota L Rev 167, 210; JE Stake 'Towards an Economic Understanding of Touch and Concern' [1988] Duke LJ 925, 929.

166 Eg ones which determine whether a party is benefited *qua* proprietor if the right increases the value of the land: any right attached to land will increase its value.

167 The House of Lords contented itself with providing a 'satisfactory working test', albeit one which was not exhaustive, in *P & A Swift Investments v Combined English Stores Group plc* [1989] 1 AC 632 (HL) 642E.

beneficial to any party and therefore not referable to the lease.[168] On the other hand, it may be thought that the tenant is peculiarly benefited because he is able to invest in the property during his lease, safe in the knowledge that his investment will not be lost upon termination.

2. An independent analysis of benefit and burden?

Are benefit and burden to be analysed separately?[169] That is to say, if an obligation binds the landlord *qua* landlord, but the correlative right does not benefit the tenant *qua* tenant, is that term 'referable to the relationship of landlord and tenant' so as to be a real condition? If benefit and burden must both be referable to the lease in order for a condition to be real, this presupposes that the same test applies to determine which conditions vest in and burden an assignee of the tenant as applies to determine which vest in and burden a singular successor of the landlord. Although there is no readily available case law which considers that issue, this is thought to be an acceptable working premise. Gloag, Paton & Cameron, and Gordon all state that the distinction between real and personal conditions is drawn equally upon transfer by the landlord and by the tenant.[170] Even although assignation of a lease is a tripartite legal act, involving consent by the assignee, the question still arises: what rights does he acquire and by what obligations does he consent to be bound? In the absence of specific provision in the assignation, it is reasonable to assume that an assignee does not acquire rights, nor is he bound by obligations, which are extrinsic to the contract of lease, for it is only that contract which is being assigned. A consequence is that an assignee will not automatically take the benefit of a personal condition such as an option to purchase. Provision should be made in the assignation to transfer that right, if that is the parties' intention.

A term might bind the landlord *qua* landlord but not benefit the tenant *qua* tenant, or vice versa, for one of two reasons. It might simply be because of the nature of the term or it might be that the benefit or burden of a term which would otherwise run with the lands has been expressed to be personal to a particular party. Each will be dealt with in turn.

---

168 See Chp 6 Pt A.

169 They are in respect of pre-1995 Act leases in English law: *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA) 50L ('the transmission of the benefit does not depend on the transmissibility of the burden'); Megarry & Wade *Real Property* [15-024].

170 Gloag *Contract* 233; Paton & Cameron 95; Gordon *Land Law* [23-22].

(a) The substance of the term

An example of the former might be an obligation on the landlord to carry out improvements to the subjects of the lease shortly after the date of entry. Prior to the date when they required to be completed, the landlord transfers. It is suggested later that, as the law stands, the status of such a term is genuinely unclear.[171] If such a term is held not to be a real condition, it is not because it does not benefit the tenant *qua* tenant, for clearly it does: the undertaking to carry out improvements to the property would be of no benefit to the original tenant after he had assigned the lease. If such a term is personal, it is because the obligation is not viewed as binding the landlord *qua* landlord. This is a statable position: as a one-off obligation to be performed at the very start of the lease, it might be said that it is just as reasonable that the original landlord be bound after transfer as that the successor be bound. Whether an assignee of the lease would have title to sue the original landlord on this obligation depends upon whether benefit and burden, title to sue and liability, are analysed separately. The American commentator Berger argues that there is no policy reason why not.[172] So far as can be discerned, there is no Scottish consideration of this point in a lease case. A sense of fairness and pragmatism may favour the assignee, as the right is of no use to anyone but the tenant, but there are many contractual rights which are beneficial only to the owner for the time being of a thing and yet they are not automatically assigned with it. As Gloag states: '[i]n general, the acquisition of property does not carry with it any right to sue on contracts to which the acquirer was not a party'.[173] In cases where the assignee of a lease does acquire title to sue, it is because the term is part of the landlord-tenant relationship which has been transferred to him. This is hard to maintain in respect of an obligation which does not bind the landlord *qua* landlord. That point is made in the feudal context by Lord Deas in *Hope v Hope*.[174] In his explanation of the rationale behind *Stewart v Duke of Montrose*,[175] he made clear that, when

---

171 Chp 6 Pt E.

172 Berger (n 165) 213. Bigelow discussed the Common Law authorities: Bigelow (n165) 331.

173 Gloag *Contract* 224. See, in particular, two decisions of the House of Lords in *Maitland v Horne* (1842) 1 Bell App 1 and *Marquis of Breadalbane v Sinclair* (1846) 5 Bell App 353.

174 (1864) 2 M 670 (IH).

175 (1860) 22 D 755 (IH), aff'd (1863) 1 M (HL) 25.

considering whether a feudal condition had transmitted as part of the relationship of superior and vassal, benefit and burden were inter-dependent.[176]

> The liability, on the one hand, and the right to enforce it upon the other, depended upon the same principle, - namely that the obligation related directly to the subject of the grant and the permanent enjoyment of it by the vassal, and that thus it formed an inherent part of the feu-contract, transmissible on both sides by the mere continuance of the relation of superior and vassal. ... There would be no consistency in holding that the vassal could enforce the obligation because it was a condition inherent in the feudal relation constituted by the grant, and yet that the superior was not liable to implement it *qua* superior, on the same ground.

The reasoning applies equally to leases. In order to be referable to the relationship of landlord and tenant, a term must both burden the landlord *qua* landlord and benefit the tenant *qua* tenant, or vice versa.

(b) Terms expressed to be personal

It is suggested below that, although parties to the lease cannot make a personal condition real merely by stating it to be so, they can, within limits, make a real condition personal, although it may be that very precise language is required to achieve this effect.[177] Can a term be made personal at one end only, so that – for example – the benefit of a break clause (which is a real condition) could be made personal to the original tenant? This is a point of considerable commercial importance, for the benefit or burden of particular terms of leases, such as options or provisions relating to a reduction in rent, are often stated to be personal to one party. An example clarifies the issue; let an English case provide one. In *System Floors Ltd v Ruralpride Ltd*[178] the landlord covenanted *inter alia* that he would accept surrender of the leases within three months of a rent review, but stated that this privilege was to be personal to the original tenant. The assignee of the reversion was held bound by the covenant in a question with the original tenant, but he would not have been bound to an assignee of the lease.

The question whether Scots law would recognise that a successor of the landlord could be burdened by an agreement, the benefit of which is expressly stated to be

---

176 *Hope* (1864) 2 M 670 (IH) 677. See also in *Stewart* itself: 'In an ordinary disposition the obligation must be of a purely personal nature, for there is no room for anything else; and, being thus purely personal on the one side, the inference of the House of Lords deduced, in the cases of *Maitland* and *Sinclair*, naturally arises – that the right to enforce the obligation is also personal on the other side ... it does not pass *ipso jure*, with the lands, but requires to be transmitted like any other personal and collateral right': (1860) 22 D 755 (IH) 798.

177 Pt E.

178 [1995] 1 EGLR 48 (CA).

personal to a particular tenant, has not been authoritatively addressed. The practical response is to bind the landlord to procure his successors bound by the obligation.[179] However, not every tenant will be able to obtain such a promise and, in any event, such chain clauses are only as good as the landlord. They expose the tenant to the risk of breach by the landlord or his insolvency. The question whether the burden of such a term transmits automatically is therefore important. The point was raised in argument in *Optical Express*. There the benefit of an exclusivity clause was stated to be personal to the tenant. Lord Macfadyen opined that this was irrelevant to whether the burden of the obligation could transmit.[180] The parallel issue (i.e. whether the benefit of a term can transmit when the burden is expressly stated to be personal) could have been raised in *Bisset v Magistrates of Aberdeen*,[181] because the burden of the option in that case was expressed to be personal to the original landlord. The tenant who sought declarator that the landlord's successor was bound by the option was an assignee. But this opportunity for resolution was missed: because of the focus upon the successor's liability, the equally important question of whether the tenant had title to sue was neglected. Rankine's discussion of a clause of resumption expressed to be personal to the original landlord contains no suggestion that the personal nature of the benefit would prevent the burden of that clause affecting a successor to the tenant's interest (i.e. an assignee).[182]

It is suggested that Scots law, like English, allows the parties to a lease to agree that the benefit or burden of a real condition is to be personal to one party only, or to a defined class of parties. The compatibility of that position with the rule that benefit and burden must be analysed as a unity must, however, be demonstrated. It is suggested that these are not instances of the transmission of the burden of an obligation being analysed separately from the transmission of the benefit of the correlative right. Instead this is simply merely one of the ways in which the parties are permitted to regulate their lease relationship. These are not examples of the

---

179 See eg the style back-letter in *Green's Practice Styles* (May 1999) C1007.

180 *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH) 650B.

181 (1898) 1 F 87 (IH).

182 Rankine 528 – 529. The tentative suggestion above is that when ascertaining the position of an assignee we undertake the same exercise as when considering the position of a singular successor of the landlord: ie only the 'contract of lease' is transferred. So if the break clause were held to be extrinsic to that contract due to the personal nature of the benefit, its burden would not affect the assignee.

transmission of a term which is attributable to the lease relationship only at one end. Rather the condition is attributable to the leasehold relationship at both ends. A useful way to approach the matter is to consider whether the term would be a real condition had it not been expressed to be personal: if so, the fact that it is expressed to be personal to one party does not prevent it from being a real condition. Had the parties provided that, for example, a break clause would be available for the first five years, the temporal restriction would not prevent the term from being real. That they chose another restriction (namely, that the term is to subsist only as long as a particular person is tenant) should not result in a different analysis.

3. Policy concerns: term must not be contrary to the nature of the lease or to another rule of law

There are some terms which, although they bind only the landlord for the time being and benefit only the tenant for the time being, and so satisfy the first element of the general test proposed here, are nevertheless not real conditions. There is, therefore, a further element to the analysis: for a term to be referable to the relation of landlord and tenant it cannot be incompatible with that relationship. Nor may it be incompatible with the right which the transferee acquires (ownership in the case of transfer by the landlord) or with some other rule of law. In respect of real burdens, there are also rules that a burden cannot be illegal or contrary to public policy.[183] This is a convenient heading under which to accommodate similar concerns in respect of leases. A lease will, however, already have been subject to the normal contractual rules about illegality and public policy.[184]

This idea finds its roots in the tendency, noted already to explain decisions in the early cases on the basis of incompatibility with some rule of lease law.[185] Rules preventing the transmission of conditions which are incompatible with the nature of the right burdened are well-established in other areas of law. Lord Young's 'repugnancy with ownership'[186] ground is a well-known objection to the validity of a

---

183 Reid *Property* [391]; Title Conditions (Scotland) Act 2003 s3(6).
184 McBryde *Contract* Chp 19.
185 Text to n9 *et seq.*
186 Eg *Earl of Zetland v Hislop* (1881) 8 R 675 (IH) 681, rev'd (1882) 9 R (HL) 40

real burden.[187] Similarly, a servitude cannot detract excessively from the burdened proprietor's ownership.[188]

Because of the diversity of uses to which leases may be put, it is difficult to maintain that they have a single 'nature'.[189] They are protean. In the discussion of specific terms in the following chapters, this element of the general test finds application in respect of terms relating to the duration of the lease and options to purchase. An obligation on the landlord to renew the lease in perpetuity can more readily be performed by the owner of the property for the time being and is of more benefit to the tenant for the time being, but such a term is not a real condition because it is inconsistent with the nature of a real right of lease which must have a definite duration.[190] Other obligations to renew, or options to have the lease renewed, are also personal conditions: to hold otherwise would be inconsistent with the rule that a lease to begin at some point in the future does not bind a successor until the tenant possesses by virtue of the lease.[191] Similarly, although the option to purchase may more reasonably be performed by the successor landlord and, at least arguably, is of more benefit to an assignee than to the original tenant, there are particular policy reasons which justify the rule that options to purchase do not bind singular successors of the landlord.[192]

4. 'Customary and usual' terms: an automatic exception?

It was said in *Bisset v Magistrates of Aberdeen* that it would have materially aided the tenant's contention that the successor was bound by the obligation to grant a feu charter had he shown that the obligation was 'customary and usual in leases of such duration'.[193] As has been seen, Gloag, and Paton and Cameron, gave this as the only requirement which a term had to satisfy in order to be a real condition; but this is not the law.[194] In *Advice Centre for Mortgages v McNicoll*[195] Lord Drummond Young

---

187 Now codified in Title Conditions (Scotland) Act 2003 s3(6).

188 DJ Cusine & RRM Paisley *Servitudes and Rights of Way* (1998) [1.71]; *Moncrieff v Jamieson* [2007] UKHL 42, 2007 SLT 989 [24] (Ld Hope), [47], [54] – [61] (Lord Scott), [134] – [144] (Lord Neuberger), cf [76] (Lord Rodger); Title Conditions (Scotland) Act 2003 s76(2).

189 A point made by I Quigley 'On the Wrong Track' [2007] JLSS (Feb) 48, 49.

190 See Chp 5, text to n101, discussing *Dalrymple v Hepburn* (1737) 5 Br Sup 190.

191 See Chp 5 Pt A.2(b).

192 See Chp 6 Pt A.

193 (1898) 1 F 87 (IH) 90.

194 *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) 650H, discussed at n80.

195 [2006] CSOH 58, 2006 SLT 591 [39].

stated the normal rule as being that options to purchase are not real conditions, but that exceptions may exist, one of which is 'where it is established by evidence that custom and practice in leases of a particular nature is to insert a particular form of clause'.[196] That appears to go further than Lord Moncreiff in *Bisset* and to suggest that whenever a term which would otherwise be held to be a personal condition can be shown to be customary and usual in the class of leases concerned, it will be held to be a real condition. This is thought to be incorrect. There is no necessary correlation between a term being customary in a class of leases and its being referable to the relationship of landlord and tenant.[197] It would be illogical for proof that a term is customary and usual in a class of leases to operate as an automatic 'override' of the general rule. In *Ross v Duchess-Countess of Sutherland*[198] and *Gillespie v Riddell*,[199] terms which were said to be common were held not to bind a successor landlord. Nevertheless, evidence of practice is plainly useful. The possibility of leading such evidence is welcomed by Quigley as a means of keeping decisions in this field in line with commercial reality.[200] One would certainly think hard before holding that a term which has been shown to be customary and usual in leases is not a real condition, given the practical difficulties which such a conclusion causes. Nevertheless, that possibility must remain open. If the custom is so strong that the term would be implied into any lease of that class, then it is thought that such a term would be a real condition. That, however, will be highly unusual, given the stringency of the test for implying contractual terms on this basis.[201] *Bell v Lamont*[202] is, however, an example of a term being implied into a lease on this basis and binding a successor.

---

196 ibid.
197 Text following n80.
198 (1838) 16 S 1179 (IH)1182.
199 1908 SC 628 (IH), 1909 SC (HL) 3.
200 I Quigley 'On the Wrong Track' [2007] JLSS (Feb) 48. He cites, in particular, the examples of exclusivity clauses and options to purchase, both of which are common in particular classes of leases.
201 McBryde *Contract* [9-60] – [9-64].
202 1814 FC 645.

5. Registered leases

The rules outlined above apply equally to unregistered and registered leases, although there is only one case, *Bisset*,[203] which deals with the latter. The fact that the lease in *Bisset* was registered was not noted in any of the judgments, so it was presumably not regarded as material by the judges. This was despite the tenants arguing that the lease had been registered and that the case was therefore not one of a latent or indefinite burden.[204]

The opposite argument is sometimes advanced.[205] Section 2 of the Registration of Leases (Scotland) Act 1857 is unqualified when it states that registered leases 'shall, by virtue of such registration, be effectual against any singular successor in the lands and heritages thereby let'. Section 16, however, provides that registration completes the tenant's right as effectually as if he had entered into possession at the date of registration. This, it is thought, has the effect of importing the rules developed in respect of leases which are real under the 1449 Act. The result is the same under the 1979 Act. Section 3(1)(b) details the effect of registration: it makes any registered real right or obligation relating to the registered interest in land a real right or obligation *insofar as the right or obligation is capable, under any enactment or rule of law, of being ... made real.* The doctrinal reasons given in Part A for distinguishing between real and personal conditions apply as much to registered as to unregistered leases. Nevertheless, there are policy arguments that unregistered and registered leases should be treated differently. In particular, it is said that the purpose of the rule that some conditions affect only the original landlord is to protect purchasers and that they are in no need of protection when registration alerts them to any obligations which the lease would impose upon them. Notice, it is said, cures all. This policy argument is considered and rejected in the chapter which follows.[206] Just as notice does not cure all in respect of real burdens, so, as the law currently stands, it does not cure all in respect of terms of leases.

---

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

204 ibid 90.

205 S Brymer 'Enforcing Commercial Lease Terms against Singular Successor Landlords' (2000) 49 Property Law Bulletin 4; (2001) 50 Property Law Bulletin 3; Quigley (n200) 49.

206 Chp 4, text to n28.

E. INTENTION AND INTERPRETATION

1. General approach

The rule that only certain terms are real conditions is a mandatory one, so parties cannot make a term real when it would not otherwise be so. This is also the position in English law.[207] Parties can, however, make a term which would otherwise be a real condition personal. Their power to do so is limited: for example, a provision that the right to rent is personal to the original landlord would not affect a successor, because he acquires the right to rent as a civil fruit of the property.[208] This section considers how one determines whether a term is intended by the parties to be real or personal.

In contrast to the law of real burdens, where the importance of the use of appropriate words to indicate that a burden is real is emphasised,[209] there is no similar insistence in lease law. There is no discussion of the relevance of intention and interpretation in the sections of lease texts dealing with real and personal conditions. Yet they must have a role in the analytical framework of real and personal conditions. This role, it turns out, is a negative one. In order for a term to be a real condition there need not be a clear statement that the parties intend the term to be real. In *Warren James (Jewellers) Ltd v Overgate GP Ltd*[210] Lord Drummond Young correctly rejected an argument that the common law rules regarding the precision required to create a real burden (i.e. that the burden must be clear and unambiguous and that there may be no reliance on extrinsic evidence as an interpretative aid) applied to leases. To create a real burden, there is now a statutory requirement that the expression 'real burden' or an equivalent be used.[211] The position at common law was more nuanced. The formulation in *Tailors of Aberdeen v Coutts*, that 'to constitute a real burden or condition ... words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be

---

207 Woodfall *Landlord & Tenant* [11-051]. cf Restatement *Landlord & Tenant* §16.1 Reporter's Note 5: traditionally intent could prevent the burden of a promise which touched and concerned land from running with the land, but could not overcome a failure to touch and concern; 'today, intent might be viewed as the controlling factor'. That statement is difficult to reconcile with the approach of the Restatement, which retains 'touch and concern' and 'intention' as separate requirements for the burden of a promise to transmit to a successor.

208 Erskine *Institute* II vi 20. See also P Gane (tr) *The Selective Voet* (1956) XIX ii 19 & Bankton *Institute* II iii 169.

209 Eg Reid *Property* [390]; Gordon *Land Law* [22-36] – [22-40].

210 [2005] CSOH 142 [16] – [19].

211 Title Conditions (Scotland) Act 2003 s4(2).

affected, and not the grantee and his heirs alone',[212] was applied with differing degrees of severity to deeds, depending on their type. Thus 'clearer words are needed in ordinary dispositions, which do not as a rule create real burdens, than in feu dispositions, which do; and very little indeed is required in deeds of conditions, which are statutory creations whose only purpose is to create real burdens'.[213] The position with leases is a stage further on. Rankine notes that the English rules which insisted upon the use of the word 'assigns' in a lease in order for an assignee to be bound by covenants *in posse* 'have no analogue in our law'.[214] There is no need to use any particular expression in order to create a real condition in a lease. This is appropriate, given that the vast majority of lease terms are real conditions. Instead there is a presumption that if the content of a term is such that it is referable to the relationship of landlord and tenant, the parties intend it to be real. A well-drafted lease will indicate which, if any, of its provisions are intended to affect only the original parties.[215] The unresolved question is just how clear the parties must be that this is their intention.

Murray v Brodie[216] and *Ross v McFinlay*[217] both concerned break clauses. Despite being expressed in a way which might have been thought to restrict the benefit to the original landlord, the options were said to be available to the landlords' successors in title. In *Murray* the lease allowed for the landlord to resume possession 'personally and by herself only'.[218] In *Ross* there was an eleven-year lease with a break 'at the end of five years in favour of Mr Ross [the landlord], in case he chooses to take the whole or part for himself or his brother'. In *Ross* the court stated that:

> ... the faculty reserved in the tack was not personal, but an ordinary power, transmissive to a purchaser. The texture of a clause of resumption might be such

---

212 (1840) 1 Robin 296, 306. These are actually the requirements for a 'real burden' in the original heritable security sense of that term.

213 Reid *Property* [390]. See also Gordon *Land Law* [22-36] – [22-40].

214 Rankine 475, n8. He is referring to rule that covenants relating to things *in posse* (not in existence) had to mention 'assigns' in order to bind assignees to the lease. This does not apply to leases concluded after 1926, so modern English law also contains no rules on the appropriate phrasing of covenants in order to be transmissible: Megarry & Wade *Real Property* [15-038]. That is also the position of the Restatement *Landlord & Tenant* §16.1.

215 See, eg, Style Lease in *Greens Practice Styles* (4 Oct 1998) C 1010/26.

216 (1806) Hume 825 (IH)

217 (1807) Hume 832 (IH).

218 (1806) Hume 825 (IH) 825.

> as to make it otherwise; but there would be need of a precise limitation for that purpose ...[219]

Hunter criticised the decisions for ignoring the terms of the lease.[220] Rankine viewed that criticism as unfounded, noting the decisions simply as illustrations of the strength of the presumption that a term which is referable to the relation of landlord and tenant runs with the lands.[221]

Doubt about the weight to be given to the wording of a condition can also be seen in *Bisset v Magistrates of Aberdeen*,[222] where Lord Trayner required rather less than *Murray* and *Ross* might have suggested for his conclusion that an option to purchase bound only the original landlord. He noted simply that the option was expressed to be binding on the landlord alone, distinguishing it from the position in *Wight v Earl of Hopetoun*[223] where an option had been stated to bind the landlord and his heirs and successors.[224] The comparison should have been between the wording of the option and that of the other provisions of the lease.[225] The case report in *Bisset* does not disclose the entire terms of the lease. If none was stated to bind successors, the fact that the option was also not does little to indicate that it was intended to bind only the original landlord. It seems difficult to reconcile Lord Trayner's position in *Bisset* with that in *Murray* and *Ross* and there was no reference to those two cases in *Bisset*. *Bruce v McLeod*[226] and *Turner v Nicolson*[227] – which, it was suggested earlier,[228] are best viewed as examples of terms which were intended only to bind the granter and not his successors – are also difficult to reconcile with the idea of a strong presumption in favour of transmission, for there the parties' intention that the obligation should bind only the granter was far from crystal clear. The presumption is at best inconsistently applied: a consequence – perhaps – of the fact that the

---

219 (1807) Hume 832 (IH) 834.
220 Hunter vol II 118.
221 Rankine 528.
222 (1898) 1 F 87 (IH).
223 (1763) Mor 10461.
224 (1898) 1 F 87 (IH) 89.
225 cf *Montgomerie v Carrick* (1848) 10 D 1387 (IH) 1392 where the successor argued that the failure to mention successors in the arbitration clause of the lease, in contrast to their being mentioned in other clauses, meant that the arbitration clause was not a real condition. This was rejected by the Lord Ordinary as being 'too hypercritical to be listened to'. See the similar leniency in the feudal case of *Holburn v Buchanan* (1915) 31 Sh Ct Rep 178.
226 (1822) 1 Sh App 213.
227 (1835) 13 S 633 (IH).
228 Chp 2, text to n14.

relevance of intention has not previously been highlighted as a separate aspect of the analysis, and also of the fact that questions of interpretation are particularly susceptible to differences of opinion.

2. Back-letters

Within the framework of ascertaining the parties' intention as to transmission, the approach taken to back-letters may differ to that for the main document of lease. By use of a back-letter, parties make a deliberate choice to record some terms separately from the main provisions of a lease.[229] Such documents may not receive as lenient an interpretation as to the intention to bind and benefit successors as did the documents of lease in *Murray* and *Ross*. It was suggested in Chapter Two that the consideration in *Optical Express* of whether a back-letter amounted to a 'variation' of the main lease document might better be viewed as a consideration of whether the parties, by recording certain terms of their agreement in an unrecorded back-letter, expressed the intention that these terms should not bind successors of the landlord.[230] The complexity of Lord Macfadyen's discussion in *Optical Express* indicates that this is not a black-and-white issue. There are various reasons for opting to express certain terms in a back-letter beyond an intention that the terms should not transmit to successors. A desire for privacy is a prime example.[231] Crucially, often a side letter is used precisely because the parties want a successor landlord to be bound by a particular term, but where it is unclear whether the term would be classified as a real condition. Rent phasing clauses and exclusivity agreements are two commercially significant examples.

When the transmission of the provisions of a side-letter was considered by the English Court of Appeal in *System Floors*, little weight was placed on the parties' choice of medium.[232] The benefit of the side-letter was expressly stated to be personal to the tenant. It did not refer to the landlord's assignees in the reversion, but only to "we", "us" and "our". This was held to be a reference to the landlord for the

---

229 This is not the case with variations. Although they appear in a separate document, there is no realistic choice but to do this.

230 Chp 2 Pt A.2.

231 It may be that the lease is registered in the Books of Council and Session, but the back-letter is very unlikely to be.

232 *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA). There are other English decisions which take the same approach: eg *Lotteryking Ltd v AMEC Properties Ltd* [1995] 2 EGLR 13 (Ch).

time being, especially when contrasted with an express statement that the benefit of the side-letter was personal to the tenant. Particular weight was placed on the need for a commercial interpretation of the document. The tenant would not, it was said, have been content for the landlord to be able to defeat the covenant created by the side-letter by disposing of the reversion.[233] The trial judge had refused to be swayed by this point, reasoning that a personal obligation may have been all that the tenant was able to extract in negotiations. In effect he held that the onus was on the parties to the lease to make clear those terms which are to bind the landlord or tenant for the time being.[234]

Again, therefore, we see an area which is under-developed, and indeed rarely addressed at all as a distinct issue in the Scottish analysis of the transmission of terms.[235] What is clear, however, is that there is no need for an express statement that a term is to bind a successor in order for it to do so. Rather the presumption is that if the content of a term is such that it is referable to the relationship of landlord and tenant, then the parties intend it to transmit to successors. It would be logical if the clarity of expression required to indicate an intention to depart from that presumption were proportional to the strength of the conclusion that the condition belongs to the relationship of landlord and tenant. Ascertaining the parties' objectively expressed intention is not an exact science. The complex web of potential inferences serves to highlight the benefit of clarity of expression.

F. CONCLUSION

This chapter has sought to outline the rationale behind the distinction between real and personal conditions and to propose a test for how that distinction may be drawn in the context of a clearer analytical structure for Scots law. It has shown that the distinction between real and personal conditions is a mandatory one, which applies equally to unregistered and registered leases, and which cannot be overcome by the intention of the parties to the lease. In general terms, the distinction is between terms which are attributable to the relationship of landlord and tenant and those which are

---

233 *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA) 49J & 51C.

234 ibid 49K.

235 In Lord Moncreiff's opinion in *Bisset* the two points (ie the substantive objection to an option to purchase transmitting and the question of the parties' intention) were not really analysed separately: *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) 90.

collateral or extrinsic to that relationship. In assessing into which of those two categories a particular term of a lease falls, it is useful to consider:

(i) whether the term burdens the landlord *qua* landlord and benefits the tenant *qua* tenant, or vice versa;

(ii) whether to allow the term to transmit would be inconsistent with the nature of a lease, or with another rule of law or would be contrary to broader legal policy; and

(iii) whether the parties to the lease clearly expressed an intention that the term be personal to particular parties.

Chapter Four analyses this approach from the perspective of legal policy. Chapters Five to Seven consider in more detail how specific terms have been treated. For ease of reference, the results of that analysis are summarised here, along with the classification of some terms which are not considered in those chapters.

The following conditions are likely to be real:

- A break option.[236]
- An obligation to compensate the tenant for the value of improvements made to the property.[237]
- An obligation to allow the tenant to make use of other land as a pertinent or accessory to the lease, such as a right of way over adjoining property.[238]
- A prohibition upon using adjoining land in a particular way, provided that the prohibition is of benefit to the tenant *qua* tenant. Examples include an exclusivity clause or a prohibition on building on adjoining land.[239]
- An agreement to submit disputes relating to those conditions of the lease which are real conditions to arbitration.[240]
- A obligation to allow a mineral tenant permission to sink new pits.[241]
- Possibly, a partial discharge of rent.[242]

---

236 Chp 5 Pt A.2(d) & B.3(c).
237 Chp 6 Pt D.
238 Chp 7 Pt A.
239 Chp 7 Pt B.2.
240 Chp 6 Pt F.
241 *Montgomerie v Carrick* (1848) 10 D 1387 (IH).
242 Chp 6 Pt C.

- A term requiring a tenant to pay a larger share of public burdens than usual in relief of the lessor, and entitling him to deduct that amount from the rent.[243]

The following conditions are likely to be personal:

- An obligation on the landlord to renew the lease at its ish.[244]
- A term giving the tenant the option to renew the lease at its ish.[245]
- A term giving the tenant the option to purchase the subjects of the lease.[246]
- A clause providing for rent to be set-off against a personal debt due by the landlord to the tenant.[247]
- An absolute discharge of rent, and possibly a partial discharge (such as a rent free period).[248]
- An obligation on the landlord to pay the tenant at the expiry of the lease a sum of money, undertaken when the tenant paid at the start of the lease that sum to the previous tenant in discharge of the landlord's liability to that previous tenant.[249]
- A term allowing the tenant a reduction of rent in consideration of services rendered to the landlord.[250]
- An obligation on the landlord to pay the tenant the value of sheep stock which the tenant was bound to deliver either to the landlord or to the incoming tenant.[251]

The status of an obligation on the landlord to carry out certain works to the subjects appears to be genuinely unclear,[252] as does that of the landlord's obligation to reimburse the tenant for his outlay on repairs, as distinct from outlay on improvements.[253]

---

243 Hunter vol I 477; Rankine 145, citing *Oliphant v Currie* 1677 Mor 15 245.

244 Chp 5 Pt A.2(b).

245 Chp 5 Pt A.2(b). But it is suggested in Chp 5 that such an option is a real condition of a registered lease: Chp 5 Pt B.3(b).

246 Chp 6 Pt A.

247 Chp 6 Pt B.

248 Chp 6 Pt C.

249 Chp 6, text to n102.

250 *Ross v Duchess of Sutherland* (1838) 16 S 1179 (IH).

251 *Gillespie v Riddell* 1908 SC 628 (IH), 1909 SC (HL) 3. Paton & Cameron 96 and SME vol 13 [241] both assert that this obligation was a real condition, but did not bind the successor in this case because she was an heir of entail. That is inconsistent with the reasoning of both Lord Kinnear (643) and LP Dunedin (645). In the two page House of Lords judgment the case was treated as raising a point of entail law, but no doubt was cast upon the Inner House opinions.

252 Chp 6 Pt E.

253 Chp 6, text to n103.

CHAPTER FOUR
DISTINGUISHING REAL AND PERSONAL CONDITIONS: POLICY ANALYSIS

A. SOME TRADITIONAL POINTS 85
B. THE AMERICAN RESTATEMENT OF SERVITUDES 88
C. HOME-GROWN PROBLEMS 95
D. MODELS FOR LAW REFORM 97

Holding a transferee to be bound by his transferor's obligations and vested in his personal rights is anomalous in terms of contract and property law doctrine. The general test proposed in Chapter Three controls the scope of this anomaly in a doctrinally satisfying way: the successor becomes party to the lease, but not to obligations which are 'collateral' or 'extrinsic' to that contract. The exception to the general rule is no wider than it need be. We must not, however, be ruled by doctrine. In other legal systems parallel distinctions to that which Scots law draws between real and personal conditions have been criticised, and sometimes abandoned. The *numerus clausus* doctrine does not demand that every legal system recognise the same property rights, but rather simply that within each legal system only certain property rights may be created. Re-adjusting the balance between real and personal conditions in leases, indeed even holding all terms of leases to be real, would not mean that there ceased to be a *numerus clausus* of property rights. Rather, it would simply mean that parties had more freedom when creating property rights.

This chapter considers whether distinguishing real and personal conditions is justified on a policy level or whether it would be better to adopt another approach, be it allowing all terms of leases to transmit to successors, or adopting some intermediate position. The scheme of the chapter is as follows. First, standard arguments about protecting purchasers and keeping land free from burdens are considered. American academic comment, which has been influenced by legal realism and the law and economics movement, is then canvassed. It is generally critical of a distinction between obligations which transmit and those which do not. Particular attention is paid to the question of whether there is any justification for distinguishing real and personal conditions where successors have guaranteed notice

of the terms of leases (as could be provided by registration). Finally, recent statutory reform in England and reform proposals in Ireland are noted as potential models for reform in Scotland, were any to be considered.

A. SOME TRADITIONAL POINTS

There has been little discussion in Scotland of the justification for the rule that only certain conditions transmit to successor landlords. As was noted in Chapter Three, a common explanation for early applications of the rule was that a particular term was personal because its transmission would be inconsistent with some rule of lease law or a rule about the constitution of another real right (notably wadset).[1] A wadset had to be constituted in a particular way (by registration)[2] and to allow a functionally equivalent right to be created via a lease would have undermined that rule. This concern with the protection of purchasers is explicit in *Oliphant v Currie*.[3] The landlord's singular successor argued that if a clause permitting the tenant to retain rent in satisfaction of a debt owed to him by the original landlord were to be sustained against him as a successor, there would need to be a register of tacks in order to secure the protection of purchasers. The tenant's response was that there was no such need as purchasers could simply enquire as to the terms of the lease. The successor's argument did not convince the court in that case: *Oliphant* preceded the decision in *Auchinbreck v Maclaughlan*[4] in which such clauses were held to be personal. Erskine justified the rule finally adopted in *Auchinbreck* on the basis that, were such clauses to bind singular successors, 'the security intended for singular successors by the records would dwindle to a mere name, as tacks need not be registered'.[5] It is suggested in Chapter Six that the same logic underlies the general rule that an option to purchase does not bind a successor landlord: to allow an option to run as a real condition of a lease would be inconsistent with the rule that such an obligation may not be constituted as a real burden and would deprive purchasers of the protection which that rule leads them to expect.

---

1 Chp 3, text to n9.
2 Bell *Commentaries* I 712.
3 (1677) Mor 15 245, 15 246.
4 (1748) Mor 15 248. See Chp 6, Pt B.
5 Erskine *Instititue* II vi 29.

The 'policy-based' objection to a term's being real is only one element in the general test, however, so these arguments are only a partial explanation of the distinction between real and personal conditions. The central feature of the general test proposed in Chapter Three is that a term must relate to the lease in order to transmit. Here, too, one suspects that the concern is with protecting purchasers and the transmissibility of land in general. The concern is obviously with protecting acquirers of land from being bound by obligations. There is a well-documented general hostility to allowing obligations to run with land, and that is true of positive obligations in particular (although Scots law is more open to this than other systems). The fear is that such obligations act as a clog on title and render land, an important and finite asset, less marketable. In particular, lenders are more reluctant to lend, or will do so only on less favourable terms, if the property against which the loan is to be secured is subject to onerous, unusual, burdens. The rule that a successor becomes party to the lease exposes him to both positive and negative obligations. If they become due when he is landlord, the liability is personal: it cannot be got rid of by transferring ownership of the subjects.[6] The test proposed here limits the types of obligation by which a successor can be bound to those which are referable to the relationship of landlord and tenant. But, because leases are diverse, many terms can qualify as real conditions, so it might be said that the protection provided to purchasers by the rule is rather limited. Also, the rule gives no guarantee as to the extent of the obligation by which the successor could be bound.[7] In the case of unregistered leases, possession alerts the purchaser only to the existence of the lease, but not as to its content. The guarantee which the rule offers the purchaser is that he will not be bound by an obligation which is unrelated to the lease. Beyond that generality it does not go: the purchaser will require to investigate the terms of the lease in order to determine exactly which obligations it contains and which will bind him. In line with the general law of real conditions, there is also a guarantee that the purchaser will not be bound by a condition which is inconsistent with the right of ownership itself.

---

6 *Barr v Cochrane* (1878) 5 R 877 (IH) 883; Hume *Lectures IV* 83 – 84.

7 Bankton makes a similar comment in the analogous context of the transmission of the rights and obligations of a feudal superior to and against a successor: Bankton *Institute* II iii 11.

An argument which one might be tempted to make in order to justify a restriction on the transmission of terms is that it protects purchasers from being bound by obligations of which they are unaware. Rudden notes that 'one of the main reasons given in common and civil law for the *numerus clausus* of real rights is the problem a purchaser would face in finding out about fancies'.[8] In the English decision of *Keppel v Bailey* a successor of a tenant of an iron works was held not bound by the original tenant's promise to purchase all limestone used in the works from a particular quarry. Lord Chancellor Brougham concluded, in a famous passage:[9]

> [I]t must not ... be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. ... There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and *it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.*

Although the argument is common, it is flawed as a justification for the distinction drawn between real and personal conditions: that distinction is based upon the *nature* of the obligation, not upon whether the successor was aware of the term in question. If the purpose of the distinction between real and personal conditions were to protect the purchaser from unknown obligations, one would expect the purchaser to be bound by all those obligations of which he was aware. Yet, in Rudden's words:[10]

> Notice is not sufficient, because no system holds a fancy binding just because the acquirer of land knows all about it. Indeed, were this not so, common-lawyers would be spared all that dreary learning on 'touch and concern'.

In fact, a person acquiring property subject to a lease will typically be aware of its terms. If the lease is registered, its terms will be disclosed on the land register.[11] If it is an unregistered lease, it may well be the law that the successor has constructive

---

8 B Rudden 'Economic Theory v. Property Law: The *Numerus Clausus* Problem' in J Eekelaar & J Bell (eds) *Oxford Essays in Jurisprudence: 3rd Series* (1987) 239, 246.

9 (1834) 2 My & K 517, 535-6; 39 ER 1042, 1049 (emphasis added).

10 Rudden (n8) 246.

11 Although, as was seen in Chapter Two, the state guarantee may not extend to the terms of leases so the successor cannot be sure that those are the only terms by which he will be affected.

notice of the terms of subsisting leases.[12] In both cases, he is likely to have enquired as to the terms of subsisting leases,[13] yet he may be bound by only some of the terms. The arguments in favour of notice acting as a cure-all are considered below.[14] What is clear is that it cannot be said that certain terms are personal because of the difficulty which the successor would have finding out about them. At most what can be said is that a side-effect of the rule is that it protects the ignorant successor by limiting the types of obligation by which he is bound.

B. THE AMERICAN RESTATEMENT OF SERVITUDES

The American Law Institute *Restatement of the Law Third: Property: Servitudes* (2000)[15] encompasses what a Scots lawyer would call servitudes and real burdens. While it does not cover landlord and tenant covenants,[16] the approach adopted by the Restatement and the debates which preceded its adoption demand consideration here. In Common Law systems, the test for determining whether leasehold covenants run with the land or the reversion is the same as that for determining whether freehold covenants run with the land: does the benefit or burden of the covenant in question 'touch and concern' the land or the reversion? This is equivalent to the Scots rule that a servitude or real burden must be praedial and to the rule of lease law that only certain types of condition are real. The Restatement demands our attention because it purports to abandon the 'touch and concern' rule.[17]

There was significant debate about the merits of this proposal. The Reporter (Susan French) took the view that the touch and concern rule served no independent

---

12 Such at least was the tenant's argument in *Fraser v Maitland* (1824) 2 Sh App 37, 42. In *Stewart v M'Ra* (1834) 13 S 4 (IH) 6 LP Hope stated that 'a party intending to lend money on land, is just as much bound to look at the leases affecting it as a purchaser is'. See Chp 9, text to n41.

13 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [48].

14 Text to n29.

15 Some important articles preceding the drafting of the Restatement are: L Berger 'A Policy Analysis of Promises Respecting the Use of Land' (1970) 55 Minnesota L Rev 167; RA Epstein 'Notice and Freedom of Contract in the Law of Servitudes' (1981–2) 55 Southern California L Rev 1353; SF French 'Towards a Modern Law of Servitudes: Reweaving the Ancient Strands' (1981-82) 55 Southern California L Rev 1261 and U Reichmann 'Towards a Unified Concept of Servitudes' (1982) 55 Southern California L Rev 1177. There also is a retrospective work: SF French 'The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E Berger' (1998) 77 Nebraska L Rev 653.

16 They are the subject of a different Restatement: American Law Institute *Restatement of the Law Second: Property: Landlord and Tenant* (1977).

17 Its approach was considered by the Scottish Law Commission during its reform of the law of real burdens: Scottish Law Commission *Discussion Paper on Real Burdens* (SLC DP 106, 1998) and *Report on Real Burdens* (SLC Rpt 181, 2000).

function but was instead used by courts for various ends. Better, it was said, that the Restatement identify those ends and address them directly. This would promote clarity of reasoning and would enable the abandonment of a requirement which had in any event proved difficult to define.[18] The following functions were identified as being those which courts really performed under the guise of applying the 'touch and concern' test: (i) ascertaining intent; (ii) protecting purchasers; (iii) preventing covenants from running with the land where this was viewed as objectionable on policy grounds; and (iv) tackling covenants which had become obsolete.[19] The first and second points appear to be linked. In respect of the first, French argued that where parties had not made clear their intent as to whether a covenant should run with the land, courts, when determining the parties' intent, would consider the nature of the arrangement and whether it could more easily be performed by or was of particular benefit to the owner of land for the time being. An affirmative answer to either of these questions suggested that the covenant 'touched and concerned' land, in which case it was said to indicate an intention on the part of the original parties that it should bind successors. A negative answer indicated the contrary. The 'touch and concern' test was used to make up for the parties' silence on the matter. The conclusion that a condition did not touch and concern the land could even be used to disregard apparent statements of intent where these were 'boilerplate' and were thought not to represent the parties' true intention.

The second function which French identified the touch and concern test as performing was protecting purchasers. One might expect this to mean that, in the absence of a system of land registration, the law limited the types of obligation which could bind a successor.[20] But this is not the sense in which French perceived purchasers as being protected. Rather, her argument was that it protects them even where they *do* have notice of the obligation in question. Even although they have notice, they may not expect to be bound by a particular term.[21] In formulating this argument, French relied upon a much-cited article by Berger, where he stated that:[22]

---

18 One of the reasons for which it was said that the test has escaped accurate definition was that it was being used for this variety of different purposes.

19 French *Reweaving* (n15) 1289 – 1292 and French *Tribute* (n15) 661 – 663.

20 This is the argument advanced above: text to n3 *et seq.*

21 French *Reweaving* (n15) 1290 and French *Tribute* (n15) 662.

22 Berger (n15) 208.

> The real policy, then, is to give effect to the intent that most people would probably have if they thought about the issue and thereby protect subsequent parties against unexpected or unexpectable liability. Touch and concern is a device for intent effectuation, through which the law conforms itself to the normal, usual or probable understandings of the community.

There are difficulties internal to this approach[23] and with the doctrinal understandings which underlie it.[24]

The touch and concern requirement performed the third and fourth functions identified by French in the following way: if it was felt that a covenant was unreasonable or obsolete, and the ownership of burdened property had transferred since its constitution, the property could be freed from the covenant by declaring that it did not touch and concern the land. Given that the touch and concern doctrine operates only when the land comes to be transferred, it does not seem particularly suited to either of these roles.[25] French's response to this was to propose that the touch and concern requirement be dropped and the concerns of unreasonableness and obsolescence be addressed directly. Others doubted whether, given its unsuitability for those functions, the touch and concern doctrine actually performed other functions which French did not consider.[26]

French asserted that the third and fourth doctrines could be better performed by specific doctrines. Also, the insight provided by Berger as to the intent-effectuating role of the touch and concern doctrine allowed it to be treated simply as an interpretative aid, to be used in the absence of a clear expression of intent on the part of the original parties. Thus, specific policy-based objections to the creation of a

---

23 Such a test provides no guidance where the obligation is unusual (as Berger admits: (n15) 224). Further, whether the benefit or burden of a covenant runs with land is an issue upon which it is unlikely that the community will have expectations independent of the law. Rather, expectations as to which terms transmit and which do not are likely to be conditioned by what the law provides, so it seems illogical to use community expectations to provide content for the law, as Berger seeks to do.

24 The underlying assumption appears to be that the intent of the original grantor controls whether a successor is bound by an obligation. The theory explains a finding that a covenant does not 'touch and concern' land in the following way: the successor would not have thought that the original party intended him to be bound because this is not the type of obligation which binds successors; because of this deemed negative intent on the part of the original owner, the term does not transmit and so the successor is not bound. A logical difficulty is that this does not explain why the touch and concern test could not be overcome by a clear statement of intent. (This logical difficulty is removed by the Restatement's approach: see text to n28.) More seriously, the premise is wrong: whether a successor is bound is not dependent upon the grantor's intent. See text to n42.

25 J Stake 'Towards an Economic Understanding of Touch and Concern' [1988] Duke LJ 925, 943.

26 ibid. See text to n33 below.

servitude were proposed, as was a mechanism to allow the termination of servitudes which had become obsolete. Beyond that, however, the law need not go. The fashionable phrase is that there has been a shift from *ex ante* to *ex post* controls.[27] Provided that there is notice, and the term does not fall foul of the policy objections, parties should be able to make any covenant run with the land by a clear expression of intent. Where the intention is not clear, the 'touch and concern' doctrine, despite its vaunted disappearance, is in fact still used to determine whether the parties intended the covenant to be attached to land (appurtenant to it) or not (in gross).[28] It has ceased, however, to be a mandatory rule.

In the debate preceding the adoption of the new Restatement, Epstein argued that the original owners' intent should govern the transmission of covenants. His may be characterised as a 'notice cures all' approach: he viewed notice, presumably provided by registration, as the only constitutive requirement of a servitude and insisted that there was no normative justification for any other rule, such as that the servitude must touch and concern land.[29] Much of his analysis, indeed much of the American debate, relies upon a law and economics analysis. Doubtless this summary does not do it full justice. Epstein's argument is that any negative economic effects of granting a servitude will be taken into account by the original owner when making his decision whether to grant the right, for they will impact upon the value of his land. If the owner is prepared to accept a reduction in value, the argument runs, what justification is there for the law's refusing to recognise the servitude as binding future owners who bought with their eyes open and therefore paid a lesser price for the property? The 'touch and concern' doctrine simply increases transaction costs, both at the time of creation and upon subsequent transactions: because it is unclear, parties will often need to seek legal advice as to its effect on their proposed bargain. There may also be adverse 'incentive effects': doubt about whether crucial covenants touch and concern may be enough to prevent some parties from proceeding with a

---

27 S French 'The American Restatement of Servitudes Law: Reforming Doctrine by Shifting from Ex Ante to Ex Post Controls on the Risks Posed by Servitudes' in S van Erp & B Akkermans (eds) *Towards a Unified System of Land Burdens?* (2006) 109.

28 American Law Institute *Restatement of the Law Third: Property: Servitudes* (2000) §4.5. For discussion of the new role for 'touch and concern', see SF French 'The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E Berger' (1998) 77 Nebraska L Rev 653, 662 – 663.

29 RA Epstein 'Notice and Freedom of Contract in the Law of Servitudes' (1981–2) 55 Southern California L Rev 1353.

transaction. This appears to amount to a powerful economic argument for saying that the touch and concern doctrine is unjustified when applied to obligations of which the successor has notice by means of registration.

The premise of Epstein's argument has been disputed. It presupposes that the conclusion of a servitude imposes costs only on the original parties and successors to their interests. On that basis, he argued that any costs imposed on successors will be capitalised into a reduction in value of the interest at the time of grant. Merrill and Smith have argued that this is not the case.[30] On their view, the recognition of real rights imposes costs not only on successors to the grantor's interest in land (i.e. the actual liability incurred under the obligation and also 'information costs' incurred when researching title) but also upon *all other* participants in the land market. All acquirers of property incur increased information costs when the law increases the number of rights which it recognises as binding successors in title, for they must investigate whether the land which they are acquiring is subject to the type of right in question. They would not incur this cost if they knew that the law simply prohibited the creation of such rights as real rights or real obligations. Such information costs are an externality to the grantor of the right – he will not take them into account when considering whether to grant the right in question – and so this provides a justification for the law's intervention to limit the number of rights which may bind successors in title. An obvious objection to this argument is that land registration systems reduce information costs.[31] Merrill and Smith retort that, although it reduces costs, land registration does not eliminate them completely and so a land register simply enables a legal system to recognise a larger number of property rights, but does not enable total freedom of property.[32] Notice is not a 'cure-all'.

---

30 TW Merrill & HE Smith 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 Yale LJ 1, especially 26 *et seq.* As the title suggests, this article is not a specific discussion of the transmission of covenants, but rather seeks to advance an economic justification for the closed system of property rights present in most (all?) legal systems. See also SE Sterk 'Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions' (1985) 70 Iowa L Rev 615, 621 – 4.

31 Eg BWF Depoorter & F Parisi 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' (2003) *Global Jurist Frontiers* Vol 3 Issue 1 Article 2 n56, available at: http://www.bepress.com/gj/frontiers/vol3/iss1/art2.

32 Merrill & Smith (n30) 43 – 45. See also M Wolff & L Raiser *Sachenrecht: Ein Lehrbuch* (10th edn 1957) §2 II 1, where it is argued that a land register can only function if there is a limited number of registrable rights.

There were dissentient voices in the debate surrounding the Restatement's abandonment of the 'touch and concern' doctrine. Stake considered the American law and concluded that the touch and concern doctrine provided for the efficient allocation of the benefit and burden of covenants after transfer of an interest land.[33] It ensured that an obligation bound the party who could perform it more efficiently following transfer and that a right was allocated to the party who stood to gain most from it. (He noted, however, that this did not necessarily provide an economic justification for the doctrine, as these benefits could be offset by other costs which it created, such as transaction costs.[34])

Reichmann advanced two arguments in support of touch and concern.[35] First, agreements which do not relate to land so as to touch and concern it are highly individualised and likely to become inefficient after transfer. The best way to ensure the efficient termination of such arrangements is to place the burden of re-negotiation upon the beneficiary: should he wish to continue to benefit from the covenant, he will have to negotiate with the new owner for its reconstitution.[36] In an appealing phrase, he states: 'Personal contracts remain the subject of personal bargains'.[37] His second reason – and one also sees this point made in Civilian explanations of the *numerus clausus* principle[38] – was that to have no limits on the type of obligations to which owners could be subject would subvert individual freedom and could potentially create modern variations of feudal serfdom.[39]

---

33 Stake (n25).

34 ibid 971.

35 U Reichmann 'Towards a Unified Concept of Servitudes' (1982) 55 Southern California L Rev 1177, 1233.

36 This fails to take account of the obvious point that these personal covenants do not terminate upon transfer. Instead, they remain contractually binding upon the original owner, who should take the new owner bound by them if they require performance related to land. See Chp 8 Pt B.5(b). Rudden noted this: B Rudden 'Economic Theory v. Property Law: The *Numerus Clausus* Problem' in J Eekelaar & J Bell (eds) *Oxford Essays in Jurisprudence: 3rd Series* (1987) 239, 256. This is actually one of the strongest arguments against continuing to distinguish between real and personal conditions: see text to n60.

37 Reichmann (n35) 1233.

38 Eg V Sagaert 'Les interférences entre le droit des biens et le droit des obligations: une analyse de l'évolution depuis le Code civil' in P Wéry (ed) *Le droit des obligations contractuelles et le bicentenaire du Code civil* (2004) 353, 362.

39 Although this argument might appear fanciful, illustrations can be thought of. In *Brador Properties Ltd v BT plc* 1992 SC 12 (IH) the landlord undertook to provide secretarial services and a telephone answering service for the tenant. Is such an obligation a real condition of the lease, so as to bind a successor to the landlord? It is thought not.

When considering the rules of Scots lease law, how much weight should be given to these arguments and to the ultimate position adopted in the Restatement? There are various points which detract from their weight. First, and most obviously, the debate in the United States was concerned with United States law governing what we would call servitudes and real burdens. The result of that analysis cannot simply be accepted as equally compelling here, especially not in the distinct field of leases. In its reform of the law of real burdens, the Scottish Law Commission considered, but chose not to follow, the American Law Institute's lead: it maintained the rule that a real burden must be praedial.[40] It does not seem that the distinction drawn between real and personal conditions in leases performs the functions which French suggested that the 'touch and concern' rule performed in the United States. In particular, it is not a device for 'intent effectuation'. On the contrary, it is a mandatory rule which can sometimes frustrate parties' intentions. There is an independent, statutory basis on which terms can be adjusted by the Lands Tribunal,[41] so it seems unlikely that the distinction between real and personal conditions performs that function. One of its functions is, however, to prevent the transmission of terms where there is a policy objection to their doing so.

Secondly, particularly for those not schooled in law and economics, much of the debate is difficult to evaluate. Its results appear inconclusive: against Epstein one may pit Stake, for example. Finally the arguments pay too little regard to the doctrinal starting points of contract and property law. It is more of a free-ranging

---

40 The Law Commission of England and Wales proposes that analogous rules be retained for easements and created for its new category of 'land obligations': Law Commission *Easements, Covenants and Profits à Prendre: A Consultation Paper* (LC CP 186, 2008) [3.20] – [3.25] (easements) & [8-71] – [8-80] (land obligations). The Scottish Law Commission's work on real burdens is cited.

41 Title Conditions (Scotland) Act 2003 Pt 9. This is, probably unintentionally, broader than the provision of the Conveyancing and Feudal Reform (Scotland) Act 1970 which it replaced. Title Conditions (Scotland) Act 2003 s122 defines 'title condition' as including 'a condition in a registrable lease if it is a condition which relates to the land (but not a condition which imposes either an obligation to pay rent or an obligation of relief relating to the payment of rent)'. Compare that with s1(2) 1970 Act: 'a land obligation is an obligation relating to land which is enforceable by a proprietor of an interest in land, *by virtue of his being such proprietor*, and which is binding upon a proprietor of another interest in that land ... *by virtue of his being such proprietor*' (emphasis added). The omission of the italicised words from the new definition appears to have the result that all provisions of registrable leases (providing they relate to land and are not specifically excluded) are title conditions, regardless of whether they are real or personal conditions. There is no trace of an intention so to alter the law in the preceding consultation: Scottish Law Commission *Report on Real Burdens* (SLC Rpt 181, 2000) [6.26] – [6.36].

policy discussion, set free from any moorings in contract or property doctrine.[42] Were it to have been accepted as a starting point that contracts only bind parties to them and that parties cannot create whatever real rights they wish, and then to have been argued that an exception needed to be made here for particular reasons, then the debate's conclusion that 'touch and concern' should be abandoned would be more easily applied to a system, such as Scots law, which does adhere to those doctrines. That is not, however, the approach. Rather, when reading works such as Epstein's, with its emphasis upon 'freedom of contract', one gets the impression that the opposite principle was taken as a starting point:[43] the assumption is that covenants should benefit and burden successors unless there is a reason to the contrary and that the original parties' intent should be determinative. That was also the case with Berger's explanation of 'touch and concern' merely as a device for intent effectuation.

Nevertheless, Epstein's 'notice cures all' argument is a powerful one, especially when one is dealing with commercial actors and registered leases. Its simple appeal must be set against the concerns noted above with allowing obligations to bind successors in title.

C. HOME-GROWN PROBLEMS

Problems inherent in any attempt to distinguish between real and personal conditions are exacerbated in Scots law by the relative lack of case law and comment thereon. The primary difficulty with a distinction between real and personal conditions is uncertainty, a result of the impossibility of providing a precise test. Scottish attempts to distinguish between conditions of a lease which transmit to successors and those which do not have not resulted in a clear rule. Formulations are often circular.[44] This is not, though, a problem unique to Scots law. The German experience is the same: 'Diese Abgrenzung bereitet häufig Schwierigkeiten'.[45] Similar criticisms have been

---

42 For critical comments about such an approach to law, see DM Johnston 'The Renewal of the Old' [1997] CLJ 80, 89 *et seq* and 92 especially.

43 Stake noticed this: JE Stake 'Towards an Economic Understanding of Touch and Concern' [1988] Duke LJ 925, 932.

44 See Chp 3, text to n165.

45 *Staudingers Kommentar* §566 [39]. [This distinction gives rise to frequent difficulties.]

made in England[46] and it does not seem that the South African position is much more certain.[47] On the other hand, the difficulties of a general test can be overplayed. There are many areas where property law relies upon fluid tests,[48] just as there are in private law generally.[49] Few tests can be said to produce absolute certainty and yet they continue to function.[50] A particular problem for Scots law is that, as a small jurisdiction, the problems of an uncertain general test have not been alleviated by a sufficient volume of litigation to allow the treatment of individual instances to be predicted with certainty.[51] It cannot therefore be said with confidence how many of the terms which have given rise to litigation in other systems would be treated here. This uncertainty does increase transaction costs, as Epstein noted. The problem is compounded by the fact that the experience of those larger jurisdictions may be of limited value. Rankine warned that English cases on this point 'do not afford a safe guide to a Scots lawyer'.[52] They are useful to consider, indeed this thesis has considered them and those of other jurisdictions, but – as we have seen – the reasoning used, and results reached, vary. Another recently voiced objection is that the current rules are out of touch with commercial reality.[53] Finally, terms which are held to be personal might be of fundamental importance to the continuing parties to the lease.

A further difficulty is the effect on the contract of lease of holding some conditions to be real and some personal. Although the point is not always appreciated, the conclusion that a term is a personal condition of a lease does not

---

46 Eg HA Bigelow 'The Contents of Covenants in Leases' (1914) 30 LQR 319, 319. One of the best known critical judicial passages is *Grant v Edmondson* [1931] 1 Ch 1 (CA) 28 – 29 (Romer LJ).

47 Cooper *Landlord & Tenant* 297 – 303; Kerr *Sale & Lease* 440 – 442.

48 Eg the rules to determine whether accession has taken place, or that a real burden or a servitude be praedial, or that a servitude must be exercised *civiliter*, or that prescriptive possession be as of right, or that a trustee in sequestration takes property *tantum et tale*. The list could go on.

49 *Passim*: J Dietrich 'Giving Content to General Concepts' (2005) 29 Melbourne University L Rev 218.

50 In Tarlock's view 'open-ended standards are more troublesome to law professors than to lawyers and judges': AD Tarlock 'Touch and Concern is Dead, Long Live the Doctrine' (1998) 77 Nebraska L Rev 804, 818.

51 Fancourt says of English law that, despite the uncertainty of the touch and concern test, there is an established body of decisions and, because there is not an inexhaustible supply of lease covenants, unlitigated ones do not arise very often: TM Fancourt *Enforceability of Landlord and Tenant Covenants* (2nd edn 2006) [4.09].

52 Rankine 478.

53 I Quigley 'On the wrong track' 2007 (Feb) JLSS 48.

lead to its extinction.[54] The rule which distinguished between real and personal conditions has no impact upon the existence of contractual rights and obligations, but merely controls who is bound by or entitled to them. It is a rule about allocation of rights and obligations. In respect of an obligation on the landlord, the tenant's rights remain unaltered; the difference is that, after transfer by the landlord, in place of one counterparty, the tenant is faced with two. One can readily conceive that this may cause difficulties. One French commentator has referred to 'un véritable dépeçage du contrat dont on ne comprend pas le critère'.[55] Take, for instance, the facts of *Brador Properties Ltd v BT plc*,[56] where a landlord undertook to provide secretarial services to the tenant. It was suggested above[57] that this would constitute a personal condition. If after transfer the original landlord remained bound, what consideration would he receive for providing these services? He would no longer be entitled to rent, but equally he could not be expected to provide these services for free. Is the 'rent' due under the lease to be apportioned between the sum due for these services and the sum due for the occupation of the land, and these sums allocated to the original landlord and his successor respectively? There is no clear answer to this question. Options to purchase the subjects or to renew the lease are also awkward, but in a different way. Although they are personal conditions, the person bound by them requires a right in the property concerned in order to be able to perform. It follows that the original landlord should take steps to remain in a position to perform after transfer, most likely by taking the successor bound by the obligation concerned.[58] This appears not to be common practice in Scotland. It should be.

D. MODELS FOR LAW REFORM

Because of similar criticisms to those which have just been made, in 1988 the Law Commission of England and Wales recommended abolition of the distinction between leasehold covenants which touched and concern leased land or its reversion and those which did not. Responses to its consultation had not indicated that the

---

54 See Chp 8 Pt B.5(b). There will, however, be some terms which are intended to bind the original parties only so long as they remain parties to the lease.

55 Civ 3^{e} 17 nov 1998, JCP 1999 II 10 227 obs F Auque at 2310. [A veritable carving up of the contract, the criteria for which are unknown.]

56 1992 SC 12 (IH).

57 At n39.

58 See Chp 6 Pt A & Chp 8.

'touch and concern' test gave rise to significant practical problems,[59] but the Law Commission suspected that this was because of the use of indemnity covenants and not because the touch and concern test was in itself satisfactory. An indemnity covenant is an undertaking by, say, an assignee of the tenant's interest by which he would undertake to perform *all* of the obligations of the lease.[60] The result was that the touch and concern rule was circumvented.[61] Such indemnity covenants were implied by statute into transfers by the tenant. There was no statutory implied covenant in respect of transfer of the reversion, but apparently they were nevertheless common.[62] The Law Commission proposed the following governing principle as a 'simple and easy to understand' rule: [63]

> [A]ll the terms of the lease should be regarded as a single bargain for letting the property. When the interest of one of the parties changes hands the successor should fully take his predecessor's place as landlord or tenant, without distinguishing between different categories of covenant.

The resulting legislation did not give effect to this proposal in its entirety. Section 3(1) of the Landlord and Tenant (Covenants) Act 1995 applies to all leases created on or after 1 January 1996 and provides that the benefit and burden of all landlord and tenant covenants[64] of a tenancy shall pass on assignment of the tenancy or the reversion. Section 3(6), however, inserts a significant limitation:

> Nothing in this section shall operate –
> (a) in the case of a covenant which (in whatever terms) is expressed to be personal to any person, to make the covenant enforceable by or (as the case may be) against any other person; or
> (b) to make a covenant enforceable against any person if, apart from this section, it would not be enforceable against him by reason of its not having been registered under the Land Registration Act 2002 or the Land Charges Act 1972.

The second exception primarily covers options to acquire the reversion or to renew the lease.[65] The Irish Law Reform Commission has recently proposed a similar rule:

---

59 Law Commission *Landlord and Tenant Law: Privity of Contract and Estate* (LC 174, 1988) [3.29].

60 ibid [3.30]; Fancourt (n51) [7.18] – [7.20]. Such covenants are implied by statute into transfers by the tenant of pre-1996 leases: Land Registration Act 2002 s134(2) & Sch 12 para 20(2).

61 *Privity of Contract and Estate* (n59) [3.30]; Fancourt (n51) [7.29]

62 *Privity of Contract and Estate* (n59) [2.15].

63 ibid [4.1].

64 Inadvertently, the 'touch and concern' test may have been re-introduced by the back door via the definition of 'landlord' and 'tenant' in 'landlord covenant' and 'tenant covenant'. See Landlord and Tenant (Covenants) Act 1995 s28(1) and TM Fancourt *Enforceability of Landlord and Tenant Covenants* (2nd edn 2006) [11.03].

65 Fancourt (n64) [12.07] – [12.09].

all leasehold covenants transmit, apart from those expressed to be personal either to the original holder or to another holder of the landlord's or tenant's interest.[66]

This approach has the virtue of simplicity. It does seem odd that were a lease to contain a provision, say, obliging the landlord to sing once a week for the tenant, that would bind a successor. But perhaps the risk of such an esoteric term being included in a lease is worth running for the benefit of certainty and simplicity which a 'bright-line' rule provides. That is a judgment which those involved in the property market will have to make if reform is considered in Scotland. The argument would be more easily made in respect of registered leases, provided that only registered terms could affect a successor. Were legislation to be contemplated, specific provision could be made for terms where there are thought to be particular policy reasons against transmission.

---

66 Irish Law Reform Commission *Report on the Law of Landlord and Tenant* (LRC 85, 2007) cl 16 draft Landlord and Tenant Bill. As noted in Chp 2 (at n90) this does not apply to an obligation in an agreement separate from the lease, unless the acquirer had actual knowledge of such an obligation at the time of transfer.

CHAPTER FIVE
RENEWALS AND BREAK OPTIONS

A. UNREGISTERED LEASES 101
1. Extending the lease 101
(a) Terminology 101
(b) New lease to commence at ish: protection postponed 103
(c) New lease to commence at once: immediate protection 107
(d) Varying the ish 109
(e) Supervening options 114
2. Terms of the original lease relating to duration 118
(a) Consecutive Leases 118
(b) Options to renew 119
(c) Options to extend 126
(d) Break options 127
3. Assessment of the rules for unregistered leases 129
B. REGISTERED LEASES 132
1. Two overarching issues 132
2. Extending the lease 133
(a) Registration of Title Practice Book 133
(b) New lease to commence at ish 134
(c) New lease to commence at once 135
(d) Varying the ish 135
3. Terms of the original lease relating to duration 136
(a) Consecutive leases 136
(b) Options to renew 136
(c) Break options 136
C. CONCLUSION 137

Parties to a lease may provide for its renewal either when agreeing the original lease or subsequently. This may take the form of an agreement to extend the lease in some way or of an option to the tenant to do so.[1] Alternatively, the lease might contain a break option, allowing one or both parties to bring it to an end before the ish. This chapter considers the extent to which a successor landlord is affected by these types of agreement, whether or not he is aware of them. The potential impact of knowledge is considered in Chapter Nine.

[1] More exotically, the landlord might have the option to require the tenant to take a new lease.

A. UNREGISTERED LEASES

1. Extending the lease

(a) Terminology

Logically there are three ways in which parties to a subsisting lease might provide for it to be 'extended' so as to allow the tenant to remain on the property after the ish. They might:

- conclude a new lease to commence at the ish of the subsisting one;
- conclude a new lease to commence immediately, its duration being the sum of the unexpired period of the subsisting lease and the desired period of extension; or
- vary the duration of the subsisting lease.

Previous discussion in Scotland has focused upon the first two possibilities. Most texts on leases contain chapters entitled 'Prorogations and Renewals'.[2] What is the meaning of these terms? First: 'prorogation'. According to Ross, a prorogation was a lengthening out or extension of the same thing, so a lease was said to be 'prorogued' when the transaction amounted to an extension of the period of the old lease, leaving all its other conditions unaltered.[3] That suggests that a prorogation amounted to a continuation of the same contract: the ish was simply varied. This impression is heightened by Ross's use of the term 'new lease' to describe other means of extending the tenant's right and it would cohere with the dictionary definition of prorogation, which is 'the action of causing something to last longer or to continue in effect'.[4] But this seems not to be the way in which the term is used in most of the Scottish discussion. Rankine stated that a prorogation was 'a new term to run after the lapse of the old'[5] and the word is used in that way in various cases.[6] On the other hand, when Bankton discussed the treatment of consecutive leases, he noted that they

---

2 Hunter vol I 442 – 444 & 488 – 492; Rankine 148 – 151; Paton & Cameron 41 – 42. Although there is not a chapter devoted to the issue, there is discussion in Bell *Leases* 46 ff.

3 Ross *Lectures* vol II 500.

4 Oxford English Dictionary: available online at www.oed.com. The word's origins are in Old French and Latin. The term 'prorogation' is used in French texts: eg P Malaurie, L Aynès & P-Y Gauthier *Les contrats spéciaux* (2nd edn revised 2005) [667]. In French law it seems to mean an actual continuation of the subsisting lease, as opposed to the conclusion of another.

5 Rankine 148. See also Paton & Cameron 41, who use 'prorogation' and 'renewal' synonymously to cover any form of 'extending' the tenant's right: 113.

6 In *Richard v Lindsay* (1725) Mor 15 217, *Creditors of Lord Cranston v Scot* (1757) Mor 15 218 and *Scot v Graham* (1769) Mor 15 220 'prorogation' was used to refer to a lease granted to an existing tenant to commence at the ish of the current lease.

were initially treated as being 'in effect' prorogations of the subsisting tacks.[7] That presupposes the existence of a concept of prorogation distinct from the grant of consecutive leases and one assumes that this separate concept was the continuation of the subsisting lease. It seems, therefore, that there was no unanimity as to the exact meaning of 'prorogation'. It was unclear whether the grant of a second lease on identical terms to the first was a 'prorogation', or whether a 'prorogation' was in fact an extension of the original lease and the grant of a second lease on identical terms to the first was, for a period, simply treated analogously to this. The point is of importance when discussing whether the duration of a lease may be extended simply by varying the ish.[8] The dominant view is that 'prorogation' meant an extension effected by means of a second lease which was on identical terms to the original one and which was to commence at its ish. As for the practicalities, in Ross's words: 'a prorogation of a tack should recite the former one, and ought not to differ from it in rent, or any other circumstance, to the prejudice of the proprietor, the extension of the term excepted'.[9]

Distinct from a prorogation was what Ross called 'a new lease',[10] which later writers described as a 'renewal'.[11] This existed if the terms of the lease were altered *and* the new lease began before the ish of the original. These definitions of 'prorogation' and 'renewal' were not, however, adhered to by later writers. If one approaches the matter logically, one can see that, even if considering only extensions effected by means of a new lease, these are not the only possibilities. When one includes the possibility of extending a lease by varying its ish, there are in fact five possible types of transaction:

1. A lease on identical terms to the subsisting lease, to commence at its ish.
2. A lease on different terms to the subsisting lease, to commence at its ish.
3. A lease on identical terms to the subsisting lease, to commence immediately.
4. A lease on different terms to the subsisting lease, to commence immediately.
5. A variation of the duration of the subsisting lease.

---

7 Bankton *Institute* II ix 39.
8 Pt A.1(d).
9 Ross *Lectures* vol II 500.
10 *Ibid* 501.
11 Hunter vol I 442; Rankine 148; Paton & Cameron 41.

Ross's definition classified types 1 and 4: 1 was a prorogation, 4 a 'new lease'. At some point, a 'new lease' became known as a 'renewal'. Ross's definition was repeated by Hunter,[12] but Rankine,[13] and Paton and Cameron,[14] whilst maintaining Ross's definition of prorogation, altered his definition of 'renewal', which became: a transaction where the new lease begins before the lapse of the old *or* where alterations are made to the rent or other conditions.[15] This definition of renewal encompasses types 2 to 4.

This traditional terminology is unhelpful. As will be shown below, when ascertaining whether a transaction binds a successor landlord, the crucial distinction is now between transactions of types 1 and 2 on the one hand and types 3 and 4 on the other. The former commence at the ish of the subsisting lease and so do not bind a successor landlord who acquires ownership prior to its termination, which is also the date when the 'extension' is to commence. It is thought that the latter cases (i.e. types 3 and 4) immediately become real because they commence immediately. They therefore do bind a successor landlord who acquires before the subsisting lease would have expired. The prorogation/renewal distinction therefore sits in the wrong place, making it unsuitable for determining when a transaction becomes effective in a question with a successor landlord. This explains the modern view that there is 'no important distinction between prorogation and renewal, and the word "renewal" is commonly used for either transaction'.[16] Modern texts assume that leases are extended by means of separate contracts of lease, whether they begin at the ish of the subsisting lease or immediately. They pay little attention to the fifth possibility. Here it will also be considered.

(b) New lease to commence at ish: protection postponed

In order for a successor of the landlord to be bound by an unregistered lease, the tenant must possess by virtue of that lease. The rule is well expressed by Hume: 'the possession which shall serve to validate a tack must be possession upon the particular

---

12 Hunter vol I 442. Bell uses the terms 'prorogation' and 'renewal' but does not appear to define them: Bell *Leases* 51.

13 Rankine 148.

14 Paton & Cameron 41.

15 In the case of Paton & Cameron, the alteration appears not to be deliberate: they cite Ross as authority for the definition which they propose.

16 Paton & Cameron 41. Indeed, that text uses the terms synonymously to refer to an extension, however effected. 'Prorogation' is used in this way in *Birbeck v Ross* (1865) 4 M 272 (OH) 276.

title, or very tack which is in question between the parties'.[17] Such possession can only occur *after* the lease's date of entry. Thus Erskine: 'a tenant can have no possession upon his tack till the term of his entry'.[18] So if parties conclude a contract of lease which is to commence at some point in the future, and before the date of entry the landlord transfers ownership of the subjects, the tenant's right in respect of that future lease will not be enforceable against the successor even if the tenant possesses the subjects in the meantime by virtue of some other right.[19] A commonly encountered phrase is that the subsequent lease was conferred *in tempus indebitum*.[20] Following transfer, the tenant will be left with a contractual claim against the original landlord for non-performance.[21] As George Joseph Bell says, the tenant remains a personal creditor until he begins to possess upon the lease.[22]

Bankton is a good place to start when considering how this rule applies to transactions to extend leases:[23]

> If an heritor grant a tack to a tenant already possessed of one, to commence after expiration of the first tack, and thereafter sell the lands, and the disponee is infeft before commencement of the second tack, the question is, if it can defend the tenant against such singular successor. It may seem, that the possession, being only upon the first, and not on the second tack, the purchaser is not concerned with it; but the court found the second tack good against him, as being in effect but a prorogation of the first tack[24]: but if the second tack varied from the first, to the prejudice of the proprietor,[25] this could not hold; for then it could not be deemed a prorogation of the first, and would ensnare purchasers. And, with submission, even the first case may still be doubted, since purchasers are bound only to enquire as to the tacks, by virtue whereof the tenants are in the possession, and the old statute only secures such leases, till the issue or termination of the same.

---

17 Hume *Lectures IV* 81.

18 Erskine *Institute* II vi 25.

19 *Wallace v Harvey* (1627) Mor 67; *Hamilton v Tenants* (1632) Mor 15 230; *Maxwell v Tenants* (1630) Mor 15 215; *Johnston v Cullen* (1676) Mor 15 231; *Millar v McRobbie* 1949 SC 1 (IH) 8. cf German law: *Staudingers Kommentar* §566 [29] and *Münchener Kommentar* §566 [13].

20 This phrase is used in *Drum v Jamieson* (1602) Mor 15 209, 15 210; *Preston v Tenants of Duddingston* (1604) Mor 15 210 and *Maxwell v Tenants* (1630) Mor 15 215. In *Drum* this is translated: 'to begin in such a year when the setter had no right'. Trayner's rendition is 'at an undue time': J Trayner *Latin Maxims and Phrases* (4th edn 1894) 277.

21 *Creditors of Lord Cranston v Scot* (1757) Mor 15 218.

22 Bell *Commentaries* I 65, citing *Creditors of Lord Cranston v Scot* (1757) Mor 15 218. See also Hunter vol I 443 – 444.

23 Bankton *Institute* II ix 39.

24 He cites *Edgar*, July 7 1725 and *Richard*. I have not been able to trace the former reference; the latter may be to *Richard v Lindsay* (1725) Mor 15 217.

25 In doctrinal terms, it should surely not matter whether the variation is to the prejudice of the proprietor or not. If there is any variation, the renewal must be viewed as a separate contract of lease.

Bankton makes three points. (I) The conclusion of a second contract of lease to commence at the ish of the existing lease and on the same terms (a type 1 case) was, at that time, viewed as being 'in effect' a prorogation of the original contract of lease, and not as a separate lease to commence at the ish of the original. The difficulty in determining exactly what earlier writers meant by 'prorogation' was noted above.[26] Here Bankton uses the word it in its literal sense: an extension of the same thing. This is a key point. The two leases were fused. The second lease was to be viewed as simply extending the duration of the first, and so the tenant was protected against alienation by the landlord even before the period of the extension began, for he was already in possession under the lease as extended. (II) When the terms of the second contract varied from those of the original lease (a type 2 case), it could not be viewed as simply an extension of the original lease, but was instead to be seen as a *separate contract of lease* with a future date of entry. As there could be no possession upon this lease prior to that date, a successor acquiring the subjects in the meantime would take free of it. (III) Bankton thought the rule which plainly applied to type 2 cases might also apply to type 1 cases. In fact, at the time he was writing there was already some authority to this effect,[27] although cases subsequent to that one had taken a different approach.

In the cases cited by Bankton one can see debate about how type 1 cases should be characterised: are they extensions to, or distinct from, the existing contract of lease?[28] In *Mackarro*,[29] for instance, the successor argued that the second tack was 'a several and distinct right from the first ... to which [the tenant] could not ascribe his possession'. This argument was rejected and the successor was held bound by the subsequent lease. Likewise in *Preston v Tenants of Duddingston*[30] current and future leases were viewed as 'a conjunct tack'. These early cases simply considered whether a lease to commence at the ish of a subsisting lease would bind a successor who acquired before that lease commenced. Subsequent decisions considered

---

26 Text to n3.

27 *Drum v Jamieson* (1602) Mor 15 209.

28 Future lease not binding upon successor as it is separate from the original lease: *Drum v Jamieson* (1602) Mor 15 209. Second lease binding upon successor as it is an extension of the original lease: *Preston v Tenants of Duddingston* (1604) Mor 15 210 and *Mackarro* (1662) Mor 15 213. An obligation to renew a lease contained in the original lease was held not to bind a successor in *Dalrymple v Hepburn* (1737) 5 Br Sup 190 (on which, see text to n101).

29 (1662) Mor 15 213.

30 (1604) Mor 15 210.

transactions specifically described as 'prorogations'.[31] The law fluctuated[32] and finally reached the position that leases to begin after the ish of a current lease were viewed as separate from the current lease and, like other leases with future dates of entry, did not become real until the tenant began to possess by virtue of them.[33] That is clearly the rule today. There are various cases to support this position[34] and it is accepted by many writers.[35] It is most pithily expressed in *Johnston v Monzie*,[36] in which it was unanimously found that 'a prorogation of a tack, upon which no possession had followed, the old tack not being expired, is not a real right, and, consequently, not valid against a singular successor'. The cases in which the opposite rule was adopted and the contracts fused, are no longer good law.[37] It is said to make no difference whether the two (or more) leases are recorded in a single deed,[38] or whether the subsequent contract is endorsed upon the existing lease.[39]

As a matter of logical inference, future contracts of lease which are upon different terms to the original lease (type 2) are subject to the same treatment: these are separate contracts from the subsisting lease and so the 'renewal' does not bind a

---

31 *Richard v Lindsay* (1725) Mor 15 217; *Creditors of Lord Cranston v Scot* (1757) Mor 15 218; *Scot v Graham* (1769) Mor 15 220. (In *Richard* the description as a prorogation was inaccurate, for the rent was increased.)

32 cf, eg, *Drum v Jamieson* (1602) Mor 15 209 (not binding); *Preston v Tenants of Duddingston* (1604) Mor 15 210 and *Richard v Lindsay* (1725) Mor 15 217 (binding); *Creditors of Lord Cranston v Scot* (1757) Mor 15 218 and *Scot v Graham* (1769) Mor 15 220 (not binding). The chronological development is documented by Hunter vol I 489 – 491.

33 German law also recognises that the treatment of extensions of a lease and future leases are linked. It was noted above (n19) that in German law leases bind successors where the tenant had been admitted to possession *before* the date of entry. From this it follows that an extension binds successors who acquire after the conclusion of the contract to extend the lease, but before the extended period commences: see *Staudingers Kommentar* [29].

34 *Creditors of Lord Cranston v Scot* (1757) Mor 15 218; *Creditors of Douglas v Carlyles* (1757) Mor 15 219; *Scot v Graham* (1769) Mor 15 220; *Johnston v Monzie* (1760) 5 Br Sup 877.

35 Erskine *Institute* II vi 25 (the note first appeared in the 4th edn, J Gillon (ed) 1805); JS More *Notes to Stair's Institutions* (1832) ccxlv; JS More (J McLaren ed) *Lectures on the Law of Scotland* vol II (1864) 3; Hume *Lectures IV* 81-2; Bell *Principles* §1210; Bell *Commentaries* I 65.

36 (1760) 5 Br Sup 877.

37 *Preston v Tenants of Duddingston* (1604) Mor 15 210; *Mackarro* (1662) Mor 15 213; *Richard v Lindsay* (1725) Mor 15 217; *Wight v Earl of Hopeton* (1763) Mor 10 461; *Scott v Straiton* (1771) Mor 15 200, aff'd (1772) 3 Pat 666. This is certainly Rankine's view: 151. *Wight* and *Scott* are discussed in more detail below: see text to n110. cf the suggestion in *Jacobs v Anderson* (1898) 6 SLT 234 (OH) that had a contract been made between a landlord and tenant to renew a lease at its expiry and, in reliance upon it, the tenant incurred expenditure, it might have been arguable that a new lease was constituted from the date of the letter. That is not the law.

38 cf the reasoning in an early case, where it was the fact that consecutive leases were in separate deeds which appears to have been conclusive: *Drum v Jamieson* (1602) Mor 15 209.

39 Bell, Hunter and Rankine are unanimous upon this point, although there appears to be no relevant case authority: Bell *Leases* 57; Hunter vol I 475; Rankine 149.

successor of the landlord until the tenant begins to possess by virtue of it.[40] Obviously, if the new lease is a long lease, it must be registered in order to become real.[41]

(c) New lease to commence at once: immediate protection

The rule just discussed defers protection of the tenant against a singular successor until the ish of the subsisting lease. To avoid this, parties may structure their transaction differently. Instead of agreeing, say, in year ten of a fifteen-year lease that there will be a further lease for fifteen years at the end of the original lease, a new lease is concluded to start immediately, aggregating the period remaining on the original lease with that of the desired new lease. In the example given a twenty-year lease would be concluded. Possession may be ascribed right away to the new lease so as to render it immediately binding in a question with a successor.[42] In the classification given earlier, this is a type 3 or 4 transaction and this is how a lease would normally be extended in modern practice.

In order to remove any doubt as to the basis for the continuing possession, it is best for the original lease to be renounced. If there is no express renunciation, it must be clear that possession is upon the new lease.[43] The general view is that this requires a change in rent (or presumably of any other term which results in an immediate change in the parties' conduct). It has been said that only in special circumstances will possession be ascribed to the new lease where there is neither express renunciation nor such a change.[44] The mere fact that the second lease has a different ish is insufficient. There must, in the ordinary course of things, be some alteration to the terms which is immediately observable and therefore serves as evidence that the tenant is now possessing by virtue of the new lease. The acceptance of a lease on

---

40 *Richard v Lindsay* (1725) Mor 15 217 is *contra*, but is now viewed as wrong, for it is inconsistent with the general rule: Rankine 150 – 151.

41 See discussion of the effect of prospective registration at n153.

42 *Neilson v Menzies* (1671) Mor 15 231 is often cited. The note in Morison is 'one possessing by a tack, getting a new tack for a lesser tack-duty presently to commence, it was found, That he might ascribe his possession to the new tack, so as to prefer him to a successor'. This is Stair's report. Gosford's differed: he reports that the second tack did not commence until the expiry of the first, making it a type 2 transaction (for there was a variation of rent). If that is so, the result is inconsistent with the current rule in respect of future leases. For this reason, Bell describes the decision as 'very doubtful': *Principles* §1210.

43 *Birbeck v Ross* (1865) 4 M 272 (OH) 276.

44 ibid; Bell *Principles* §1210; Rankine 149; Paton & Cameron 113; SME vol 13 [312].

such altered terms is regarded as an implied renunciation of the original lease.[45] This explains why possession is attributed to the new lease. The requirements of a particular change to the terms of the lease, or 'special circumstances', will normally, albeit not necessarily,[46] be satisfied by a type 4 transaction, for that involves a second lease on different terms to the first. But if the rule as to when there is an implied renunciation is as just stated, a type 3 transaction will not bind a successor until the original lease has expired, absent an express renunciation or special circumstances, for it is a lease on the same terms as the original (except, of course, for the ish).

This distinction is illogical. The conclusion by the parties to a subsisting lease of one with a different ish to commence immediately must surely amount to an implied renunciation of the subsisting lease, regardless of whether terms other than the ish are different. From that point on, only the new lease provides the basis for possession. Erskine may be cited in support of this position. He viewed the conclusion of a contract with a different ish as sufficient to amount to implied renunciation:[47]

> The consent of parties to give up a current tack is presumed when the tenant accepts of and uses a posterior tack, in which *any* variation is made from the first, either as to the tack duty, *term of endurance*, or other provisions relating to it.

Hunter is in similar terms,[48] as is Gloag.[49] *Montgomerie v Vernon*[50] is the case relied upon by Rankine, and Paton and Cameron, for the proposition that only in 'special circumstances' may possession be attributed to the new lease if there is no change of rent. In fact, there is no trace of such a rule in that case. A successor there argued that she was not bound by a lease granted to an existing tenant. The second lease was at a higher rent, but the tenant had continued to pay, and the previous landlord had continued to accept, the original rent. The successor argued that there had been no

---

45 Ross *Lectures* vol II 501. On implied renunciation: Hunter vol II 110 – 112; Rankine 524; Paton & Cameron 239.

46 The alteration might be to a term which does not result in an immediate alteration to the parties' behaviour.

47 Erskine *Institute* II vi 44 (emphasis added). See also Bankton *Institute* II ix 48: 'There is an implied renunciation of a tack unexpired, by taking a posterior lease, innovating the terms of the first' and *Campbeltown Coal Co v Duke of Argyll* 1926 SC 126 (IH) 131. In addition, see the unqualified statement in *Jenkin R Lewis & Son Ltd v Verman* [1971] 1 Ch 477 (CA) 496 B-C as to when the parallel English doctrine of implied surrender operates.

48 Hunter vol II 110.

49 Gloag *Contract* 392.

50 (1895) 22 R 465 (IH).

possession on the second lease. This argument was rejected. According to Lord McLaren, 'from the time the lease was granted, the defender [the tenant] necessarily possessed upon the lease, and on no other title'.[51] It is therefore thought that suggestions[52] that there require to be 'special circumstances' to indicate that possession is on the new lease where there is no change of rent or something similar are misplaced and that the conclusion by parties of a new lease to commence at once necessarily amounts to a renunciation of the existing lease.[53] If so, extensions of a lease effected by concluding a new lease to commence immediately can immediately become real. If the new lease is short, and the tenant in possession, it will become real immediately; if long, it will require to be registered in order to do so.

(d) Varying the ish

A third way by which parties might attempt to extend a subsisting lease is to vary its duration (type 5). For example, the parties to a fifteen-year lease might, in year ten, agree as follows: 'the term of the lease shall be extended by a period of ten years and the lease shall henceforth be construed as though it were for a term of twenty-five years'.[54] Is that a possible transaction and, if so, how does it affect singular successors?

It is difficult to be certain of the law here. A preliminary point to be addressed is the definition of 'prorogation'.[55] If that means an extension to the same lease effected by varying the ish, then the many texts which state that prorogations do not bind a successor landlord until the term of the original lease has expired would determine the result in this case. However, that seems not to be the position. In general, the term 'prorogation', when it retained a distinct meaning, was used to refer to extensions to leases effected by concluding a separate lease to begin at the ish of the subsisting lease. Just because a 'prorogation' in that sense is not treated as an

---

51 *Ibid* 475.

52 Rankine 113; Paton & Cameron 113; SME vol 13 [312].

53 Because of this, thought must be given to preserving any subsisting claims arising from the original lease: unless they are specifically reserved they will be impliedly relinquished (*Lyons v Anderson* (1886) 13 R 1020 (IH) 1024 & 1025). What is to happen should the new lease for some reason prove ineffective should also be considered. There is some suggestion that the old lease could revive if the new lease proved ineffective. On both points, see Ross *Lectures* vol II 501; Rankine 524; Gloag 706; McBryde *Contract* [25-28].

54 This drafting is taken from an English decision: *Goodaston Limited v F H Burgess plc* [1998] L & TR 46 (Ch D) 47.

55 See text to n2.

extension to the original lease, it does not necessarily follow that an actual variation of the ish is subject to the same rule.

How, then, is such a variation treated? Various arguments may be marshalled in favour of the view that the parties to a lease may extend it simply by varying its ish, and that such an extension is immediately binding on successors. The first is that there is no reason why such a transaction should not receive effect in line with the parties' intentions. A lease is a contract and, like any other, its terms may be varied. As was discussed in Chapter Two, variations generally bind successors.[56] If no effect were to be given to an agreement to vary, what would happen to it?[57] Secondly, the authorities do contain some support for the proposition that a lease may be extended by varying its ish. Despite what was said earlier about the meaning of 'prorogation', when Bankton discusses whether extending a lease by means of a consecutive lease can be treated as *in effect* a prorogation, he presupposes the existence of a concept of prorogation distinct from a second lease to commence at the ish of the first. Presumably he had in mind an extension to the existing lease. Just such a transaction was given effect in a question with a successor landlord in *Thomson v Terney*.[58] The landlord granted to the tenant a missive providing that, instead of being obliged to quit the farm at Michaelmas,[59] he could remain until Martinmas. This was held to bind a successor of the landlord who acquired before Michaelmas. The court seems to have viewed the nature of the supplementary agreement as amounting to a variation of the original contract of lease, which took immediate effect, and not as the conclusion of a separate contract which commenced at Michaelmas and ran until Martinmas. Rankine described the missive as effecting 'a mere readjustment' of the original lease and explained the decision on this basis.[60] It is highly significant that in the only case in which a lease was extended simply by varying the ish, the variation was effective and bound a successor landlord. A final point of note is that the Legal

---

56 As the duration of a lease determines how may be made real, variation of the ish may impact upon this: see the text to n75 below.

57 It might, by virtue of a mandatory rule of law, be treated as an agreement to extend the lease by means either of a new lease to commence at the ish of the current lease or a new lease to commence immediately. The second of these alternatives is English law: *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477 (CA) 496E.

58 (1791) Hume 780, discussed in Chp 2, text to n5.

59 One of the English quarter days, falling on 29th September.

60 Rankine 149.

Manual produced by the Registers of Scotland assumes the competence of such transactions and allows for registration of a lease which is extended in such a way.[61]

Against the possibility of extending the lease by varying the ish, one must note that Bell doubted the decision in *Thomson*,[62] presumably on the basis that its approach is difficult to reconcile with the rule that a second contract of lease, which 'extends' the original lease, binds a successor landlord only once the tenant possesses upon it. Hume, however, approved of the decision when he reported it.[63] Despite this, and despite citing it favourably at one point in his lectures,[64] Hume appeared hostile to the idea of being able to extend a subsisting lease in his discussion of prorogations. After noting the rule that possession does not make a lease binding upon successors if its date of entry has not yet arrived, he stated:[65]

> The question is nicer, but I rather incline to the same opinion, – where a writing is executed between the parties, enlarging or prorogating the terms, (as we call it) for the same rent, and on the same conditions. It may be, and has been argued, upon such a case, that, by means of such a writing the old and the new agreements are consolidated, – are blended and united – and that the sale falls now to be regarded complexly, as one set, – a set for the entire – new – and prorogated term. And thus, though the lands be sold before the end of the original term, yet still, according to this notion, the tenant shall maintain his right down to the additional or prorogated issue, in respect of his possession on that title which is now to be considered (so it is argued) as simple and undivided. This view of things does seem to have prevailed with the Court in *Richards v Neilson*, Janry. 1725,[66] as it also had in a case reported by Durie (but without the names of parties) 20 July 1622.[67] But I rather think it is the sounder opinion, that the two bargains here are, in their own nature, distinct bargains – equally so as if they had been contained in two formal instruments, both bearing the conditions of agreement at large. The thing is done in the form of a minute of prorogation, for brevity-sake only, and to save expence and trouble. If the parties truly mean to blend and consolidate the two bargains, the fit and natural form for it would be different. They would withdraw the old tack, and substitute a new one for it – a tack embracing both terms, and declaring, that possession has commenced upon that tack (notwithstanding its date) from such a day, being the true date of the tenant's first entry to the lands. The Court seem to have judged

---

61 RoS Legal Manual [19.4.2.(a)]. It also allows for a short lease which has been extended so that it exceeds twenty years' duration to be noted as an overriding interest. This will apply where a lease which commenced prior to the Land Register becoming operational is extended: s28(1) Land Registration (Scotland) Act 1979.

62 Bell *Principles* §1210, cited with apparent approval by the Lord Ordinary in *Birbeck v Ross* (1865) 4 M 272 (OH) 276. The tone of Rankine's discussion is also critical: 149.

63 See his favourable comment: (1791) Hume 780.

64 Hume *Lectures IV* 99.

65 Hume *Lectures IV* 81 – 82.

66 (1725) Mor 15 217 cit v Lindsay

67 *Mackarro* (1622) Mor 15 213.

on that footing in *Creditors of Cranston v Scott*, 4 Janry. 1787,[68] and *Creditors of Douglas v Carlisle*, 2 July 1757.[69] You find a hint to the same purpose in *Maxwell v Tenants*, 3 March 1630, Durie.[70]

In this passage, the reader faces the same terminological difficulty which affects all discussions of the rules applicable to 'prorogations': that is to say, there is uncertainty as to exactly what a prorogation was. Hume probably had in mind transactions by which it was agreed that the existing lease would be followed by, for example, a three year extension, to commence at the ish of the current lease. That is supported by the facts of the cases which he cites.[71] Because of this, his statement that the two bargains should be treated as distinct does not compel us to adopt the view that a variation of the ish of an existing lease must be regarded as creating a distinct contract. On the other hand, Hume states that if the parties had truly meant to consolidate the two bargains they would have renounced the old lease and substituted a new one in its place, declaring it to have commenced at the ish of the original lease. That rather suggests that he did not view variation of the ish as competent. There is also the point that other texts do not mention this as a means of extending the lease, despite the fact that it would appear to be the most obvious way of doing so. Such a view of the law might be the result of the influence of rules relating to feudal rights. They could not be varied. Instead there had to be a re-grant by a charter of *novodamus*[72] or a minute of waiver had to be used.

It is therefore uncertain what effect is to be given to an agreement by parties to a lease to vary its ish. It is submitted, relying on *Thomson v Terney*[73] in particular, that the better view is that such an agreement should receive effect in line with the parties' intention, that is to say as a variation of the original lease. This is not inconsistent with the rules which apply to extensions effected in other ways. On the contrary, this is a principled position. If the parties agree to extend a lease, that contract is immediately varied and the varied contract binds a successor (subject to the points made below about a variation converting a short lease into a long one). On

---

68 (1787) Mor 15 128.

69 (1757) Mor 15 219.

70 (1630) Mor 15 215.

71 It was the situation in *Richard v Lindsay*, *Mackarro*, *Douglas v Carlisle* and *Maxwell v Tenants*. Also, in *Creditors of Lord Cranston v Scot* we are told that the landlord gave the tenant 'a prorogation of his tack ... to commence ... when the former lease expired'.

72 Gordon *Land Law* [12-84]; Reid *Property* (Gretton) [95].

73 (1791) Hume 780.

the other hand, if they agree to a second, separate lease to commence at the ish of the former, that will not become binding upon a successor until the tenant begins to possess by virtue of it. Alternatively, if they agree to conclude a new lease to commence immediately, the tenant will immediately be protected against transfer by the landlord. The appropriate analysis depends upon the appropriate interpretation of the parties' agreement. That it may on occasion be difficult to distinguish between the types of transaction[74] does not mean that the concepts are not distinct.

If this type of transaction is possible, other issues arise. Variation of the ish may have particular consequences which the variation of other terms does not. In particular, it may affect the characterisation of the lease as long or short, which in turn controls whether the lease must be registered in order to be made real.[75] If the parties to a nineteen-year lease agree to vary the ish with effect from year fifteen and to add a further twenty years to the duration, must this be registered? Two models are possible. Registrability might depend upon the total duration of the lease as varied (in this example, thirty-nine years); or it might turn upon the unexpired duration of the lease as varied (in this example, twenty-four years).[76] The Legal Manual produced by Registers of Scotland adopts the former view.[77] In the absence of any contrary authority, that is thought to be acceptable and, indeed, logical. Consider a thirty-five-year lease which the parties neglect to register. The tenant has no real

---

74 Which, for example, is the 'Minute of Extension' in the *Scots Style Book* vol V (1905) 329? It is in the following terms: 'We, the parties to the foregoing lease, hereby agree that the duration of the said lease shall be extended for the period of [ ] years from and after the term of [ ], on the same terms and conditions in all respects as are expressed in the said lease, which it is hereby agreed and declared shall be operative and binding for the said extended period, and shall form the contract between us, as if the whole clauses and stipulations thereof so far as not already implemented were herein inserted at length with reference to said period of extension'. It is thought that this extension is a separate lease to follow upon the subsisting one. Although the initial clause refers to the duration of the lease being extended, which might suggest a variation of the subsisting lease, the later clauses, which incorporate the provisions of the original lease into the extension, point towards the extension being a distinct contract of lease.

75 In addition, there will be stamp duty land tax consequences. See: M Hutton & S Anstley *Stamp Duty Land Tax* (2nd edn 2005) [6.6.7]; P Cannon *Tolley's Stamp Taxes 2005-06* (2005) [63.4]; R Nock *Stamp Duty Land Tax: The New Law* (2004) [7.129] – [7.136]. Hutton & Anstley state that it is possible to vary a lease in Scotland to change the 'demise'.

76 There is a third possibility: that it turns on the duration of the period of extension itself. This is unlikely. It would be appropriate were an agreement to vary the ish to be interpreted as an agreement that the subsisting lease will be followed by another. That is not thought to be the rule.

77 RoS Legal Manual [19.4.2(a)]. It states that such a varied lease is registrable or capable of being noted as an overriding interest. The second possibility covers the situation of an unregistered lease which was made real by possession prior to the Land Register becoming operational and which was then varied so as to become a long lease. Such a lease is an overriding interest (s28(1) Land Registration (Scotland) Act 1979) and so does not require to be registered.

right. In year fifteen, when the lease has fewer than twenty years to run, the lease does not suddenly become real by possession. It is a long lease and remains such. If the tenant realises his error in year fifteen, he must register in order to render his right real. The position adopted in the Legal Manual in respect of a variation of the ish is consistent with that. If a fifteen-year lease is varied in year ten to become a twenty-five-year lease, that lease should be registered, even although it has only fifteen years to run. The lease has been varied to become a long lease.

To focus only on unexpired duration would be consistent with viewing an extension of a lease by means of varying its ish as involving a deemed renunciation of the subsisting lease and the grant of a new lease for the aggregate of the unexpired period of the subsisting lease and the period of extension. That is the rule of English law:[78]

> It is not possible simply to convert the existing estate in the land into a different estate by adding more years to it, and even if the parties use words which indicate that this is what they wished to achieve the law will achieve the result at which they are aiming in the only way in which it can, namely by implying a fresh lease for the longer period and a surrender of the old lease.

There is no suggestion in the sources that this is Scots law. Were it to be, it would mean that an extension of a lease by varying the ish is actually a type 3 transaction (namely, a new lease to commence immediately for the combined period of the unexpired part of the subsisting lease and the length of the desired duration). That, it is suggested, is unlikely to have been what the parties had in mind. It would also have the potentially unwelcome consequence that what was conceived as a variation would, in fact, operate as a renunciation, with a potential impact upon subsisting claims.[79]

(e) Supervening options

Instead of agreeing that the lease will be extended in one of the ways just discussed, parties might agree that the tenant is to have the option of obtaining a new lease at the ish. Alternatively, the landlord might unilaterally grant the tenant such an option.[80] No case law has been found which considers whether such supervening

---

78 *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477 (CA) 496E.

79 See citations at n53.

80 As in *Arbuthnot v Campbell* (1793) Hume 785 and *Mackenzie v Mackenzie* (1799) Hume 801.

options bind successor landlords.[81] Whereas some jurisdictions have committed themselves to a particular theoretical analysis of options to conclude contracts,[82] Scots law has not yet reached that position. There has been some debate about how best to analyse an option to purchase property,[83] which has favoured the view that an option is a promise by the grantor to enter into a contract on certain terms if the option holder so desires within a particular period of time.[84] It is too early to say whether this will become the accepted position. There are other approaches which should be considered.[85] Even if a promise-based approach does become the established analysis of a transaction by which the landlord simply grants to the tenant 'an option to renew',[86] there is nothing to prevent the parties expressly adopting another approach to achieve the same ends.

These are thought to be the possible analyses of terms conferring upon the tenant an option to renew the lease. Or, on Lord Hoffmann's approach, these are the metaphors which may be used to describe the situation which arises upon the grant of an option:[86a]

---

81 *Jacobs v Anderson* (1898) 6 SLT 234 (OH) concerned a unilateral obligation granted by a principal landlord to a sub-tenant.

82 See, eg, M Dray & A Rosenthal *Barnsley's Land Options* (4th edn 2004) (England); F C Dutilleul *Les contrats préparatoires à la vente d'immeuble* (1988) and B Gross & P Bihr *Contrats: ventes civiles et commerciales, baux d'habitation, baux commerciaux* (2002) [87] (France); D Medicus *Schuldrecht II: Besonderer Teil* (12th edn 2004) [156] – [164] (Germany); S van der Merwe *et al Contract: General Principles* (3rd edn 2007) 79 (South Africa).

83 Note this fundamental difference: whereas the exercise of an option to purchase need not result in a contract, but could simply trigger a unilateral obligation to convey property, an option to conclude a lease must result in a contract.

84 HL MacQueen 'Offers, Promises and Options' 1985 SLT (News) 187. There is a general discussion of options in M Hogg *Obligations* (2nd edn 2006) [2.52] – [2.71], which expresses a preference for constituting an option as a promise: [2.64].

85 Three which deserve more consideration are these. (I) Viewing the option simply as the substantive contract (eg of sale or lease) subject to a suspensive condition, namely the exercise of the option. This view prevailed in South Africa for some time, but was then abandoned: Van der Merwe (n82) 80. Instead, the predominant South African approach is to view the option as (II) 'a legal concept which comprises a contract between two parties, the option grantor and the option holder, to keep open an offer to contract (the substantive offer) made by the grantor to the holder' (79 – 80). The option contract is distinct from the substantive contract which results from the exercise of the option. Obviously analyses I and II are available only where there is an agreement to grant an option and not in cases of unilateral grant. (III) A third, important, approach is that of Hoffmann J in *Spiro v Glencrown Properties Ltd* [1991] Ch 537 (Ch D). He viewed an option as *sui generis* and used notions of 'conditional contract' and 'irrevocable offer' as metaphors to describe the various aspects of this *sui generis* concept. Hogg, on the other hand, rejects that 'option' is a term of art: (n84) [2.52].

86 In *Commercial Union Assurance Co Ltd v Watt & Cumine* 1964 SC 84 (IH) 85 the lease simply provided that the tenants should 'have the option to renew the lease from time to time on the same terms, if they so desire'. There was no discussion of how this should be analysed.

86a See, most recently, *Camarthen Developments Ltd v Pennington* [2008] CSOH 139.

- unilateral promise by the landlord to renew the lease at its ish (i.e. to grant the tenant a further lease on the terms provided for in the option).[87]
- firm offer by the landlord to the tenant to renew the lease at its ish. The usual analysis of a firm offer is that it consists of an offer accompanied by a promise that the offer will not be revoked before a particular time.[88] The same result could also be achieved by a subsidiary contract that the offer will be kept open for a particular time.[89]
- a lease to commence at the ish of the current lease, but subject to a suspensive condition, eg that it is only to take effect if the tenant so requests, or upon the tenant's paying a premium for the renewal.[90]

---

87 Eg *Jacobs v Anderson* (1898) 6 SLT 234 (OH). (The promise here was not to renew an existing lease but rather from a landlord to a sub-tenant to grant a lease on the expiry of the headlease, if the sub-tenant so required.) The notion of a unilateral obligation to grant a lease seems to be accepted, but it is unclear that it is any different to possibility 2, namely a firm offer of a lease. It is a promise that, at a particular time, the landlord will be willing to contract on particular terms. There is no room for further negotiation. What is this but an offer? There are differences, such as assignability, between promises and offers which may make the distinction between a promise-based and an offer-based based analysis of options important: McBryde *Contract* [2-20].

88 Eg TB Smith *A Short Commentary on the Law of Scotland* (1962) 747; R Black 'Obligations' in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XV (1996) [617].

89 This is the South African analysis of an option contract: n85.

90 Eg (it is thought) *Campbell v M'Kinnon* (1867) 5 M 636 (IH), *sub nom Campbell v M'Lean* (1870) 8 M (HL) 40. There a 99 year lease was stated to be 'renewable for ever ... at [the tenants'] cost and expense, upon payment to [the landlord] of [a grassum].' There may be cases where it is difficult to determine whether a condition is suspensive of the landlord's obligation to renew, or is an obligation imposed on the tenant once the landlord grants the renewal.

As one would expect, each of the above possible analyses has different attributes.[91] But it is suggested that they are united by one: under none does the option bind a singular successor landlord who acquires before the tenant has exercised the option. No matter which analysis is adopted, it is difficult to see how a different conclusion could be reached consistently with the rules discussed above about when contracts of lease bind successors. It was suggested that an option to renew may be characterised either as a contract subject to a suspensive condition, as a unilateral obligation or as a firm offer. A successor is only bound by a contract of lease by virtue of which the tenant is in possession and this rule logically applies to contracts subject to suspensive conditions. So, just as successive contracts of lease are viewed as separate from the subsisting one, if a conditional contract analysis is adopted of an option, that conditional contract will be viewed as separate from the original contract of lease. It would be odd were a successor landlord not to be bound by an unconditional contract of lease with a future date of entry (which might itself be the result of the exercise of an option), but for the option itself to bind a successor. As for the other possible analyses (i.e. firm offer or promise), these cannot bind successors because the 1449 Act applies only to contracts of lease and not to offers or unilateral obligations to conclude such contracts.[92] An option to obtain a new lease granted or concluded during a lease does not bind a successor of the landlord who acquires before the tenant has exercised the option and has made the resulting lease real by possession or registration. This coheres with the predominant view, discussed below,

---

91 This is not the place for detailed exploration. In particular, the following points arise. (I) Does the Requirements of Writing (Scotland) Act 1995 require the exercise of the option to be in writing? Exercise must be written if it is either an offer or an acceptance, but not, it seems, if it is simply the purification of a condition of an existing contract: *Stone v Macdonald* 1979 SC 363 (IH) 368 (re purification of a condition of a unilateral obligation); *Hamilton v Lochrane* (1898) 1 F 478 (IH) 480 (tenant's initial argument, abandoned on appeal) and PJ Hamilton (ed) WG Dickson *A Treatise on the Law of Evidence* vol II (1887) § 1036 (oral evidence of non-fulfilment of condition admissible). (II) How may the tenant exercise the option? Does it require explicit exercise on his part, or might the tenant's remaining upon the property after the ish amount to exercise? *Commercial Union Assurance Co Ltd v Watt & Cumine* 1964 SC 84 (IH) held that where a lease expressly gave the tenant an option to renew and it did not exercise the option before the ish, possession after that date was attributable to tacit relocation and the option lapsed. Similarly: *Marquess of Linlithgow's Trs v Gifford* 1969 SLT 288 (IH). The Scottish Law Commission's understanding was that 'a renewal requires action on the part of the tenant': *Report on Conversion of Long Leases* (SLC Rpt 204, 2006) [2.24]. cf two earlier cases involving unilateral, unconditional undertakings by the landlord to renew the lease at its ish, in which the tenant's continued possession after the expiry of the initial lease was attributed to a lease in terms of that undertaking and not to tacit relocation: *Arbuthnot v Campbell* (1793) Hume 785 and *Mackenzie v Mackenzie* (1799) Hume 801.

92 *Jacobs v Anderson* (1898) 6 SLT 234 (OH).

that an option to renew included in a lease is a personal condition.[93] Were, however, the offside goals rule to be developed as academics suggest, it would produce the opposite result in cases where the successor knew of the option or acquired at a material undervalue. That is discussed in Chapters Eight and Nine.

2. Terms of the original lease relating to duration

Another situation to consider is where the original lease contains a term relating to its renewal or permitting one or both parties to terminate before the ish. Early cases considered the rule where consecutive leases had been agreed. More likely today would be some form of option, typically in favour of the tenant to have the lease renewed.[94] Another possible term is one which imposes an unconditional obligation upon the landlord to renew the lease. This may be difficult to classify as either an option or a binding contract of lease.[95] Finally, there might be a break option, giving either party, or both, the power to terminate the lease before its ish. Bassett gives two examples of when such options might be used. The tenant might be an overseas company which wishes a long period of occupation, but whose domestic laws or customs necessitate the use of short leases. Also, in some cases (such as cinemas and theatres) the suitability of a site can only be assessed after a trial period of operation.[96] Here we consider whether such terms are real conditions.

(a) Consecutive Leases

The conclusion of consecutive leases is unlikely, but there are older cases in which parties agreed at the outset that an initial lease was to be followed by a second (and perhaps a third, and a fourth ...) lease. The consecutive leases might be individually documented[97] or could be in one document. It is unclear what advantage such an arrangement would confer over a lease for the whole period.[98] But if the advantage is

---

93 Pt A.2(b).

94 An option in favour of the landlord to require the tenant to take a new lease is also conceivable, but likely to be very rare indeed. In the terms used in financial markets, that would be a 'put' option.

95 See text to n103.

96 D Neuberger & J Bassett 'Options: are they worth the paper they are written on?' in *The Blundell Memorial Lectures: Current Problems in Property Law* (1988) 1, 30.

97 As in *Drum v Jamieson* (1602) Mor 15 209 and *Birbeck v Ross* (1865) 4 M 272 (OH).

98 This structure may have been used because of rules of entail law. At one point, leases of agricultural land or of mines and minerals could be granted, notwithstanding the terms of any entail, but not for a period exceeding twenty-one years: A Duff *A Treatise on the Deed of Entail* (1848) [31].

not clear, the law is. Such transactions are governed by the rule expounded above: consecutive leases are separate contracts and cannot be amalgamated; the successor is unaffected by the future lease(s), for he is bound only by the lease by virtue of which the tenant possesses at the time of acquisition. Here the argument against viewing the leases as one is strong: had the parties wished to conclude a single lease, they could have done so.[99]

(b) Options to renew

The possible analyses of an option were noted above.[100] Where the option is a term of a lease, a promissory analysis would be artificial so the possibilities are: firm offer (offer backed by contract) or consecutive lease subject to a suspensive condition. This section considers whether an option to renew which is included in a lease binds a successor landlord.

(i) Case law and commentary

There are various relevant cases. None makes clear which analysis of an option is being adopted and they reach conflicting results. The accepted view is, however, that an option to renew is a personal condition. In *Dalrymple v Hepburn*[101] a landlord was bound by an unconditional obligation in the lease to renew the lease at its ish. The Lord Ordinary held that this did not bind a successor who acquired before the ish. The court initially reversed, on the basis that they 'considered the obligement in the tack as a continuation of the same tack, being *in eodem corpore juris*, and not a new tack, to which the only reasoning upon that topic ... did apply'. After subsequent argument, however, the Lord Ordinary's view was restored, on the basis that 'a bond to renew a tack, contained in the end of a tack, makes no part of the tack, but is a separate obligation', which was not effectual against a singular successor.[102] One may debate whether this clause conferred upon the tenant an option to renew[103] or whether it actually bound both landlord and tenant to a second contract of lease to

---

99 *Birbeck v Ross* (1865) 4 M 272 (OH) 275-6.

100 Pt A.1(e).

101 (1737) 5 Br Sup 190.

102 Citing *Corsehill v Wilson* and *Hamilton v Tenants*, both reported at (1626) Mor 15 188.

103 Because the only obligation created was that incumbent on the landlord to renew the lease and the tenant could chose whether to exercise his correlative right.

commence at the expiry of the first.[104] In English law it is said that such a term is equivalent to one expressly conferring an option upon the tenant.[105] In Scotland, the second possibility arises because of the rule that an agreement to grant a lease is equivalent to a contract of lease.[106] A term of a lease which obliges the landlord to grant another lease at the ish might be said to be an agreement to grant that second lease, as opposed to simply an option to conclude such a contract. The term is contained in a contract and has therefore been agreed by both the landlord and then tenant. Whichever analysis is correct, *Dalrymple* is clear authority for the proposition that an obligation to renew a lease is 'no part of the tack [which binds a successor], but is a separate obligation' and this is of importance for options cases.

At first sight *Clerk v Farquharson*[107] also appears to provide authority for the proposition that options to renew do not bind successor landlords. An agreement was interpreted as being a lease for one year, with an obligation upon the landlord to give the tenant a lease for seven years if required. That is an option. The year passed; the tenant remained on the property but did not exercise the option. Subsequently, the landlord sold the subjects and his successor sought to remove the tenant on the expiry of that year. The successor successfully argued that the only agreement between the original landlord and tenant had been a lease for one year, which had then been tacitly renewed. 'He [the tenant] had farther a personal obligation on the landlord, giving an option to obtain a lease for seven years; but as [the tenant] had not made the requisition before sale, his right to do so is ineffectual against a singular successor'.[108] In fact, this case may raise no speciality involving a singular successor.

---

104 The tenant has both a right and an obligation to enter into possession in the future: Paton & Cameron 135.

105 Woodfall *Landlord and Tenant* [18.001].

106 See Rankine 100 – 101. One often sees the phrasing that an *obligation* to grant a lease is equivalent to a lease, but that is too broad: a unilateral obligation to grant a lease cannot be equivalent to a contract of lease, which is a bilateral legal act. Another variant is that an obligation to grant a lease followed by possession is equivalent to a contract of lease. But this, whilst correct, seems too narrow, for possession is only one way in which the tenant may signal his acceptance of the obligation. This rule (in its varying formulations, some too wide and some too narrow) has substantial institutional foundation: Craig *Jus Feudale* II x 10; Stair *Institutions* II ix 6; Erskine *Institute* II vi 21; Bell *Principles* §1190. The relevant Latin maxim is *pactum de assedatione facienda et ipsa aequiparantur*. An unconditional obligation to renew and an option to renew were treated differently in the Long Leases (Scotland) Act 1954 s18.

107 (1799) Mor 15 225.

108 ibid 15 226, citing *Dalrymple v Hepburn* (1737) 5 Br Sup 190.

As in *Commercial Union Assurance*[109] it may be that, once the one-year lease had expired without the option having been exercised, the option simply lapsed. On that approach, the tenant could not have exercised the option even in a question with the original landlord. If that is correct, as it seems to be, the case is not authority as to whether an option to renew binds a successor. The court's view on this point certainly seems to have been negative, however.

There are some cases which support the opposite position, namely that obligations to renew do indeed bind successors. In particular, there are two well-known cases in which a successor was held bound by a lease which was renewable in perpetuity. These are *Wight v Earl of Hopeton*[110] and *Scott v Straiton*,[111] the latter a decision of the House of Lords. In *Campbell v M'Kinnon*[112] both the Inner House and the House of Lords refused to express an opinion upon whether a successor would be bound by an obligation in a 99-year lease to renew it in perpetuity.[113] The decisions in *Wight* and *Straiton* are now typically explained upon other grounds: in the case of *Wight*, as depending upon the particular terms of the transfer involved, which bound the successor to abide by the leases;[114] and, in the case of *Straiton*, as depending upon the successor's homologation of the obligation. They are not now perceived as establishing any general rule that a successor is bound by an obligation to renew.[115]

---

109 *Commercial Union Assurance Co Ltd v Watt & Cumine* 1964 SC 84 (IH).

110 (1763) Mor 10 461.

111 (1771) Mor 15 200, aff'd (1772) 3 Pat 666.

112 (1867) 5 M 636 (IH) 649 & 652, *sub nom Campbell v M'Lean* (1870) 8 M (HL) 40, 43 & 48

113 Such an obligation faces the further problem that it is contrary to the nature of a lease, which is a temporary real right. Mackenzie insisted that an obligation on the landlord not to remove a tenant would not bind a successor as it was both *contra naturam Dominii* and not of the nature of a tack, which must have a definite ish: Mackenzie *Observations* 189. And yet such obligations were commonplace in a particular class of leases, called 'Blairgowrie Leases': Scottish Law Commission *Report on the Conversion of Long Leases* (SLC Rpt 204, 2006) [2.23].

114 The lease was both excluded from warrandice and assigned to the successor: *Wight v Earl of Hopeton* (1763) Mor 10 461, 10463 and argument at 10464 – 10465. See also Rankine 140 and the footnote to Erskine *Institute* II vi 24 (the relevant part of the footnote first appeared in 4th edn. J Gillon (ed) 1805).

115 Rankine 140 and Paton & Cameron 112 both state that the rule is the opposite. cf Gloag *Contract* 234 where the point was said to be 'doubtful'. For specific discussion of *Wight* and *Straiton* see, eg, *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) 89: 'it may be doubtful whether it [*Wight*] would now be followed'; *Mann v Houston* 1957 SLT 89 (IH) and Paton & Cameron 97. Hume also viewed these cases as being decided upon specialities. He noted that there is a third similar, but unreported, case (*Skene v Bryce* 20 May 1790): Hume *Lectures IV* 78. cf 82, where he suggests that an obligation to renew a 19 year lease every Whitsunday to ensure that there are always 19 years to run would bind a successor. This is probably incorrect, for that would amount to a perpetual lease, which cannot be made real: *Carruthers v Irvine* (1717) Mor 15 195.

(ii) Registration statutes

There is an argument that statutes providing for the registration of leases assume that obligations to renew do bind successor landlords. Both the Registration of Leases (Scotland) Act 1857 and the Land Registration (Scotland) Act 1979 state, in varying terms, that provisions relating to renewal are to be taken into account when calculating the length of a lease and determining whether it is registrable. Thus, section 17 of the 1857 Act:

> Leases containing an obligation upon the granter to renew the same from time to time at fixed periods, or upon the termination of a life or lives, or otherwise, shall be deemed leases within the meaning of this Act, and registerable as such, provided such leases shall by the terms of such obligation be renewable from time to time so as to endure for a period exceeding twenty years.

Under the 1979 Act only 'long leases' may be registered. Section 28(1) of the 1979 Act provides the following definition of 'long lease':[116]

> "long lease" means a probative lease-
> (a) exceeding 20 years; or
> (b) which is subject to any provision whereby any person holding the interest of the grantor is under a future obligation, if so requested by the grantee, to renew the lease so that the total duration could (in terms of the lease, as renewed, and without any subsequent agreement, express or implied, between the persons holding the interests of the grantor and the grantee) extend for more than 20 years.[117]

In the South African case of *Shalala v Gelb*,[118] the decision as to whether the tenant's right of renewal could be exercised against a successor landlord was influenced by the fact that such rights are there taken into account when determining whether a lease is short or long. Ogilvie Thomson J reasoned that the renewal period is included in computing the duration of a lease, *ergo* the renewal period falls to be

---

116 The second limb of the definition was not present in the original Bill. It was introduced at the Report stage, after the status of leases containing such options was raised in the House of Lords: Hansard HL vol 397 col 926.

117 Note the differences between the two provisions. The definition of long lease in the 1979 Act takes into account only those terms which impose upon the grantor 'a future obligation, *if so requested by the grantee*, to renew the lease' (emphasis added). What if the obligation is unconditional and simply requires the landlord to renew the lease at its ish? (See nn103 and 106 and the text thereto for discussion of this type of obligation.) Section 28(1) appears not to cover this, meaning that a nineteen year lease which simply obliges the landlord to renew it for a further nineteen years would not classify as a long lease. That lease would have been registrable under the 1857 Act.

118 1950 (1) SA 851 (CPD).

included in the protection accorded to the tenant by the maxim *huur gaat voor koop*.[119]

Two distinct arguments may be advanced on the basis of the Scottish provisions. The first is based on section 28(1) of the 1979 Act and runs as follows. The purpose of the system of land registration is to provide information to those acquiring land of the real rights and real conditions which affect that land, subject to the possibility of off-register rights. Off-register rights are an elite group: they include short leases, which may be made real by possession.[120] Those acquiring property do so in the knowledge that if a lease is not disclosed on the Land Register, the maximum duration of lease by which they may be bound is twenty years. By providing that a lease for a period shorter than twenty years with a renewal option which, if exercised, would extend its duration to more than twenty years must be registered in order to become real, the law assumes that such a renewal obligation would bind a successor. Otherwise, why would it insist upon registration? Were the renewal option not binding upon a successor, he could simply ignore it, and there would be no breach of the principle that the acquirer of property on the Land Register cannot be bound by a lease which exceeds twenty years in duration.

This argument, however, rests on too narrow a view of the purposes of registration. Although the protection of acquirers is certainly a key aim of registration of title, it is not the only aim.[121] Registration also benefits the tenant. In particular, he will benefit from the guarantee of title offered by registration. It may be thought entirely appropriate that a tenant with an option to renew which, if exercised, would make the lease a long lease, should be able to benefit from the advantages of land registration. In many cases, there will be no change of landlord. Even where there is such a change, and the liability correlative to the option to renew does not automatically bind a successor, the original landlord should take the successor bound to respect the option and the tenant should therefore remain able to exercise it.[122] The presence of a similar provision in the 1857 Act is also important. In the Register of Sasines, registration was not compulsory in order to obtain a real

---

119 ibid 862.

120 And also long leases made real by possession prior to the Land Register becoming operational.

121 I am grateful to David Irvine for helping to clarify my thoughts on this point.

122 See, generally, Chp 8.

right of lease. One cannot therefore use the argument which has just been made in respect of the 1857 Act. An acquirer who found no mention of a lease in the GRS was offered no guarantee that the property was free from leases in excess of twenty years duration.[123] The 1857 Act also substantiates the point that registration serves broader purposes than solely the protection of acquirers of ownership of property: it was introduced in order to facilitate the use of leases as security.[124]

The second argument is not exclusively based upon the 1979 Act. It is simply that by aggregating the durations of the lease and the option, the statute treats the two as one, and one would expect the same approach to prevail when it comes to binding successors. It is not only registration statutes which so aggregate the duration of leases.[125] The definition of 'long lease' in the 1979 Act is, for example, similar to that of the Land Tenure Reform (Scotland) Act 1974.[126] It seems to have been this argument which was influential in *Shalala v Gelb*.[127] It is not, however, particularly convincing. These definitions come from Acts pursuing social policy objectives, such as the conversion of the tenant's right under a long lease into ownership, or the prohibition of the letting of residential property on long leases. The inclusion of renewal obligations or options in the calculation of likely duration is to be expected in such a context. It is either an anti-avoidance measure (as in the 1974 and 2000 Acts) or recognition that such renewals are typically exercised and that not to include them would underestimate the likely duration of the lease and undermine the policy

---

123 The continuing effectiveness of long leases made real by possession prior to the Land Register becoming operational means that, for some time yet, the Land Register can also offer no guarantee that the maximum duration of off-register lease by which a successor may be bound is twenty years. The number of such leases will decrease as the leases in question expire or are transferred, as transfer induces first registration: Land Registration (Scotland) Act 1979 s2(1)(a)(v).

124 See W Guy 'Registration of Leases' (1908 – 09) 20 JR 234.

125 The following statutory provisions also do so: Long Leases (Scotland) Act 1954 s18, Land Tenure Reform (Scotland) Act 1974 s8(4), Abolition of Feudal Tenure etc (Scotland) Act 2000 s67(2), Leasehold Casualties (Scotland) Act 2001 s10(2)(b). See also the proposed conversion of long leases into ownership: Scottish Law Commission *Report on Conversion of Long Leases* (SLC Rpt 204, 2006) [2.23] – [2.26]

126 JM Halliday *Annotations to the Land Registration (Scotland) Act 1979* in *Current Law Statutes Annotated*. The provisions are similar, but not identical. The 1979 Act refers to an obligation to renew which operates 'without any subsequent agreement, express or implied' between the landlord and tenant. Technically, this rules out an option which is analysed in terms of a promise or an offer, for in those cases exercise would require further agreement. This language is lifted from the first limb of the definition of long lease in the Land Tenure Reform (Scotland) Act 1974. It is not that limb which mentions options to renew.

127 1950 (1) SA 851 (CPD).

objectives of the legislation (as in the case of leasehold conversion schemes[128]). These definitions carry no implication that renewal obligations bind successor landlords.

In respect of both arguments, a further point may be made. They read a lot into statutory provisions which are not explicit upon the question being considered here and which may have other objectives in view. Case law is fairly clear, and commentary more so, that options to renew do not transmit. The argument based on the registration statutes is not specific to registered leases. It is that these statutes presuppose (and therefore require?) that options to renew bind successor landlords. It is suggested that such a change is too radical to be achieved by legislation which is not explicit upon the matter. As Bennion phrases it:[129]

> It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. ... The court, when considering ... which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

These statutory provisions do not require one to conclude that an obligation or option to renew binds a successor of the landlord.

(iii) Applying the general test

If an option to renew is a term of a lease, why does it not transmit as part of that lease?[130] The application of the general test proposed in Chapter Three to determine whether a term is real or personal may now be discussed. A real condition is one which is referable to the relationship of landlord and tenant, whereas a personal condition is extrinsic to that relationship. The first element of the test is to consider whether the term in question burdens the landlord *qua* landlord and benefits the tenant *qua* tenant. An obligation to grant a lease is certainly more readily performable by a successor than by the original landlord after transfer. It might be said that that any party benefits from the option to obtain a lease, and so that the

---

128 Scottish Law Commission *Report on Conversion of Long Leases* (SLC Rpt 204, 2006) [2.25].

129 FAR Bennion, K Goodall & G Morris *Bennion's Statutory Interpretation: A Code* (5th edn 2008) §269. See also *Kirkness v John Hudson & Co Ltd* [1955] AC 696 (HL) 714: 'the beliefs or assumptions of those who frame Acts of Parliament cannot make the law'. This is cited in *Pritchard v Briggs* [1980] Ch 338 (CA) 398D, where Goff LJ distinguishes between 'an Act which is passed under a misapprehension as to the law and an amending Act'.

130 Hume noted this argument and specifically emphasized that he viewed it as debateable: *Lectures IV* 82.

benefit is not to the tenant *qua* tenant. Such a term will, however, be of particular benefit to the tenant for the time being, as it allows him to conduct himself on the property secure in the knowledge that he can obtain another lease if required. That is sufficient to satisfy the first stage of the test.

The second stage of the general test encompasses broader issues: a term is not referable to the relationship of landlord and tenant if it is inconsistent with the nature of a lease or with rules of law or legal policy. It is at this stage that the current classification of options to renew can be explained. In view of the fact that a second contract of lease is viewed as separate to the original lease, even if concluded contemporaneously, the same analysis is adopted in respect of an option to conclude such a second contract of lease. To do otherwise would be inconsistent with these more general rules of law. Were an option real, a successor would be bound by an option prior to its exercise, but not by the contract of lease which resulted from exercise of the option unless or until the tenant began to possess by virtue of that lease. That seems illogical. An option to renew a lease, even if it is a term of an existing lease, is not referable to that existing lease: it is an option to enter into another contract and is treated in the same way as that contract would be. It is collateral or extrinsic to the existing lease. John Schank More therefore summarised the position accurately in his lectures when he stated that 'no obligation to grant or renew a lease is of any avail against purchasers or other singular successors'.[131]

(c) Options to extend

The question how an option to extend (as opposed to an option to renew) would be treated has not been litigated in Scotland. The English case of *Baker v Merckel*[132] provides an example of possible drafting. It concerned an option to convert a seven-year lease into an eleven-year lease: 'if the tenant shall give notice in writing to the landlord before [date] of such his desire, the lease shall thereupon be read, construed and take effect as though the term thereby granted was for a period of 11 years from [date of entry of subsisting lease]'. It is arguable that this would bind a successor landlord. The term appears to satisfy the general test proposed in Chapter Three, namely that it be referable to the relationship of landlord and tenant. It binds the

---

131 JS More (J McLaren ed) *Lectures on the Law of Scotland* vol II (1864) 3.

132 [1960] 1 QB 657 (CA) 658. German law also recognises the concept of an option to extend the existing contract of lease: H Roquette *Mietrecht* (5th edn 1961) 82 ff.

landlord in his capacity as landlord and benefits the tenant in his capacity as tenant. The exercise of the option would not give rise to a separate contract of lease, but would result in the duration of the subsisting lease being extended, so the argument that the option itself is collateral to the existing lease is not strong. It is not an option to enter into another lease, so the objection to such an option transmitting cannot be made. It cannot, however, be stated with any certainty how such an option would be dealt with.

(d) Break options

A break option permits either or both parties to the lease to terminate it before the ish. In Hohfeldian terminology, it confers upon the holder of the option a 'power' to terminate the contract, and therefore upon the other party to the lease a 'liability' to have his legal position altered.[133] Such options are becoming more common.[134] They are thought to be real conditions. The transmissibility of a break clause was considered most recently in *Allan v Armstrong*.[135] This was a professional negligence claim which tenants raised against their solicitors when a successor landlord refused to allow them to exercise a break clause contained in missives of let but not in the subsequently executed lease. The question whether in principle a break option is a real condition was not independently focused in the judgment, as it also considered the relevance of the fact that the option was documented only in the missives, and of the successor's alleged knowledge of the option.[136] However, in two early nineteenth-century cases – neither of which is free of idiosyncrasies – the view was expressed that a break clause, albeit here in favour of the landlord, would transmit to

---

133 WN Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 44ff. There is a second article at (1917) 26 Yale LJ 710. This is likely to be what in German law is called a 'Gestaltungsrecht', but I have not explored this parallel in any depth: K Larenz & M Wolf *Allgemeiner Teil des Bürgerlichen Rechts* (9th edn 2004) §15 Rn 65. The parallel concept in French law, apparently developed under German and Italian influence, is the 'droit potestatif'. Not all French commentators agree that this is a useful concept: cf FC Dutilleul *Les contrats préparatoires à la vente d'immeuble* (1988) [254] and C Larroumet *Droit civil* vol III *les obligations, le contrat* (5th edn 2003) [11]. The appropriate classification may be significant. In *Harbour Estates Ltd v HSBC Bank plc* [2004] EWHC 1714, [2005] Ch 194, the parties proceeded on the assumption that the benefit of a break option could be assigned. One wonders whether 'assignation' is the appropriate term if what is involved is a 'power' and not a 'right'. Larenz states that in German law *Gestaltungsrechte* are, as a rule, not freely transferable, but are instead linked to the person or legal relationship to which they refer: Larenz *Allgemeiner Teil* §15 Rn 78. That supports a break option being a real condition.

134 Cockburn *Commercial Leases* [4.2.3].

135 2004 GWD 37-768 (OH).

136 On the relevance of these two points, see Chp 2 Pt A.1(3) and Chp 9 respectively.

a successor.[137] It is submitted that this is the correct position. As Reid and Gretton comment, 'it is difficult to think of anything more central to the lease than this'.[138] In terms of Chapter Three's general test, this is a term which is referable to the relationship of landlord and tenant: a break option in favour of a tenant clearly benefits the tenant *qua* tenant and burdens the landlord *qua* landlord. Such an option transmits in English law.[139] Logically, this rule should extend to equivalent terms, such as one obliging the landlord to accept a renunciation of the lease at a particular time.[140]

Often break options will be expressed to be personal to a particular landlord or tenant. How a term may be made personal to a particular party was discussed in detail in Chapter Three.[141] Very clear language is required. Taking an option in favour of a tenant as an example, the rule is that if such an option is expressed to be personal to the original tenant, that tenant remains able to exercise it in a question with a successor landlord. After parting with the lease, the original tenant is no longer able to exercise the break, and nor is his assignee. And most probably, if the lease is retrocessed to the original tenant, the break option does not revive.

A modern English case raises some interesting issues.[142] A lease contained a break option in favour of the tenant. It was provided that the benefit of the clause which contained the break option was personal to the original tenant and not capable of assignment to or exercise by any other person, provided that the benefit of the clause could be assigned to a defined class of assignees. A group company automatically fell into this category, as did a permitted assignee who satisfied certain approval conditions. First the reversion was transferred and then the term of years to a permitted assignee, but the assignment of the lease made no mention of the break

---

137 *Murray v Brodie* (1806) Hume 825 and *Ross v McFinlay* (1807) Hume 832. These cases are controversial because they held the clauses to be transmissible even although it was fairly clear from the language used that the parties intended them to be personal to the granter of the lease. This aspect of the decisions was discussed earlier in Chp 3 Pt E.

138 KGC Reid & GL Gretton *Conveyancing 2004* (2005) 106. Although they are correct to state that there are no cases which consider whether a break clause is *inter naturalia*, as has just been noted there are cases which consider whether a break clause will continue to regulate the landlord-tenant relationship between successors to the original parties.

139 In respect of both old and new tenancies: *Roe d Bamford v Hayley* (1810) 12 East 464, 104 ER 181; Landlord and Tenant (Covenants) Act 1995 s3; Woodfall *Landlord and Tenant* [17.288].

140 As was the phrasing of the term in the English decision of *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA).

141 Chp 3 Pt E.

142 *Harbour Estates Ltd v HSBC Bank plc* [2004] EWHC 1714, [2005] Ch 194.

option. The assignee sought to exercise it and the question arose whether it had passed automatically to the successor tenant. One aspect of the decision considered whether this was a covenant which 'touched and concerned' the land: if it was, the benefit of it had passed despite its not being mentioned in the assignment. The landlord argued that, although a break clause would usually touch and concern the land, the overriding characteristic of this clause was that it was personal and therefore it did not do so. Lindsay J rejected this argument. The benefit of the clause was not personal to one specific tenant; in fact, the clause which contained the option expressly contemplated that it would benefit two classes of assignee. It was a hybrid: it was not wholly personal and therefore could be viewed as having reference to the subject matter of the lease. The break option could therefore be exercised by an assignee, despite the fact that no mention of it had been made in the assignment. None was required: it was a term which 'touched and concerned' the lease and therefore transferred automatically. It is thought that Scots law would reach the same result.

3. Assessment of the rules for unregistered leases

Are the rules outlined above sound? Consider first those which apply to the various ways to extend a subsisting lease. If parties choose to extend the subsisting lease by agreeing to a second lease to commence at the ish of the first, this will not bind a successor landlord who acquires ownership of the subjects before the first lease has expired, whereas if the second lease is to commence immediately, such a successor will be bound. This rule may be objected to on the basis that it leads to functionally equivalent transactions being treated differently, without there being any compelling reason for this to be so. Rankine felt this. He stated:[143]

> Without venturing to impugn what seems to be a settled rule of law, it may be allowable to suggest that where both parties are thus bound there is nothing more than a formal distinction between the tenant's position and that which he would have occupied if he had taken the precaution to renounce the old lease and take a new one for the space of the aggregate number of years of the old lease still to run and of the new lease.

It is difficult to see a policy justification for this different treatment. Until recently the law was willing to allow successors to be bound by unregistered leases of any

---

[143] Rankine 151.

duration.[144] In light of that, it is difficult to see that there is a strong objection to a successor being bound by a renewal, for he could have been bound by a lease for the complete period. One might attempt to justify the rule on the basis that it protects purchasers. The argument would be that the 1449 Act is an exception to the more general principle that contracts do not bind successors, and, as such, it should be applied narrowly.[145] Holding successors bound by such obligations might be thought to reduce the marketability of land in general (there is the possibility, say, that the rent will be below the market rent) and any opportunity should be taken to limit the extent of obligations by which a successor is bound. Although the parties could have concluded a longer lease subject to the same rent, which would have bound a successor, the fact remains that they did not do so, and the law will take this opportunity to free the land from a potentially oppressive burden. The 1449 Act is not, however, usually restrictively interpreted. Instead the focus is generally upon protecting the tenant[146] and so this reasoning does not really convince.[147]

It is, however, often a consequence of rules of law that different results follow from different structures of transactions. Here the rules have the virtue of being clear. If parties wish to render an agreement to extend a lease immediately binding upon a successor landlord, it is obvious what they must do: they should conclude a new lease to commence immediately and then renounce the subsisting lease.[148] From a

---

144 At common law there was no limit to the length of leases to which the 1449 Act applied: JS More *Notes to Stair's Institutions* (1832) ccxlvii. There are statutory inroads into this position. One is that since 9 June 2000 it has not been possible to create a lease which exceeds 175 years in duration: Abolition of Feudal Tenure etc (Scotland) Act 2000 s67. In areas in which the Land Register is operational (since 1 April 2003 it has been operational in all counties), registration is compulsory for, broadly, leases over twenty years in length: Land Registration (Scotland) Act 1979 ss3(3) & 28(1).

145 This point was made in argument in *Scott v Straiton* (1771) Mor 15 200, 15 202.

146 Its protection is not, for example, limited to the 'puir people that labouris the ground', as a strict application of its terms might entail: *Waddell v Brown* (1794) Mor 10 309 and Rankine 135. But cf *Millar v McRobbie* 1949 SC 1 (IH) where it was held that possession prior to the date of entry did not protect the tenant. Of course, it is the rule which that case embodies which is the source of the rule about when renewals bind successors to the landlord. On the general approach to interpreting Acts of the Parliament of Scotland, see *Governors of George Heriot's Trust v Paton's Trustees* 1912 SC 1123 (IH) 1134 – 5.

147 In *Shalala v Gelb* 1950 (1) SA 851 (CPD) the argument that a right of renewal could not be exercised against a singular successor was characterised as 'too narrow and technical a standpoint which pays insufficient regard to the basis reason underlying the rule of *huur gaat voor koop*': 863.

148 As noted above (text to n45) express renunciation, although desirable, is probably unnecessary. Also, an agreement simply to extend the lease would arguably take immediate effect (Pt A.1(d)). A further possibility would be to secure the landlord's obligations under the future lease with a standard security.

doctrinal perspective, the current rule in respect of extensions effected by future leases maintains consistency with the broader treatment of future leases. Of course, as the earlier law demonstrated, where a subsisting lease is extended by means of a future lease, it would be possible to analyse the second lease simply as an extension of the first, so that a successor acquiring before the original lease would have expired is bound. Doctrine would then be superficially preserved. But this would be by means of a fiction and it would create logical inconsistencies of its own: if a future leases used to extend a current lease were to become real prior to its date of entry, why not also other leases with future dates of entry where, for some other reason, the tenant is already in possession?[149] It is not thought that the objections to the current rule are sufficiently strong to require it to be changed.

Policy issues about the rules relating to options are in the same vein: the current rule results in functionally equivalent transactions being treated differently and there is little conceivable policy justification for this different treatment. Altering the rule would, however, simply result in different inconsistencies. A fifteen-year lease with a break option after ten years is functionally equivalent to a ten-year lease with an option to extend on identical terms for a further five,[150] yet, as the law stands, the successor is bound by the break option[151] but not by the option to renew. There appears to be no strong policy justification for this distinct treatment. As was remarked in a South African case:[152]

> it is ... hardly more inequitable to bind the innocent purchaser with a right of renewal for four years contained in a lease whose original term is five years than it is to bind him with an existing lease whose original term happens to be nine years and of which he is equally ignorant.

Again, however, changing the rule here would simply lead to a different inconsistency, namely between the rule that an option to renew would bind a successor landlord but that a future contract of lease does not. The current rule is in this respect as sound as the alternative.

---

149 German law recognises that the points are linked: n33.

150 The point is made in the English case of *Roe d Bamford v Hayley* (1810) 12 East 463, 104 ER 181, in support of an argument that a break option should touch and concern, given that an obligation to renew does. Cockburn also treats options to extend and break the lease together: Cockburn *Commercial Leases* [4.2.3]. See also *Clerk v Farquharson* (1799) Mor 15 225, 15226. The point is true only if both options are unconditional, which is rare.

151 Pt A.2(d).

152 *Shalala v Gelb* 1950 (1) SA 851 (CPD) 862.

Finally, break options. It has just been suggested that because a renewal option is functionally equivalent to a break option, which is real, one might argue that an option to renew should also be a real condition. That would be a major change to the law and lead to the inconsistencies noted above. For completeness, one should note that the converse argument does not hold: it is not a strong argument to say that because a renewal option does not bind a successor, neither should a break option. A renewal option is personal because there are particular rules about when contracts of lease bind successors. These do not impact upon the consideration of whether a break option is real or personal. There seem to be no reasons of policy or principle which require a change in the treatment of break options.

B. REGISTERED LEASES

1. Two overarching issues

As with unregistered leases, two preliminary issues are key: (i) when does a contract of lease become a real right? and (ii) what is the appropriate contractual analysis of the transaction to extend or give the option of extending the lease?

Unlike unregistered leases, registered leases may be made real before their date of entry. This was not always the case. At first, the Registration of Leases (Scotland) Act 1857 adhered to the position under the 1449 Act. As originally enacted, section 2 provided for leases to be effectual against a singular successor of the landlord if they had been registered 'at or subsequent to the date of entry therein stipulated'.[153] These words were removed, with retrospective effect, by the Land Tenure Reform (Scotland) Act 1974.[154] The purpose of the amendment was to allow leases to be made real prior to their date of entry so that they could immediately be used as security.[155] In the Land Register, the Keeper's practice is to accept for registration

---

153 I am extremely grateful to Martin Corbett for bringing this to my attention.

154 Schedule 6, para 2.

155 *Annotations to the Land Tenure Reform (Scotland) Act 1974* in *Current Law Statutes Annotated.* The effect of registration is detailed in s16(1) of the 1857 Act, which provides that 'registration ... shall complete the right ... to the effect of establishing a preference in virtue thereof, as effectually as if the grantee ... had entered into the actual possession of the subjects leased under such writs respectively at the date of registration thereof'. This provision was enacted when the Act applied only to leases recorded on or after the date of entry. It might be objected that deeming the tenant to be in possession prior to the date of entry does not render the lease binding upon a successor prior to the date of entry. Given the clear objectives of the 1974 Act, however, this argument would not succeed. In any event, the provision deems the tenant to be in possession *under* the lease. That this is impossible prior to the date of entry is irrelevant: the purpose of a deeming provision is to treat something as being the case when it is not.

leases presented prior to their date of entry, provided that they meet the other criteria for registration.[156] The lease becomes real upon registration, even although its date of entry is not until a later date.[157] Unlike in English law, there is no control over how far in advance the lease may commence.[158] This different basic rule means that some renewal transactions are treated differently in registered leases than in unregistered leases.

The second issue is whether the contractual analysis applied to renewals of registered leases is the same as that which applies to unregistered leases. It is thought that it must be: a lease is a lease, whether unregistered or registered. The point is best made by recalling that, prior to the advent of registration of title, the recording of leases in the Register of Sasines was optional: the situation could have arisen in which two neighbouring plots were held on identical twenty-five-year leases; only one of the leases was recorded but both were real. It is unlikely that if the parties to both leases agreed in year twenty four to the grant of a second twenty-five-year lease, there should be a difference in legal analysis. In both it was the conclusion of a separate contract of lease, and not the extension of the existing lease. It is also thought that terms of existing leases relating to renewal should be analysed in the same way in registered and unregistered leases.

2. Extending the lease

(a) Registration of Title Practice Book

The Registration of Title Practice Book states that:[159]

> If on expiry of the original term, the lease is renewed for a further period in excess of 20 years, the minute of extension or renewal is registrable in terms of

---

156 RoS Legal Manual [19.4.2(a)].

157 Land Registration (Scotland) Act 1979 s3(1)(a) & 3(4). For a discussion of eligibility for and the effect of registration in the Land Register, see Scottish Law Commission *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (SLC DP 128, 2005) [3.24] & [5.46] – [5.50].

158 At English common law, the grant of a lease to begin on a future day did not create an estate in land, but rather conferred upon the tenant an *interesse termini*. The lessee's title was completed only by entry. This was changed by Law of Property Act 1925 s149 which abolished the doctrine of *interesse termini* but provided that a lease to commence more than twenty-one years from the date of the instrument purporting to create it is void, as is any contract to create such a lease. Since the Land Registration Act 2002 came into force, registration of a lease of any length has become compulsory where possession is to be given more than three months after the date of the grant: s4(1)(d). See Woodfall *Landlord and Tenant* [5.065] – [5.066].

159 ROTPB [5.56]. There seems to be no mention of this in the first edition.

section 2(4)(c). Application should be made on Form 2 to ensure the lessee's continuing real right.

This seems to refer to an extension effected by means of a subsequent long lease concluded on the expiry of the original lease. Such a second lease is separate from the original lease, even if it is on the same terms. If so, registration should proceed by virtue of section 2(1)(a)(i) and not under section 2(4)(c). The former applies to the 'grant of the interest in land in long lease', whereas the latter is used 'for registration of a transaction or event which deals with or affects a registered interest ... in land'.[160] Furthermore, references to the tenant's 'continuing real right' are misleading: the real right which he acquires is a new one, for the lease is new.[161] If the original lease is recorded in the Register of Sasines, a renewal executed in this way should be registered in the Land Register, for it is the grant of a new lease.

(b) New lease to commence at ish

In respect of unregistered leases the rule is that where parties agree during one lease that it shall be followed by a second, this is viewed as a separate contract from the original lease.[162] There is no reason to suppose that the rule for registered leases is different. One result is that the duration of the renewal is assessed independently of the original lease: the renewal must itself meet the definition of long lease in order to registrable, and if it does so then, obviously, registration is compulsory in order for the lease to become real. If the second lease is a short lease, it is not registrable and so will not become real until the tenant begins to possess by virtue of it. If registrable, the second lease should be registered separately from the subsisting lease, for it is the grant of a separate, new lease. Because of the rule that a lease becomes

---

160 This is the phrasing of the ROTPB 410. It is a broader formulation than s 2(4)(c), which refers to a transaction or event capable of affecting the *title* to a registered interest in land.

161 cf the treatment of tacit relocation. The Keeper will not remove the lease from the register until he is given evidence that tacit relocation is not operating: ROTPB [5.55]. This is in line with the modern view that tacit relocation operates as an *extension* of the original lease (see, eg, S Halliday 'Tacit Relocation' 2001 JR 201, 202 and Paton & Cameron 222, both of which cite *Douglas v Cassilis & Culzean Estates* 1944 SC 355 (IH) 261). This was not the original view (eg Erskine *Institute* II vi 35), which presumably drew upon the civilian position: RJ Pothier *Traité du contrat de louage* (1764) in M Bugnet (ed) *Œuvres de Pothier* vol IV (1861) §342. Pothier states that tacit relocation is *not* a continuation of the previous lease, but is a new lease, and that remains the position in French law today: P Malaurie, L Aynès & P-Y Gautier *Les contrats spéciaux* (2nd edn revised 2005) [667]. It is also the position of South African law: Cooper *Landlord & Tenant* 345. The first edition of the *Registration of Title Practice Book* (1991, incorporating 2nd amendments) took this view of tacit relocation: [D4.20]. One wonders what prompted the change of view.

162 Pt A.1(b).

real on registration, even if the date of entry is postponed,[163] a renewal effected in this way becomes real immediately. This is a fundamental difference to the rule which applies to unregistered leases. It means that there is no strong need to extend a registered lease by one which commences at once.

(c) New lease to commence at once

A new lease to commence at once is also effective to confer an immediate real right upon the tenant, provided that it is registered. Parties will wish to use this device where the period of extension does not qualify as a long lease but the combination of the unexpired period of the subsisting lease and the period of extension does so. The Keeper should cancel the title sheet of the existing lease and issue a new title sheet for the new lease. It was suggested above that the conclusion of a new lease to commence immediately necessarily amounts to the implied renunciation of the existing lease, although it is unclear whether the Keeper will accept this as sufficient evidence of renunciation. The Registration of Title Practice Book states that evidence of renunciation 'will generally consist of a formal deed of renunciation'.[164]

(d) Varying the ish

In the discussion of unregistered leases, it was suggested that parties might extend an existing lease simply by varying its duration.[165] If this is possible for unregistered leases, which is uncertain, then presumably it is also possible for registered leases. There is no guidance in the Registration of Title Practice Book on how such a variation would be treated. The Keeper recognises the validity of such a transaction in respect of a short lease[166] and it is submitted that it should also be possible to vary the ish of a registered lease. Chapter Two discussed whether an off-register variation binds a successor, and concluded that the position was unclear. The safest course is for the tenant to register.

---

163 Text to n153 – 158.

164 ROTPB [5.55]. See, further, [5.66] on renunciation and Halliday *Conveyancing* [46-58] – [46-59] for a style.

165 Text to n54.

166 RoS Legal Manual [19.4.2(a)].

3. Terms of the original lease relating to duration

Discussion of unregistered leases suggested the following as possible terms of leases: provision for consecutive leases, some form of option for the tenant to have the lease renewed[167] and a break option.

(a) Consecutive leases

There is nothing to suggest that the analysis of consecutive leases which is applied under the 1449 Act would differ were the leases to be registered: they are separate contracts of lease and the point at which they become real is determined by the general rule as to when registered contracts of lease bind successors. This means that such a lease will be real on registration, even if this is prior to its date of entry.

(b) Options to renew

In distinction to the treatment of options to renew in unregistered leases, I suggest that an option to renew in a registered lease does bind a successor. The difference is because of the distinct underlying rules about when a lease becomes real. An option to renew is not a real condition of an unregistered lease because, although such a term binds the landlord *qua* landlord and benefits the tenant *qua* tenant, and so satisfies the first stage of Chapter Three's general test, it fails the second stage of that test. To allow such a term to transmit would be inconsistent with the broader rule of law that an unregistered lease cannot become real until the tenant begins to possess by virtue of it. In registered leases, no such inconsistency exists: a long lease can be made real by registration prior to its date of entry. There is, therefore, no reason to hold that the option does not transmit as a term of the existing lease. Of course, once it is exercised, a new and separate contract of lease will arise, and the tenant will require to register that separately in order for it to be protected against a successor of the landlord.

(c) Break options

Just as a break option in an unregistered lease is a real condition[168] because it satisfies the general test suggested in Chapter Three, so also such a term is a real condition if the lease is registered.

---

[167] It is unclear into which of these two categories an unqualified obligation upon the landlord to grant a renewal of the lease falls: n103.

C. CONCLUSION

This chapter has considered whether a successor landlord is bound by various types of transaction by which a lease may be renewed (using that term in a neutral way) or by which a tenant is given an option to renew a lease or to terminate it prematurely. Its principal conclusions are these. Whether a successor is bound by an agreement to renew an existing lease depends upon the exact nature of the transaction. It may be (1) a new contract of lease to commence on the expiry of the existing one, (2) a new contract of lease to commence immediately or (3) a variation of the ish of the existing lease. On this classification hangs how the resulting contract may be made real. Short leases require possession in order to become real and that possession must be by virtue of the exact lease which is said to bind a successor. So, a short lease to commence in the future cannot bind a successor until its date of entry, whereas one to commence immediately becomes immediately binding upon successors (even – it is thought – without express renunciation of the original lease). If the second lease is a long one, it must be registered. Registration can, though, take place before the date of entry, so here the distinction between a lease to commence immediately and one to commence in the future is not as important. Nevertheless, it is thought that parties to a registered lease will still wish to renounce the existing lease and register a new one to commence immediately. Whether the ish can simply be varied with binding effect on successors is more doubtful: the view taken here is that it can be. Where the lease is registered, or where the variation converts a short lease into a long lease, this should be registered.

The status of an option to renew was also considered. An option granted independently from a lease clearly does not bind a successor (although the offside goals rule may provide a different result). The predominant view is that an option to renew which is a term of an unregistered lease is treated in the same way and so is a personal condition. It is an option to enter into a second, distinct contract of lease and, as such, is collateral to the existing one. In particular, such an option is said to be personal because of the conflict which would otherwise arise with the rule that a short lease does not bind a successor prior to the tenant beginning to possess by virtue of that lease. That is not an issue where the lease is registered, as a registered

---

[168] Pt A.2(d).

lease becomes real on the date of registration, even if this is prior to its date of entry. It is therefore thought that an option to renew contained in a registered lease is a real condition. By analogy with a variation of the ish, an option to extend a lease is probably real (although there is no authority on the point). More certainty is possible in respect of a break option, which may confidently be said – even in the absence of modern authority – to be real.

CHAPTER SIX
FURTHER SPECIFIC INSTANCES

A. OPTIONS TO PURCHASE 139
1. The rule 139
2. The justification 141
3. Other legal systems 147
B. RETENTION OF RENT IN SATISFACTION OF DEBT OWED BY LANDLORD TO TENANT 149
C. DISCHARGE OF RENT 153
D. COMPENSATION FOR IMPROVEMENTS 155
E. LANDLORD'S OBLIGATION TO IMPROVE THE SUBJECTS 158
F. ARBITRATION CLAUSES 160

This chapter continues the consideration of whether particular lease terms are real or personal. It both considers existing case law and how such terms would be analysed within the framework of the general test proposed in Chapter Three.

A. OPTIONS TO PURCHASE

1. The rule

Bisset v Magistrates of Aberdeen[1] and *The Advice Centre for Mortgages v McNicoll*[2] provide the rule for an option to purchase in favour of the tenant. *Bisset* establishes, and *Advice Centre* follows, the general rule that such an option does not bind a successor landlord. In *Bisset* the granters of a lease for 999 years were bound in terms of the lease to subscribe and deliver to the tenant, and his heirs, executors and successors, at any time they shall desire, a feu charter of the subjects of the lease. The lease was registered. By a series of transfers the landlord's and tenant's interests came into the hands of the defenders and pursuers respectively, both as singular successors of the original parties.[3] Bisset sought declarator that the Magistrates were bound by the obligation to grant a feu charter. The Magistrates had two arguments to the contrary: first, the wording of the option was such that no obligation was imposed upon successors of the landlord and, secondly, in any event the obligation was not of

---

1 (1898) 1 F 87 (IH).

2 [2006] CSOH 58, 2006 SLT 591.

3 The report discloses no separate assignation of the option to purchase. It was suggested above that a condition is either 'real at both ends or neither' (Chp 3 Pt D.2). If that is correct, then the fact that the option was not a real condition and so did not bind a successor landlord would have had the consequence that it did not pass automatically to the tenant's assignees. That point was not, however, raised in the case.

the type that could bind singular successors of the landlord. They were successful. Lords Trayner and Moncreiff appear to have relied upon both arguments.[4] *Bisset* is therefore authority for the proposition that there is a substantive objection to a successor landlord being bound by an option to purchase. In *The Advice Centre for Mortgages v McNicoll*,[5] *Bisset* was accepted as 'clear authority' for the proposition that 'an option to purchase is not normally *inter naturalia* of a lease'. That case concerned a ten-year lease of commercial premises. Lord Drummond Young rejected submissions that there might be scope for developing the law on the basis of judicial knowledge in favour of a rule that a successor is bound by such an option.[6] The relevant part of the decision was, however, *obiter*, as the lease had not been constituted in compliance with the Requirements of Writing (Scotland) Act 1995.[7]

This general rule may be subject to an exception, albeit one which has never been applied. In *Bisset* Lord Moncreiff said that it would have 'materially aided' the tenant's contention had it been established that such an obligation was 'customary and usual in leases of such duration',[8] although he stopped short of stating that this would definitely result in the term being treated differently.[9] In *Advice Centre*, Lord Drummond Young's formulation was different. He appeared to hold that if it is established that the term is customary in the type of lease concerned, it automatically binds a successor. After stating the general rule, he continued:[10]

> That is the normal rule, and exceptions may exist. One such exception has been identified; that is where it is established by evidence that the custom and practice in leases of a particular nature is to insert a particular form of clause. ... Other exceptions may exist, but none was suggested in relation to the present lease.

---

4 cf *Davidson v Zani* 1992 SCLR 1001 (Sh Ct), where it is suggested that *Bisset* 'was concerned solely with the construction of the terms of the lease under which the obligation in question was assumed only by the original lessor, without reference to successors': 1004.

5 [2006] CSOH 58, 2006 SLT 591[39].

6 ibid [40].

7 ibid [19] & [20]. This aspect of the decision is considered by A McAllister 2006 SLT (News) 254; EC Reid 'Personal Bar: Three Cases' (2006) 10 Edin LR 437; KGC Reid & GL Gretton *Conveyancing 2006* (2007) 106 – 109. There is some discussion at Chp 2 Pt A.1(c).

8 *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) 94.

9 In *Bisset* it would have been unlikely to do so given the wording of the lease: it imposed an obligation upon the two named original landlords in favour of the tenant, and his heirs, executors and successors. The contrast suggests that it was intended that the obligation bind only the original landlords. See Chp 3 Pt E on the approach to interpretation.

10 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [39]. Establishing the exception would require appropriate averments and evidence, of which there had been none. The supposed prevalence of options to purchase was not a fact which was within judicial knowledge: [40].

He noted that options to purchase are likely to be rare in investment leases. There are, however, categories of lease in which options are common. One is capital allowances leases, namely those granted by owners of industrial property which cannot be sold immediately without triggering a clawback of industrial building allowances. Instead of the property being sold, it is leased for a considerable premium but at a nominal rent. The tenant enjoys an option to purchase at a particular point in the future when the clawback period for the relevant tax allowances has expired.[11] A second category of lease in which a purchase option is common is a ground lease granted to a developer with an option to purchase when the tenant has completed the development to a particular stage.[12] In other cases, a tenant may sometimes benefit from a statutory option to purchase.[13]

The relevance of a term being customary and usual in a particular class of lease was discussed in Chapter Three.[14] The view taken there was that, although this is a factor to be taken into account in considering whether a term is a real condition, it is not conclusive, particularly if there are policy reasons why a term should not bind a successor. There are policy factors which justify the general rule that an option is a personal condition. Only if these are overcome can it be said that an option should transmit because it is customary and usual in the class of lease.

Options to purchase are one of the types of term which the offside goals rule may render binding upon a successor, despite the rule of lease law to the contrary. Indeed, Chapter Nine suggests that the offside goals rule has exactly this effect on an option, despite recent case law to the contrary. This removes the sting from the rule that an option is a personal condition.

2. The justification

The application of the general test proposed in Chapter Three to determine whether a term is real or personal may now be discussed. The first element of that test is to consider whether the term binds the landlord in the capacity of landlord and benefits the tenant in the capacity of tenant. Once the property is transferred, an obligation to transfer ownership can more reasonably be performed by the successor landlord.

---

11 D Bell & R Rennie 'Purchase options in leases' 2006 (May) JLSS 49.

12 I Quigley 'On the wrong track' [2007] (Feb) JLSS 48, 50.

13 Housing (Scotland) Act 1987 ss 61 – 84; Housing (Scotland) Act 2001 Pt 2, Chp 2. See McAllister *Leases* [16.106] – [16.137].

14 Chp 3 Pt D.4.

This is, however, because he owns the property, rather than because he is a party to the lease, and the test is that the term must bind the landlord *qua* landlord, not simply *qua* owner.[15] To focus that distinction, consider the situation if the original landlord granted an interposed lease of the premises: the interposed lessee would become party to the existing contract of lease, but the burden of the option which it contained would remain more readily performable by the original landlord, who remained owner. That suggests that the burden is not referable to the contract of lease but is in fact distinct from it.[16] As for benefiting the tenant *qua* tenant, one might argue that the benefit is not particular to the holder of the lease for the time being, for any party would benefit from an option to purchase land.[17] It will, however, be of *particular* benefit to the tenant for the time being, as it allows him to invest in the property secure in the knowledge that he will be able to acquire a permanent right to it in the future.[18]

The second stage of the general test encompasses broader policy issues, looks at the content of the obligation and asks whether it is compatible with the nature of the real right of lease and with the right (ownership subject to a lease) which the successor acquires.[19] The objection expressed in *Bisset*[20] and reiterated in *Advice Centre*[21] is that it can scarcely be said to be consistent with the nature of a real right of lease to provide the tenant with the right to put an end to the relationship of landlord and tenant, and substitute for his rights as tenant those of an absolute proprietor. Admittedly, as was noted above, leases are protean: it is difficult, therefore, to identify their 'nature'.[22] But one thing which all real rights of lease have in common is that they are temporary.[23] This is reinforced by recent legislative caps

---

15 Chp 3 Pt D.1.

16 Whether the real/personal condition distinction is actually drawn in respect of the terms of a subsisting lease when an interposed lease is granted is not considered here. See Land Tenure Reform (Scotland) Act 1974 s17(2).

17 HA Bigelow 'The Contents of Covenants in Leases' (1914) 30 LQR 319, 334. He views the benefit (and therefore the covenant) as 'clearly personal'.

18 Restatement *Landlord and Tenant* §16.2 Illustration 3.

19 Chp 3 Pt D.3.

20 *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 (IH) 91.

21 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [39].

22 Chp 3, text to n189.

23 A perpetual lease is contractually valid, but does not bind a successor of the landlord: *Carruthers v Irvine* (1717) Mor 15 195. There was initially argument about whether leases of exceptionally long endurance benefited from the protection of the 1449 Act, but the view developed that they did. The point was rendered less important when the Registration of Leases (Scotland) Act 1857

on the length of leases[24] and will become clearer still if proposals to convert tenants' rights under existing ultra-long leases into ownership are enacted.[25] Given that their temporary nature is a key characteristic of all leases, it is understandable that a term which, if exercised, would replace a temporary right with a permanent one is regarded as incompatible with the nature of a real right of lease. It might be objected that in some leases the tenant's right is already virtually equivalent to ownership and that it is not inconsistent with the nature of such a right to give the tenant a power to acquire ownership. The terms of the lease may place all of the responsibilities of owner on the tenant, as will be the case in a typical commercial lease, or there may be a long lease at a nominal rent. But, as was noted by the tenant in argument,[26] *Bisset* concerned just such a lease: a 999-year lease. In that sense, the decision is a strong one. Its logic applies *a fortiori* to shorter leases, in which the tenant's position is not as functionally equivalent to ownership.

The rule that a successor landlord is not bound by the obligation correlative to an option may also be explained on another basis. The policy issues relevant to whether the burden of an option should be capable of running with land have been aired recently in the reform of the law of real burdens. Prior to the coming into force of the Title Conditions (Scotland) Act 2003, a variety of types of option could be created as real burdens: rights of pre-emption, redemption or reversion. A right of pre-emption is a right of first refusal in the event of sale by the owner; rights of redemption and reversion, on the other hand, are rights to reacquire property independently of some trigger act by the owner. The exercise of such a right is outwith the owner's control and can occur at any time. The Scottish Law Commission considered whether these

---

introduced the possibility of registration: see the discussion in JS More's Notes to Stair *Institutions* ccxlvii.

24 There is now a maximum duration of 175 years: Abolition of Feudal Tenure etc (Scotland) Act 2000 s67. This period was chosen after consultation with commercial actors. Leases of such length are required in order to obtain finance for property development. See, eg, Memorandum by the Royal Institute of Chartered Surveyors, Pt 6, which is reproduced in Scottish Parliament Justice and Home Affairs Committee, 3rd Report 1999, Annexe B. Since 1974 the maximum length of a residential lease has been 20 years: Land Tenure Reform (Scotland) Act 1974 s8.

25 The Scottish Law Commission has proposed that tenants' rights under existing leases which exceed 175 years and still have a substantial period left to run should be converted into ownership: Scottish Law Commission *Report on Conversion of Long Leases* (SLC Rpt 204, 2006).

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

options should continue to be capable of being constituted as real burdens.[27] It viewed reversions and redemptions as potentially oppressive: the owner had no control over when,[28] or whether, the option was to be exercised; on exercise, he might lose the property without consent and, potentially, without adequate compensation.[29] The possibility was mooted that this type of condition might be repugnant with ownership,[30] but that argument encounters the difficulty that courts did enforce them.[31] In the Scottish Law Commission's view, these objections amounted to a convincing case for prohibiting the creation of such options as real burdens. This was despite the fact that an acquirer should have known of the existence of the burden because registration against the burdened property is, and has always been,[32] a constitutive requirement of real burdens. The Commission accepted that the offside goals rule could lead to a different result, and that an option could be made to bind a successor by virtue of a standard security. Its position was that an option should not be able automatically to run with the land as a real burden. Consultees agreed with this assessment. A different approach was taken in respect of rights of pre-emption. They do not create the danger of forced sale, for the holder has a right to purchase only in the event of the owner deciding to sell. In the Commission's view, such rights retain considerable perceived utility. The result is section 3(5) of the Title Conditions (Scotland) Act 2003, which only allows options in the form of rights of pre-emption to be constituted as real burdens.

At a general level, these policy concerns apply equally to lease law. The point of departure is the general property law rule that the burden of an option to purchase does not run with the land and that one acquiring ownership should not be liable to

---

27 Scottish Law Commission *Discussion Paper on Real Burdens* (SLC DP 106, 1998) Pt 8; Scottish Law Commission *Report on Real Burdens* (SLC Rpt 181, 2000) Pt 10.

28 This will not always be the case: an option may be exercisable only at particular points in time. The main objection to options is that the owner is liable to be divested against his consent.

29 But note the doubt about whether successors could be bound if the purchase price was 'elusory': *McElroy v Duke of Argyll* (1902) 4 F 885 (IH) 889. A pre-emption was unsuccessfully challenged as resulting in a deprivation of property without adequate compensation, contrary to Article 1 of the First Protocol to the ECHR, in *Macdonald-Haig v Gerlings* (Inverness Sheriff Court, 3 Dec 2001, unreported but noted in KGC Reid & GL Gretton *Conveyancing 2002* (2003) 63).

30 *Report on Real Burdens* (n27) [10.20].

31 Acknowledged in the Scottish Law Commission's Report, where *Strathallan v Grantley* (1843) 5 D 1318 and *McElroy v Duke of Argyll* (1902) 4 F 885 (IH) are cited.

32 Gordon *Land Law* [22-33] & [23-05].

compulsory expropriation.[33] It would be odd for a legal system which insists upon registration in order to transfer ownership[34] to permit an obligation to transfer ownership to burden land without the need for registration. That is the effect of holding an option to be a real condition of a lease: it binds a successor landlord, even if he is unaware of it. This is a factor which must be borne in mind when the option is in an unregistered lease. Where the lease is a registered commercial lease, however, the policy considerations can differ. Indeed, the current rule has been criticised as out of touch with commercial realities.[35] Commercial property which is subject to an institutional lease is purchased as an investment. The landlord's interest is purely financial, so there is not the same concern about such a person being obliged to transfer ownership as there is about, say, the owner-occupier of a dwelling-house being forced to transfer title. One can, however, imagine situations in which – even between commercial parties – holding an option to bind a successor landlord will have negative effects in terms of policy: a landlord may wish to redevelop a site, for example, yet be unable to do so because one tenant exercises his option. I prefer the certainty and consistency provided by a clear rule that an option is a personal condition. But there is scope for different views, and so the law could well develop so as to allow an option in a lease between commercial parties to transmit, providing that it is shown to be customary in that class of lease.

The approach adopted in respect of real burdens prompts the question whether lease law too should distinguish between an option which the tenant may trigger at any time, and one which affords a right to purchase only should the landlord sell.[36] As we have seen, the policy objections to an owner being bound by the second type of term are not as strong as in respect of the first: although there remains a limitation on one of the main aspects of ownership, namely freedom of transfer, there is no question of being compelled to sell the property when one does not wish to do so. Nevertheless, this limitation might prove problematic for the incoming owner in

---

33 Subject, of course, to statutory rules of compulsory purchase.

34 *Sharp v Thomson* 1995 SC 455 (IH), 1997 SC (HL) 66; *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19.

35 I Quigley 'On the wrong track?' [2007] (Feb) JLSS 48.

36 Cooper distinguishes between options to purchase and rights of pre-emption in South African law, although he treats both identically when considering whether they bind a successor to the landlord: Cooper *Landlord & Tenant* 139 – 140 & 147 – 148. He views both as binding the successor unless the right is separable from the contract.

certain circumstances: he might, for instance, wish to transfer the property as part of a corporate restructuring, or as one of a group of properties, or he may wish to donate it to a particular person.[37] Not all transfers of title are simply to realise the market value of the property. Furthermore, the transmission of such an obligation would still face the doctrinal objection, noted above, that it would subvert the temporary nature of the burden constituted by the lease, which was the main objection raised in *Bisset* and reiterated in *Advice Centre*. For these reasons, it is suggested that it is unlikely that a court would carve out an exception to the general rule and hold a successor bound by an option to purchase in the form of a pre-emption.

Legislative provisions applicable to rights of pre-emption may be noted here for completeness, although they raise no particular issue in respect of singular successors. Their application to leases is a relatively recent development. By legislation, the holder of a right of pre-emption has only one bite at the cherry. Where O(wner) offers the property to H(older) following an event which triggers the pre-emption, and H fails to intimate his intention to exercise the pre-emption within 21 days[38] of the sending of the offer, the right of pre-emption expires and so H cannot demand that he be offered the property when a trigger event next occurs.[39] This rule only applies where an event occurs to trigger the right of pre-emption. There may be instances where transfer does not trigger such an offer or where there is a transfer without an offer being made, although one should have been. In both cases, the right of pre-emption persists and can be exercised upon the next trigger event. Against whom it may then be exercised depends upon (i) whether a pre-emption is a real condition (which it is suggested above that it is not) and (ii) whether

---

37 Whether a right of pre-emption is triggered by gift may be expressly regulated by the constitutive agreement. As to the position where it has not been, cf Scottish Law Commission *Report on Real Burdens* (SLC Rpt 181, 2000) [10.22] (pre-emptions not usually triggered by gifts) and *Gardner v Coutts* [1968] 1 WLR 173 (Ch D) 179B ('To my mind the notion of a first refusal is inconsistent with the idea that the person who has to give the first refusal should be entitled to give the property away without offering it to the other party.')

38 Or such shorter period as is mentioned in the document constituting the pre-emption.

39 Title Conditions (Scotland) Act 2003 ss82 – 84. There is also provision for extinction following a 'pre-sale undertaking', which is where the holder gives an undertaking not to exercise the option and the property is transferred while that undertaking subsists. The general rule was first introduced by Conveyancing Amendment (Scotland) Act 1938 s9 which applied to rights of pre-emption in feudal grants. Land Tenure Reform (Scotland) Act 1974 s13 amended this and extended its application to 'any right of pre-emption, created in a deed or other writing executed after the 1st September 1974 ... of an interest in land in the event of the sale thereof or of any part thereof by the proprietor for the time being'. This new provision covered rights of pre-emption in leases.

the offside goals rule may render it binding upon a successor (which, currently, it does[40]).

The reforms of the Title Conditions (Scotland) Act 2003 have a perhaps unforeseen consequence.[41] Sections 83 and 84 are more restrictive in their terms than their predecessor provision, section 9 of the Conveyancing Amendment (Scotland) Act 1938:[42] they apply only to a subsisting right of pre-emption which is constituted *as a title condition*,[43] meaning, on the definition in section 122, that only conditions of *registrable* leases are covered.[44] This limitation was not present in section 9 of the 1938 Act, as amended to apply to leases. So, since 28 November 2004, the 'single opportunity to purchase' rule has ceased to apply to rights of pre-emption contained in short leases. It seems therefore that a landlord of property let under a short lease which contains a right of pre-emption must take his successor bound by the tenant's right of pre-emption, even if the tenant refuses the opportunity to purchase when the subjects are offered to him, for the right is not extinguished by non-exercise.

3. Other legal systems

There is little South African authority directly on the question whether an option to purchase in a lease binds a successor landlord by virtue of the *huur gaat voor koop* rule. In *Shalala v Gelb* it is stated, *obiter*, that 'the maxim *huur gaat voor koop* has no application as between competitors for dominium'.[45] That rule is concerned with binding an acquirer by the contract of lease and not by an obligation to enter into a different contractual relationship. However, this view is rejected by the two leading commentators, Cooper and Kerr, both of whom favour the position that a successor is bound by an option to purchase contained in a lease provided that it is an integral

---

40 Chp 9, text to n56.

41 Not the only unforeseen consequence flowing from the s122 definition of 'title condition'. See Chp 4 n41.

42 Repealed by Title Conditions (Scotland) Act 2003 Sch 15.

43 Title Conditions (Scotland) Act 2003 s82.

44 Title Conditions (Scotland) Act 2003 s122. Note there is no requirement that the lease be registered, only that it be registrable in order for the condition to qualify as a title condition and for ss 83 – 84 to apply.

45 1950 (1) SA 851 (CPD) 865. It is one of four cases on this point discussed by Cooper *Landlord & Tenant* 300–303. The other three are *Ginsberg v Nefdt* (1908) 25 SC 680; *Archibald & Co v Strachan & Co* 1944 NPD 40 and *Van der Pol v Symington* 1971 (4) SA 472 (T). These concern knowing or gratuitous successors and so do not provide authority on the *huur gaat voor koop* rule. *Shalala v Gelb* is the only case he cites which considers whether an option binds a successor by virtue of that rule.

part of the lease.[46] This requirement will be satisfied where, for example, the option was an inducement to contract. These authors proceed on the basis of a different, more lenient, test for distinguishing between real and personal conditions than does Scots law.[47] The contrary view, adopted in *Shalala* is, however, accepted by the authors of a leading property law text.[48] Even if an option to purchase does not bind a successor as a term of the lease, he may be bound by virtue of the doctrine of notice (the equivalent of the offside goals rule).[49]

The position of the Common Law is that an option to purchase is collateral to the relationship of landlord and tenant, so the liability to perform does not run with the reversion. The authority commonly cited for this is *Woodall v Clifton*,[50] where a tenant sought to compel an assignee of the reversion to grant a conveyance in line with an option agreement. The tenant was unsuccessful. The defendant answered that 'the statute[51] is confined to contracts dealing with the leasehold relation, and does not apply to contracts which are collateral or personal'. This argument was successful. Romer LJ stated:[52]

> The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. ... It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion ... . An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing.

This expresses well the objection to the transmission of the obligation: the contract to which the transferee becomes party upon transfer is that of lease; a term relating to a

---

46 Cooper *Landlord & Tenant* 300–303; Kerr *Sale & Lease* 441 – 442 and LAWSA vol 14 [46].

47 Chp 3, text to n142.

48 PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Shoeman's The Law of Property* (5th edn 2006) 433.

49 Cooper *Landlord & Tenant* 300 – 303; Kerr *Sale & Lease* 441 – 442.

50 [1905] 2 Ch 257 (CA).

51 The Grantees of Reversions Act 1540 (32 Hen 8, c 34). When monastic lands were seized and distributed, it was necessary to enable grantees to enforce the terms of existing leases. The effect of this Act, as interpreted, was that the benefit and burden of covenants, provisions and conditions contained in a lease which touched and concerned the land passed with the reversion: Megarry & Wade *Real Property* [15-046].

52 *Woodall v Clifton* [1905] 2 Ch 257 (CA) 279.

contract of sale is separate from that contract and so does not automatically bind a successor landlord.

Woodall v Clifton has been followed in the Commonwealth.[53] English law, however, is now different. By statute, all landlord and tenant covenants in a lease concluded after 1 January 1996 transmit, provided that they are not expressed to be personal. This rule does not, however, circumvent those rules which require an option to be registered in order for it to bind a purchaser.[54]

B. RETENTION OF RENT IN SATISFACTION OF DEBT OWED BY LANDLORD TO TENANT

A successor landlord is not bound to allow the tenant to set-off his rent against a personal debt of the original landlord, although the tenant may do so until he is properly interpelled by the successor landlord. This is a straightforward application of the general test set out in Chapter Three, the first element of which requires that, in order for a successor landlord to be bound by a condition, it must affect the landlord *qua* landlord and the tenant *qua* tenant. The rule can be seen in cases which consider attempts to use the real qualities of leases to secure debt.[55] This seems to have been common for some time.[56] Stair referred to 'wadset tacks'.[57] One of the structures used was this: a debtor would lease land to his creditor and allow the creditor to retain his rents in satisfaction of the sum he was owed, be it the interest (annual-rent) or the principal. Alternatively, the debtor/creditor relationship might arise after the parties were landlord and tenant: the landlord of a wealthy tenant, Ross recounts, would naturally have recourse to him to borrow money and would equally naturally arrange for the loan to be paid off by the retention of rent.[58]

---

53 *Davenport Central Service Station Ltd v O'Connell & ors* [1975] 1 NZLR 755 (Supreme Court) 757; *Derham Bros Ltd v W Freestone Leasing Pty Ltd* [2003] QCA 376 [6], [22] & [66]. (http://www.austlii.edu.au/au/cases/qld/QCA/2003/376.html). In *Sandhurst Trustees Ltd v Australian Country Cinemas Pty Ltd* [2006] QSC 165, the Supreme Court of Queensland applied *Woodall* to a right of pre-emption (http://www.austlii.edu.au/au/cases/qld/QSC/2006/165.html).

54 See Chp 9 n64.

55 See, generally, Morison's Dictionary 15 234 – 15 249; Stair *Institutions* II ix 28 – 29; Bankton *Institute* II ix 7 – 9; Erskine *Institute* II vi 29; Ross *Lectures* vol II 502 – 503.

56 According to Bell, from the sixteenth to the eighteenth centuries. At that point other ways of taking security took over: Bell *Commentaries* I 69.

57 Stair *Institutions* II ix 28. He was referring to leases granted which were to endure until the sum borrowed had been repaid. These did not bind successors as they lacked a definite ish.

58 Ross *Lectures* vol II 502.

The effectiveness of these transactions as 'securities' depended upon the clause permitting retention of rent remaining effective in a question with the landlord's successors. The extent to which such clauses did so was controversial. This was one of the earliest type of case in which it had be determined which aspects of an agreement between landlord and tenant regulated the relationship between a successor landlord and the tenant. The law fluctuated. The initial view was that a clause permitting the tenant to retain rent 'would not liberate [a] tacksman at the hands of a singular successor, albeit it might militate against the setter and his heirs'.[59] For a period, an intermediate position was adopted: successors were bound to allow the tenant to set-off the debt due by the original landlord, but only where there remained a surplus of rent which could be paid to the successor.[60] The reasoning was that the lease could have been granted for that surplus rent in any event. So, one reads of leases where, in addition to a money rent, the tenant also had to provide the landlord with '2 stones butter, 4 wedders and 1 dozen poultry'.[61] In *M'Tavish v M'Laughlan*,[62] however, the court changed its view and held the distinction between cases which involved a surplus duty and those which did not to be unsound. Hume summarises the resulting rule thus: 'the purchaser's interest shall ... prevail over all these provisions of the tack, which are destined to intercept the rent, – and turn it into other pockets than his own'.[63] The successor's argument, that tenants were entitled to the protection of the 1449 Act only upon paying to the successor 'sicklike mail as they took [the lands] for', was successful. But, although this argument also appears elsewhere,[64] it proves too much. It would amount to a blanket rule that the tenant may not retain rent in a question with a singular

---

59 *Ross v Blair* (1627) Mor 15 167.

60 *Thomson v Reid* (1664) Mor 15 239, followed in *Peacock v Lauder* (1674) Mor 15 244; *Oliphant v Currie* (1697) Mor 15 245 contains the same rule, and was itself followed in *Creditors of Dunce v Simpson* (1698) Mor 15 247. *Seton v White* (1679) Mor 15 245, on the other hand, held the tenant entitled to retain the *whole* rent in a question with a successor landlord. In *Oliphant* reference is made to decisions in cases which raised the parallel feudal issue: in *Blackbarony v Borrowmains* (1679) Mor 10 272 a clause in a feu right discharging the feu duties in all time coming was found not to be effectual against a successor in the superiority. In *Pringle v Earl of Home* (1699) Mor 10 274 the same decision was reached in respect of a discharge which was not in the original feu charter, but was instead subsequent to it.

61 *M'Tavish v M'Laughlan* (1748) Mor 1 736 & 15 248.

62 ibid.

63 Hume *Lectures IV* 76.

64 Bankton *Institute* II ix 9. (He does not cite *M'Tavish*, despite that case's having preceded the appearance of his Institute.)

successor, which is not the law. Clauses permitting the retention of rent as compensation for expenditure improving the subjects are real conditions (Part D, below). The 1449 Act's statement that the tenant must continue to pay 'sicklike mail as he took the lands for' is therefore not absolute.

Erskine's explanation of decisions such as *M'Tavish* is better:[65]

> [T]he retention was ... claimed by the tenant not *qua* tenant, but in the character of a creditor to the landlord, with which last character it is obvious that the statute hath no concern, since the only view of it was to secure tenants in the possession of their farms, but not the landlord's creditors in the payment of their debts.

The logic is this: the basis of the tenant's ability to retain rent is that he is the landlord's creditor. In truth, it is not an example of retention, for that is the withholding of performance by one party to a contract to spur the other party to perform his counterpart obligation. Instead it is an instance of compensation, or set-off.[66] Although this does not operate *ipso jure* and usually must be pled and sustained by judgment before it has effect,[67] it can operate earlier by agreement: debtor and creditor can agree that their mutual claims and debts will extinguish each other.[68] Thus it seems that the clauses under discussion amounted to agreements to set-off the landlord's (debtor's) claim to rent against the tenant's (creditor's) claim to repayment under the contract of loan. In order for a successor landlord to be bound to allow a tenant to 'retain' his rent by virtue of such a clause, he would have to have been the tenant's debtor in the contract of loan. Otherwise, one of the prerequisites of set-off/compensation, that there be *concursus debiti* and *crediti*, would have been lacking. The successor was not a debtor of the tenant, for upon transfer by the landlord it is the contract of lease and not the contract of loan to which he becomes party. The final position reached by the courts is therefore correct. Identifying the proper basis for these decisions is important. It makes clear that there is no rule that a successor landlord must always be paid the rent stipulated in the lease, which would

---

65 Erskine *Institute* II vi 29.

66 On the distinction between retention and compensation, see McBryde *Contract* [20-62] – [20-65] & [25-34] and Erskine *Institute* III iv 20.

67 McBryde *Contract* [25-54]. Institutional passages are: Erskine *Institute* III iv 12; Bell *Commentaries* II 124 and Bell *Principles* §575. cf Stair *Institutions* I xviii 6, which has not been followed.

68 McBryde *Contract* [25-53]; WA Wilson *The Scottish Law of Debt* (2nd edn 1991) [13-6]. This rule is not unique to Scots law: R Zimmermann *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) 20.

have meant that there was no scope at all for a tenant to retain rent in a question with a successor landlord.[69] The question is whether the successor landlord is bound by the obligation which the tenant wishes to set-off against the rent.[70]

One often also sees the rule in *M'Tavish* justified in another way: the clause is viewed as an assignation of rents by the landlord (debtor) to the tenant (creditor).[71] Such an assignation is effectual only so long as the cedent remains owner.[72] Although Bankton states that such clauses are 'truly, in effect' assignations of the rent,[73] Hume simply uses assignation of rent as a metaphor to argue that the result of a clause permitting retention could not be stronger in effect than such an assignation.[74] What is odd is that the parties' aims could have been achieved had the debtor simply granted a lease at a low rent for a suitable duration to amortise the debt.[75]

The tenant may continue to set-off the rent against the sum outstanding until he is interpelled by the successor landlord.[76] It is not clear exactly when this takes place. In his Principles Erskine referred to 'litiscontestation or other legal interpellation'.[77] Hume states that:[78]

> as a *bona fide* possessor and consumer, the tenant may have the advantage of such a clause of retention, until the purchaser shall put an end to that *bona fides* by some reasonable course of interpellation on his part.

This is an instance of the principle of good faith payment, which protects a debtor who pays his former creditor in good faith after the creditor's right to receive payment has transferred to another.[79] *Bona fide* payment by a tenant to a former

---

69 Erskine *Principles* II vi 12 makes this point.

70 More's formulation in his Notes to Stair was that the tenant may not retain (used to mean set-off) rent against a successor landlord in respect of debts not arising out of the lease: JS More's Notes to Stair's *Institutions* vol I (1832) ccxlvi.

71 eg *Thomson v Reid* (1664) Mor 15 239; *Oliphant v Currie* (1697) Mor 15 245; Bankton *Institute* II ix 9; Hume *Lectures IV* 76.

72 Erskine *Institute* III v 5; Bell *Commentaries* I 793; Rankine 318.

73 Bankton *Institute* II ix 9. Bankton states that the assignee of the landlord's right to the rent would be affected by the tenant's right to retain: Bankton *Institute* II ix 10.

74 Hume *Lectures IV* 76.

75 Ross *Lectures* vol II 503; Bell *Commentaries* I 69; Bell *Principles* §1201;

76 Erskine *Institute* II vi 29; Hume *Lectures IV* 77; *M'Tavish v M'Laughlan* (1748) Mor 1736, 15 248. That case held that a baron decree obtained by a judicial factor on the landlord's sequestrated estate amounted to sufficient interpellation. Hunter vol I 482 and Rankine 146 repeat the rule

77 Erskine *Principles* II vi 12.

78 Hume *Lectures IV* 77.

79 Stair *Institutions* I xviii 3, III i 13 & IV xl 33; Bell *Principles* § 561.

landlord after transfer to a singular successor who has used no diligence to put the tenant in *mala fide* is said by Stair to be the most ordinary example of the principle of *bona fide* payment.[80]

German[81] and South African law, in distinction to Scots, hold a successor bound by a clause of retention of rent. In *De Wet v Union Government*,[82] a decision which appears to have been reached on the basis of reasoning of a kind familiar in Scotland was reversed on appeal. A borrowed money from B in order to erect a house on his land and then let the house and part of a farm to B. The lease provided that the rent was to be paid by a *pro tanto* diminution in the amount lent. The leading judgment (by Byers JA) is in Afrikaans, but Stratford ACJ's was in English. The Scottish rule was quoted in argument.[83] Stratford ACJ stated:[84]

> The term as to how the obligation to pay rent month by month as it accrues is to be extinguished is a material and integral part of the lease, and not ... merely collateral .... It was because the learned Judge in the Provincial Division failed to appreciate the difference between an express term of the lease ... and the operation of the law of set-off apart from agreement, that led him to an erroneous conclusion.

South African commentators approve of this result.[85]

C. DISCHARGE OF RENT

A common provision relating to rent in modern leases is one which provides that for a particular period no rent will be payable (a 'rent-free period') or that rent will be at a lower level than otherwise provided in the lease. These provisions are of the utmost commercial importance. A rent-free period is commonly provided to allow for the tenant to fit out the subjects. There may be 'rent-phasing' provisions to provide that a tenant will only pay a proportion of the full rent until, say, an anchor tenant begins to trade from the development. Yet, whether such terms bind a successor landlord has not been litigated. As they concern the rent payable, a core term of the lease, it might be said that they are clearly referable to the relationship of landlord and tenant and therefore do transmit. However, there are suggestions to the contrary in the texts.

---

80 Stair *Institutions* I xviii 3.
81 *Staudingers Kommentar* §566 Rn [40].
82 1934 AD 59.
83 ibid 61.
84 ibid 63 – 64.
85 Cooper *Landlord & Tenant* 291 – 292; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Shoeman's The Law of Property* (5th edn 2006) 433.

When discussing the cases considered in Part B where a tenant sought to retain rent on the basis of a personal debt owed by the original landlord, Rankine stated:[86]

> [I]f a fixed rent has been stipulated for in the lease, and then, either *unico contexu*, or later, the obligation to pay it is discharged, the discharge is regarded as a purely personal contract, not transmissible against singular successors; and the fixed rent is still due in a question with them.

There is a very similar passage in Stair.[87] Both Rankine and Stair refer to *Ross v Blair*,[88] one of the decisions discussed above, where the entire rent due under the lease had been discharged in satisfaction of a debt owed to the tenant, but the passages are in general terms. What if the discharge was granted for other reasons, say to encourage a prospective tenant to take a lease? One may distinguish: (i) a total discharge of all rent due under the lease, and a partial discharge whether it be (ii) only of part of the rent or (iii) only for a part of the lease or (iv) a combination of those two. Stair and Rankine's discussion is of the first possibility. The reason why the successor cannot be bound by a total discharge is clear: it would undermine the rule that a successor is not bound by a lease unless it provides for a tack duty. Such a term therefore falls foul of that part of the general test which prevents the transmission of a term inconsistent with the nature of a lease. That would probably also prevent a successor from being bound by a discharge of the entire rent for a particular period, although it would depend why the discharge was granted: if it was in consideration of an obligation due to the tenant which would itself bind the successor landlord, then it is thought that the discharge should do so also. This point could have been, but was not, raised in *Ashford & Thistle Securities LLP v Kerr*,[89] where a tenant argued that her lease had been varied so that no rent would be payable for the first five years on the basis that she would carry out repairs and refurbishment work to the subjects. The question is whether the rule that a discharge of rent does not affect a successor should be applied more widely, to encompass a discharge of only part of the rent, perhaps also only for a particular period. It is thought that it should not be. It is difficult to distinguish between such a discharge and a variation of the lease, and it was suggested in Chapter Two that variations do bind successors.

---

86 Rankine 145 – 146, citing *Ross v Blair* (1627) Mor 15 167

87 Stair *Institutions* II ix 29, also citing *Ross v Blair* ibid.

88 (1627) Mor 15 167.

89 Unreported decision of Sheriff Poole, Edinburgh Sheriff Court 19 Dec 2005; reversed on appeal 2007 SLT (Sh Ct) 60. The appeal turned on a different point.

A term concerning payment of rent is clearly referable to the relationship of landlord and tenant, and there is no policy reason why a reduction of rent – as opposed to a complete discharge – should not bind a successor. Unless the partial discharge is intended to subsist only as long as the granter remains landlord, there is no reason why it should not also affect a successor.

D. COMPENSATION FOR IMPROVEMENTS

An example of a term which permits the tenant to retain rent which is effectual in a question with a singular successor is one which provides for the tenant to be compensated for the cost of improvements made.[90] At common law a tenant has no right to be compensated for improvements,[91] but parties often derogated from this default position and 'it has been decided that a *bona fide* and fair stipulation for meliorations is just as effectual against a purchaser as any other stipulation in a lease.'[92] This has been clear since *Arbuthnot v Colquhoun* in 1772[93] and was reaffirmed by the House of Lords in *Fraser v Maitland.*[94] It also follows from the general test set down in Chapter Three. It was noted there that a test which asks whether a person is benefited or burdened in a particular capacity does not produce especially clear results in respect of an obligation to pay money, for everyone is benefited by receiving money and, similarly, such an obligation can be performed by anyone.[95] One should look, however, at the purpose of the payment and ask, in light of that, who may more reasonably perform the obligation after transfer. An obligation to compensate the tenant for the cost of improvements may more reasonably be performed by the successor landlord because it is he who will take the benefit of improvements at the end of the lease.

Although the general proposition that conditions of the type under discussion are real was established early, there was a fairly substantial volume of litigation

---

90 Rankine 267.

91 Stair *Institutions* II i 40; Bankton *Institute* II ix 68; Erskine *Institute* III i 11; Bell *Principles* §538; *Scott's Exrs v Hepburn* (1876) 3 R 816 (IH) 827; *Earl of Galloway v McClelland* 1915 SC 1062 (IH: Whole Ct) 1099.

92 *Purves' Trs v Traill's Tr* 1914 2 SLT 425 (OH).

93 (1772) Mor 10 424. cf *Rae v Finlayson* (1680) Mor 10211, where such a clause was thought to be personal. From Fountainhall's report it becomes clear that the lease itself in this case would not in any event have bound a successor for the tenant was not in possession by virtue of the lease when the successor took infeftment. Bankton *Institute* II ix 7 reflected the law of his time when he stated that such a clause did not bind a successor.

94 (1824) 2 Sh App 37. See also *Stewart v M'Ra* (1834) 13 S 4 (IH).

95 Chp 3, text to n164.

concerning them. The issue in these cases was not, however, whether there was a substantive objection to a successor landlord being bound. Rather, the focus was upon whether the term bound an heir of entail or when liability under such an obligation crystallises, which is important for determining whether the original or the successor landlord is bound.[96] This thesis does not consider that point, so these cases are not discussed here.[97]

One case which does deserve mention is *Macdoual v Macdoual*.[98] There a lease provided that the landlord was to compensate the tenant for improvements at the termination of the lease. During the subsistence of the lease, the tenant acquired the lands. The original landlord was held bound to reimburse the tenant on the date at which the lease would have terminated. Rankine's view was that the opposite result would have been reached when he wrote, and it is thought that that remains the case: the lease would be held to have been extinguished *confusione* and the parties deemed to have taken the obligation into account in settling the price.[99] The decision dates from 1760. At that time the general rule was that such an obligation did not bind successors[100] and the decision may have been influenced by that consideration: after transfer, the original landlord remained bound so it made no difference who acquired the lease. Now, however, that such a condition is real, it would be extinguished

---

96 The most likely rule is that a successor landlord does not acquire liability for one-off obligations which had already become due before he acquired the property: *Barr v Cochrane* (1878) 5 R 877 (IH) 883.

97 Here is a full list of all of the cases which the writer has traced: *Rae v Finlayson* (1680) Mor 10 211; *Macdoual v Macdoual* (1760) Mor 15 259; *Arbuthnot v Colquhoun* (1772) Mor 10 424; *Dillon v Campbell* (1780) Mor 15 432; *Webster v Farquhar* (1791) Bell's Octavo Cases 207; *Taylor v Bethune* (1791) Bell's Octavo Cases 214; *M'Neil v Sinclair* (1807) Hume 834; *Bell v Lamont* 1814 FC 645 (IH); *Bruce v McLeod* (1822) 1 Sh App 213; *Todd v Skene* (1823) 2 S 113 (IH); *Fraser v Maitland* (1824) 2 Sh App 37; *Moncrieff v Tod & Skene* (1825) 1 W & S 217; *Fraser v Fraser* (1827) 5 S 673 (IH), (1831) 5 W & S 69; *Macra v M'Kenzie* (1828) 6 S 935 (IH); *Barclay v Earl of Fife* (1829) 7 S 708 (IH); *Fraser v Mackay* (1833) 11 S 391 (IH); *Stewart v M'Ra* (1834) 13 S 4 (IH); *Stewart v Campbell* (1834) 13 S 7 (IH); *Turner v Nicolson* (1835) 13 S 633 (IH); *Stewart v Earl of Dunmore's Tr* (1837) 15 S 1059 (IH); *Cumine v Bailey* (1856) 19 D 97 (IH); *McGillivray's Exrs v Masson* (1857) 19 D 1099 (IH); *Runcie v Lumsden's Exrs* (1857) 19 D 965 (IH); *Purves' Tr v Traill's Tr* 1914 2 SLT 425 (OH); *Younger v Traill's Tr* 1916 1 SLT 397 (OH). Many consider whether an agreement which is not documented in the actual lease can bind a successor (eg *Bruce v McLeod* and *M'Neil v Sinclair*, which reach the opposite conclusion). Such decisions are discussed in Chp 2. Many also concern leases of entailed land.

98 (1760) Mor 15 259. Remarkably, Paton and Cameron cite this case as authority for the proposition that a successor *is* bound by such an obligation: 96.

99 Rankine 265, citing *Lord Blantyre v Dunn* 1858 20 D 1188 (IH).

100 It is viewed in that light, for example, by G Brodie (ed) Stair *Institutions* (4th edn 1826) 371.

confusione, along with the rest of the real conditions of the lease, when the tenant acquired the landlord's interest.

From Part B above, it is clear that a successor is not bound simply by a personal debt of the original landlord. That is one of the clearest examples of an obligation which is extrinsic to the lease. So, if the tenant undertakes to discharge a liability of the landlord's in return for an undertaking from him to be repaid at the end of his lease, that undertaking is a personal condition. This was the position of the majority of the Inner House in *M'Gillivray's Exrs v Masson.*[101] The landlord was bound to pay the outgoing tenant a sum in respect of meliorations. Instead of doing so, he reached an agreement with the incoming tenant whereby the incoming tenant would pay the outgoing tenant the sum which the latter was entitled to be paid by the landlord. In return, the landlord undertook that he would pay the incoming tenant the valuation of the buildings on the land at the end of the lease. That obligation did not bind a successor.

It is unclear whether the rule which applies to compensation for meliorations also applies to a term which provides for the tenant to be paid a sum of money at the end of the lease in the event that he leaves the subjects in good repair. Repair and improvement are different. The one case in which the status of such a term arose does not provide clear guidance.[102] The question raised was whether, where the tenants carried out repairs and the landlord subsequently transferred the subjects of the lease, the original landlord remained bound by the obligation to refund the tenant's outlay. The claim against the original landlord was sent to proof before answer and it is not known how it was finally resolved. The claim could have remained binding upon the original landlord either because (i) the term was not a real condition of the lease, (ii) it was a real condition, but the original landlord remained liable in addition to the successor landlord or (iii) that it was a real condition but liability under it had already crystallised prior to transfer. It cannot be determined from the terms of the report which of these possibilities was the basis of the decision.

---

[101] (1857) 19 D 1099 (IH) 1101. See, similarly, *Younger v Traill's Tr* 1916 1 SLT 397 (OH) 399 and the entail case of *Fraser v Fraser* (1831) 5 W & S 69. cf *Stewart v Campbell* (1834) 13 S 7 (IH).

[102] *Swan & Sons v Fairholme* (1894) 2 SLT 74 (OH).

E. LANDLORD'S OBLIGATION TO IMPROVE THE SUBJECTS

The texts are unanimous that an obligation to repair is a real condition.[103] There is, however, a distinction between repair and improvement. A landlord might agree to carry out improvements, for example, to make various alterations to a shop so as to equip it for the business which the tenant is to run, or even to construct new premises from scratch – often land is leased before it has been developed.[104] Both case law and the general test are ambivalent as to whether such an obligation constitutes a real condition of a lease. In terms of the general test, an undertaking to improve certainly benefits the tenant *qua* tenant, but there is more doubt as to whether it binds the landlord *qua* landlord. Given that the obligation is to put the subjects into a particular state so that they can be used by the tenant – the very purpose of the lease – it is submitted that such an obligation is referable to the lease. It relates to the condition of the subjects of the lease. The argument that such a term is real is bolstered by the fact that an obligation to compensate the tenant for improvements is a real: if a successor landlord is bound to pay for improvements, why can he not also be bound to carry them out? On the other hand, it might be said that an obligation to carry out improvements is more onerous than an obligation to repair or to pay for improvements carried out by another. Also if the obligation is immediately performable, it is more likely to be personal than real.[105] And finally, in a particular case, the consideration for the obligation may be a capital sum paid at the start of the lease, as opposed to a rent, and this may indicate that the term is separate from the lease.[106]

The leading case is *Barr v Cochrane*.[107] Cochrane, the landlord, undertook to put the buildings and fences of the leased farm into good condition, while the tenants agreed to maintain and leave them in such condition at the end of the lease. Cochrane sold and transferred the subjects to Barr without having fulfilled this obligation, but undertook to Barr to execute the work which he was bound by the lease to perform

---

103 Rankine 256; Paton & Cameron 96; SME vol 13 [241].

104 Cockburn *Commercial Leases* [2.6].

105 *Tailors of Aberdeen v Coutts* (1840) 1 Robin 296, 311.

106 It is not generally useful to argue that consideration is given in the form of rent for the performance of the obligation and that this points towards a successor being bound, for that argument could be made in respect of all obligations in a contract of lease, but some are only personal conditions. The argument does, however, seem to be of value here.

107 (1878) 5 R 877 (IH).

and to relieve Barr of all claims at the tenants' instance. At issue was whether this undertaking to Barr bound Cochrane to execute the works or whether he had fulfilled his obligation by paying the tenants the value of the performance and obtaining a discharge from them. It was held, by majority, that Barr had no right to insist that Cochrane actually carry out the work, either from the undertaking given by Cochrane, or by *jus quaesitium tertio* from the lease. All that was intended was that Cochrane discharge his obligation to the tenants so as to relieve Barr of his potential liability to the tenants.[108] It is this point which is interesting: what liability would Barr have come under in respect of the obligation to the tenants? Lord Justice Clerk Moncreiff states that 'in taking up the estate he [Barr] was exposed to a claim on behalf of the tenant as he came into the place of the person by whom the lease was granted'.[109] This indicates that he viewed the obligation as being a real condition of the lease. In contrast, Lord Gifford described the obligation as a 'personal obligation' and envisaged the tenants looking to Cochrane for performance even after the subjects had been transferred to Barr.[110] Lord Ormidale's dissent appears to be predicated upon the assumption that the obligation was real. He explains Cochrane's being bound actually to carry out the works on the basis that he was landlord at the time when the obligation became prestable. Were the obligation personal and not real, this line of reasoning would be superfluous. Further, he states that Cochrane was unable to agree with the tenant that the repairing obligation would be discharged by payment because, after transfer to a new landlord, he could not vary a term of a lease to which he was no longer party. This suggests that the term was real.

Mackenzie v Mackenzie[111] is another case to consider. There a succeeding heir of entail was held not to be bound by an obligation in a lease of a farm granted by his predecessor to trench, drain, lime and enclose adjoining woodland from time to time. It is unclear whether the basis of the decision was (i) that the term was not a real condition of the lease or (ii) that the term could be a real condition but did not bind a successor landlord because of the entail. Passages in the opinions of Lords Jeffrey

---

108 ibid 881.

109 ibid 881.

110 ibid 885. Although the successor landlord was not bound by the obligation, nevertheless Lord Gifford held that he would be affected by its non-performance, for the doctrine of mutuality meant that the tenant could retain rent in a question with the successor.

111 (1849) 11 D 596 (IH).

and Fullerton suggest the former,[112] and this is how the case has subsequently been interpreted,[113] but the position is not beyond doubt.[114] The same point arose again in respect of entailed land in *Waterson v Stewart*[115] but did not require to be decided because the tenant had discharged the landlord's obligation. The court did not view the point as settled. Given the state of the authorities, that seems a fair conclusion.

F. ARBITRATION CLAUSES

A clause referring all disputes to an arbiter was held to bind a successor landlord in *Montgomerie v Carrick.*[116] However, the authority of this case alone does not allow one to state that an arbitration clause will always bind a successor. The gloss put upon the case by some texts is that the clause transmitted because it was essential to the contract.[117] That is based upon the Lord President's opinion.[118] It will not always be possible to state that an arbitration clause is essential to the contract. Indeed, it might be thought that, more often than not, and perhaps even in *Montgomerie* itself, an arbitration clause will be inessential as a court could adjudicate in the dispute equally well. As discussed above, however, it is not the general law that a term requires to be 'essential' to the contract of lease in order to be a real condition.[119]

There is a contrast in the opinions in *Montgomerie* between the Lord President and Lord Mackenzie, who were content to hold a clause referring *all* disputes between the parties to an arbiter as binding upon the successor, and Lords Fullerton and Jeffrey, who took the view that such a broad clause would not always bind a successor. Lord Fullerton specifically states that he did not decide that a general

---

112 ibid 600 – 601. Another two cases consider whether the landlord's trustee in sequestration is personally bound by such obligations, but that is a different issue and the cases provide no guidance for the question under consideration here: *Harvie v Haldane* (1833) 11 S 872 (IH) and *Harkness v Rattray* (1878) 16 SLR 117 (IH). In *Harvie* Lord Cringletie states that all singular successors would be bound by an obligation to erect an onstead on a farm, but this is because he viewed such an obligation as implied into any lease of a farm. This provides no guidance upon whether other obligations which are not default rules of a lease would amount to real conditions.

113 *Gillespie v Riddell* 1908 SC 628 (IH) 640. The reasoning in *Gillespie* on this point is too broad: Chp 3, text to n118. However, the Lord Ordinary in *Gillespie* thought that 'an obligation by the lessor to put the fences and gates in a proper state of repair, and to re-roof the old farm buildings with corrugated iron' would have bound a successor heir of entail (634), which means that he must also have thought such a term would transmit as a real condition of the lease.

114 The Lord Ordinary decided the case on the entail point: (1849) 11 D 596 (IH) 598.

115 (1881) 9 R 155 (IH).

116 (1848) 10 D 1387 (IH).

117 Paton & Cameron 96; SME vol 13 [241].

118 (1848) 10 D 1387 (IH) 1395.

119 Chp 3, text to n98.

obligation to refer is transmissible against singular successors.[120] It was only because of the nature of the dispute that Lords Fullerton and Jeffrey were willing to hold the successor bound: the question at issue was whether the landlord's power to refuse the tenant permission to sink another pit had to be exercised reasonably, and this question required the expertise of an arbiter to resolve. Had the issue related simply to the construction of the lease, for example, it is less clear that a successor would have been held bound. In terms of the general test, the distinction seems suspect. Provided that the matter which would be referred to arbitration for resolution is one which is referable to the relation of landlord and tenant, an arbitration clause affects the landlord *qua* landlord and the tenant *qua* tenant. Davidson notes that the doubts raised in *Montgomerie* have not been echoed since and proposes, as a general principle, that 'where one party succeeds to another's rights and obligations under a contract, then should that contract contain an arbitration clause, he will be bound by it'.[121] He notes that this principle has been applied to feu contracts, a parallel which is particularly instructive.[122] For this reason, it is thought that Rankine's view that 'a singular successor is bound by a reference clause only in so far as it is ancillary to a real condition' is sound.[123]

---

120 (1848) 10 D 1387 (IH) 1395.

121 FP Davidson *Arbitration* (2000) [7.26]. The case is also discussed in RG Anderson *Assignation* (2008) [9-10].

122 *Holburn v Buchanan* (1915) 31 Sh Ct Rep 178: reference clause effective between successor superior and vassal, despite wording which might have suggested it was to benefit only the original vassal.

123 Rankine 477. This position is that which was adopted in *Abbott v Bob's U-Drive* 222 Or 147, 352 P 2d 598 (Supreme Court of Oregon 1960). It was there held that a covenant to arbitrate disputes arising from a lease did touch and concern the land so as to bind the tenant's assignees where the dispute itself related to a term which touched and concerned the land. In German law, too, an arbitration clause has been held to remain effective in a question with a successor to the landlord: 2000 *Neue Juristische Wochenschrift* 2346.

CHAPTER SEVEN
CONDITIONS WHICH RELATE TO OTHER PROPERTY

A. 'LEASEHOLD PERTINENTS' 163
1. Introduction 163
2. Classification and enforceability 165
3. Criteria for being a 'pertinent' 171
B. AFFIRMATIVE OR NEGATIVE OBLIGATIONS IN RESPECT OF OTHER LAND 172
1. Affirmative obligations 173
2. Negative obligations 174
(a) Exclusivity clauses 174
(b) Building restrictions 179
C. CONCLUSION 180

To be a real condition of a lease, a term must relate to the relationship of landlord and tenant. If a standard gloss on that is that it must benefit the tenant *qua* tenant and burden the landlord *qua* landlord,[1] it might be thought that a term which relates to property other than the subjects of the lease cannot qualify as a real condition. It might appear difficult to say that an obligation burdens the landlord *qua* landlord if it relates to some other property. If a landlord subject to such an obligation transfers the subjects of the lease but retains the other property, the contractual right against him continues to be of use to the tenant, even although the landlord no longer owns the subjects of the lease. Does this mean that such obligations do not bind successor landlords? The point is especially worth considering because of the practical importance of some of the terms which would be caught by such a rule, such as rights of access and exclusivity agreements. In *Optical Express (Gyle) Ltd v Marks and Spencer plc*,[2] one of the reasons for Lord Macfadyen's conclusion that a successor landlord was not bound by an exclusivity agreement was that it did not control the landlord's behaviour in respect of the subjects of the lease, but instead regulated his conduct in respect of other property which he also owned, namely the

1 Or vice versa: see Chp 3, Pt D.1.
2 2000 SLT 644 (OH).

other units of the shopping centre. '[S]uch an obligation is prima facie not inter naturalia of a lease.'[3]

The exact weight which Lord Macfadyen intended this consideration to bear is not clear. There are similar general statements in other legal systems. In England, for example, Woodfall states that 'covenants in respect of lands not parcel to the demise' do not touch and concern the land or the reversion.[4] Recent German case law has taken the position that an acquirer is only bound by such obligations as refer to the leased land and which can therefore only be performed by the owner for the time being. This approach is said to protect the acquirer from unforeseeable duties,[5] but has been criticised in academic commentary as unduly restrictive.[6]

There would be a certain neatness in holding that only obligations in respect of the subjects of the lease can be real conditions, for the successor landlord would be guaranteed to own the property which was needed in order to fulfil the obligation.[7] Nevertheless, this chapter demonstrates that there is no rule in Scots law that a term which imposes obligations in relation to property other than the subjects of the lease cannot be a real condition. In fact, successors are often bound by such terms. The sections which follow consider, first, conditions which are analogous to servitudes and confer upon the tenant a right to make use of some other property of the landlord, and, second, conditions which are akin to real burdens, in that they impose a prohibition or an affirmative obligation upon the landlord in respect of other land.

A. 'LEASEHOLD PERTINENTS'

1. Introduction

A tenant sometimes has rights which permit him to use property other than the main subjects of the lease.[8] An obvious example is a right of access. The law can be

---

3 ibid 650J. See also DJ Cusine (ed) *The Conveyancing Opinions of Professor JM Halliday* (1992) Opinion 86, which discusses whether an option to work minerals discovered on other land owned by the landlord was a real condition and concludes that it was not, as it related to other land.

4 Woodfall *Landlord & Tenant* [11.063]. The American Restatement states that if the performance of a promise is related to other property, it will not touch and concern the landlord's reversion: Restatement *Landlord and Tenant* §16.1 p116.

5 *Münchener Kommentar* §566 Rn [33].

6 Discussed at Chp 3, text to n155.

7 Bigelow was concerned by this: HA Bigelow 'The Contents of Covenants in Leases' (1914) 30 LQR 319, 337.

8 See, generally, MJ Ross & DJ McKichan *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn 1993) Chp 4.

summarised in this way: provided that such a right is sufficiently connected to the lease, it will qualify as a 'pertinent' and bind the successor owner of the main subjects. It does so simply as a condition of the contract of lease. If the property over which the pertinent right is exercised and the main subjects of the lease come to be owned by different parties, it is thought that the party who acquires the other land is not bound to the tenant to allow him to continue to exercise the rights. The tenant's claim lies solely against his landlord for the time being.[9]

The leading case is *Campbell v McKinnon*,[10] the history of which lies in the foundation by the British Society of the village of Tobermory on Mull. Every inhabitant of the newly created village was to have the right to dig peat for his own uses in any of the Society's mosses, to take stone or limestone from any of its quarries and to a summer's grazing on its muir lawn. Subsequently, all of the Society's property in the area was sold and, by a series of conveyances, it passed to Campbell, who sought declarator that he had the sole and exclusive right of property in the lands and, specifically, that it was free from any servitude or other right to allow the defenders to graze their cows or horses. Much of the argument was about whether the rights of those occupying the land had been properly constituted at all. There were various classes of defender: some held on feus, some on leases, whilst others were rentallers. The right of pasturage granted to the tenants was held to bind a singular successor of the Society as a term of the contract of lease.[11] The argument which succeeded in the Inner House and the House of Lords was that the right bound the successor landlord as a pertinent or accessory of the lease.[12] That terminology has

---

9 Subject to the possibility of a residual claim against the previous landlord, which this thesis does not explore.

10 (1867) 5 M 637 (IH), *sub nom Campbell v M'Lean* (1867) 8 M 40 (HL).

11 The conclusion was that the pursuer was bound by virtue of the 1449 Act to allow the tenants to continue to exercise this right. Whether the terms of the warrandice clause in some of the transfers which preceded the pursuer's acquisition would have produced the same result was also debated: *Campbell v McKinnon* (1867) 5 M 637 (IH) 653 & 655. The 'exclusion from warrandice' argument might not succeed today (*Mann v Houston* 1957 SLT 89 (IH)) so it is important to recognise that the decision in *Campbell* did not depend upon it.

12 *Campbell v McKinnon* (1867) 5 M 637 (IH) 649, 651 & 656, *sub nom Campbell v M'Lean* (1867) 8 M 40 (HL) 46.

been used in subsequent cases.[13] What exactly may qualify as a pertinent or accessory is considered below.[14]

2. Classification and enforceability

Merely classifying a right as a 'pertinent' or 'accessory' does not much help to elucidate its juridical nature. Adopting Reid's definition, a pertinent is 'a right which pertains to the land and which stands in a subordinate and ancillary relationship to that land'.[15] So the question remains as to its precise characterisation. Proper classification is important for it determines against whom the right is enforceable, in particular whether it is enforceable against an owner of the land over which the pertinent is exercised. If pertinents are directly enforceable against a successor owner of the other land, then it seems less likely that they bind a singular successor of the landlord.

For a successor owner of the land to which the pertinent relates to be bound, the right must be a real right. There seem to be three possibilities: (i) lease, (ii) servitude or (iii) *sui generis* right. Certainly the first two fail. Although the authorities are unclear, it is thought that the third also does so. The right is not in itself a lease. The protection of the 1449 Act is limited to 'land' and that term, according to Lord Deas, includes only 'heritable subjects capable of such open and continuous possession as may naturally suggest to a singular successor the existence of a lease'.[16] In *Campbell*, the right of pasturage was held not to meet this requirement.[17] Nor, thought Lord Young in *Duncan v Brooks*, would a term permitting a tenant of a farm to take peat from a nearby moss.[18]

Nor is the tenant's pertinental right a servitude.[19] Apart from liferent, Scots law recognises only praedial servitudes[20] and the law is clear that the tenant's right in a lease, even if the lease has been made real, does not count as a *praedium* for the

---

13 eg *Galloway v Cowden* (1885) 12 R 578 (IH) 581 ('accessory' right); *Adamson v Sharp's Trs* (1917) 5 SLCR 76, 78 ('accessory' or 'pertinental' right); *Munro v Forbes* (1933) 21 SLCR 31, 34 ('pertinental' right).

14 Pt A.3.

15 Reid *Property* [200], citing *int al* Bankton *Institute* II iii 170.

16 *Campbell v McKinnon* (1867) 5 M 637 (IH) 651.

17 ibid.

18 (1894) 21 R 760 (IH) 764. See also *Ross v Graesser* 1962 SC 66 (IH) 74.

19 cf *Campbell v M'Lean* (1867) 8 M 40 (HL) 47 (Lord Westbury).

20 Erskine *Institute* II ix 39.

purposes of servitudes. Gordon suggests otherwise,[21] but does not cite all of the relevant cases.[22] Cusine and Paisley cite more[23] and conclude that '[d]espite some speculation to the contrary, and a number of loosely-worded judgments, the interest of a tenant is not a feudal *praedium* and cannot form a dominant or servient tenement in its own right'. This is the predominant view.[24] In *Galloway v Cowden*[25] the Second Division specifically stated that the claim of one tenant to take access over the land held by a neighbouring tenant was not a servitude, as did the Land Court in *Adamson v Sharp's Trs*.[26] Admittedly there are cases in which 'accessory' rights held by tenants have been referred to as servitudes,[27] but, given the bulk of authority to the contrary, it is thought that these should be seen as erroneous. (It is a separate question whether, given the importance of leasehold property and the abolition of feudal tenure, it should remain the law that a tenant's interest in land is incapable of supporting servitudes and real burdens.)

The third possibility is that these rights are *sui generis* real rights. That seems unlikely. In *Dougbar Properties Ltd v Keeper of the Registers of Scotland*[28] Lord Macfadyen assumed that a right given to one tenant of access over and parking upon an adjacent car park leased to another tenant was a real right. Remarkably, the point was not the subject of argument.[29] It is certainly true that these rights are *sui generis*: if the land over which they exist is also leased from the same landlord, they are directly enforceable against the tenants of that land.[30] Not all formulations of the rule

---

21 Gordon *Land Law* [24-09].

22 He cites *McDonald v Dempster* (1871) 10 M 94 (IH); *Reid v Anderson* (1900) 8 SLT 80 (OH); *Metcalfe v Purdon* (1902) 4 F 507 (IH); *Kuckron Landholders v Stromfirth and Gillaburn Landholders* (1920) 8 SLCR 21 and *Safeway Food Stores Ltd v Wellington Motor Co (Ayr) Ltd* 1976 SLT 53 (OH). *Reid v Anderson* (81) contains the most hostile *dictum*.

23 DJ Cusine & RRM Paisley *Servitudes and Rights of Way* (1998) [2.12]: *Galloway v Cowden* (1885) 12 R 578 (IH); *Munro v Forbes* (1933) 21 SLCR 31 and *Adamson v Sharp's Trs* (1917) 5 SLCR 76. *Galloway v Cowden* (581) and *Munro v Forbes* (38) both contain *dicta* which refuse to recognise a servitude in favour of a tenant. See also *Campbell v The Lochness Estate Trs* (1918) SLCR App 41 and *M'Kechnie v M'Diarmid* (1919) SLCR App 49.

24 AGM Duncan in Reid *Property* [449]; J Rankine *The Law of Land-Ownership in Scotland* (4th edn 1909) 414.

25 (1885) 12 R 578 (IH).

26 (1917) 5 SLCR 76, 78.

27 *Stewart v Caithness & Smart* (1788) Hume 731; *Simpson v Mackenzie* (1884) 21 SLR 564 (IH) 566.

28 1999 SC 513 (OH).

29 For brief comment, see KGC Reid & GL Gretton *Conveyancing 1999* (2000) 71 – 72.

30 There are numerous cases to this effect: *Stewart v Caithness & Smart* (1788) Hume 731 (right incorrectly characterised as a servitude); *M'Donald v Dempster* (1871) 10 M 94 (IH) 98; *Simpson v Mackenzie* (1884) 21 SLR 564 (IH) (right incorrectly characterised as a servitude: 566);

that the tenant's interest cannot be the *praedium* of a servitude make this point clear.[31] The exact juridical basis for such inter-tenant enforcement is undebated and unclear, as are many of the constitutive requirements of such rights.[32] But, although these rights are enforceable against other tenants, it is thought that if the subjects of the lease and the land over which the pertinent is exercised come into separate ownership, the pertinent is not automatically enforceable against the owner of the other land.[33] This point was not clearly focussed in *Campbell*,[34] for there the successor owned both the subjects of the lease and the land in which the pertinents were exercised. However, in the subsequent case of *Duncan v Brooks*,[35] the clear view of the Inner House was that the successor owner of the other land was not bound to allow the tenant to exercise the pertinent right. There an agricultural tenant was entitled to take peats from a moss on another part of the landlord's estate. The farm and the moss were transferred to different parties. The tenant successfully claimed a rent abatement from the successor landlord because he had been deprived of the right to take peats. Lord Young was inclined to think that, so far as the taking of the peats was concerned, the lease was not good against the new owner of the moss.[36] In *Findlay v Stuart*[37] the land over which the pertinent existed was transferred, but the disposition contained a clause protecting the tenant's pertinental rights. It was held that the acquirer of the lands could not interdict the tenant from

---

Galloway v Cowden (1885) 12 R 578 (IH); *Adamson v Sharp's Trs* (1917) 5 SLCR 76, 78; *Munro v Forbes* (1933) 21 SLCR 31, 38. Many are decisions about whether a possessory judgment could be granted to protect a party who had exercised a right for a period of seven years or more. One seeking a possessory judgment requires to show *prima facie* title (ie a title which would, if established, confer the right which it is alleged has been disturbed): Reid *Property* [146]; Gordon *Land Law* [14-18]. *Dougbar Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513 (OH) concerned a right of this type. See also discussion of the enforcement between tenants of other terms of leases at n66.

31 eg the unconditional formulation of the 'no servitude' rule in *Reid v Anderson* (1900) 8 SLT 80 (OH) 81; cf the acknowledgment in *M'Donald v Dempster* (1871) 10 M 94 (IH) 98 that although the right in question could not be a servitude, that did not exhaust the possible categories of rights.

32 It is commonly said that these rights can be created by express grant by the landlord, necessity or by use over a long number of years: *Tait v Abernethy* 1984 SLCR 19, 26; *Ross v Graesser* 1962 SC 66 (IH) 76; DJ MacCuish & D Flyn *Crofting Law* (1990) [3.07]. The requirement that any express grant be by the landlord might explain *Reid v Anderson* (1900) 8 SLT 80 (OH), where the court refused to recognise that an agreement between two adjacent tenants akin to a servitude could bind successors to their interests.

33 Whether it would remain enforceable against the tenants is unclear.

34 *Campbell v McKinnon* (1867) 5 M 637 (IH), *sub nom Campbell v M'Lean* (1867) 8 M 40 (HL).

35 (1894) 21 R 760 (IH) 764 & 765.

36 ibid 764.

37 (1890) 29 SLR 15 (OH) 19.

exercising these rights *chiefly* because of the clause in the disposition. In fact, it is thought that this was the only basis on which the transferee was bound to permit the tenant to continue to exercise these rights.

An opposite argument may be advanced. It is best made by considering the analogy of a lease of land which itself benefits from a servitude (say, of access) over neighbouring land. One may conceptualise the subject of the lease as being 'the land and the servitude'. If the lease is made real, Cusine and Paisley suggest that the tenant, if he enforces the right of access against a third party, enforces his real right of lease *not* the servitude.[38] The subject of the lease is the land and the servitude, and it is this unity in which the real right of lease arises. From this, it may be argued that if the landlord owns the other land rather than having a servitude over it, there too the subject of the lease is the land plus the right of access and, when the lease is made real, the tenant's real right is to that unity. Inherent in the notion of real right is that the right is in the land and so continue to affect the land after transfer. There are, though, at least two difficulties with this argument. First, it clashes with the very notion of 'pertinent', which implies a right separate from and additional to the main subjects of the lease. Secondly, the sole support for the underlying argument comes from Cusine and Paisley and it may be incorrect. Others have suggested that tenants are in fact unable to enforce a servitude benefiting the subjects of the lease.[39]

There is some authority which holds that pertinent rights are enforceable against owners of the land over which the pertinents are exercisable. In *Macdonald v Macdougall*[40] it was held that an 'accessory' right did bind the successor owner of the land in which it was exercised when that land was transferred separately from the subjects of the lease.[41] This proposition was reiterated by the Land Court in a subsequent case[42] and appears to have underlain its decision in another.[43] In both, *Macdonald* is cited. There, a crofter was entitled to gather sea-ware from the shore adjoining lands adjacent to his croft. The landlord transferred this land to Macdonald,

---

38 DJ Cusine & RRM Paisley *Servitudes and Rights of Way* (1998) [1.51].

39 AGM Duncan in Reid *Property* [481]. See also Scottish Law Commission *Discussion Paper on Real Burdens* (SLC DP 106, 1998) [3.60] and references given there.

40 (1896) 23 R 941 (IH).

41 This is presented as settled common law by Cusine & Paisley (n38) [3.88]. See also MacCuish & Flyn (n32) [8.08].

42 *Smith v Bruce* (1925) 13 SLCR 8, 17.

43 *Maclean v Fletcher* 1965 SLT (Land Ct) 5.

who sought to interdict the crofter from continuing to take sea-ware, arguing that (i) the right to take sea-ware was not part of the holding and (ii) in any event, it was not binding on singular successors.[44] He was unsuccessful. The second argument was not focussed in the judgments. The reasoning was simply that the right to take sea-ware had been determined to be part of the croft and that the crofters had been given fixity of tenure on this basis, *ergo* that right bound the pursuer, who now owned the land.[45] There is no consideration of the juridical basis on which it did so. This goes against what Lord President Cooper said in another context:[46]

> Primarily, if not exclusively, the protection thus afforded to [crofting] tenants by the amendments of the common law of leases is protection against their landlord, and not protection against the world at large or the State.

Statutory regimes generally affect only the terms of the landlord-tenant relationship. They are superimposed upon pre-existing property law[47] and should not, it is suggested, be treated as changing it further than is necessary. And the common law rule is that such a pertinent right does not bind a successor owner of the lands over which it is exercised. *Macdonald* and the decisions which follow it are best characterised as flowing from the terms of crofting legislation,[48] and not as expressing the common law.[49]

If such rights do not bind a successor owner of the land over which they are exercised, what of the relationship between the tenant and the successor landlord? In *Campbell v McKinnon*[50] the successor landlords were bound by the pertinents, but there they acquired ownership of both the subjects of the lease and the other land

---

44 He cited *Duncan v Brooks* (1894) 21 R 760 (IH) in this regard, but it is not expressly considered by the court.

45 The same result might have been reached by implying into the transfer to Macdonald a reservation of a servitude of wrack and ware. This was not, however, the basis on which the case was argued or decided.

46 *M'Lean v Invernessshire County Council* 1949 SC 69 (IH) 75. Crofters (Scotland) Act 1993 s3 is the provision which defines croft. Section 3(4) *deems* any right in pasture or grazing land held by the tenant of a croft to be a part of the croft but only 'for the purposes of this Act'.

47 See analogously *Kay v Lambeth BC* [2006] UKHL 10, [2006] 2 AC 465.

48 One argument in support of the outcome in *Macdonald* is that if the pertinent is deemed to be part of the croft for the purposes of the crofting legislation, so it may be deemed to be part of the subjects of the lease for the purposes of the 1449 Act and statutes concerning registration, and protected by those statutes just as are the main subjects of the lease. But the logical consequence of this approach would be that the successor owner of the other land would become a party to the lease and that is not what *Macdonald* decides.

49 cf DJ Cusine & RRM Paisley *Servitudes and Rights of Way* (1998) [3.88], who state in general terms on the basis of *Macdonald* that 'the right to collect wrack and ware can exist as a leasehold right enforceable against third parties'.

50 (1867) 5 M 637 (IH), *sub nom Campbell v M'Lean* (1867) 8 M 40 (HL)

over which the pertinents were to be exercised.[51] *Duncan v Brooks*[52] makes clear that the successor landlord is bound by the obligation to make the pertinents available to the tenant, even if he does not acquire ownership of the land over which the pertinents are exercisable. The tenant therefore has contractual remedies against the successor landlord in the event that his exercise of the pertinents is hindered. In *Duncan* the tenant was entitled, in a question with the successor landlord, to a rent abatement commensurate with the value of the pertinent right which had been rendered unenforceable by transfer to another of the lands over which it was exercisable.[53] Other remedies may also be available. Hunter's view was that whether the deprivation of such a right would allow the lessee to terminate the contract or only entitle him to damages depends upon whether it rendered the subject unfit for the purpose for which it was let or only diminished its value.[54] An example might be if the right is to extract building materials from the landlord's quarry free of charge in order to build on the land leased, but the quarry and main subjects are transferred to different parties before the tenant has commenced building without ensuring that the tenant's rights would remain enforceable.[55]

Obviously if the lands are to be transferred into separate ownership, care must be taken to ensure that the landlord will remain able to fulfil his obligations under the lease to allow the tenant to exercise the pertinent right. If the landlord is transferring the lands in which the tenant exercises these rights, he may make the transfer subject to the tenant's rights[56] or, preferably, reserve a servitude in favour of the main subjects of the lease. Alternatively, if he is transferring the main subjects of the lease, but retaining the other lands, he should grant a servitude.[57] This is one of the circumstances in which a servitude may be implied by law from the circumstances of the transfer[58] and this doctrine will often come to the tenant's rescue.

---

51 Certainly Lord Deas noted this point: ibid (IH) 652.

52 (1894) 21 R 760 (IH).

53 The transfer of the moss occurred first. The tenant then began to retain his rent and the landlord subsequently transferred the subjects of the lease. There was therefore also an argument that the successor landlord could not be in a better position than the original landlord.

54 Hunter vol II 188.

55 This example is based on Lord Deas' discussion in *Campbell v McKinnon* (1867) 5 M 637 (IH) 651.

56 As was done in *Findlay v Stuart* (1890) 29 SLR 15 (OH). This only protects against that transfer.

57 As was done in *Maclean v Fletcher* 1965 SLT (Land Ct) 5.

58 Cusine & Paisley (n49) Chp 8 *passim*. Possession by a tenant counts: *Walton Bros v Magistrates of Glasgow* (1876) 3 R 1130 (IH) 1133.

3. Criteria for being a 'pertinent'

There appears to be no definitive statement of how it is to be determined whether a right is a 'pertinent' or 'accessory' of a lease. The Lord Chancellor in *Campbell* thought that a right which had 'a considerable connection ... with the actual enjoyment of the property leased' would bind a singular successor, but he was not sure how exactly the 'considerable connection' should be defined.[59] In *Campbell* separate consideration was given for the 'pertinental right',[60] a factor which might have been thought to count against it transmitting as part of the lease, but which did not do so. It is clear from the various opinions and speeches in *Campbell* that the following would qualify as pertinents: the right to draw water from a well, the right to cut peat for fuel, the right to take stone from quarries for building purposes, and rights of way.[61] The last will often be of fundamental importance: in an industrial estate or shopping centre, access will often be over private property. The unifying feature of all of these rights is that they allow the tenant to make some use of other property which benefits the subjects of the lease but does not itself amount to an exclusive right in the other land. This mirrors the definition of a servitude. Indeed, a plausible test is to say that if the right is such that it would amount to a servitude were it to be constituted between two owners, it will qualify as a 'pertinent' of the lease. If that is correct, then, just as in order to be a servitude a right must confer praedial benefit on the benefited property, so too must a right benefit the tenant *qua* tenant in order to be a leasehold pertinent. Similarly, just as a servitude must not be repugnant with ownership, a right must not be repugnant with ownership in order to be a leasehold pertinent. Specifically, it must not be so extensive as to amount to an exclusive right in the land over which it is exercised: such a right should be constituted as a lease in its own right, and not as a pertinent to a lease. Issues and examples which are debateable in respect of servitudes will similarly be debateable in respect of leases.[62] A topical example is a right of car parking.[63] If the right fails as

---

59 *Campbell v M'Lean* (1867) 8 M 40 (HL) 44.

60 ibid.

61 *Campbell v McKinnon* (1867) 5 M 637 (IH) 651 and *Campbell v M'Lean* (1867) 8 M 40 (HL) 44.

62 For instance, is it sufficient that the right confers *economic* benefit upon the subjects leased? See discussion below: n78 *et seq.*

63 Recent servitude cases include: *Nationwide Building Society v Walter D Allan Ltd* (OH: 4 Aug 2004) and *Moncrieff v Jamieson* 2005 CSIH 14, 2005 1 SC 281; aff'd [2007] UKHL 42, 2008 SC (HL) 1.

a 'lease pertinent' because it is too extensive, which is the objection currently being voiced to some parking rights, it may amount to a lease in its own right and so the owner of the land affected will be bound in that way. Another debateable instance is a right to place advertisements on other property also owned by the landlord.[64]

B. AFFIRMATIVE OR NEGATIVE OBLIGATIONS IN RESPECT OF OTHER LAND

Just as terms conferring a right to make use of other land owned by the landlord may be sufficiently connected to the lease to bind a successor landlord, so it seems that terms which impose an affirmative or negative obligation on the landlord in respect of other land may also bind such a successor. They too, although they impose an obligation in respect of other land, may be so connected to the rights and obligations under the lease that the term is more referable to the lease than to the personal relationship of the original landlord and tenant. That suffices to satisfy the general test of Chapter Three. There is, however, little by way of authority. As with obligations to allow use of other land, even where such a term binds a successor landlord there is no juridical basis for holding it to bind the owner of the other land to which the rights relate. The statutory definition of real burden is clear that real burdens benefit and burden only owners:[65] a tenant's right under a lease cannot be a benefited property. There is, however, the possibility, as yet unexplored in Scotland, of inter-tenant enforcement where identical conditions are imposed in leases from the same landlord.[66] As with obligations to allow use of other land, the consequences for

---

64 For recent affirmation that Scots law recognises no servitude of 'shop sign': *Romano v Standard Commercial Property Securities Ltd* [2008] CSOH 105, approving *Mendelssohn v The Wee Pub Co* 1991 GWD 26-1518. In *Re No 1 Albermarle Street* [1959] Ch 531 (Ch D) 539 Upjohn J expressed the opinion that the benefit of such a covenant would not touch and concern the land. That seems inconsistent with *Moody v Steggles* (1879) 12 Ch D 261 (Ch D).

65 Title Conditions (Scotland) Act 2003 s1(1): 'an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land'. This was intended to be declaratory of the common law: note to s 1 of Draft Bill in Scottish Law Commission *Report on Real Burdens* (SLC Rpt 181, 2000).

66 The possibility is noted in Paton & Cameron 98; SME vol 13 [289] and HL MacQueen in R Black (ed) 'Obligations' in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XV (1996) [850]. It would be supported by the various cases in which pertinental rights have been enforced directly against other tenants: n30 above. In English law, such rights arise where there is a 'letting scheme': see the discussion in *Williams v Kiley (t/a CK Supermarkets Ltd) (No.1)* [2002] EWCA Civ 1645 and Woodfall *Landlord & Tenant* [11.072]. Note, however, Reid's rejection of the *jus quaesitum tertio* explanation of implied rights of enforcement of real burdens: Reid *Property* [402].

the landlord who plans on transferring the other property are clear:[67] he must ensure that he will retain the ability to perform his obligations under the clause after transfer. This is best done by means of a real burden.

1. Affirmative obligations

There appears to be no Scottish case[68] which considers whether a successor landlord is bound by an affirmative obligation in a lease which relates to land other than the subjects of the lease. Instances of such terms are, though, readily imaginable. In leases of units in a commercial development (such as a shopping centre or an industrial estate), the landlord will typically own the whole development. He will undertake, in return for the payment of a service charge, to maintain, repair and clean common areas, to keep them lit, and to inspect, maintain and repair conductors serving the premises.[69] A case from the Netherlands provides another example: a lease of land adjacent to a waterway obliged the landlord to keep the waterway at a certain depth.[70] A landlord might own land between the subjects of the lease and the sea and undertake to maintain the sea wall upon that other land.[71] It is thought that all of these examples would amount to real conditions of the lease for there is a sufficient connection between the landlord's obligation and the tenant's rights under the lease.[72] If, on the other hand, a landlord undertook to maintain buildings at another location in the same town and this was of no particular benefit to the tenant *qua* tenant, such an obligation would not amount to a real condition. There must be a considerable connection between the obligation in respect of the other land and the lease itself in order for the term to be a real condition of the lease.

---

67 See text to n56.

68 *Mackenzie v Mackenzie* (1849) 11 D 596 (IH) seems at first sight to be one. A landlord undertook to trench, drain, lime and enclose woodland adjoining the leased farm. This obligation was held not to bind a succeeding heir of entail. It seems, however, that the tenant also had a lease of the woodland, so it cannot be said that the case relates to an obligation in respect of other land.

69 Halliday *Conveyancing* 823 (provision of specimen lease); MJ Ross & DJ McKichan *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn 1993) [4.5].

70 Noted in SE Bartels & JM Milo 'Contents of Real Rights: Personal or Proprietary' in SE Bartels & JM Milo (eds) *Contents of Real Rights* (2004) 5, 7.

71 Adapted from *Lyle v Smith* [1909] 2 Ir Rep 58 (KB), where in fact the tenant undertook to maintain such a wall, its maintenance being essential for the preservation of the demised premises (64).

72 Indeed, in the second and third examples it could be argued that this duty would be an implied obligation on the landlord, for it is essential for the use and preservation of the leased subjects.

The English case of *Dewar v Goodman*[73] provides another example. There a mid-tenant covenanted with his sub-tenant to perform the covenants of the headlease so far as they affected the land included in the headlease and not demised in the sublease. The aim was to protect the subtenant against termination of the headlease. This covenant was held not to touch and concern the reversion, so it did not bind an assignee to the headlease. The decision has been criticised for adopting too narrow an approach to the 'touch and concern' test.[74] It is thought likely that, were the same facts to be litigated in Scotland, such an obligation would be held to constitute a real condition so as to bind an assignee of the headlease, as it was fundamental to the sub-tenant's continued enjoyment of his lease.

2. Negative obligations

The two negative obligations which seem most likely to arise are (i) an exclusivity agreement (i.e. an obligation on the landlord not to conduct on other land which he owns a business competing with the tenant's, or to allow such a business to be conducted) and (ii) a restriction on building for the protection of the light or prospect of the subjects of the lease.[75] Again, the question is whether such terms are sufficiently integral to the relationship of landlord and tenant to constitute a real condition, despite the fact that the obligation they impose relates to other land.

(a) Exclusivity clauses

In *Optical Express (Gyle) Ltd v Marks and Spencer plc,* Lord Macfadyen held that an exclusivity agreement was not a real condition:[76]

> Its effect was nothing directly to do with the lease of unit 41 [the subjects of the lease], but rather was to restrain the way in which the council as owners or landlords of the other units in the centre might let those other units. In my opinion such an obligation is prima facie not inter naturalia of a lease.

This *prima facie* conclusion was displaced neither by the fact that the subjects were one unit of a shopping centre and the land to which the restriction referred was the remaining units, nor by the 'close practical connection which the exclusivity clause has with the economic judgment which the tenant had to make in deciding whether

---

73 [1909] AC 72 (HL).

74 *Kumar v Denning* [1989] QB 193 (CA) 205; Megarry & Wade *Real Property* [15-027].

75 On (ii) see Halliday *Conveyancing* [44-08].

76 2000 SLT 644 (OH) 650J. Here the substantive objections to the successor landlord being bound are considered. The relevance of the term being in a back-letter was considered above: Chp 2 Pt A.2.

or not to take the tenancy'.[77] It is submitted that this decision should be reconsidered in light of the close connection between the term and the tenant's rights under the lease.

A possible objection to viewing an exclusivity clause as a real condition – although this was not mentioned in *Optical Express*, nor is it made in other Scottish cases – is that the benefit of the term could be said not to be to the tenant *qua* tenant (a requirement for a term to be a real condition) but to the tenant's business. An English parallel is *Thomas v Hayward*,[78] where a landlord's covenant not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises was held not to run with the land so as to enable an assignee of the tenant to sue upon it. 'The covenant does not touch and concern the thing demised. It touches the beneficial occupation of the thing, but not the thing itself.'[79] The objection is familiar from the law of real conditions generally, where a leading authority is *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd.*[80] LJC Aitchison said:[81]

> The law will recognise restraints upon the use of property ... provided it can be said that the restraints are ... intended and designed for the benefit of some other legitimate property interest, or its protection, or the peaceable possession of property, or its proper enjoyment, or, to put it more generally, for the securing of the dominant owner's rights and interests of ownership in his own subjects. ... But, on the other hand, if the restriction is not intended to protect the dominant property as such, or its amenity, or any of the requisites of its proper enjoyment, but is simply devised and intended to create a monopoly, or to impose a restraint of trade in perpetuity for the benefit of a trading or commercial concern, it cannot, in my judgment, receive any effect, except as a personal contract between the original contracting parties, and it is not capable of being erected into a real right[82] so as to become an inherent condition of the title.

---

77 2000 SLT 644 (OH) 650K. The American Restatement also refuses to hold the burden of an exclusivity agreement to 'touch and concern' the reversion on the basis that the performance of the obligation is related to property other than the subjects of the lease: Restatement *Landlord and Tenant* §16.1, Example 5. cf *Whitsinsville Plaza Inc v Kotseas* 378 Mass 85, 390 NE 2d 243 (Supreme Judicial Court of Massachusetts 1979) 96, 249 where it was said that 'reasonable anticompetitive covenants are enforceable by and against successors to the original parties'.

78 (1869) 4 LR Ex 311, described as a 'hard case' in *Kumar v Dunning* [1989] QB 193 (CA) 205 and criticised in Megarry & Wade *Real Property* [15-027].

79 (1869) 4 LR Ex 311, 311.

80 1939 SC 788 (IH) rev'd, but not on this point, 1940 SC (HL) 52.

81 ibid (IH) 802.

82 Reid notes that, on his now orthodox terminology, 'real right' here means 'real condition': Reid *Property* [348] n7. Indeed, LJC Aitchison uses the phrase 'real condition' in the preceding paragraph.

This, and other passages in that case, are to the effect that commercial benefit does not amount to praedial benefit so as to elevate a personal agreement into a real condition.[83] It seems unlikely that this is an absolute rule. Cusine and Paisley argue that commercial interest is sufficient to demonstrate praedial benefit for a servitude[84] and Gordon also accepts this.[85] Other legal systems certainly accept that their equivalents of the praediality requirement can be satisfied by commercial benefit.[86] Although the point was raised in the consultation preceding the recent reform of real burdens,[87] it was not addressed in the resulting legislation. Despite *Aberdeen Varieties*, in *CWS v Usher Breweries*[88] a burden aimed at protecting commercial interests was upheld. The decision is an important one for current purposes. It concerned a shopping precinct on a housing estate which consisted of three units. The titles of each contained a prohibition upon engaging in trade competing with that of the other units, the purpose being to ensure the commercial viability of the development as a whole. It was held that this provided sufficient praedial interest for the restrictions to be real burdens. Of course, the same kind of purpose typically underlies the use of 'exclusivity clauses' in leases of units in a commercial development. A question would be whether there needs to be this 'community' element in order to establish praedial benefit; arguably ordinary commercial benefit is sufficient.

---

83 *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788 (IH) 796 & 801. Both passages take the view that real burdens can exist only so as to protect the amenity of the neighbourhood. So, although a restriction upon performing a particular business may constitute a real condition, this is only if the property itself benefits, as it would, say, from a prohibition upon a particularly noisy industry from being carried out in the area.

84 DJ Cusine & RRM Paisley *Servitudes and Rights of Way* (1998) [2.51].

85 Gordon *Land Law* [24-19].

86 England: Megarry & Wade *Real Property* [16-058] (restrictive covenants, citing *Newton Abbot Co-Op Society Ltd v Williamson & Treadgold Ltd* [1952] Ch 286 (Ch D)) and [18-045] (easements, citing *Moody v Steggles* (1879) 12 Ch D 261 (Ch D)), Law Commission *Easements, Covenants and Profits à Prendre: A Consultation Paper* (LC CP 186, 2008) [3.20] – [3.25]; Germany: JF Baur & R Stürner (eds) F Baur *Sachenrecht* (17th edn 1999) §33, Rn 13; South Africa: MJ de Waal 'Servitudes' in D Visser & R Zimmermann *Southern Cross* (1996) 785, 795 – 797; USA: *Norcross v James* 140 Mass 188, 2 NE 946 (Supreme Judicial Court of Massachusetts 1885) (benefit of non-competition covenant did not touch and concern the land), overruled in *Whitsinsville Plaza Inc v Kotseas* 378 Mass 85, 390 NE 2d 243 (Supreme Judicial Court of Massachusetts 1979) (benefit of non-competition covenant did touch and concern where it 'serves a purpose of facilitating orderly and harmonious development for commercial use'). Berger saw no policy objection to this: L Berger 'A Policy Analysis of Promises Respecting the Use of Land' (1970) 55 Minnesota L Rev 167, 214.

87 Scottish Law Commission *Discussion Paper on Real Burdens* (SLC DP 106, 1998) [7.43]; Scottish Law Commission *Report on Real Burdens* (SLC Rpt 181, 2000) [2.25] – [2.27].

88 1975 SLT (Lands Tr) 9.

The Scottish Law Commission noted that the strongest case for viewing a restraint of trade as conferring praedial benefit is where the purported benefited property is specially adapted for the activity in question, meaning that it is likely to be used for the same purpose by future owners.[89] The argument in favour of viewing an exclusivity clause as benefiting the tenant *qua* tenant is equally strong, albeit for a slightly different reason. In the types of lease where the tenant benefits from an exclusivity clause, the tenant is typically obliged to conduct a particular business on the subjects and this obligation will bind an assignee. The tenant's right is therefore to occupy the subjects for a particular business and none other. In *Thomas v Hayward* Bramwell B sought to confirm his conclusion that the covenant did not benefit the land leased by asking what benefit would persist if the tenant ceased to use the demised premises as a public house.[90] He took the answer, 'none', as confirming that the benefit of the exclusivity agreement did not relate to the land but only to its mode of occupation. In most commercial leases the option to discontinue the business will not present itself, absent renegotiation. The lease is of a unit to be used as a bank, or as an optician, or as a jeweller. In those circumstances, it seems perfectly reasonable to accept that the tenant is benefited *qua* tenant by a restriction upon the commercial uses of other nearby properties. It is this restricted nature of the tenant's right which makes it appropriate to view the exclusivity clause as sufficiently related to the lease to be a real condition thereof, even although its burden relates to other land.

There are earlier Scottish decisions, not referred to in *Optical Express*, which can be cited in support of this approach. As McAllister notes,[91] *Optical Express* proceeds without reference to the decision of the Inner House in *Davie v Stark*,[92] where it was held that a successor was bound by an exclusivity obligation. There a tenant (Stark) sought to rescind his seven-year lease for breach of a condition that the adjoining shop, which the landlord also owned, would not be let to a person in the same trade. Davie was a singular successor of the original landlord in respect of both properties and refused to be controlled in his use of the shop adjoining the subjects of the lease.

---

89 *Report on Real Burdens* (n87) [2.25]. This appears to be a requirement in German law for restrictions upon competition to be treated as servitudes: M J de Waal 'Servitudes' (n86) 797.

90 (1869) 4 LR Ex 311. 312.

91 McAllister *Leases* [2.35].

92 (1876) 3 R 1114 (IH).

Stark rescinded the lease and quit the premises and in this action by Davie for the rent it was held that Stark had been entitled to do so. It seems not to have been disputed that Davie, as a singular successor, was bound by the exclusivity agreement.[93] Lord Gifford was of the opinion that this point could not be contested and that the condition bound Davie as 'an integral part of [Stark's] lease'.[94]

The subsequent case of *Mackenzie v Imlay's Trs*[95] contains *dicta* which conflict with *Davie*. An owner granted a bond and disposition in security to a creditor and then a lease to the pursuer. Subsequently, and for an extra payment, the landlord agreed with the pursuer not to let an adjoining shop, which it also owned, to any person carrying on an auctioneer's business. When the landlord was unable to repay its loan, its directors did so on its behalf and obtained in return an assignation to the creditor's right in security. Although they had not obtained a decree of maills and duties, it was held that the creditors should be treated as if they were bondholders in possession.[96] When they granted a lease of the adjoining shop to an auctioneer, the tenant sought interdict. This was refused, both by the Sheriff-Substitute and by the Inner House. The basis of the Sheriff Substitute's decision was that the restriction was created after the grant of the bond and disposition in security so did not bind the holder of a prior real right: 'ordinary acts of administration' by the debtor would bind a creditor, but this additional term was not such an act.[97] So although the creditor was bound by the lease, he was not bound by the exclusivity agreement. Relying on *Davie v Stark*, the Sheriff Substitute went on to state that had the bond and disposition in security been granted after the conclusion of the lease and the exclusivity obligation, the creditor *would* have been bound by the restriction.[98] He viewed the obligation as being capable of being a real condition. In the Inner House, Lord Dundas upheld the Sheriff Substitute's decision, but on the basis that: '[i]t [the restriction] did not, in fact, form part of the pursuer's lease; and the rent payable

---

93 ibid 1120 (Lord Ormidale). LJC Moncreiff does state that Davie argued that he was not bound by the stipulation in regard to the adjoining shop, but the basis of this assertion is not clear: 1118. Details of the parties' arguments do not clarify matters. It is unclear on what basis Davie could have argued that he was not bound by the term other than that it was a personal condition.

94 ibid 1122.

95 1912 SC 685 (IH).

96 Their ability to grant real rights of lease was contingent upon this status: WM Gloag & JM Irvine *Law of Rights in Security* (1897) 99.

97 1912 SC 685 (IH) 688.

98 ibid 689.

under that lease was not to any extent the counterpart of the condition'.[99] From this it follows that the creditor would not have been bound even had the lease and letter been concluded before the right in security was granted. But, crucially, Lord Dundas's objection to viewing the term as a real condition was not a *substantive* one. Rather, it was that the term was separate from the lease, having been concluded subsequently to it and for a separate consideration. This does not mean that this *type* of obligation could not bind a successor. Further, there is actually no rule that a subsequent agreement for a separate consideration cannot bind a successor:[100] one would expect a tenant to pay for a valuable variation to a lease.

These two cases therefore provide some support for the proposition that there is no substantive objection to an exclusivity agreement being a real condition of a lease. Certainly this was Rankine's view.[101] Recent *obiter* comment by Lord Drummond Young is to the same effect.[102] This is not to say that every exclusivity clause will be held to be referable to the relationship of landlord and tenant. In particular, if the tenant is unrestricted as to his own use of the property, the view in *Thomas v Hayward*[103] might reasonably be preferred. One must also consider whether these terms are struck at by the rule against contracts in restraint of trade[104] or by rules of competition law.

(b) Building restrictions

A restriction on building on adjacent land in order to preserve the amenity of the subjects would, it is thought, be a real condition. Such a term would benefit the tenant *qua* tenant, and although the landlord could be said to be burdened as owner of the other property and not of the subjects of the lease, the close connection

---

99 ibid 691.

100 Variations are discussed in Chp 2.

101 At Rankine 477 he 'hazards the opinion' that all of the terms discussed in the preceding chapter could be real conditions; exclusivity clauses were so discussed, with reference to *Davie v Stark*, at 439 – 440.

102 *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142 [16]. There was, however, no argument upon the point, and, remarkably, *Optical Express* (2000 SLT 644 (OH)) was amongst the authorities cited as authority for the proposition that an exclusivity obligation was a real condition. The importance to both landlord and tenant of ensuring the appropriate mix of tenants in a shopping centre was highlighted: [16].

103 (1869) 4 LR Ex 311.

104 McBryde *Contract* [19-80] – [19-143]. This point was made, but no opinion was expressed upon it, in *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644 (OH) 651 and by S Brymer 'Enforcing Commercial Lease Terms Against Successor Landlords – Pt 2' (2001) 50 Green's Property Law Bulletin 3, 4.

between the obligation and the tenant's enjoyment of the subjects of the lease makes it appropriate to view such a term as capable of being a real condition of a lease. A parallel English case is *Ricketts v Enfield Church Wardens*,[105] where a covenant by the lessor that he and his assigns would not erect or permit to be erected any building in front of a building line on adjoining premises was held to touch and concern the land demised. Neville J relied upon the following passage from Lord Collins's speech in *Dewar v Goodman*:[106] 'The reason why the covenant to do something on land other than that demised presumably does not run is ... because such a covenant is prima facie collateral i.e. does not touch or concern the land demised. But instances may be imagined of covenants to do things on land other than that demised which touch and concern so nearly the land demised as to run with it.' This was one such instance and it is thought that a similar decision would be reached in Scotland.

C. CONCLUSION

This chapter has reviewed such Scottish material as there is about whether lease terms which relate to land other than the subjects of the lease are real or personal. The conclusion drawn is that there is no absolute rule that a term must relate only to the subjects of the lease in order to be real; on the contrary, quite often terms which relate to other subjects are real. These can be either rights akin to servitudes, which permit the tenant to make some non-exclusive use of other subjects, or rights akin to real burdens, which impose negative or affirmative obligations on the landlord in respect of other land. In order for such a term to qualify as a real condition of a lease, there must be a sufficiently close connection between it and the other terms of the lease, so that it is more referable to the relationship of landlord and tenant than to the relationship between the tenant *qua* tenant and the landlord *qua* owner of the other land. Rights of access and exclusivity obligations are probably the most important types of term discussed, and both are suggested to be examples where such a close connection can exist. The logic of holding a term to be a real condition is that it is part of the lease. Such terms most likely do not bind the owner of the other land directly. They bind a successor landlord regardless of whether he also acquires ownership of the other property necessary for the performance of the obligation. If

---

105 [1909] 1 Ch 544 (Ch D).
106 [1909] AC 72 (HL) 77.

the land is split, therefore, the landlord at that time must take steps to ensure that he and his successors will be able to perform the obligations of the lease.

CHAPTER EIGHT
OBLIGATIONS INCUMBENT UPON THE GRANTOR OF AN OPTION

A. PRELIMINARY POINTS 183
1. Two types of option 183
2. The analysis of options 185
3. Revocation prior to exercise of the option 185
4. Result of exercise of option 187
5. Vicarious performance 187
B. BREACH PRIOR TO EXERCISE OF THE OPTION 187
1. Introduction 187
2. The existence of a contractual fetter upon transfer 190
(a) Common Law 190
(b) French law 191
(c) South African law 192
(d) Conclusion 193
3. A rejected juridical basis: implied term 193
4. Anticipatory breach 196
5. A particular rule for options in leases? 203
(a) Intention 204
(b) Rule of law: do personal conditions bind the original landlord after transfer? 206
C. CONCLUSION 208

Until now, this thesis has been concerned with those rules which determine which terms of a lease are 'real conditions', that is to say, those which bind a successor landlord regardless of whether he knows of the term in question. In this final part, it turns to consider whether a personal condition will bind a successor of the landlord if he was aware of it, or acquired gratuitously or for a materially inadequate consideration. This point has arisen in various recent controversial cases. In both *Davidson v Zani*[1] and *Advice Centre for Mortgages v McNicoll*[2] the tenant argued that a successor landlord was bound by an option to purchase, which is a personal condition, because he acquired with knowledge of it and therefore fell within the scope of the 'offside goals' rule. These decisions reached different results: in *Davidson* the option was held to bind a successor because of the offside goals rule, whereas in *Advice Centre*, this argument was rejected as 'fundamentally wrong' and *Davidson* was strongly disapproved.

1 1992 SCLR 1001 (Sh Ct).
2 [2006] CSOH 58, 2006 SLT 591 [41] – [48].

Chapter Nine considers the effect of the successor landlord's knowledge and, specifically, the requirements of the offside goals rule. One of those requirements is that the transfer to the successor must have been in breach of the personal right which the offside goals rule is being invoked to protect. It is therefore crucial, as a first step to ascertaining whether the offside goals rule applies to options, to discover the obligations to which the grant of an option gives rise. Unfortunately, there is no existing Scottish discussion of this point.[3] This chapter attempts to fill that void. It considers whether the grantor of an option to purchase breaks his obligations to the option holder if he transfers the subjects of the option to a third party without taking steps to preserve the option holder's right. The conclusions drawn may be applied more broadly to other options to acquire a right in respect of land (e.g. an option to renew a lease) and also to other personal rights relating to land (such as licences,[4] and leases which have not been made real).

Although the primary purpose of the analysis is to enable the next chapter to consider whether the offside goals rule renders some personal conditions of leases binding upon successors, the material is of broader importance. Both the grantor of an option and its holder will wish to know what is required of the grantor: the option holder, so that he may act to protect and vindicate his rights; the grantor, so that he may act in compliance with his obligations. The analysis is relevant for all options, not simply those in leases.

A. PRELIMINARY POINTS

1. Two types of option

Two types of option are conceivable. In the standard type, the G(rantor) undertakes to the H(older) that he will transfer certain property to H if H exercises the option. G's obligation to H is not conditional upon his still owning the subjects of the option at the time of its exercise. A typical purpose of the transaction is to give H time to decide whether to purchase property whilst, at the same time, guaranteeing him the

---

3 Other legal systems are better provided for: M Dray & A Rosenthal *Barnsley's Land Options* (4th edn 2004) is an English text and FC Dutilleul *Les contrats préparatoires à la vente d'immeuble* (1988) a French. There are also treatments in French works on special contracts. Texts on South African contract law contain discussion: RH Christie *The Law of Contract in South Africa* (5th edn 2006) 53 – 57; S van der Merwe *et al Contract: General Principles* (3rd edn 2007) 79 – 84.

4 Ie a contract which permits the use of land and which does not amount to a lease. The exact boundary between lease and licence is unclear: McAllister *Leases* [2.39] – [2.49].

ability to do so if he so desires. Typically, H will pay for this right. Examples of such options are legion. They might be used where a property developer wishes to acquire a whole site, but is unable to do so in one acquisition. Instead, he can acquire options over individual plots, which he will exercise only if it becomes clear that he is going to be able to acquire all of the required land. Another common use is where a purchaser requires planning permission for a proposed development and wishes to be able to walk away if either permission is not received or is not to his liking. That favours using an option instead of a conditional contract.[5] Parties to a lease might include an option to allow the tenant to improve the property without necessarily losing the value of the improvements at the end of the lease.[6] Also, as in a 'capital allowances lease', the parties may from the outset intend to transfer ownership of the property, need to defer the date of transfer, but nevertheless wish the transferee to be able to enter into occupation immediately: those goals can be achieved by a suitably structured lease containing an option to purchase.[7] It would obviously defeat the aims of the parties to such options were the grantor to be free, even after granting the option, to transfer to a third party, and the option holder were to have no recourse against him.[8]

It is, however, possible to conceive of another type of option, where H is to acquire from G only if G still owns the property when H exercises the option. H has only the chance of acquiring. The right which arises upon exercise of the option is conditional upon G still being owner. It is thought that, although possible, this type of option will be rare for it does not satisfy the goals for which options are typically entered into. In the English case of *Pritchard v Briggs*[9] it was argued that an option was conditional upon the grantor not having disposed of the property prior to the exercise of the option, but this was rejected.[10] The option in question contained no such condition and none could be implied. One seeking to establish that an option is

---

5 D Neuberger & J Bassett 'Options: are they worth the paper they are written on?' in *The Blundell Memorial Lectures: Current Problems in Property Law* (1988) 1, 22 – 24. Suspensive conditions can however be drafted so widely that there is little difference between an option properly so called and a conditional contract of sale.

6 *Corpus Juris Secundum: vol 52 Landlord and Tenant* (2003) §112.

7 D Bell & R Rennie 'Purchase options in leases' 2006 (May) JLSS 49. See text to Chp 6 n11.

8 Millet LJ remarked in respect of a break option that a tenant would not have been content with a right which could be circumvented merely by the landlord transferring the reversion: *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA) 51.

9 [1980] Ch 338 (CA).

10 ibid 386D, 420A & 422E.

conditional in this way faces an uphill task. The default position must be that the grant of an option creates an option of the first kind. The question is, however, ultimately one of interpreting the option correctly in its context.

Obviously if the option is of the second type, the grantor is free to transfer the property to another. The following discussion is of the rules which apply to options of the first, more common, type.

2. The analysis of options

The various possible classifications of options (or, as Lord Hoffmann would have it, the various metaphors which may be used to describe the attributes of options[11]) were noted earlier.[12] Whereas the exercise of an option to renew a lease must always result in a contract, an option to acquire property need not. It is possible that exercise of such an option gives rise to a unilateral obligation to convey. This will, however, be unusual. More typically, exercise will result, eventually, in a contract of sale. This means that the option can either be analysed as that contract, subject to a suspensive condition, or as an obligation to enter into such a contract if the option is exercised. The latter could take the form either of a promise to contract or of a firm offer to contract, which is an offer backed up either by a promise not to revoke the offer or a contract not to do so.

3. Revocation prior to exercise of the option

It might be argued that, even if the option is not conditional upon the grantor being owner at the time of exercise, because there is no concluded contract until the option is exercised, prior to that moment the grantor may revoke his consent to transfer the property to the option holder. The holder would be left with a damages claim for breach of the option, but could not, by exercising the option, oblige the grantor to convey. This is the position in French law. The *Cour de cassation* has held that the grantor of an option to purchase does not irrevocably give consent to enter into a contract of sale.[13] Rather, he simply undertakes to remain willing to enter into a contract of sale upon exercise of the option. Because the option contract and the substantive contract are distinct, however, he may withdraw his consent to enter into

---

11 *Spiro v Glencrown Properties Ltd* [1991] Ch 537 (Ch D) 544.

12 Chp 5 Pt A.1(e).

13 Civ 3^{e}, 15 décembre 1993, D 1994 507.

the substantive contract prior to the exercise of the option. Such revocation is effective and confines the option holder to a damages claim for breach of the option contract.[14] As no contract of sale arises, the grantor cannot be compelled to transfer. This approach has been roundly criticised for weakening the option-holder's right. Malaurie and Aynès, for instance, state that:[15]

> Il est à souhaiter que ces arrêts, unanimement critiqués, ne fassent pas jurisprudence, car ils retirent toute sécurité à la promesse unilatérale de vente. La cour raisonne comme s'il agissait de la retraction d'une offre, alors que la promesse, fût-elle unilatérale, est un contrat obligeant le promettant à immobiliser le bien au profit du bénéficiaire et dans lequel le promettant a, de manière définitive, donné son consentement à la vente, ce qu'a accepté le bénéficiaire.

Nevertheless, the 1993 decision has since been reiterated by the court.[16]

In Scots law a purported revocation of the option by the grantor prior to its exercise will be ineffective.[17] This is so regardless of which analysis of an option is adopted. If an option is viewed as a conditional promise, it is irrevocable because a promise is a binding obligation which the promisor cannot revoke.[18] The result is the same if an option is viewed as a conditional contract, for the grantor has already entered into a contract of sale, albeit a conditional one. The position is also the same for the final possible analysis (firm offer): there is no suggestion that where an offer is firm, the offeror can revoke it upon payment of damages. Quite the contrary is our law.[19]

---

14 B Gross & P Bihr *Contrats: ventes civiles et commerciales, baux d'habitation, baux commerciaux* (2002) [73].

15 P Malaurie & L Aynès *Les contrats spéciaux* (2nd edn 2005) [120]. [One would hope that these decisions, which have been universally criticised, do not constitute precedent, as they remove any security afforded by an option. The court reasons as though it were concerned with the retraction of an offer, whereas the option, even if unilateral, is a contract which obliges the grantor to refrain – for the benefit of the option holder – from dealing with the property, and by which the grantor has definitively consented to a contract of sale, which consent the holder has accepted.] See also O Barret 'Promesse de Vente' in *L'Encyclopédie Dalloz* (2003) [100]. Practitioners apparently attempt to circumvent the decision by appropriate drafting: Gross & Bihr (n14) [98]. The case is defended by D Mainguy 'L'efficacité de la retraction de la promesse de contracter' 2004 *Revue trimestrielle de droit civil* 1.

16 Civ 3e, 26 juin 1996, D 1997 somm 169.

17 This is also the position in England: *Mountford v Scott* [1975] Ch 258 (CA).

18 McBryde *Contract* [2-20]. See also DM Walker *The Law of Contracts and Related Obligations in Scotland* (3rd edn 1995) [2.9], citing *Campbell v Glasgow Police Commissioners* (1895) 22 R 621 (IH).

19 *Littlejohn v Hadwen* (1882) 20 SLR 5 (OH) 7 – 8; *A &G Paterson v Highland Railway Co* 1927 SC (HL) 32, 38; *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84; TB Smith *A Short Commentary on the Law of Scotland* (1962) 747 and R Black 'Obligations' in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XV (1996) [617].

4. Result of exercise of option

Depending upon the analysis adopted, exercise of an option to purchase either: (a) purifies a conditional promise, (b) amounts to an acceptance of a firm offer of a substantive contract, (c) amounts to an offer to enter into a substantive contract which the grantor must accept, or (d) purifies a conditional contract. The result is either a contract of sale or a unilateral obligation to convey. The usual remedies are available to enforce or protect this right: the option holder may enforce his right by specific implement or protect it by interdicting transfer to another,[20] or, if the grantor is unable to perform (typically because he is not owner of the property) claim damages.[21]

5. Vicarious performance

The discussion of breach below makes it important to establish exactly what amounts to performance of the obligations to which the grant of the option gives rise. It is thought that the grantor of the option need not be the owner of the property in order to perform the obligations which crystallise upon its exercise, for the obligation to vest ownership is one which is capable of vicarious performance.[22] There is usually no *delectus personae* in the choice of contracting party. The option holder could not reject performance on the grounds that the transfer was to be made by another. Such transfer would still discharge the grantor's obligations.

B. BREACH PRIOR TO EXERCISE OF THE OPTION

1. Introduction

Although the obligations incumbent upon the grantor of an option after its exercise are clear, recent Scottish case law suggests that the position prior to exercise is not. Obviously, the grantor remains able to transfer as a matter of property law, for he

---

20 Eg *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 84. Interdict here prevents what would otherwise be an anticipatory breach of the obligation, discussed in Part B.4.

21 This is an obvious point, which the following English cases illustrate: *Goffin v Houlder* (1920) 124 LT 145 (Ch D); *Wright v Dean* [1948] Ch 686 (Ch D); *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 (Ch D) 611D (Oliver J), approved [1981] AC 513 (HL) 527C (Lord Wilberforce). Likewise French law: A Bénabent *Droit civil: les contrats spéciaux civils et commerciaux* (6th edn 2004) [94].

22 On vicarious performance, see Gloag *Contract* 416 – 418; McBryde *Contract* [12-44] – [12-45]; J Beatson *Anson's Law of Contract* (28th edn 2002) 506. Two prominent Scottish cases are *Anderson v Hamilton & Co* (1875) 2 R 355 (IH) and *West Stockton Iron Co (Ltd) v Nielson & Maxwell* (1880) 7 R 1055 (IH).

owns the property.[23] The issue is whether he is free to do so as a matter of contract law. Two models are conceivable. On the first approach, until the option is exercised and an obligation to convey arises, the grantor is under no obligation.[24] Of course, if the option is exercised and he is unable to perform, he will be liable for breach of the resulting obligation to convey, but transfer before exercise cannot amount to breach. This approach provides only weak protection for the option holder, who would not be able to interdict transfer prior to exercise of the option.

A second approach anticipates the obligations which would arise were the option to be exercised. By granting an option, the grantor irrevocably consents to transfer. Whether an obligation to transfer actually arises is out of his power: that depends upon whether the holder exercises the option. In recognition of this, and to protect the option holder, the law binds the grantor to remain, for as long as the option subsists, in a position to perform the obligations which would arise were it to be exercised. The main distinction between the first and second approach is that, on the second, the option holder could interdict transfer to a third party even before exercising the option. Also, were the option not to be exercisable until some point in the future and the grantor to transfer prior to that date, the holder could claim damages for breach immediately, instead of having to wait until the time for exercise of the option arose and then claiming damages for breach of the obligation resulting from exercise.

In *Advice Centre* Lord Drummond Young said, *obiter*, that sale by the landlord did not involve the landlord in any breach of his obligations, even although the tenant had an option to purchase the property at a particular time during the lease.[25] This point appears not to have been the subject of detailed argument.[26] In the earlier case of *Davidson v Zani*[27] Sheriff Principal Ireland took a different view. He held that,

---

23 Any transfer by him would therefore not be in excess of capacity, even if it is in breach of an obligation: Hume *Lectures IV* 313; Reid *Property* [689].

24 This is distinct from the possibility noted above that the option is simply a chance to acquire (n9). On that view, if the grantor is no longer owner when the option is exercised, no obligation to convey would arise. On the view considered here, the grantor is bound to convey and is liable in the usual way should he fail to perform, but comes under no obligation prior to exercise not to disable himself from performance.

25 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [47] – [48].

26 ibid [47].

27 1992 SCLR 1001 (Sh Ct). This case was discussed in S Brymer 'Enforcing Commercial Lease Terms Against Successor Landlords' Pt I (2000) 49 *Greens Property Law Bulletin* 4 & Pt II (2001) 50 *Greens Property Law Bulletin* 3.

even although the obligation to convey to the holder was conditional upon exercise of the option, which could not take place until a particular future date, nonetheless from the time of the grant of the option the grantor was bound by an obligation to transfer to the option holder. Transfer to a third party was in breach of this obligation. He stated:[28]

> If an obligation is qualified only by a potestative condition, such as the condition that the creditor can exact performance when he chooses, then, from the point of view of the debtor in the obligation ... the obligation is in existence from the time of its constitution, although performance is not due until this is demanded by the creditor.

This decision was disapproved in *Advice Centre*.[29]

Steven supports this departure from *Davidson*.[30] The argument that transfer by the landlord did not amount to breach had been made previously by Reid and Gretton.[31] These comments proceed, however, without consideration of all of the relevant authority. It is submitted that, once that authority is explored, it is clear that *Davidson* should be preferred to *Advice Centre* on this point. If the offside goals rule is not to apply to render an option to purchase binding upon a successor who knew of it, this is not because the transfer by the grantor of the option did not amount to breach.

Although there is no Scottish discussion of the obligations to which the grant of an option gives rise, there has been discussion in other jurisdictions. That is noted next. The position adopted in Common Law systems is of particular importance, because the contractual doctrines relied upon are similar, if not identical, to those of Scots law. For this reason, when the doctrinal explanation for a contractual fetter on the grantor's power to transfer is analysed below, English and Scottish authorities are cited interchangeably.

---

28 1992 SCLR 1001 (Sh Ct) 1004.

29 The head-note to the SLT report states that *Davidson* was overruled, but this is incorrect. A superior court may overrule a precedent of a lower court in the same line of descent: DM Walker *The Scottish Legal System* (8th edn 2001) 473. Decisions of the Outer House do not bind Sheriff Courts or Sheriffs Principal (G Maher & TB Smith 'Sources of Law (Formal)' in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XXII (1987) [298]) and so a decision of either of those cannot be overruled by the Outer House.

30 AJM Steven 'Options to Purchase and Successor Landlords' (2006) 10 Edin LR 432.

31 KGC Reid & GL Gretton *Conveyancing 2004* (2005) 106. *Advice Centre* is noted in KGC Reid & GL Gretton *Conveyancing 2006* (2007) 102 – 109. Reid had earlier supported the decision in *Davidson*: Reid *Property* [698] and K Reid & CG van der Merwe 'Property Law: Some Themes and Some Variations' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 637, 657.

2. The existence of a contractual fetter upon transfer

(a) Common Law

The authors of *Barnsley's Land Options* formulate English law as follows:[32]

> The landowner has by the very grant of the option fettered his own power of disposal, since the grant of an option is coupled with a promise (usually implied) to refrain from putting it out of his power to transfer the land to the option holder. He can be restrained by injunction from parting with the land except subject to the option[33] and will be liable in damages to the grantee in the event of actual breach.[34] The grantor is bound to convey when duly requested and this imports a duty not to do anything whereby he will be prevented from conveying what he has agreed to convey.

This text states later that the option holder need not exercise the option in order to be able to claim damages.[35] In a similar vein, Tromans has argued that a grantor who rids himself of the option property breaches the option contract.[36] Various cases support this proposition. In *United Scientific Holdings Ltd v Burnley Borough Council*[37] Lord Diplock explained why an option must be exercised exactly in accordance with its terms, in particular those relating to time:[38]

> [T]he grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition, the grantor needs to know with certainty the moment when it has come to an end.

The Court of Appeal has expressed a similar view:[39]

---

32 M Dray & A Rosenthal *Barnsley's Land Options* (4th edn 2004) [2-005].

33 Citing *Vanderwell v IRC* [1967] 2 AC 291 (HL) 395; *Commissioner of Taxes v Caraphin* (1937) 57 CLR 127 (HCA) 134; *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA) 83.

34 Citing *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 (CA) 611 (Oliver J in High Ct). The breach referred to here is breach of the contract of sale which results from exercise of the option.

35 Dray & Rosenthal (n32) [10-021].

36 S Tromans 'Options: as safe as houses?' (1984) 43 CLJ 55, 64.

37 [1978] AC 904 (HL).

38 ibid 929C. (The passage is obiter. The case concerned whether rent review clauses were unilateral contracts. Options were discussed as another instance of that type of contract.) Lord Diplock has not always expressed the position so categorically. In *United Dominions Trust* he stated only that 'a unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except *possibly* an obligation on the part of the promisor to refrain from putting it out of his power to perform his undertaking in the future': *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA) 83 (emphasis added). In *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444 (HL) his view was that an option does not give rise to *any* legal obligations on the part of either party unless and until it is exercised: 477A (emphasis added).

39 *Little v Courage Ltd* (CA 21 Dec 1994), The Times 6 Jan 1995. The quotation is from The Times's report. (The case concerned an option to renew which was conditional upon certain other factors; obviously not all options will be.)

> An option ... was a unilateral contract under which the grantor undertook to do something if, but only if, certain conditions were satisfied. If those conditions were satisfied the grantor had to comply with his undertaking, and in the meantime, as long as it remained possible that the conditions would be satisfied, he must not put it out of his power to perform his undertaking when the time came. That apart, however, he was under no obligation to do anything.

In a particularly clear passage, the High Court of Australia provided this formulation:[40]

> The right of the person who may be called the owner of the option is a right to prevent the owner of the property in question from disposing of it inconsistently with the option, together with a right, if he exercises the option, to compel the owner of the property to carry out the contract which has been made by exercise of the option.

Other authorities are cited.[41] In light of this, it is clear that in English and Australian law the grantor of an option breaks his obligation under the option if he transfers to a third party without taking steps to preserve the option holder's right.

(b) French law

In French law an option contract – 'une promesse unilatérale de vente'[42] – is viewed as distinct from the substantive contract of sale which results from the exercise of the option. It seems to be accepted that the grantor of an option (le promettant) may not transfer the property to a third party, as long as the option subsists.[43] He contractually disables himself from doing so for the duration of the option.[44] This is reflected in the name for the sum which is often paid in return for the grant of an option. It is

---

40 *Commissioner of Taxes v Caraphin* (1937) 57 CLR 127 (HCA) 134.

41 *Pritchard v Briggs* [1980] Ch 338 (CA) 420F. *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48 (CA) 51 discusses how transfer of the reversion would put performance of an obligation to accept surrender of a lease out of one's power.

42 Scots lawyers beware: 'promesse' is a false friend. It is not equivalent to the unilateral promise of Scots law. 'La promesse unilatérale' is not a unilateral act but rather a contract. 'Une promesse unilatérale de vente' is a *contract* by which one party (A) agrees to sell to another (B) who comes under no obligation to purchase but instead has the option to bring a bilateral contract of sale into existence. It is unilateral in the sense that only one party (A) is at the outset bound by obligations (although this is often not the case, for the grantee may be obliged to pay for the option, in which case the contract is actually synallagmatic): A Bénabent *Droit civil: les contrats spéciaux civils et commerciaux* (6th edn 2004) [84].

43 Although the rule, discussed above, that the grantor may revoke the option prior to its exercise means that he could transfer if he revoked the option beforehand: B Gross & P Bihr *Contrats: ventes civiles et commerciales, baux d'habitation, baux commerciaux* (2002) [73].

44 See, eg, O Barret 'Promesse de Vente' in *L'Encyclopédie Dalloz* (2003) [100]; P Malaurie & L Aynès *Les contrats spéciaux* (2nd edn 2005) [120]: 'un contrat obligeant le promettant à immobilier le bien au profit du bénéficiare' [a contract obliging the grantor to refrain – for the benefit of the option holder – from dealing with the property]; Gross & Bihr *Contrats* (n43) [73]; A Bénabent *Droit civil: les contrats spéciaux civils et commerciaux* (6th edn 2004) [93]; F Collart Dutilleul *Les contrats préparatoires à la vente d'immeuble* (1988) [226] *et seq.*

called 'une indemnité d'immobilisation' and its purpose is to compensate the owner for 'l'immobilisation du bien' while the option subsists.[45] A common view is that an option splits the formation of a contract of sale into two stages: when the option is concluded, the grantor is bound by the obligations of a seller; if the option is exercised the holder (le bénéficiaire) then also becomes bound and the 'promesse de vente' is transformed into a contract of sale.[46]

Despite general acceptance that transfer to a third party amounts to breach of the option contract, there has been debate about how best to analyse this breach, or – more accurately – how best to analyse the obligations to which the grant of an option gives rise. This is not explored here. There is support in 'la doctrine' for the view that the grantor is bound by 'une obligation de ne pas faire'. Collart Dutilleul renders this as 'une obligation de ne pas accomplir d'acte ou de faits susceptibles de faire disparaître l'un des elements essentiels – déjà presents – du contrat envisagé'.[47] He states that, although it is not possible to provide a definitive list of '*actes et faits*' which are thereby prohibited, sale to a third party is certainly included.[48]

(c) South African law

South African law also recognises that the grantor of an option may not simply transfer the property to a third party.[49] The grantor who breaks the option agreement in this way is liable to the option holder in damages even although the latter has not exercised the option.[50] The option holder is able to interdict transfer.[51] The position

---

45 Bénabent (n44) [84].

46 Gross & Bihr (n43) [65]; Malaurie & Aynès (n44) [110] – [111]. This is strikingly similar to Lord Diplock's analysis in *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444 (HL) 477A – B.

47 Collart Dutilleul *Contrats* (n44) [227] [an obligation not to do any carry out any legal transaction or do anything else liable to destroy one of the essential elements, which already exists, of the envisaged contract].

48 Subject to an exception for those cases in which the grantor is permitted to transfer the option contract: ibid [228]. *L'Encyclopédie Dalloz* (n44) is to the same effect: [147] – [150], under the heading 'Restriction à la liberté de disposer'. It notes, however, that certain decisions reveal a reluctance to impose an absolute prohibition and accept the possibility of a transfer by way of contribution of capital into a business or sale of an entire thing if the option related only to part of it.

49 GRJ Hackwill *Mackeurtan's Sale of Goods in South Africa* (5th edn 1984) [17 G.1.6]; DJ Joubert *General Principles of the Law of Contract* (1987) 53 – 56; D Hutchison & BJ van Heerden 'Remedies for Breach of an Option' (1988) 105 South African LJ 547; RH Christie *The Law of Contract in South Africa* (5th edn 2006) 54.

50 *Boyd v Nel* 1922 AD 414.

51 Early cases did not permit the holder to interdict transfer to a *bona fide* third party: *Gardner v Jones' Exrs* (1899) 16 Supreme Court Reports 206 & *Kohling v Mackenzie* (1902) 19 Supreme

of the option holder is equated with that of a purchaser.[52] In *Ginsberg v Nefdt*[53] a lessor was interdicted from transferring the property unless the transfer was made subject to the tenant's option to purchase contained in a lease.

(d) Conclusion

There is, then, strong support in other jurisdictions for the view that the grantor of an option is not entitled to put it out of his power to perform the obligations which would result from exercise of the option by transferring the property. Indeed, the systems which I have considered are unanimous on this point. It is submitted that this should also be the position of Scots law. The alternative rule weakens the option holder's position. It is of particular weight that this result is reached by Common Law jurisdictions, for the rules of breach of contract in those jurisdictions are very similar to those of Scots law.

The exact basis for the fetter upon transfer now falls to be considered. It has been suggested either (i) that there is an implied term not to transfer to a third party or (ii) that such a transfer amounts to an anticipatory breach of the option. Neither *Barnsley's Land Options* nor Tromans opts for one approach to the exclusion of the other. It is important, however, to distinguish between the two: if the breach is anticipatory, the remedies available are different. In particular, the option holder would have to rescind in order to claim damages.

3. A rejected juridical basis: implied term

Tromans argues that 'there would seem to be little difficulty in implying a term against the grantor of an option ridding himself of the option property while the grantee is still entitled to exercise the option.'[54] He places particular reliance on a dictum of Lord Cockburn CJ in *Stirling v Maitland*:[55]

Court Reports 287. Such an interdict was, however, granted in *Thomas v Robertson* (1907) 24 Supreme Court Reports 404 and that position has the support of writers and subsequent cases: *Archibald & Co Ltd v Strachan & Co Ltd* 1944 NPD 40, 46 – 7; *Van der Merwe v Scheepers* 1946 NPD 147; *Le Roux v Odendaal* 1954 (4) SA 432, 442 – 443.

52 *Mackeurtan* (n49) [17 G.1.6], cited with approval in *Archibald*, *Van der Merwe* and *Le Roux*, all ibid.

53 (1908) 25 Supreme Court Reports 680.

54 S Tromans 'Options: as safe as houses?' (1984) 43 CLJ 55, 64. See also M Dray & A Rosenthal *Barnsley's Land Options* (4th edn 2004) [2-005].

55 (1864) 5 B & S 840, 852; 122 ER 1043, 1047. See also HG Beale (ed) *Chitty on Contracts* vol I (29th edn 2004) [13-012]. Tromans also cites *McIntyre v Belcher* (1863) 14 CB (NS) 654; 143

> [I]f a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

Of the cases cited in support of this argument, only one – *Pritchard v Briggs*[56] – actually considers the issue and there the Court of Appeal *refused* to imply the very term which Tromans proposes. The facts are rather complex. L sold land and granted to the buyer a right of pre-emption over some other land which L retained. B became entitled to this right. It was exercisable upon sale of the retained land during the vendors' lives. L subsequently granted P a lease of the retained land with an option to purchase exercisable upon L's death. During L's life the retained land was sold and transferred to B. On L's death, P exercised the option and sought to claim the land from B. In the High Court there was an argument about whether the sale to B had been in breach of an implied term of the option. Walton J acknowledged that 'at first blush this is precisely the kind of term which one would expect to find implied in the grant of an option, because otherwise the grantor would from the first have it in his power to destroy the subject matter of the relationship between him and the grantee as and when he pleased'.[57] However, he perceived a difficulty in implying such a term: although it might be clear that the grantor should not be able to sell, he thought that 'one ought not to imply only part of an implied term, because one thinks that one sees what that part of it would have been, if one cannot see what the implied term in the round ought to be'.[58] This he could not do. The only sufficiently clear term which he could envisage was a blanket requirement that the grantor was to maintain the property in the same state as at the point of granting the option. That would render the property economically sterile, and although it might be acceptable were the option to have only a short duration, the parties would not have consented

---

ER 602 and *Mackay v Dick* (1881) 8 R (HL) 37. *Mackay* was considered recently in *Coranta Corporation Ltd v Morse Business Applications Ltd* (Sh Pr Bowen 11 July 2007 unreported).

56 [1980] Ch 338 (CA). None of the other cases which Tromans cites is directly in point. *Gardner v Coutts* ([1968] 1 WLR 173 (Ch D)) considers whether a right of pre-emption, which according to its express terms was exercisable only upon sale, was also triggered by gift. Others, such as *Midland Bank Trust Co Ltd v Green* ([1980] Ch 590 (Ch D) 611D) and *Wright v Dean* ([1948] Ch 686 (Ch D)) concerned claims for breach of contract for failure to perform the contract of sale which resulted from the exercise of the option.

57 [1980] Ch 338 (CA) 358D.

58 ibid 358E.

to it in the long term. There was no sufficiently clear term which would pass the 'officious bystander' test[59] to allow the implication of a term in fact.

On appeal, the focus of the arguments switched from implication to priorities.[60] The Court of Appeal clearly viewed the option as fettering L's ability to transfer the property;[61] however, this was not on the basis of an implied term. Stephenson LJ commented that 'that is not an implication, except in the sense that it must be implicit in any promise to sell something to A that you will not sell it to B'.[62] This echoes an earlier statement of Lord Atkin's. Commenting upon *Stirling v Maitland*,[63] he had stated that he did not view the principle established by that case as a matter of implication, but rather simply as:[64]

> a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is in itself a breach. If A promises to marry B and before performance of that contract marries C, A is not sued for breach of an implied contract not to marry anyone else, but for breach of his contract to marry B.

The example given is one of the classic cases of anticipatory breach.[65] In denying that a term prohibiting transfer should be implied, the Court of Appeal in *Pritchard* was not denying that the grantor of an option would be in breach if he transferred the property to a third party whilst the option subsisted without preserving the means of performance. Rather, it simply viewed the implication of a term as unnecessary to reach that result.[66] As the transfer occurred before the time for performance (for the option had not yet been exercised), the breach would be anticipatory.

---

59 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA) 227.

60 It was held that the option took priority over the subsequent transfer to B which had not been in implement of the right of pre-emption, so B was bound by P's option.

61 *Pritchard v Briggs* [1980] Ch 338 (CA) 420F.

62 ibid 422.

63 (1864) 5 B & S 840; 122 ER 1043.

64 *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 (HL) 717.

65 *Frost v Knight* (1872) LR 7 Ex 111.

66 One of the early explanations of anticipatory breach was that contracts contained an implied promise that neither party will do anything to the prejudice of the other inconsistent with the contract: eg *Hochster v De la Tour* (1853) 2 El & Bl 679, 689; 118 ER 922, 926. This is one of several theories explaining anticipatory breach, but it is no longer generally adhered to: JW Carter *Breach of Contract* (2nd edn 1991) [717] – [723], [720] in particular, but cf E McKendrick *Contract Law* (6th edn 2005) [19.9].

4. Anticipatory breach

If the question is to be approached from the perspective of anticipatory breach, the different ways in which that may occur must be considered. There are two forms of anticipatory breach: (i) renunciation of one's liabilities under the contract and (ii) impossibility created by one's own act or default.[67] There are various cases in which A first contracts (by sale or otherwise) to transfer property to B, but subsequently, and before the time appointed for delivery under the first contract, transfers to C. Indeed, this is one of the classic examples of anticipatory breach. In *Synge v Synge*[68] the defendant promised to leave property to the plaintiff for her life. His conveying it instead to a third party was a breach of his obligation and the plaintiff was able to recover damages immediately. It is often said that such cases are instances of anticipatory breach by incapacitating oneself from performance. This was certainly the position adopted in some of them[69] and authoritative English texts adhere to it.[70] However, it is not clear that this is the law. The test for impossibility is a strong one. The breach must have become inevitable in fact; in Devlin J's formulation: breach must have become 'practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities'.[71] As was remarked in the foundational case on anticipatory breach, sale by the vendor to a third party does not

---

67 J Beatson *Anson's Law of Contract* (28th edn 2002) 569: a passage approved in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 (Ch D) 438. A different aspect of the case was appealed: [1957] 1 WLR 979 (CA). See also E Peel *Treitel: The Law of Contract* (12th edn 2007) [17-073]. For detailed discussion see Carter (n66) Pt III. This is an area where Scots and English law have been said to be identical: *Forslind v Bechely-Crundall* 1922 SC (HL) 173, 179. McBryde's analysis, however, differs from typical English texts. He classifies breach by 'putting implement out of one's power' separately from anticipatory breach, which he seems to view as coterminous with repudiation: McBryde *Contract* Chp 20, Pts 5 & 7. It is not clear what 'putting implement out of one's power' can be but anticipatory breach. It is difficult to find a succinct statement in the Scottish authorities recognising that it is a breach of contract to render impossible performance of one's obligations by one's actions or failure to act. See, however, *Ross v McFarlane* (1894) 21 R 396 (IH) 407; *Thomas Nelson & Sons v The Dundee East Coast Shipping Co* 1907 SC 927 (IH) 933 (LP Dunedin); and Gloag *Contract* 600.

68 [1894] 1 QB 466 (CA). Other frequently cited cases are: *Bowdell v Parsons* (1808) 10 East 359, 103 ER 811 and *Schaefer v Schuhmann* [1972] AC 572 (PC) 586. In *Ford v Tiley* (1827) 6 B & C 325, 108 ER 472 the same reasoning was applied to an undertaking to grant a lease in the future: the grant of a lease to another party in the meantime amounted to an immediate breach. No Scottish decisions on this point have been found, but the rule is clearly accepted by the writers: McBryde *Contract* [20-20] and DM Walker *The Law of Contracts and Related Obligations in Scotland* (3rd edn 1995) [32.8].

69 *Ford v Tiley* (1827) 6 B & C 325, 327; 108 ER 472, 473; *Bowdell v Parsons* (1808) 10 East 359, 361; 103 ER 811, 812; *Synge v Synge* [1894] 1 QB 466 (CA) 471.

70 Peel (n67) [17-075].

71 *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 (Ch D) 438.

necessarily render performance impossible for 'prior to the day fixed for doing the act ... the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff'.[72] This is not to say that those decisions which hold transfer to amount to anticipatory breach no longer represent the law, but rather that they should perhaps be reclassified as instances of anticipatory breach by repudiation instead of by rendering performance impossible.

Due to the difficulty of establishing that performance is, in fact, impossible, it is common to rely upon the acts by which the debtor is alleged to have put performance out of his power as amounting to repudiation by conduct.[73] One formulation of what is required to establish repudiation by conduct is in *Forslind v Bechely-Crundall*: 'if the defender has behaved in such a way that a reasonable person would properly conclude that he does not intend to perform the obligations which he has undertaken, that is sufficient'.[74] That is how early cases such as *Bowdell v Parsons*[75] (double sale) and *Ford v Tiley*[76] (double lease) were explained in *Hochster*.[77] Carter seems to be correct when he states that 'an act disabling a party from performing the contract is a clear indication by that party of an absence of readiness or willingness to perform'.[78] The fact that the inability created cannot be said to be absolute is no bar to the conduct being viewed as a repudiation.

The approach of South African law is of interest here. Like Scots law, it has imported the concept of anticipatory breach from England.[79] It distinguishes between cases of absolute and relative impossibility.[80] The former is an objective concept which predicts breach with absolute certainty. (It would be established, say, if a seller destroyed the subjects of the contract of sale.) That mirrors what is required in English law to show that performance has been put out of one's power. Relative

---

72 *Hochster v De la Tour* (1853) 2 El & Bl 679, 688; 118 ER 922, 926.

73 *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 (Ch D) 436. See, generally, HG Beale (ed) *Chitty on Contracts* vol I (29th edn 2004) [24-018] and McBryde *Contract* [20-23].

74 1922 SC (HL) 173, 179.

75 (1808) 10 East 359, 103 ER 811.

76 (1827) 6 B & C 325, 108 ER 472.

77 *Hochster v De la Tour* (1853) 2 El & Bl 679, 688; 118 ER 922, 926.

78 JW Carter *Breach of Contract* (2nd edn 1991) [908].

79 For a recent comparison of the two legal systems, see E Clive & D Hutchison 'Breach of Contract' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 176, 180 – 183.

80 S van der Merwe *et al Contract: General Principles* (3rd edn 2007) 366; RD Sharrock *et al* 'Contract' in LTC Harms & JA Faris (eds) *The Law of South Africa* vol V, pt I (2nd edn, 2004) [244].

impossibility, on the other hand, is a subjective concept: it predicts breach only with reasonable and not absolute certainty. It arises when the debtor does something which makes it unlikely that he will still be able to perform in the future, although it does not render performance absolutely impossible. The transfer by the vendor of specific goods to a person other than the buyer is classed under this heading and is given as a clear example of anticipatory breach, although there is debate about whether such cases are a separate category or merely an instance of repudiation.[81] For the purposes of this study, the precise classification is not vital. What is important to note is that such conduct is viewed as anticipatory breach.

There are some relevant Scottish cases. In *Effold Properties Ltd v Sprot*[82] interim interdict was granted to prevent an alleged seller from transferring the subjects of a contract of sale to anyone but the pursuer. Although the judgment does not analyse the case in these terms, the interdict here prevented an anticipatory breach of contract. (It was later recalled as there was held to be no concluded contract.) Burn Murdoch notes that:[83]

> an interdict against a vendor from conveying or delivering to others the thing sold to the complainer is of rare occurrence,[84] but, both on principle and authority,[85] it is competent in any case where the Court would order specific delivery.

Similarly, in *London and North Western Rly Co v Scottish Central Rly Co*,[86] a lessor was interdicted from leasing to another before the first lessee had obtained possession.

One cannot advance the absolute proposition that all transfers of title by the seller of specific goods to a third party amount to repudiation of an existing contract of sale. Transfer amounts to repudiation only if the debtor takes no steps to remain in a position to perform his obligation, for otherwise it reveals no intention not to perform one's obligations. The seller might remain able to perform after transfer: as was noted above, the obligation to transfer ownership can be performed vicariously.[87] It is not, however, sufficient for the debtor simply to assert that he is

---

81 Van der Merwe *et al* (n80) 366; Sharrock *et al* (n80) [244].
82 1979 SLT (Notes) 84 (OH).
83 H Burn Murdoch *Interdict in the Law of Scotland* (1933) [298].
84 Citing *Dick v Thom* (1829) 8 S 232 (IH) and *Boyd v Reid* (1836) 14 S 653 (IH).
85 Citing *Williamson v North British Railway* (1846) 9 D 255 (IH) 274 & 279.
86 (1847) 10 D 215 (IH).
87 Pt A.5

confident that he will remain in a position to perform. As it was put by Bankes LJ, that is 'substituting a chance for a certainty' and amounts to repudiation.[88] No doubt there may be difficult cases.[89] There is a tension between the rule that one need not have title to property in order to conclude a contract of sale in respect of it[90] and the rule that transfer of title by a seller to a third party will usually amount to repudiation of the sale.[91]

What is the impact of these rules on options? The English case of *Lovelock v Franklyn & Cox*[92] concerns the anticipatory breach of an option. The defendant was to assign his interest in particular land to the plaintiff upon payment of 140l. The option was to last for seven years. Before these seven years had run their course, the defendant assigned his interest in the land to another. This was held to constitute a breach: the grantor had incapacitated himself from performing the contract. This result was, however, said to flow only from the particular terms of the option: it required the grantor to convey the property whenever the option holder called upon him to do so. By transferring, the grantor put it out of his power to perform this obligation. The court distinguished that from what would have been the position had the option been to acquire at the end of seven years. In that event, the defendant 'may have all the intermediate time open to him for acquiring the means of performing his contract'[93] and so it was said that the transfer would not, in those circumstances, have amounted to an anticipatory breach. It is thought that this would not be the result today. The decision precedes *Hochster* and so stems from a time when rendering performance impossible was the only form of anticipatory breach which

---

88 *Omnium d'Enterprises v Sutherland* [1919] 1 KB 618 (CA) 621.

89 A transfer within a corporate group may be one.

90 Stair gives the general principle: Stair *Institutions* I x 13. See also RJ Pothier *Traité des obligations* (1761, reprinted with additions 1764) in M Bugnet *Œuvres de Pothier* vol II (1861) [133] – [134]; RJ Pothier *Traité du contrat de vente* in M Bugnet *Œuvres de Pothier* vol III (1861) [7]; MP Brown *Treatise on the Law of Sale* (1821) [136]. cf *Campbell v McCutcheon* 1963 SC 505 (IH).

91 For American comment, see EA Farnsworth *Farnsworth on Contracts* (2nd edn 1998) §8.21, citing *Neves v Wright* 638 P 2d 1195 (Supreme Court of Utah 1981) 1198: the American rule is that the 'seller of real estate need not have title at all times during the executory period of a contract', but this must be 'carefully applied to avoid unfairness, sharp practice, and downright dishonesty'.

92 (1846) 8 QB 371, 115 ER 916.

93 ibid 378, 918.

was recognised.[94] *Hochster*, however, made clear that conduct could amount to repudiation even if it did not render performance absolutely impossible, and that some of the cases previously characterised as instances of impossibility could better be viewed as instances of repudiation. It is thought that transfer by the grantor, even where the option is not exercisable until a particular point in the future, would amount to repudiation of the grantor's obligations even if it did not render performance absolutely impossible. The authors of *Barnsley's Land Options* support this position, although they do not note the decision in *Lovelock*.[95] In doing so, they rely upon American decisions in which options were found to have been repudiated when the grantor transferred the land to a third party.[96]

As with contracts of sale, there can be no absolute rule that transfer amounts to repudiation. Rather, it does so only if it reveals an objective intention on the part of the grantor not to perform his obligations. The possibility of vicarious performance was noted above:[97] the grantor might transfer but agree with the purchaser that he (the purchaser) will honour the option if it is exercised.[98] Alternatively, the grantor might agree with the purchaser that the property is to revert to him in the event of the option being exercised. He would then perform the contract personally, not vicariously.[99]

One potential difficulty arises from the different ways in which options may be analysed.[100] On some analyses (namely the conditional promise and conditional contract approach), there exists from the outset an obligation to convey, albeit a conditional one, whereas on the firm offer approach it might be said that no such

---

94 It is therefore authority for the stringency of the impossibility requirement and suggests that it would not be met where a seller transfers to another some time before the date of entry under the pre-existing contract of sale.

95 M Dray & A Rosenthal *Barnsley's Land Options* (4th edn 2004) [10-001] & [10-021].

96 *Schoonover v Kahn* 377 SW 2d 535 (1964 Kansas City Court of Appeals) and *Fullington v M Penn Phillips Co* 395 P 2d 124 (1964 Supreme Court of Oregon). In both the repudiation consisted of more than simply transferring the subjects to a third party. See also *Space Center Inc v 451 Corp* 298 NW 2d 443 (1980 Supreme Court of Minnesota) 450, which is clear that loss of title amounts to repudiation, and *Corpus Juris Secundum: vol 52 Landlord and Tenant* (2003) §118.

97 Part A.5.

98 This might confer a *jus quaestium tertio* upon the option holder. On this approach, the grantor remains liable but performs through another.

99 Another possibility is for there to be tripartite agreement between the grantor, the transferee and the holder of the option that, from the moment of transfer, the transferee is to be bound and not the grantor. This would amount to a novation.

100 Part A.2.

obligation exists until the option is exercised. Instead there is only an obligation to keep open an offer to convey. It is thought that the two positions should be treated identically when considering what is required of the grantor of an option. In the case of an option analysed as a firm offer, the grantor has irrevocably consented to enter into a contract of sale; it makes no sense to speak of him being under an obligation to keep that offer open, for that acknowledges the possibility of his revoking it, which the law does not permit.[101] Instead, he has given his irrevocable consent to convey and awaits to see whether he must do so. His position should be analysed identically to that of the person who is under a conditional obligation to convey.

A second issue is the suggestion that the rules of anticipatory breach do not apply to unilateral contracts. The classic definition of a unilateral contract is that of Diplock LJ in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd*:[102]

> [O]ne party, whom I will call "the promisor," undertakes to do or to refrain from doing something on his part if another party, "the promisee", does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing.

Carter notes that the position in the United States is that the rules of anticipatory breach do not apply to unilateral contracts.[103] The logic of such a position is that the doctrine of anticipatory breach exists to allow a creditor to free himself from his obligations under a contract when it is clear that the debtor is not going to perform. If the creditor has no obligations (as is the case in a unilateral contract), there is no need to protect him via the doctrine. If that is also the rule here, then the rules of anticipatory breach do not apply to options.[104] The rule has, however, been criticised,[105] primarily on the basis that there are other reasons for the doctrine of anticipatory breach besides freeing the creditor from his obligation to remain ready

---

101 Part A.3.

102 [1968] 1 WLR 74 (CA) 83. (Diplock LJ). See MA Hogg *Obligations* (2nd edn 2006) [1.09] – [1.15] on the use of the terminology 'unilateral' in Scots law.

103 JW Carter *Breach of Contract* (2nd edn 1991) [781]. See also AL Corbin *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law* vol IV (1951) §962.

104 Even if the option were analysed otherwise than as a unilateral contract: the same reasons which are given for the refusal to apply the doctrine of anticipatory breach to unilateral contracts exist in respect of unilateral promises and firm offers.

105 Eg Corbin (n103) §962; DW Robertson 'The Doctrine of Anticipatory Breach of Contract' (1959) 20 Louisiana L Rev 119, 122. RA Lord (ed) S Williston *A Treatise on the Law of Contracts* vol XXIII (4th edn 2002) §63:60 supports the rule, partly because this text is hostile to the entire concept of anticipatory breach.

to perform. Carter cites no English authority in favour of a similar exclusion[106] and I have found none, either in English or Scots law. Quite the contrary is the case: in the English decision of *Lovelock v Franklyn & Cox*,[107] there was held to have been anticipatory breach of an option.

A final issue to be raised is this: the dominant English view is that an anticipatory breach is not an actual breach of contract, but rather only becomes such upon acceptance by the 'innocent' party.[108] Were this view to be adopted, there might be thought to be difficulties for the application of the offside goals rule, for which breach is a prerequisite. Where the 'innocent party' seeks to rely on the offside goals rule, he cannot accept the breach, for he seeks performance of the contract and not damages. Various points may be made in response to this. First, although that is the orthodox English conceptualisation of anticipatory breach, there is also support for treating it as an actual breach, albeit one governed by particular rules.[109] The 'present breach' doctrine is also dominant in the United States[110] and in South Africa. A leading South African textbook states: '[a]nticipatory breach of contract [is] construed as a breach that sets in immediately due to the breach of an *ex lege* duty, flowing from *bona fides*, not to commit anticipatory breach of contract'.[111] Clive and Hutchison state that Scots law is 'ambivalent' about whether anticipatory breach constitutes an actual breach of contract;[112] in fact, the issue has hardly been debated.[113] In any event, it seems unlikely that the application of the offside goals rule turns upon what is essentially a question of classification for contract law. The litmus test for that rule is whether the option-holder could interdict transfer to a third

---

106 He suggests that it has in fact been applied to options contracts, citing *Wright v Dean* as an example: [1948] Ch 686. *Wright* was not, however, a case of anticipatory breach but rather one where damages were claimed when the grantor was unable to perform the contract arising from exercise of the option.

107 (1846) 8 QB 371, 115 ER 916.

108 Eg *Johnstone v Milling* (1886) 16 QBD 460 (CA) 472. This view is criticised by JC Smith 'Anticipatory Breach of Contract' in EZ Lomnicka & CGJ Morse (eds) *Contemporary Issues in Commercial Law: Essays in Honour of Prof A G Guest* (1979) 175, 179.

109 Smith ibid.

110 Carter (n103) [721].

111 S van der Merwe *et al Contract: General Principles* (3rd edn 2007) 360. This is not viewed as breach by infringement of a contractual prohibition, but rather simply as breach of contract by wrongful conduct.

112 E Clive & D Hutchison 'Breach of Contract' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 176, 181.

113 Clive and Hutchison, ibid, do not, for example, cite a passage in Green's Encyclopaedia which states that 'repudiation is in law a wrongful act': WT Watson 'Contract' in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol IV (1927) §1021.

party were he to discover the grantor's intentions in time. This, it was suggested above, he may do, for it amounts to an anticipatory breach and is inconsistent with the grantor's obligations under the option. Whether that anticipatory breach is technically classified as breach is not of importance here.

It will be recalled that at first instance in *Pritchard v Briggs* Walton J refused to imply a term prohibiting the grantor of an option from transferring the subjects on the basis that this would render the property economically sterile.[114] Presumably he would level the same criticism against the results drawn above from the application of the rules of anticipatory breach. The point may be made slightly differently. In *Advice Centre* Lord Drummond Young's concern was that 'the right to sell is one of the most normal incidents of a right of property, and ... clear wording or a clear implication would be required to restrict or remove that right'.[115] These views seem flawed. First, the property is not sterilised, for the prohibition upon transfer is not absolute. The grantor remains free to transfer, but if he does so that transfer must be subject to the option. Secondly, the restriction upon transfer is a direct consequence of obligations which the grantor has voluntarily assumed. They are not imposed against his will. This is made especially clear by considering the rules of anticipatory breach: transfer is inconsistent with, and breaches, the core obligation of the option. If an owner contracted to sell property, one would not suggest that he should be free to sell to another because the right to sell is one of the incidents of property. The suggestion is no more valid where the transaction concerned is the grant of an option.

5. A particular rule for options in leases?

It is submitted that the rule in respect of free-standing options is clear: transfer by the grantor without taking steps to protect the option is not permitted. Are options to purchase in leases to be treated differently? That is the only remaining justification for Lord Drummond Young's view in *Advice Centre* that a landlord breaches no obligation if he transfers the subjects of the lease. If this view were correct, it would give rise to difficult borderline issues.[116] When is the usual rule to apply and when the rule about options contained in leases? What if the option was granted in a

---

114 [1980] Ch 338 (CA), discussed at n56.

115 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591[47].

116 The same issues arise with a rule that the offside goals rule cannot apply to the terms of leases: Chp 9 Pt B.

separate 'back-letter' contemporaneous with the lease, or if it was granted, say, a week after the lease? The fact that rules have fuzzy borders is not a very strong critique, however, for it is inherent in the concept of boundaries that there will be boundary disputes. The merits of the argument must therefore be considered.

For a landlord to be entirely free to transfer the subjects of the lease, the option to purchase would have to cease to bind him after transfer,[117] for otherwise the prospect of a damages claim would impinge upon his freedom of transfer. An option which is defeasible by the transfer of the subjects is an odd one, for which there is likely to be little demand in practice.[118] There are at least two grounds on which it might be said that an option to purchase which is included in a lease ceases to bind the original landlord after transfer and so can impose no obligation upon the landlord not to transfer. The first is that, as a matter of interpretation, this was what the parties intended. The second is that there is a rule that all personal conditions of leases cease to bind the original landlord should he transfer the subjects. These possibilities are considered in turn. The first is possible, but unlikely; the second is clearly wrong.

(a) Intention

Obviously, if the parties intend that the tenant will cease to have the benefit of the option if the landlord transfers the property, that intention must receive effect. The question is what the parties' intention should be taken to be when an option is included in a lease. The point was discussed in the English case of *Wright v Dean.*[119] The grantor of a lease containing an option to purchase transferred the reversion to a third party without taking any steps to protect the option. The tenant, unable to exercise the option against the successor, sought to do so against the original landlord, who argued that he had ceased, upon transfer, to be bound by the option. It was argued that 'the fact that [the option] is contained in a lease is relevant to its

---

[117] If this construction of the option is adopted, securing performance of the grantor's obligations with a standard security would do nothing to render it binding upon a successor. If the obligation is conditional upon the grantor being owner at the time of exercise, after transfer of the property there would be no obligation to secure and so the security would lapse: WM Gloag & JM Irvine *Law of Rights in Security* (1897) 2 and GL Gretton 'The Concept of Security' in DJ Cusine (ed) *A Scots Conveyancing Miscellany* (1987) 126, 128. Despite this, *Advice Centre* states both that the option lapses upon transfer by the landlord and that the use of a standard security would avoid this consequence: *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [47] – [48].

[118] Pt A.1.

[119] [1948] Ch 686 (Ch D).

construction and effect'.[120] Specifically: a landlord is free to transfer property which is subject to a lease and the parties cannot have intended that the option would prevent him from being able to do so. Indeed, typically the parties will have made their view clear that the landlord is to be free to transfer the reversion by defining the term 'landlord' or 'lessor' as including, where the circumstances admit, successors in title of the original party. That had been done in *Wight*, but it was held insufficient to alter the normal rule that contracts bind the parties to them. Wynn Parry J thought that it would require far clearer language than this to demonstrate an intention that the lessor should cease to be bound by the option upon parting with the reversion.[121] (Note, though, that in English law at that time, the original landlord remained bound by all of the terms of the lease even after transfer.[122])

Wright was not cited in *Advice Centre*. Lord Drummond Young made the same points which the original landlord made there and which Wynn Parry J rejected. He stated that:[123]

> the right to sell is one of the most normal incidents of a right of property, and in my opinion clear wording or a clear implication would be required to restrict or remove that right. Nothing in either the Missives or the Lease comes close to achieving that result. Indeed, in the lease the expression "the Landlords" is defined as including, where the context so admits, all persons deriving title from them.

The approach in *Wright* is to be preferred. First, it is not true that granting an option prevents the landlord from transferring; it merely requires him to ensure that he remains in a position to perform the requirements of the option after transfer. This he may do by taking the successor bound by the option. Second, the restriction on the landlord's freedom of transfer is voluntarily undertaken: as has been shown above, it is inherent in consenting to be bound by an option.

A third response concerns the premise on which the argument is based, namely that a landlord may freely transfer the subjects of the lease. This will be true of most, but not all, leases. However, a landlord is only able to transfer the property subject to a lease without having to take the successor bound to recognise the tenant's rights because there is a rule of law which does this for him. The position of contract law is

---

120 ibid 689.
121 ibid 694.
122 TM Fancourt *Enforceability of Landlord and Tenant Covenants* (2006) [3.02].
123 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [47].

that if L leases to T for twenty years, L is bound to maintain T in possession of the subjects for those twenty years. If T's right were not real and L wished to transfer the subjects to S, in order to perform his obligations under the lease he would have to ensure that S would not challenge T's possession. If he did not do so, and S evicted T, L would be liable for breach of contract. This proposition has the imprimatur of Gaius[124] and of Bankton,[125] Erskine[126] and Bell,[127] although it was not accepted by Lord Drummond Young.[128] If the lease in question is a real right, it binds successors by virtue of a rule of law, and so L may transfer without having to take S bound. Ownership of land subject to a lease is freely transferable only because there exists this rule of law which ensures that the obligations of the lease continue to bind someone capable of performance after transfer. Such free transmissibility does not provide a strong basis for arguing that an option should cease to bind the original landlord after transfer. Rather it is submitted that Wynn Parry J was correct when he stated in *Wright* that it would require clear language for the original landlord to cease to be bound by an option after transferring the subjects of the lease.

(b) Rule of law: do personal conditions bind the original landlord after transfer?

The second possible basis for concluding that an option to purchase ceases to bind the original landlord after transfer is that *all* personal conditions cease to bind the original landlord after transfer. Lord Drummond Young stated in *Advice Centre* that 'an option is not *inter naturalia* of the lease ... and is accordingly personal to the original landlord ... . Thus the option was always liable to be defeated when the property passed to a singular successor.'[129] As well as not binding a successor landlord, personal conditions are said to cease to exist altogether upon transfer. It is suggested that this is incorrect. The ordinary rule of contract law is that contracts

---

124 D 19.2.25.1.

125 Bankton *Institute* I xx 1 & 2.

126 Erskine *Institute* III iii 15. *Downie v Campbell* 31 Jan 1815 FC is an illustration, involving a lease with a date of entry in the future. See also P Gane (tr) *The Selective Voet* vol III (1956) XIX 2 17. Stair *Institutions* I xv 4 might be thought to suggest that the lessee's contractual right ceases, but that would be inconsistent with the lessor's duty to maintain the lessee in possession for the duration of the lease, which Stair detailed at I xv 6. See also Bell *Leases* vol I 88.

127 Bell *Commentaries* I 64.

128 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [47], discussed in the following paragraph.

129 ibid.

bind the parties to them and no one else. An exception is recognised for certain terms (real conditions) of those leases which are real rights: upon transfer by the landlord, his successor acquires those rights and is bound by those duties of the lease which are real conditions. But some of the terms of the lease do not transmit. To these personal conditions the ordinary rule of contract law applies: the original landlord remains vested in these rights and bound by these duties. Gloag viewed it as 'clear on principle' that 'a landlord must remain liable on any obligations in the lease which do not transmit against the purchaser'.[130] The rule which distinguishes between real and personal conditions is simply one which allocates rights and obligations: it does not terminate them. The suggestion to the contrary is unfounded.

The idea that personal conditions might be extinguished upon transfer by the landlord stems from a broader misapprehension about the behaviour of personal rights upon the transfer of the property to which they relate. Lord Drummond Young stated that any personal rights relating to property, and not only personal conditions of leases, disappear on transfer by the grantor. When discussing contractual licences and leases which do not satisfy the requirements of the 1449 Act, his Lordship stated that those rights 'are purely personal, and do not survive the sale of the property'.[131] Such rights 'would necessarily terminate on a sale because they are not valid against singular successors'.[132] But these are contracts and so they bind the original grantor despite the transfer of the property to which they might relate.[133] Professor Zimmermann's outline of the position of the *ius commune* is useful:[134]

> The authors of the European ius commune usually summed up the position which had been handed down to them from Roman law in the maxim "emptio tollit locatum": sale breaks hire. This is as crisp and poignant as it is inaccurate. First of all, it is not the contract of sale that has any detrimental effect on the relationship

---

130 Gloag *Contract* 264. See also DJ Cusine (ed) *The Conveyancing Opinions of Professor JM Halliday* (1992) 361; KGC Reid & GL Gretton *Conveyancing 2006* (2007) 105. This is also the position of the American Restatement: Restatement *Landlord & Tenant* §16.1, Comment d.

131 *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [47]. Presumably the point at which the rights would cease to exist would be transfer and not the conclusion of a contract of sale.

132 ibid [49]. See also [24]: 'The rights that the pursuers enjoyed as against Thomas H. Peck Limited prior to the sale to the defender were purely personal in nature, and came to an end as soon as that company disponed the property to a third party.'

133 Authority for this proposition in respect of leases was cited above: n124-127. For recent discussion of the situation to which grant of an irrevocable licence gives rise, see A Dowling 'Contractual licences: third parties and implied terms' [2006] Conv 197. An important case is *King v David Allen & Sons, Billposting, Ltd* [1916] 2 AC 54 (HL).

134 R Zimmermann *The Law of Obligations* (1996) 379.

between the lessor/vendor and his tenant. It is only on account of the subsequent transfer of possession and of ownership that the lessor/vendor makes it impossible for himself to carry out his obligation under the contract of lease (namely to provide uti frui praestare licere), and that he exposes the tenant to the risk of being expelled by the purchaser. And the second point: the contract of lease was, of course, not "broken" by either sale, transfer of ownership or any other transaction. It continued to exist and did, in fact, provide the tenant with his only remedy, the actio conducti against the lessor. Whatever transaction had taken place between the lessor and the third party did not affect the tenant's contractual position, but jeopardized his (continued) detention. Emptio tollit locatum therefore really means that the tenant was not in a position to counter the claims of any new owner of the property.

C. CONCLUSION

Although an option may be created in various ways, and may be analysed in various ways, common to all is the grantor's undertaking to transfer to the holder upon his exercising the option. A corollary of this obligation is the requirement to remain in a position to perform if called upon to do so by the holder. It is therefore a breach to transfer the subjects of the option without taking steps to ensure that, were the option to be exercised, the grantor could still perform. In practical terms, the most likely means by which this will be achieved is to make the transfer subject to the option. The holder can interdict a transfer which would put performance out of the grantor's power. This is of considerable importance for the landlord who contemplates transfer: if he does so, and yet does not take steps to remain in a position to perform, there is a real prospect of being held liable later for breach of contract. The fact that transfer amounts to breach may also be of consequence for the successor landlord. It means that an important condition for the offside goals rule has been satisfied. That rule is the subject of the next, and final, chapter of this thesis.

CHAPTER NINE
THE (IR)RELEVANCE OF KNOWLEDGE

A. THE REQUIREMENTS OF THE OFFSIDE GOALS RULE 209
B. DOES THE RULE APPLY TO THE TERMS OF LEASES? 213
C. SPECIFIC TERMS 217
1. Options to purchase 217
(a) A right to which the offside goals rule applies? 217
(b) A problem of remedies 222
2. New lease to commence at the ish of current lease 223
3. Options to renew 225
4. Other uses of the offside goals rule 226
D. CONCLUSION 228

A core principle of property law is that a singular successor is not bound by the personal obligations of his predecessor in title.[1] This also flows from the logic of contract law: obligations bind only those who have consented to be bound by them. To this rule there are two exceptions. The first is that category of personal rights known as 'real conditions', namely those where the debtor in the obligation is the owner of a particular thing for the time being. Real conditions are subject to particular rules of constitution and part two of this thesis has explored those rules for leases. The second exception to the general rule is frequently referred to as the 'offside goals rule',[2] and that is the focus of this chapter. The requirements of the rule are canvassed, before considering whether it applies to the terms of leases. The results it would produce in respect of certain common lease terms are then suggested.

A. THE REQUIREMENTS OF THE OFFSIDE GOALS RULE

It is not the case that if a term fails to qualify as a real condition of a lease, a successor will be bound by it simply because he was aware of it. Although Lord Deas once stated that a successor could be said to adopt obligations which are patent on the face of leases,[3] this is not the law. The various cases in which terms have been

1 Hume Lectures IV 311 – 318; Bell *Commentaries* I 307 – 308; Reid *Property* [688]; *Andrew Melrose & Co v Aitken, Melrose & Co Ltd* 1918 1 SLT 109 (OH) 111.

2 The metaphor used by LJC Thomson in *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 (IH) 501.

3 *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 (IH) 1106. See also *Rae v Finlayson* (1680) Mor 10 211, where a clause permitting the tenant to retain rent in compensation for expenses incurred improving the property was held to be personal, but the parties were to be heard on whether the

held to be personal are testament to that. Otherwise the distinction between real and personal conditions of leases would collapse,[4] as successor landlords will invariably know of the terms of subsisting leases. As it was put by Lord Low in *Morier v Brownlie and Watson* in respect of a failed attempt to constitute an obligation as a real burden:[5]

> It was finally argued that Brownlie and Watson knew of the obligation which the Harpers had undertaken in regard to the unfeued ground, and are therefore bound to implement that obligation. ... If, as I think was the case, the personal obligation did not affect the lands, then knowledge on the part of the purchasers that such an obligation had been granted appears to me to be of no moment. Assuming that they knew of the obligation, they knew also that it did not affect the lands.

Nor does the fact that the successor knew of the term provide a basis for saying that he is personally barred from denying that it binds him. Personal bar requires inconsistent conduct on the part of the person bound,[6] and if all the successor does is to acquire ownership with the knowledge of a personal condition, there is no inconsistency in his behaviour when he subsequently refuses to be bound by that term and seeks to assert some right against the tenant which is inconsistent with the personal condition in question.

The offside goals rule is an exception to this general position that a successor's knowledge of his predecessor's obligations is irrelevant. Professor Reid's is the leading formulation. He requires the following to be shown in order for a grantee to be affected by his grantor's personal obligations:[7]

(i) that there was an antecedent contract or other obligation affecting the grantor;

---

successor knew of the term when he agreed to purchase the subjects. Mackenzie *Obsverations* 190 noted the oddity of this.

4 B Rudden 'Economic Theory v. Property Law: The *Numerus Clausus* Problem' in J Eekelaar & J Bell (eds) *Oxford Essays in Jurisprudence 3rd Series* (1987) 239, 246.

5 (1895) 23 R 67 (IH) 74 (Ld Ord). *Beckett v Bisset* 1921 2 SLT 33 (OH) 34 is in similar terms. See also *Campbell's Trs v Corporation of Glasgow* 1902 4 F 752 (IH) 757 – 758, Gloag *Contract* 232 and Reid *Property* [392]. There are some cases which held notice of a contractual restriction in respect of the use of moveable property to bind a successor merely because he had notice of it: *M'Cosh v Crow & Co* (1903) 5 F 670 (IH) and *Wm Morton & Co v Muir Bros & Co* 1907 SC 1211 (IH). The better view is that this is not the law: *Andrew Melrose & Co v Aitken, Melrose & Co Ltd* 1918 1 SLT 109 (OH). The reasoning in *M'Cosh* does not seem to be based on the acquirer having notice. In *Morton & Co* only Lord M'Laren decided that purchasers were bound by an obligation binding on the transferor because of their notice (1225 – 6); Lords Pearson (1229) and Ardwall (1232) held that the purchaser had adopted the contract. It is no longer, if it ever was, English law that one who acquires property in goods is bound by the transferor's obligations to use or employ the property in a specified manner: A Burrows (ed) *English Private Law* (2nd edn 2007) [4-138].

6 EC Reid & JWG Blackie *Personal Bar* (2006) Chp 2, Pt II, specifically [2-08].

7 Reid *Property* [695].

(ii) that the grant was in breach of a term, express or implied, of that obligation; and

(iii) either that the grantee knew of that antecedent obligation prior to the completion of his own right[8] or that the grant was not for value.[9]

This formulation is approved in *Advice Centre*,[10] but it is incomplete. Traditionally it was asserted that, as a further requirement, the prior right must be one which is capable of being made real.[11] (Of course, this is simply a metaphor. A personal, contractual right is not 'made real' by registration. As Reid puts it: 'the real right of ownership obtained on registration is not an improved version of an earlier personal right but rather is a different right entirely'.[12]) The case cited for this proposition is *Wallace v Simmers*,[13] in which it was held that the offside goals rule could not be invoked to render a personal right of occupancy binding upon a singular successor of the grantor because it was not a right which could be made real. Reid omits this requirement from his formulation in order to accommodate the Inner House's decision in *Trade Development Bank v Warriner and Mason (Scotland) Ltd.*[14] There the court appeared to rely on the offside goals rule to reduce a lease granted in breach of standard condition 6 of a previously registered standard security,[15] which prohibits the debtor from granting leases over the burdened property. A condition of a standard security is not, however, a right which is capable of being made real in the sense in

---

8 The relevant cut-off point for knowledge is an open one. On one view, knowledge acquired at any point before the completion of transfer is sufficient to trigger an offside goal: *Alex Brewster & Sons v Caughey* 2002 GWD 15-506 (OH 2 May 2002); supported by DL Carey Miller with D Irvine *Corporeal Moveables in Scots Law* (2nd edn 2005) [8.31] and DL Carey Miller 'Good faith in Scots property law' in ADM Forté (ed) *Good Faith in Contract and Property* (1999) 103, 109. The alternative view is that the point for assessing the second party's good faith is the moment when he contracts with the transferor. That is supported by RG Anderson '"Offside goals" before Rodger Builders' 2005 JR 277, 290 – 291 and RG Anderson 'Fraud on Transfer & on Insolvency: ta ... ta ... *tantum et tale*?' (2007) 11 Edin LR 187, 202.

9 In *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 this is extended to grants which are gratuitous or 'for a manifestly inadequate consideration': [45].

10 *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [46]. It had previously been approved in *Scotlife Home Loans (No 2) Ltd v Muir* 1994 SCLR 791 (Sh Ct) 795.

11 GLF Henry 'Personal Rights' (1961) II *Conveyancing Review* 193.

12 Reid *Property* [644].

13 1960 SC 255 (IH) 259. The outcome of this case has been criticised as unfair: A Wilson 'The Constructive Trust in Scots Law' 1993 JR 99, 103 – 4.

14 1980 SC 74 (IH).

15 ibid 94. No authority is cited, which makes it impossible to be certain that the offside goals rule was the basis for the court's decision. Cf 97, where, in respect of a different aspect of the decision, the 'classic cases' on offside goals are cited and the traditional formulation (that there must be a personal right capable of being made real) is given.

which that expression is used in *Wallace*: it cannot be made a real right, although it certainly is a real condition of the standard security.[16] This means that either the requirements of the offside goals rule must be altered so as to accommodate *Warriner and Mason*[17] or that case must be explained as an application of something other than the offside goals rule. Initially Reid opted for the latter course,[18] but in his title in the *Stair Memorial Encyclopaedia* he abandoned the requirement that the prior right must be capable of being made real and reformulated the offside goals rule in the manner noted above.

Reid's new formulation relies upon the concept of breach as a control mechanism: in order for the transferee to be bound by the transferor's prior obligation, the transfer by which he acquired must have been in breach of that obligation. The assumption seems to be that only where the first right is capable of being made real will a subsequent transfer by the grantor amount to breach. The result in *Wallace v Simmers* is thought to be preserved, although via different reasoning.[19] This analysis may be questioned. Provided that a licence (such as that considered in *Wallace*) is irrevocable, there can be few clearer examples of breach by the licensor than his transferring the subjects while the licence subsists without ensuring that the transferee will honour the licence. As was discussed in Chapter Eight, this is an anticipatory breach, because such a transfer would put performance out of the transferor's power.[20] If that is correct, then Reid's reformulation radically changes the scope of the offside goals rule: it ceases to be a rule which regulates the ranking of competing entitlements to real rights and becomes instead one which, in some cases, can convert purely personal rights into rights binding upon third parties, undermining a fundamental distinction of private law.[21]

A less radical amendment of the offside goals rule would equally accommodate the result of *Warriner and Mason*. It could be said that the rule applies where A is

---

16 As Reid himself has noted: KGC Reid 'Standard Conditions in Standard Securities' 1983 SLT 169 & 190.

17 There is no sign from the judgments that the court was aware that it was proceeding inconsistently with that traditional formulation. See, eg, the formulation of the offside goals rule in terms which restrict its operation to rights capable of being made real at 1980 SC 74 (IH) 97.

18 Reid (n16) 191.

19 Reid *Property* [697].

20 Chp 8, Pt B(4).

21 The point is made in the English context by S Bright 'The Third Party's Conscience in Land Law' [2000] Conv 398, 408. See also *Wallace v Simmers* 1960 SC 255 (IH) 259 – 60.

bound either by an obligation to grant B a right which is capable of being made real or by an obligation to B which is a real condition of an existing real right. If A subsequently grants a real right in the same subjects[22] to C in breach of the prior obligation, the grant is voidable at B's instance if C knew of the prior obligation or the transfer was gratuitous or at a material undervalue. Whether that is an acceptable formulation must be debated elsewhere:[23] the offside goals rule awaits its own thesis. Two things are clear. The first is that some further limitation is needed in addition to Reid's three criteria. The second is that the core case for the offside goals rule will remain that where the prior obligation is to grant a right which is capable of being made real. This is important for present purposes: it makes clear that, if the offside goals rule does apply to the terms of leases, it can benefit only particular terms and does not render all personal conditions binding upon a knowing or gratuitous successor landlord.[24] This may allay the fears of those who suggest that the offside goals rule must be held to be inapplicable because it would wholly undermine the real condition/personal condition distinction. It would only do so in respect of particular terms: Part C considers which.[25]

B. DOES THE RULE APPLY TO THE TERMS OF LEASES?

A first point to consider is whether there is any room at all for the offside goals rule to apply to the terms of a lease. In *Advice Centre*[26] and Steven's commentary on that case[27] there are traces of the view that once a term has been held to be a personal condition, no other rule of law can override that result. Some parts of Lord Drummond Young's judgment suggest that the mere fact that the offside goals rule

---

22 *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 (OH) 652A.

23 Brand, Wortley and Steven favour returning to the position in *Wallace v Simmers* and explaining *Warriner and Mason* on another basis: DA Brand, AJM Steven & S Wortley *Professor McDonald's Conveyancing Manual* (7th edn 2004) [32.55] (departing from the position of earlier editions).

24 By definition, where one is seeking to argue that a personal condition is binding on a successor landlord, the grant to him will not have been in breach of a real condition of a subsisting real right.

25 The offside goals rule may not exhaust the ways in which the tenant enjoying an option or another personal condition could argue that a knowing successor is liable: the economic delicts may also be of relevance. The point has not been explored in Scotland, although Wortley has discussed whether the economic delicts are the basis of the offside goals rule: S Wortley 'Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right' 2002 JR 291, 308 – 309. For a consideration of the English position: RJ Smith 'The Economic Torts: Their Impact on Real Property' (1977) 41 Conv 318.

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

27 AJM Steven 'Options to Purchase and Successor Landlords' (2006) 10 Edin LR 432, 436.

would produce a different result from *Bisset v Magistrates of Aberdeen*[28] means that it cannot apply. For instance, his ultimate reason for concluding that *Davidson v Zani*[29] was wrongly decided was simply that 'the sheriff principal did not give *Bisset* its proper significance'.[30] Yet the preceding ten paragraphs of his opinion discussed the requirements for the offside goals rule to apply, suggesting that, were they to have been satisfied, the rule would have applied to bind a successor landlord to the option agreement. At one point, Lord Drummond Young states that the rule would have applied if the lease had contained an express obligation upon the landlord to bind any disponee to the terms of the option.[31] The question whether the offside goals rule applies to terms of leases was not focussed in *Davidson*,[32] perhaps because the term was in missives of let and not in the subsequently executed lease. Dr Steven favours an exclusionary rule. He states bluntly: making the option bind the successor landlord by virtue of the offside goals rule would be 'to override the *inter naturalia* doctrine. That must be wrong'.[33]

In favour of the view that the offside goals rule cannot be applied to the terms of a lease, one may say this: the rule that only certain lease terms transmit is a mandatory one which the landlord and tenant cannot circumvent, so it should not be circumvented by other rules of law. To allow the offside goals rule to apply would undermine the policy justifications underlying those rules of lease law which determine which terms are real and which personal. The response to this argument is that, if there is a policy objection to a particular term binding a successor, it should be faced square-on within the terms of various rules. For instance, the objection to an option to purchase binding a successor landlord is that such rights are potentially oppressive and unsuitable for creation as real conditions. If that is the case, one would expect this policy to be reflected in the offside goals rule and to find that it does not render an obligation binding on a successor if there are strong policy reasons against such an outcome. In other words, the debate should take place within

---

28 (1898) 1 F 87 (IH).

29 1992 SCLR 1001 (Sh Ct).

30 *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [51]. See also [48].

31 ibid [48]. This technique is discussed in GL Gretton & KGC Reid *Conveyancing 2006* (2007) 104 – 106, who are sceptical about whether it would work.

32 *Davidson v Zani* 1992 SCLR 1001 (Sh Ct).

33 Steven (n30) 436.

the framework of that rule, instead of relying upon an exclusionary rule to support the position of lease law.[34]

A second, and weaker, argument against the exclusionary position may also be advanced: a rule which said that the offside goals rule does not apply to the terms of a lease might lead to very fine distinctions. Would the exclusion apply if the option agreement is concluded contemporaneously with the lease, but is recorded in a separate document?[35] What if the option is concluded one week after the lease, or if, as in *Davidson*, it is in missives which precede the lease? Of course, there are boundary issues with all rules, so by itself this is not a very convincing argument, but it is a factor to be borne in mind if one considers that there is little other support for the suggestion that the offside goals rule cannot apply to the terms of a lease.

In other systems the same conflict arises: lease law provides that a particular type of term will not bind a successor, but other rules of law can produce a different result. The legal systems which I have considered do not prevent these alternative rules from being applied just because this would circumvent a rule of lease law. In South African law, for example, it is unclear whether an option to purchase binds a successor landlord by virtue of the rule *huur gaat voor koop*.[36] However, the South African equivalent of the offside goals rule (the doctrine of notice) does apply and it results in the option binding a knowing or gratuitous successor.[37] Similarly, in England the fact that the burden of an option does not touch and concern the reversion at common law does not preclude the application of equitable rules which result in an assignee to the reversion being bound. In German law an option to purchase would not bind a successor landlord under BGB §566,[38] but contractual rights to acquire property can be protected against transfer by the debtor by registering a *Vormerkung* in the Land Register (*Grundbuch*).[39] On registration, a

---

34 This, of course, has the added benefit that it will contribute to understanding of the offside goals rule. Notably, the only offside goals 'options' cases to have arisen have concerned those granted by a landlord to a tenant.

35 As is advised by Rennie and Bell 2006 (May) JLSS 49, 50.

36 Chp 6 Pt A.3.

37 See n61 below.

38 H Roquette *Mietrecht* (5th edn 1961)194.

39 §883 BGB. A Wacke in ME Rinne (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol VI *Sachenrecht* (4th edn 2004) §883 Rn [33]. I am grateful to Dr Sonja Meier for her assistance with this point.

tenant would protect his option to purchase and therefore render binding upon a successor the obligation which BGB §566 would not.

This brief comparative survey suggests that other systems find no structural reasons for refusing to apply rules to personal conditions of leases which could render those terms binding upon successors in title of the landlord. If a different rule is proposed for Scots law, it must be demonstrated why it is required. The simple assertion that the offside goals rule produces a result which conflicts with that of lease law is insufficient. In my view, the arguments that the offside goals rule should not apply to the terms of a lease are unpersuasive.

If, as I suggest, the rule does apply, it may well be that the requirement of knowledge is automatically satisfied. Certainly it will be if the lease is registered: a successor has constructive knowledge of the contents of the register, and this has been held sufficient for the purposes of the offside goals rule.[40] Some authorities support the proposition that a successor also has constructive knowledge of the terms of unregistered leases. In *Stewart v M'Ra*[41] Lord President Hope stated that 'a party intending to lend money on land, is just as much bound to look at the leases affecting it as a purchaser is'. More also stated that purchasers are presumed to make themselves acquainted with the terms of subsisting leases before purchasing or acquiring property.[42] These statements must, however, be set against the emphasis placed by texts discussing the offside goals rule upon the successor having 'certain knowledge' of the right by which he is alleged to be bound.[43] That makes it less likely that constructive knowledge suffices to invoke the offside goals rule. In most cases, the issue will not arise, for the successor will have checked the terms of subsisting leases and so will have actual knowledge.[44] Part C considers which lease terms satisfy the other requirements of the offside goals rule.

---

40 *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74 (IH).

41 (1834) 13 S 4 (IH) 6.

42 JS More's *Notes to Stair's Institutions* vol I (1832) ccxlvii.

43 Stair *Institutions* I xiv 5, given renewed emphasis recently by RG Anderson '"Offside goals" before Rodger Builders' 2005 JR 277.

44 *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591[48].

C. SPECIFIC TERMS

1. Options to purchase

Two modern cases consider whether the offside goals rule applies to options to purchase concluded between a landlord and tenant. In both, a tenant had an option to purchase the subjects of the lease which could only be exercised at a particular point in time. When the subjects were transferred before the option was exercisable, the tenant pled that the successor was bound by the option because of his knowledge thereof. In the Sheriff Court case of *Davidson v Zani*[45] it was held that an option to purchase contained in missives but which was not in the subsequently executed lease did bind a knowing successor. However, in the subsequent Outer House decision of *The Advice Centre for Mortgages v McNicoll*,[46] *Davidson* was strongly disapproved and it was held that the offside goals rule did not render an option to purchase binding upon a singular successor. The argument based upon offside goals was described as 'fundamentally wrong'.[47]

The issues which arise when determining whether the option holder may invoke the offside goals rule against a knowing or gratuitous transferee are:

(i) whether the transfer of ownership is in breach of the option;

(ii) whether the option is a right to which the offside goals rule applies; and

(iii) if the rule does apply, whether a suitable remedy is available.

The first issue was discussed in the previous chapter, where the conclusion was drawn that, so long as the option is not intended to be conditional upon the grantor still being owner at the time of exercise, transfer to a third party without taking steps to preserve the option holder's rights does amount to breach of the option. The other two issues are now considered.

(a) A right to which the offside goals rule applies?

Whether an option is a right to which the offside goals rule applies – or, in the traditional phrase, is a right 'capable of being made real' – is not an issue specific to lease law, although, coincidentally, the two cases which have considered the point have both involved options in leases. There is no doubt that once an option has been

---

45 1992 SCLR 1001 (Sh Ct).

46 [2006] CSOH 58, 2006 SLT 591.

47 ibid [42].

exercised, the personal right which then arises is one which the offside goals rule protects. The question is whether that rule protects an option prior to its exercise.

Two objections have been raised to applying the offside goals rule to options. The first, which is common to all options, is that prior to exercise there is no right to call for a conveyance and so no right 'capable of being made real'. Given the inaccuracy of the metaphor,[48] the difficulty should be phrased in other terms, namely that the offside goals rule applies only to personal rights the correlative obligation of which is to confer a real right upon the creditor. The objection in respect of options is that an option holder is one stage removed from acquiring such a personal right. Prior to exercise, he has only a personal right to acquire a personal right to acquire a real right. That is certainly true if an option is analysed as a firm offer to enter into a contract of sale. If, however, an option is analysed as a conditional contract of sale, one might say that there is in existence from the outset a contractual right to conveyance, albeit one which is subject to a potestative condition. Chapter Eight suggests that these alternatives are identical from the point of view of the obligations incumbent upon the grantor.[49] The point was made in *Davidson v Zani* that the obligation on the grantor exists from the moment that the option is granted:[50]

> If an obligation is qualified only by a potestative condition, such as the condition that the creditor can exact performance when he chooses, then, from the point of view of the debtor in the obligation ... the obligation is in existence from the time of its constitution, although performance is not due until it is demanded by the creditor.

In *Advice Centre*, Lord Drummond Young also addressed this issue. Although he noted that the distinction has not been made in any of the other cases, he stated that 'an option may properly be characterised as a power rather than a right, and what is made real is not the entitlement in the option but the right that arises when it is exercised'.[51] It is submitted that characterising an option as conferring a power is not determinative. If Hohfeldian terminology is accepted, the characterisation as a 'power' is, of course, quite correct. Options are one of the examples which Hohfeld

---

48 See n12.

49 Chp 8, text following n100.

50 *Davidson v Zani* 1992 SCLR 1001 (Sh Ct) 1004D. The same point is made in the English case of *London and South Western Railway Co v Gomm* (1880) 20 Ch D 562 (CA) 581.

51 *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [51].

himself used to illustrate his concept of 'power'.[52] However, the fact that an option may be characterised as conferring a 'power' is not conclusive against the application of the offside goals rule. The holder of an unrecorded disposition also has a 'power'[53] (that is to say, the ability unilaterally to affect another's legal position) and there is no doubt that that 'power' is protected by the offside goals rule.

Given the variety of theories which it is possible to advance about the nature of an option, and the fact that Scots law has yet to adopt a view of its own,[54] it is submitted that formalistic reasoning which depends upon the classification of the option holder's right is unlikely to provide a conclusive answer to the question of whether the offside goals rule applies. Instead, that issue should be faced head on: does the offside goals rule apply to protect the legal position of one who, by intimating his intention to acquire property, can oblige another to convey to him, or is its application limited to those who are already bound to acquire?

The following may be said in favour of the offside goals rule applying to options. First, there is case law, accepted by commentators, which holds that the rule applies to rights of pre-emption. This is the basis on which the decisions in *Matheson v Tinney*[55] and *Roebuck v Edmunds*[56] are explained.[57] A pre-emption right is weaker than an option: it gives the holder the power to purchase only if the grantor triggers the pre-emption, typically by selling the property. In an option, the holder has the power to purchase regardless of whether the grantor decides to sell, although he may only be able to exercise that power at a particular point in time.[58] Any objection

---

52 WN Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 50 – 51.

53 Reid *Property* [644].

54 See Chp 5 Pt A.1(e).

55 1989 SLT 535 (OH).

56 1992 SCLR 74 (OH)

57 Reid *Property* [698]. Anderson has noted that the earlier law differed: RG Anderson *Assignation* (2008) Chp 11, Pt B. In *Stirling v Johnson* (1756) 5 Br Sup 323 a transfer in breach of a right of pre-emption was not reduced, despite the transferee's bad faith. It was said that the transferor was 'in pessima fide to transgress the prohibition, and as the purchaser knew it, he was particeps; but the answer to this was, that as he knew of the prohibition, so he knew it was ineffectual in law': 324. This was criticised by Erskine *Institute* II iii 13, n37. Cf *Workman v Crawford* (1672) Mor 10 208 where an obligation to denude once paid sums due was said to be of no effect against a singular successor, unless he knew of the back-bond in which the obligation was contained or acquired without onerous cause.

58 The contrast is not as absolute as this. As Professor Wade has remarked in an English context, one could conclude an option which is conditional upon the grantor ceasing to make a particular use of the subjects: HWRW 'Rights of Pre-Emption: Interests in Land' (1980) 96 LQR 488, 490. This makes the different treatment of options and pre-emptions even more difficult to justify.

which may be made against the application of the offside goals rule to options on the basis that the initial personal right is too remote from the real right which would result from exercise, may also be made in respect of rights of pre-emption. *Matheson v Tinney* and *Roebuck v Edmunds* cannot stand with a decision that the offside goals rule does not apply to options. It is odd, therefore, that both were cited by Lord Drummond Young with apparent approval in *Advice Centre*.[59]

Secondly, if the rule is that the offside goals rule does not apply to protect those who have the power, but no obligation, to acquire, it must also exclude from its scope contracts of sale subject to a potestative condition. There has previously been no suggestion that this is the case.

Thirdly, other legal systems use their equivalents of the offside goals rule to enforce options against successors in title. In South Africa, for example, the position of an option holder is equated to that of a purchaser[60] and the doctrine of notice applied to protect him.[61] In English law an option to purchase a legal estate is a form of estate contract, which is an equitable right and may accordingly bind third parties.[62] There are statutory provisions which require such rights to be registered in certain circumstances in order to bind a transferee.[63] In French law, too, although the option holder's right is purely personal, it is protected against transfer by the grantor to a knowing or gratuitous successor, as such a transfer can be held *inopposable* in a question with the option holder.[64] (The rule that the grantor of an option may simply revoke it upon paying damages may, however, mean that the law will change here.[65])

---

59 *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 [50].

60 eg *Le Roux v Odendaal* 1954 (4) SA 432 (NPD) 442 D – F.

61 Cooper *Landlord & Tenant* 300 – 303; Kerr *Sale & Lease* 441; PJ Padenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* (5th edn 2006) 433; *McGregor v Jordaan* 1921 CPD 301; *Archibald & Co Ltd v Strachan & Co Ltd* 1944 NPD 40, 46 – 47; *Van der Pol v Symington* 1971 (4) SA 472 (TPD).

62 Gray & Gray *Elements* [9.38] – [9.40] on the protection of estate contracts against transferees in general and [9.82] on options in particular. Also: M Dray & A Rosenthal *Barnsley's Land Options* (4th edn 2004) [2.080] – [2.109].

63 Registration is required for unregistered land in the Land Charges Register by the Land Charges Act 1972 and in the Land Register in respect of registered land by the Land Registration Act 2002. Where the option subsists in respect of registered land, there is an exception to the need for registration where the beneficiary of the estate contract is 'in actual occupation', which will typically be satisfied where the option is in a lease: Land Registration Act 2002 s29(1) & 2(a)(ii) & Sch 3, Para 2.

64 A Bénabent *Droit civil: les contrats spéciaux civils et commerciaux* (6th edn 2004) [94]; P Malaurie & L Aynès *Les contrats spéciaux* (2nd edn 2005) [113]; B Gross & P Bihr *Contrats: ventes civiles et commerciales, baux d'habitation, baux commerciaux* (2002) [73].

65 Gross & Bihr ibid.

Fourthly, Professor Reid's initial view,[66] and that of the Scottish Law Commission,[67] was that options to purchase do benefit from the offside goals rule, although both were admittedly based on *Davidson v Zani*.[68]

Against the application of the offside goals rule are the same policy factors which, it was noted in Chapter Six,[69] militate against the protection of the options to purchase as real burdens. Options are thought to be oppressive to owners. If these objections are sufficiently strong to require that options cannot bind successors even when registered, this approach should not be undermined by rendering options binding upon successors by virtue of the offside goals rule. However, these policy arguments required legislation to receive effect in the field of real burdens. And, in any event, the arguments made by the Scottish Law Commission apply equally to concluded contracts to transfer property: if a successor is bound by such a contract, he is deprived of property which he has acquired, and that is what the offside goals rule does. Finally, one might say that the offside goals rule is an exceptional one and, as an exception, it should be construed narrowly. On balance, the arguments in favour of applying the offside goals rule seem stronger.

A second possible objection to the application of the offside goals rule to options can only be made in respect of some options, namely those which can only be exercised at a particular point in the future. This could be said to prevent the option holder from having a right which is capable of being made real at the time of transfer. This is really just a variant of the argument presented above. It is not a strong point. It has not been suggested that the offside goals rule should not apply to a contract of sale with a future date of entry (as will typically be the case).[70] In *Davidson* this argument was dismissed: the fact that the obligation was a future one did not make it any less a present right.[71] The Sheriff Principal quoted Stair:

---

66 Reid *Property* [698]. Cf G Gretton & KGC Reid *Conveyancing 2004* (2005) 106.

67 Scottish Law Commission *Report on Real Burdens* (SLC Rpt 181, 2000) [10.15].

68 1992 SCLR 1001 (Sh Ct).

69 Chp 6 Pt A.2.

70 See, though, the suggestion that if the rule were to apply to leases, which is not the current law, it would only apply when the date of entry had passed but the tenant had not taken possession: *Birbeck v Ross* (1865) 4 M 272 (OH), discussed at n85.

71 *Davidson v Zani* 1992 SCLR 1001 (Sh Ct) 1004.

'[O]bligations to a day are presently binding, but the effect or execution thereof is suspended to a day'.[72]

(b) A problem of remedies

This point is specific to options in leases: in such cases, the offside goals rule is put to a different use from usual.[73] In the paradigm offside goals case, A contracts to sell to B but, in breach of that contract, transfers to C. B then seeks reduction of the transfer to C and implement against A of the obligation to transfer to him. That approach is still open where the first grant is a free-standing option: if A grants an option to B and then transfers to C, B might exercise the option against A, and then seek reduction of the transfer to C and implement against A of the obligation to convey resulting from exercise.[74] In the case of an option in a lease, the rule is relied upon with a different objective in mind. Instead of seeking reduction of the transfer to C and then implement of the contract between A and B, B (the tenant) argues that C (the successor landlord) is bound by the obligation to convey to B upon payment of the purchase price. To argue that B may reduce the transfer to C and then enforce the contract with A is difficult, for B is likely to have recognised the transfer to C in other ways, such as by having paid rent to C. It is, however, unclear whether the offside goals rule can be used so as to impose a direct obligation on the successor. Reid thought that it could be.[75] In addition to the situation in *Davidson*, he posits two other cases in which it would be more convenient to have the obligation simply declared binding on the successor, as opposed to reducing the transfer to him. One is where the first grantor is insolvent, as reduction would mean that the property falls into the sequestrated estate; the other is where the first grant is of a subordinate real right. In *Greig v Brown & Nicolson*[76] a servitude was enforced against a singular successor of the grantor despite not having been made real. There is academic support for the position that the offside goals rule applies to leases and so simply

---

72 Stair *Institutions* I iii 7.

73 AJM Steven 'Options to Purchase and Successor Landlords' (2006) 10 Edin LR 432, 436.

74 B will in any event wish to exercise the option in a question with A so as to be able to claim damages for breach of the resulting obligation to transfer if the offside goals argument is unsuccessful.

75 Reid *Property* [700].

76 (1829) 7 S 274 (IH).

renders the right granted by A binding upon C.[77] In *Stodart v Dalzell*[78] Lord Gifford states that the result of what is now known as the offside goals rule is that the impugned grantee is made liable in the obligations of his author. As noted above, English and South African law have no problem relying on parallel doctrines to hold a successor bound by the obligations of an option, even where that is in a lease. It is thought that this is also Scots law. If, however, the offside goals rule is only a rule about reduction of title, then it cannot be relied upon in the case of options to purchase in leases (unlike the position for free standing options).

2. New lease to commence at the ish of current lease

Chapter Five discussed the various means by which parties might extend a lease. One possibility was to conclude a lease to commence at the ish of the current lease. Where the second lease is for twenty years or less, it does not bind a successor who acquires prior to its date of entry, for it is not until then that the tenant can begin to possess by virtue of the new lease. The rule is said to be no different if the successor is aware of the second lease. In *Johnston v Monzie*[79] 'it was offered to be proved ... that the purchaser knew of this prorogation; but the Lords did not listen to that'. This differed from the earlier case of *Richard v Lindsay*,[80] where a landlord granted his tenant a second lease to run from the expiry of the first and this was held to bind a successor who acquired in the meantime, with knowledge of the second lease.[81] It is the rule in *Johnston* which is generally accepted.[82]

What of the offside goals rule? Reid's three criteria are met:[83] there is an antecedent obligation affecting the grantor; the second grant is in breach of that prior obligation (for, unless the transferee is taken bound by the future lease, or other steps are taken to ensure that performance will be forthcoming, the transfer will put

---

77 Pt C.2.

78 (1876) 4 R 236 (IH) 243.

79 (1760) 5 Br Sup 877.

80 (1725) Mor 15 217. In his notes to the edition of Stair which he edited, More explained *Richard* as creating a personal exception in the acquirer: JS More *Notes to Stair's Institutions* (1832) ccxlv. This is classic 'offside goals' language.

81 There are other specialities to the decision: the second lease was granted on deathbed. Hunter viewed the case as proceeding upon this ground: Hunter vol I 491.

82 Rankine 149; Paton & Cameron 115 (although they do not note the conflict with *Richard*); SME vol 13 [312]; *Birbeck v Ross* (1865) 4 M 272 (OH) 276 – 7; *Jacobs v Anderson* (1898) 6 SLT 234 (OH).

83 Reid *Property* [695]..

performance out of the transferor's power[84]); and the transferee knew of the obligation. The issue, though, is whether leases are rights to which the offside goals rule applies at all. *Johnston* is simply a decision that the rule penalising private knowledge of a prior right does not apply to leases. This position has been reiterated in two cases since, but without any clear explanation as to why the law should be so. In *Birbeck v Ross*[85] the parties had agreed a two-year shooting lease and a further ten-year lease to commence upon the expiry of the first. The subjects were sold during the first lease and the question was which, if either, of the leases bound the successor. The Lord Ordinary (Barcaple) held that neither did. The main ground of decision was that the 1449 Act did not apply to a shooting lease because the requirement of possession could not be satisfied. He then considered the effect of the successor's knowledge of the existence of a lease, stated that knowledge could not make up for the fact that the 1449 Act did not apply to such leases, and concluded, *obiter*:[86]

> The question undoubtedly assumes a different aspect if the purchaser's right to object rests entirely upon the want of possession under the minute of agreement [which contained the second lease]. It seems less inconsistent with legal principle to hold that a defect of this kind may be supplied by a proof of the purchaser's knowledge of the right, and want of good faith. But looking to the principle on which leases, in their own nature merely contracts personally binding upon the parties to them, are effectual against singular successors, the Lord Ordinary thinks it impossible to hold that an obligation to enter into a lease on which there has been no possession, and the term of entry under which has not arrived when the lands are sold, is binding upon the purchaser in respect of his knowledge of the contract.

In *Jacobs v Anderson*[87] a head-landlord undertook to a sub-tenant to grant him a lease upon expiry of the head-lease. The sub-tenant argued that the head-landlord's successor was bound by this obligation because he had been aware of it when he purchased the property. Lord Kyllachy rejected this:[88]

> It may not be easy to fix the precise limits of the doctrine established or recognised by the cases of *Marshall*; *Petrie*; *Stodart*; and other cases of that

---

84 Chp 8 Pt B.4.

85 (1865) 4 M 272 (OH).

86 ibid 276.

87 (1898) 6 SLT 234 (OH).

88 ibid. The citations for the cases which are cited are: *Marshall v Hynd* (1828) 6 S 384 (IH); *Petrie v Forsyth* (1874) 2 R 214 (IH); *Stodart v Dalzell* (1876) 4 R 236 (IH); *Johnston v Monzie* (1760) 5 Br Sup 877; *Pollock, Gilmour & Co v Harvey* (1828) 6 S 913 (IH) and *Birbeck v Ross* (1865) 4 M 272 (OH).

description. But it is certainly the fact that that doctrine has never been applied to leases or similar contracts affecting land which remain merely personal and on which possession has not followed. The Act of 1449 provides the rule in such cases; and, indeed, the point seems to have been more than once expressly decided. See *Johnstone*; *Pollock*; *Birbeck*.

If the rule is clear, the reasons for it are not. These passages provide little insight into why leases are excluded from the offside goals rule. Both show signs of influence of the original view that a lease was simply a contract. This thesis has not explored the thorny question of whether lease should best be characterised as a real right or as a personal right which behaves in a particular fashion.[89] It was suggested that a plausible view is that a lease, when protected by the 1449 Act or by registration, is both a contract and a real right. But even if one were to conclude that lease is not a real right, nevertheless, it clearly has some real characteristics and there seems to be no good reason why one of these could not be that it benefits from the protection of the offside goals rule. Certainly Reid suggests that the exclusion of leases ought to be reconsidered[90] and there is other academic support for this position.[91] The South African doctrine of notice applies so as to bind a knowing successor to a lease which has not been made real.[92] One possibility, hinted at by Lord Barcaple in *Birbeck*, is that the offside goals rule might apply to a lease which has commenced but where the tenant has not taken possession, but not to a situation where the term of entry has not arrived at the point when ownership of the land is transferred. As it seems never to have been suggested that the offside goals rule does not apply to protect a purchaser under a contract of sale with a future date of entry, it is unclear why leases should be treated differently.

3. Options to renew

In Chapter Five the current rule about renewal options was outlined: in an unregistered lease, such an option is a personal condition, whereas in a registered lease, the option is probably real.[93] It cannot be said with confidence whether an

---

89 Chp 1 Pt B.

90 Reid *Property* [697].

91 DA Brand, AJM Steven & S Wortley *Professor McDonald's Conveyancing Manual* (7th edn, 2004) [32.60]. Both cite *Greig v Brown & Nicolson* (1829) 7 S 274 (IH), a case in which a servitude was enforced against a singular successor of the grantor despite its not having been made real.

92 Cooper *Landlord & Tenant* 284.

93 Chp 5 Pt A.2(b) & Pt B.3(b).

option to renew an unregistered lease would bind a successor by virtue of the offside goals rule. Given what has just been said about the current inapplicability of the offside goals rule to leases to commence at a future date, a mere option to conclude such a contract of lease will also not benefit from the offside goals rule.[94] Even were the offside goals rule to apply to leases, as academics suggest it should, the same difficulties would arise when applying the offside goals rule to an option to renew a lease as exist in respect of an option to purchase: are options protected by the rule at all and, if they are, does the rule provide an appropriate remedy?

4. Other uses of the offside goals rule

There have been two other recent cases where parties have sought to rely upon the offside goals rule in cases concerning a lease. The discussion in this chapter makes clear why, in both, the argument based on the offside goals rule could not have succeeded. In *Allan v Armstrong*[95] a tenant sued his solicitors for negligence when a successor landlord asserted that he was not bound by a break option contained in missives of let but not in the lease. One of the solicitor's arguments was that, because the successor had known of the term, it was bound by it and so there was no loss on which to found a negligence claim. As a break option is a real condition,[96] the offside goals point need not have been taken. The true issue in the case was whether the fact that the option had been omitted from the lease prevented it from binding a successor. It was suggested above that it should not.[97] In any event, the offside goals argument would have been unsuccessful: a break option is not a right to acquire a real right and so the offside goals rule would not render it binding upon a successor.

The other modern case in which an offside goals argument has been made in respect of leases is *Optical Express (Gyle) Ltd v Marks and Spencer plc*.[98] One of the three issues raised was whether a lease granted by a successor in breach of an exclusivity agreement entered into by the original landlord could be reduced and the

---

94 Although in *Clerk v Faruqharson* (1799) Mor 15 225 magistrates allowed proof as to whether the successor was aware of the landlord's obligation to grant a further lease. This case predates current formulations of the rule.

95 2004 GWD 37-768 (OH).

96 Chp 5 Pt A(2)(d) & Pt B.3(c).

97 Chp 2, text to n109.

98 2000 SLT 644 (OH).

tenant to whom the lease had been granted interdicted from carrying on business. Lord Macfadyen held that that offside goals rule did not produce the result sought:[99]

> It [the pursuer's argument] involves in my view a confusion between two types of real right. If the pursuers are right in their primary contention, the pursuers have a real right against the first and second defenders [the successor landlords] in the sense that the exclusivity clause as part of the lease of unit 41 has become enforceable against the first and second defenders as singular successors of the council.[100] But the pursuers have no real right, and no right capable of being made real, in the subjects of the lease between the first and second defenders and the third defenders, namely unit 56. As is in my view clear from what was said by Lord President Emslie in *Trade Development Bank v Warriner & Mason (Scotland) Ltd*, the sort of right that will prevent a party from taking a right to subjects in good faith is a prior right in respect of the relevant subjects which is either real or capable of being made real.

The conclusion is correct, but there is room for greater precision in terminology. If the pursuers had succeeded in their first and second arguments, the exclusivity clause would have bound the successor landlords not as a real right, as Lord Macfadyen stated, but as a real condition of the (most likely real right of) lease.[101] This was therefore an attempt to use the broader variant of the offside goals rule, *à la Trade Development Bank v Warriner & Mason (Scotland) Ltd*,[102] namely that a right granted in breach of a real condition of an existing real right is voidable. As was noted above, some prefer to view this as a self-standing rule, and not as an application of the offside goals rule.[103] This thesis expresses no concluded view on that point. The reason that this rule (be it an instance of the offside goals rule or otherwise) could not be applied in *Optical Express* was that the real condition bound the successor *qua* landlord of unit 41, not *qua* owner of unit 56. The distinction, explored in Chapter Seven,[104] between a term of the lease which runs between landlord and tenant for the time being, and a condition which runs directly between the tenant and the owner for the time being of other land, is therefore of critical importance.

---

99 2000 SLT 644 (OH) 651L – 652A. AJM Steven 'Keeping the Goalposts in Sight' 2000 SLT (News) 143.

100 Lord Macfadyen held that such a clause was not a real condition. Chapter 7 suggests that this is not the law: Chp 7 Pt B.2(a).

101 The distinction was explored at n16.

102 1980 SC 74 (IH).

103 Text to n14.

104 Chp 7 Pt A.2

D. CONCLUSION

This final chapter has considered whether a successor landlord is bound by a personal condition in a lease because he knows of it, or acquires gratuitously or for a materially undervalue consideration. The general rule is that knowledge does not render a personal condition binding upon a successor landlord: the successor may well know of the condition, but he also knows that it is personal. The offside goals rule is an exception to this proposition. This chapter suggests that options to purchase and rights of pre-emption do benefit from the offside goals rule, despite recent authority to the contrary. Obligations or options to renew the lease most likely do so also, although this would require the courts both to accept that options benefit from the offside goals rule and also to depart from the current rule that contracts of lease are not so protected. The rule does not, however, render voidable leases granted in breach of real conditions (such as exclusivity clauses) which relate to other property. Of all the areas discussed in this thesis, the matters canvassed in this chapter would most benefit from further academic research and development through case law.

BIBLIOGRAPHY

American Institute *Restatement of the Law Second: Property: Landlord and Tenant* (American Law Institute Publishers, St Paul, Minn 1977)

The American Law Institute *Restatement of the Law Third:Property: Servitudes* (American Law Institute Publishers, St Paul, Minn 2000)

RG Anderson '"Offside goals" before Rodger Builders' 2005 JR 277

RG Anderson 'Fraud on Transfer and on Insolvency: ta ... ta ... *tantum et tale*?' (2007) 11 Edin L Rev 187

RG Anderson *Assignation* (Edinburgh Legal Education Trust, Edinburgh 2008)

F Auque 'Les autorisations données en cours de bail sont-elles soumises aux dispositions de l'article 1328 du Code civil?' 1999 Semaine Juridique (No 51 – 52) Jurisprudence II 10 227

L Aynès *La Cession de contrat et les opérations juridiques à trois personnes* (Economica, Paris 1984)

PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Shoeman's The Law of Property* (5th edn LexisNexis Butterworths, Durban 2006)

A McDouall, Lord Bankton *An Institute of the Laws of Scotland* (1751 – 1753; Stair Society reprint, 3 vols, 1993 – 1995)

O Barret 'Promesse de Vente' in *L'Encyclopédie Dalloz* (Dalloz, Paris 2003)

SE Bartels & JM Milo 'Contents of Real Rights: Personal or Proprietary' in SE Bartels & JM Milo (eds) *Contents of Real Rights* (Wolf Legal Publishers, Nijmegen 2004)

JF Baur & R Stürner *Sachenrecht* (17th edn CH Beck, München 1999)

HG Beale (ed) *Chitty on Contracts* (29th edn Sweet & Maxwell, London 2004)

J Beatson *Anson's Law of Contract* (28th edn Oxford University Press, Oxford 2002)

AM Bell *Lectures on Conveyancing* (3rd edn Bell & Bradfute, Edinburgh 1882)

D Bell & R Rennie 'Purchase Options in Leases' 2006 (May) JLSS 49

GJ Bell (J M'Laren (ed)) *Commentaries on the Law of Scotland* (7th edn T & T Clark, Edinburgh 1870)

GJ Bell (W Guthrie (ed) *Principles of the Law of Scotland* (10th edn T & T Clark, Edinburgh 1899)

R Bell *A Treatise on Leases* (1st edn A Constable, Edinburgh 1803)

R Bell *A Treatise on Leases* (2nd edn A Constable, Edinburgh 1805)

R Bell (W Bell (ed)) *A Treatise on Leases* (3rd edn A Constable, Edinburgh 1820)

R Bell (W Bell ed)) *A Treatise on Leases* (4th edn Archibald Constable & Co, Edinburgh 1825)

W Bell (G Watson (ed)) *Dictionary and Digest of the Law of Scotland* (7th edn Bell & Bradfute, Edinburgh 1890)

A Bénabent *Droit civil: les contrats spéciaux civils et commerciaux* (6th edn Montchrestien, Paris 2004)

F Benac-Schmidt Note to Cass 3e civ 15 dec 1993 in D 1994 Jurisprudence 507

FAR Bennion with K Goodall & G Morris (eds) *Bennion on Statutory Interpretation: A Code* (5th edn LexisNexis, London 2008)

L Berger 'A Policy Analysis of Promises Respecting the Use of Land' (1970) 50 Minnesota L Rev 167

H Bigelow 'The Contents of Covenants in Leases' (1914) 30 LQR 319

TM Bingham '"There is a World elsewhere": The Changing Perspectives of English Law' (1992) 41 ICLQ 513

O Jauernig *Bürgerliches Gesetzbuch* (10th edn Verlag CH Beck, München 2003)

R Black (ed) 'Obligations' in R Black (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XV (The Law Society of Scotland/Butterworths, Edinburgh 1996)

YM Boon *Assignment of Contract: A Study in Comparative Law* (Unpublished M Litt thesis, University of Aberdeen 1971)

DA Brand, AJM Steven & S Wortley *Professor McDonald's Conveyancing Manual* (7th edn LexisNexis UK, Edinburgh 2004)

S Bright 'The Third Party's Conscience in Land Law' [2000] Conv 398

MP Brown *Treatise on the Law of Sale* (W & C Tait, Edinburgh 1821)

S Brymer 'Enforcing Commercial Lease Terms against Successor Landlords Pt I' (2001) 49 Green's Property Law Bulletin 4

S Brymer 'Enforcing Commercial Lease Terms against Successor Landlords Pt II' (2001) 50 Green's Property Law Bulletin 3

EH Burn *Cheshire and Burn's Modern Law of Real Property* (14th edn Butterworths, London 1988)

EH Burn & J Cartwright *Cheshire and Burn's Modern Law of Real Property* (17th edn Oxford University Press, Oxford 2006)

H Burn-Murdoch *Interdict in the Law of Scotland* (Wm Hodge & Co Ltd, Edinburgh 1933)

A Burrows (ed) *English Private Law* (2nd edn Oxford University Press, Oxford 2007)

PJ Butt *Land Law* (4th edn LBC Information Services, North Ryde, NSW 2001)

JGS Cameron *et al* 'Landlord and Tenant' in R Black (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XIII (The Law Society of Scotland/Butterworths, Edinburgh 1992)

C-W Canaris 'Die Verdinglichung obligatorischer Rechte' in HH Jakobs *et al* (eds) *Festschrift für Werner Flume zum 70. Geburtstag: vol I* (Verlag Dr Otto Schmidt KG, Köln 1978) 1

P Cannon *Tolley's Stamp Taxes 2005-06* (LexisNexis Tolley, London 2005)

DL Carey Miller 'Good faith in Scots property law' in ADM Forté (ed) *Good Faith in Contract and Property* (Hart Publishing, Oxford 1999) 103

DL Carey Miller with D Irvine *Corporeal Moveables in Scots Law* (W Green, Edinburgh 2005)

JW Carter *Breach of Contract* (2nd edn Sweet & Maxwell, London 1991)

JW Carter & DJ Harland *Contract Law in Australia* (4th edn Butterworths, Chatswood NSW 2002)

RH Christie assisted by V McFarlane *The Law of Contract in South Africa* (5th edn LexisNexis Butterworths, Durban 2006)

E Clive & D Hutchison 'Breach of Contract' in R Zimmermann, D Visser & K Reid *Mixed Legal Systems in Comparative Perspective* (Oxford University Press, Oxford 2004) 176

DW Cockburn *Commercial Leases* (Butterworths, Edinburgh 2002)

Code civil (104th edn Dalloz, Paris 2005)

F Collart Dutilleul *Les contrats préparatoires à la vente d'immeuble* (Sirey, Paris 1988)

F Collart Dutilleul & P Delebecque *Contrats civils et commerciaux* (7th edn Dalloz, Paris 2004)

WE Cooper *Landlord and Tenant* (2nd edn Juta & Co Ltd, Kenwyn 1994)

AL Corbin *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law* vol IV (Lexis Law Publishing, Charlottesville, VA 1951)

Corpus Juris Secundum: vol 52 Landlord and Tenant (Thomson/West 2003)

T Craig (Lord Clyde (tr)) *The Jus Feudale* (W Hodge, Edinburgh 1934)

C Crome 'Die juristische Natur der Miethe nach dem Deutschen Bürgerlichen Gesetzbuch' (1897) 37 Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1

DJ Cusine (ed) *The Conveyancing Opinions of Professor JM Halliday* (W Green/Sweet & Maxwell, Edinburgh 1992)

DJ Cusine & RRM Paisley *Servitudes and Rights of Way* (W Green, Edinburgh 1998)

J Dainow *La nature juridique du droit du preneur à bail dans la loi Française et dans la loi de Québec (Canada)* (Librairie du Recueil Sirey, Paris 1932)

F Davidson *Arbitration* (W Green, Edinburgh 2000)

MJ de Waal 'Servitudes' in D Visser & R Zimmermann (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press, Oxford 1996) 785

BWF Depoorter & F Parisi 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' (2003) *Global Jurist Frontiers* Vol 3 Issue 1 Article 2, available at: http://www.bepress.com/gj/frontiers/vol3/iss1/art2

P Derleder & K Bartels 'Der Vermieterwechsel bei der Wohnraummiete' 1997 Juristenzeitung 981

J Derruppé *La nature juridique du droit du preneur à bail et la distinction des droits réels et des droits de créance* (Dalloz, Paris 1952)

J Dietrich 'Giving Content to General Concepts' (2005) 29 Melbourne University L Rev 218

A Dowling 'Contractual licences: third parties and implied terms' [2006] Conv 197

M Dray & A Rosenthal *Barnsley's Land Options* (4th edn Sweet & Maxwell, London 2004)

A Duff *A Treatise on the Deed of Entail* (Bell & Bradfute, Edinburgh 1848)

V Emmerich '§566 – §567b' in V Emmerich & C Rolfs (eds) *J von Staudingers Kommentar zum Bürglerlichen Gesetzbuch: Buch 2: Recht der Schuldverhältnisse §§563 – 580a (Mietrecht 2)* (new edition Sellier – de Gruyter, Berlin, 2003)

RA Epstein 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 Southern California L Rev 1353

J Erskine (J Gillon (ed)) *An Institute of the Law of Scotland* (4th edn Bell & Bradfute, Edinburgh 1805)

J Erskine (A Macallan (ed)) *An Institute of the Law of Scotland* (7th edn The Edinburgh Printing and Publishing Company, Edinburgh 1838)

J Erskine (JB Nicolson (ed)) *An Institute of the Law of Scotland* (8th edn Bell & bradfute, Edinburgh 1871; Butterworths/Law Society of Scotland, Edinburgh 1989 reprint)

J Erskine (J Rankine (ed)) *Principles of the Law of Scotland* (21st edn William Green & Sons Edinburgh 1911)

WD Evans (tr) M Pothier *A Treatise on the Law of Obligations, or Contracts* vol I (J Butterworth, London 1806)

TM Fancourt *Enforceability of Landlord and Tenant Covenants* (London Thomson Sweet & Maxwell 2006)

EA Farnsworth *Farnsworth on Contracts* (2nd edn Aspen Publishers, Inc, New York 1998)

S Farran & D Cabrelli 'Exploring the Interfaces Between Contract Law and Property Law: A UK Comparative Approach' (2006) 13 *Maastricht Journal of European and Comparative Law* 403

SF French 'Towards a Modern Law of Servitudes: Reweaving the Ancient Strands' (1981 - 1982) 55 Southern California L Rev 1261

SF French 'The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E Berger' (1998) 77 Nebraska L Rev 653

S French 'The American Restatement of Servitudes Law: Reforming Doctrine by Shifting from Ex Ante to Ex Post Controls on the Risks Posed by Servitudes' in S van Erp & B Akkermans (eds) *Towards a Unified System of Land Burdens?* (2006) 109

H-H Gather 'Die Rechtslage beim Wechsel des Vermieters' in W-R Bub *et al* (eds) *Festschrift für Johannes Bärmann und Hermann Weitnauer* (CH Beck-sche Verlagsbuchhandlung, München 1990) 295

J Gaunt & P Morgan *Gale on Easements* (17th edn Sweet & Maxwell, London 2002)

K Genius *Der Bestandschutz des Mietverhältnisses in seiner historischen Entwicklung bis zu den Naturrechtskodifikationen* (1972)

J Ghestin, C Jamin & M Billiau *Traité du droit civil: les effets du contrat* (3rd edn LGDJ, Paris 2001)

B Gill *The Law of Agricultural Holdings in Scotland* (3rd edn W Green/Sweet & Maxwell, Edinburgh 1997)

SD Girvin 'An evaluation of the career of a Scots colonial judge: John Dove Wilson of Natal' 1990 JR 35

WM Gloag *The Law of Contract* (2nd edn W Green & Son Ltd, Edinburgh 1929; reprinted by Caledonian Books, Collieston 1985)

WM Gloag & RC Henderson *Introduction to the Law of Scotland* (1st edn W Green & Son, Edinburgh 1927)

WM Gloag & RC Henderson (Lord Coulsfield & HL MacQueen (eds)) *Introduction to the Law of Scotland* (12th edn W Green & Son Ltd Edinburgh 2007)

WM Gloag & JM Irvine *Law of Rights in Security* (William Green & Sons, Edinburgh 1897)

J Gordley *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press, Oxford 1991)

WM Gordon *Scottish Land Law* (2nd edn W Green & Son Ltd, Edinburgh 1999)

K Gray & SF Gray *Elements of Land Law* (4th edn Oxford University Press Oxford 2005)

GL Gretton 'The Concept of Security' in DJ Cusine (ed) *A Scots Conveyancing Miscellany* (1987) 126

GL Gretton 'Registration of Company Charges' (2002) 6 Edin LR 146

GL Gretton & KGC Reid *Conveyancing* (3rd edn Thomson/W Green, Edinburgh 2004)

G Griolet & C Vergé *Nouveau Code civil: annoté et expliqué d'après la jurisprudence et la doctrine: vol IV, part I* (Jurisprudence Générale Dalloz, Paris 1905 – 1907)

B Gross & P Bihr *Contrats: ventes civiles et commerciales, baux d'habitation, baux commerciaux* (2nd edn Presses Universitaires de France, Paris 2002)

KH Gursky *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Drittes Buch Einleitung zum Sachenrecht §§ 854 – 882* (2000)

W Guy 'Registration of Leases' (1908 – 1909) 20 JR 234

GRJ Hackwill *Mackeurtan's Sale of Goods in South Africa* (5th edn Juta, Cape Town 1984)

JM Halliday (IJ Talman (ed)) *Conveyancing Law and Practice in Scotland* vol II (2nd edn W Green, Edinburgh 1997)

JM Halliday 'Acquiescence, Singular Successors and the Baby Linnet' (1977) 22 JR 89

S Halliday 'Tacit Relocation' 2001 JR 201.

PJ Hamilton (ed) WG Dickson *A Treatise on the Law of Evidence* vol II (3rd edn T & T Clark, Edinburgh 1887)

C Harpum *The Law of Real Property* (6th edn Sweet & Maxwell Ltd, London 2000)

M Häublein '§§566 – 567b' in W Krüger & HP Westermann (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 3 Schuldrecht, Besonderer Teil I* (4th edn Verlag CH Beck, München 2004)

GLF Henry 'Personal Rights' (1961) II *Conveyancing Review* 193

M Hogg 'Leases: Four Historical Portraits' in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* vol I (Oxford University Press, Oxford 2000) 363

M Hogg *Obligations* (2nd edn Avizandum Publishing, Edinburgh 2006)

WN Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16.

WN Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913 - 1914) 23 Yale LJ 16 & (1916 - 1917) 26 Yale LJ 710

T Huc *Commentaire théorique et pratique du Code civil* vol X (Librairie Cotillon, Paris 1897)

C Hugo & P Simpson 'Lease' in R Zimmermann, D Visser & K Reid *Mixed Legal Systems in Comparative Perspective* (Oxford University Press, Oxford 2004) 301

Baron Hume (GCH Paton (ed)) *Lectures 1786 – 1822* vol II (The Stair Society, Edinburgh 1949)

Baron Hume (GCH Paton (ed)) *Lectures 1786 - 1822* vol IV (The Stair Society, Edinburgh 1955)

R Hunter *A Treatise on the Law of Landlord and Tenant* (1st edn Bell & Bradfute, Edinburgh 1833)

R Hunter *A Treatise on the Law of Landlord and Tenant* (2nd edn Bell & Bradfute, Edinburgh 1845)

R Hunter *A Treatise on the Law of Landlord and Tenant* (3rd edn Bell & Bradfute, Edinburgh 1860)

R Hunter (W Guthrie (ed)) *A Treatise on the Law of Landlord and Tenant* (4th edn Bell & Bradfute, Edinburgh 1876)

D Hutchison & BJ van Heerden 'Remedies for Breach of an Option' (1988) 105 South African LJ 547

M Hutton & S Anstley *Stamp Duty Land Tax* (2nd edn Tottel Publishing, Haywards Heath 2005)

DM Johnston 'The Renewal of the Old' [1997] CLJ 80

DJ Joubert *General Principles of the Law of Contract* (Juta & Co Ltd, Cape Town 1987)

M de Juglart in H Mazeaud, L Mazeaud & J Mazeaud (eds) *Leçons de droit civil Tome III* vol II *Principaux contrats* (3rd edn Éditions Montchrestien, Paris 1968)

Juridical Society of Edinburgh *A Complete System of Conveyancing* (6th edn William Green & Sons, Edinburgh 1907)

B Jüttner *Zur Geschichte des Grundsatzes 'Kauf Bricht Nicht Miete'* (Inaugural-Dissertation, Westfälischen Wilhelms-Universität Münster, 1960)

E Kahn *et al Principles of the Law of Sale & Lease* (Juta & Co Ltd, Kenwyn 1998)

AJ Kerr 'Lease' in LTC Harms & JA Faris (eds) *The Law of South Africa* vol XIV pt 2 (2nd edn LexisNexis, Durban 2007)

AJ Kerr *The Principles of the Law of Contract* (LexisNexis Butterworths, Durban 2002)

AJ Kerr *The Law of Sale and Lease* (3rd edn LexisNexis Butterworths, Durban 2004)

H Krenek *Die Problematik des §571BGB in direkter und analoger Anwendung* (Inaugural Dissertation zur Erlangerung der Doktorwürde der Hohen Juristischen Fakultät der Bayerischen Julius-Maximilians-Universität, Würzburg 1989)

K Larenz & M Wolf *Allgemeiner Teil des Bürgerlichen Rechts* (9th edn CH Beck, München 2004)

C Larroumet *Droit civil: vol III: les obligations, le contrat* (5th edn Economica Paris 2003)

Law Commission (England & Wales) *Landlord and Tenant Law: Privity of Contract and Estate* (LC 174, 1988)

Law Commission (England & Wales) *Easements, Real Covenants and Profits à Prendre: A Consultation Paper* (LC CP 186, 2008)

Law Reform Commission (Ireland) *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28, 2003)

Law Reform Commission (Ireland) *Report on the Law of Landlord and Tenant* (LRC 85, 2007)

RA Lord *Williston: A Treatise on the Law of Contracts* vol XXIII (4th edn West Group, 2003)

JG Lotz 'Lease' in WA Joubert (ed) *The Law of South Africa* vol XIV (Butterworths, Durban – Pretoria 1981)

P Malaurie, L Aynès & P-Y Gautier *Les contrats spéciaux* (2nd edn revised Defrénois, Paris 2005)

TW Mapp *Torrens' Elusive Title* (Alberta Law Review, Edmonton 1978)

A McAllister *Scottish Law of Leases* (3rd edn LexisNexis Butterworths Tolley, Edinburgh 2002

A McAllister 'Leases and the requirements of writing' 2006 SLT (News) 254

WW McBryde *The Law of Contract in Scotland* (3rd edn Thomson/W Green, Edinburgh 2007)

DJ MacCuish & D Flyn *Crofting Law* (Butterworths Law Society of Scotland, Edinburgh 1990)

H M'Kechnie 'Superior and Vassal' in Viscount Dunedin (ed) *Encyclopaedia of the Laws of Scotland* (W Green & Son Ltd, Edinburgh 1933)

E McKendrick *Contract Law* (6th edn Palgrave Macmillan, Basingstoke 2005)

G Mackenzie *Observations on the Acts of Parliament made by King James the First, King James the Second, King James the Third, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second* (Edinburgh 1687)

J McLaren *The Law of Wills and Succession as administered in Scotland including trusts, entails, powers, and executry* (3rd edn Bell & Bradfute, Edinburgh 1894)

HL MacQueen 'Offers, Promises and Options' 1985 SLT (News) 187

G Maher & TB Smith 'Sources of Law (Formal)' in R Black (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* vol XXII (The Law Society of Scotland/Butterworths, Edinburgh 1987)

D Mainguy 'L'efficacité de la retraction de la promesse de contracter' 2004 *Revue trimestrielle de droit civil* 1

D Medicus *Schuldrecht II: Besonderer Teil* (12th edn 2004)

TW Merrill & HE Smith 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 Yale LJ 1.

TW Merrill & HE Smith 'The Property/Contract Interface' (2001) 101 Columbia L Rev 773

JS More (J McLaren (ed)) *Lectures on the Law of Scotland* (Bell & Bradfute, Edinburgh 1864)

Motive zu dem Entwurf eines Bürgerlichen Gesetzbuchs für das Deutsche Reich vol III: Sachenrecht (1888, 1997 reprint)

C Müller 'Die Rechtsstellung des Mieters in Rom und Karlsruhe' (1997) 197 AcP 537

D Neuberger & J Bassett 'Options: are they worth the paper they are written on?' in *The Blundell Memorial Lectures: Current Problems in Property Law* (published under the auspices of The General Council of the Bar, The Law Society and The Royal Institution of Chartered Surveyors, London 1988) 1

R Nock *Stamp Duty Land Tax: The New Law* (2004)

KW Nörr, R Scheyhing & W Pöggeler *Sukzessionen: Forderungszession, Vertragsübernahme, Schuldübernahme* (2nd edn Mohr Siebeck, Tübingen 1999)

G Otte 'Die dingliche Rechtsstellung des Mieters nach ALR und BGB' in O Behrends *et al* (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (Vandenhoeck & Ruprecht, Göttingen 1978)

RRM Paisley (ed) *Green's Practice Styles* (W Green/Sweet & Maxwell, Edinburgh 1995; looseleaf)

RRM Paisley 'Real Rights: Practical Problems and Dogmatic Rigidity' (2005) 9 Edin LR 267

VV Palmer 'A Descriptive & Comparative Overview' in VV Palmer (ed) *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge University Press, Cambridge 2001)

VV Palmer *The Civil Law of Lease in Louisiana* (5th edn The Harrison Company, Norcross 1997)

GCH Paton & JGS Cameron *The Law of Landlord and Tenant* (W Green & Son Ltd, Edinburh 1967)

E Peel *Treitel: The Law of Contract* (12th edn Sweet & Maxwell, London 2007)

RJ Pothier *Traité des obligations* (1761 – 1764) in M Bugnet (ed) *Œuvres de Pothier* vol II (Cosse et Marchal, Paris 1861)

RJ Pothier *Traité du contrat de louage* (1764) in M Bugnet (ed) *Œuvres de Pothier* vol IV (Cosse et Marchal, Paris 1861)

RJ Pothier *Traité du contrat de vente* in M Bugnet *Œuvres de Pothier* vol III (Cosse et Marchal, Paris 1861)

I Quigley 'On the wrong track?' 2007 (February) JLSS 48

J Rankine *The Law of Land-ownership in Scotland* (4th edn William Green & Sons, Edinburgh 1909)

J Rankine *The Law of Leases in Scotland* (1st edn Bell & Bradfute, Edinburgh 1887)

J Rankine *The Law of Leases in Scotland* (2nd edn Bell & Bradfute, Edinburgh 1893)

J Rankine *The Law of Leases in Scotland* (3rd edn W Green & Son Ltd, Edinburgh 1916)

J Rankine *The Law of Personal Bar in Scotland* (W Green & Son Ltd, Edinburgh 1921)

R Reed 'Foreign Precedents and Judicial Reasoning: The American Debate and British Practice' (2008) 124 LQR 252

Registers of Scotland Legal Manual, available at www.ros.gov.uk/foi/legal/frame~home.htm

I Davis & A Rennie (eds) *Registration of Title Practice Book: A Guide to Land Registration in Scotland; The Policy and Practice of Land Registration* (2nd edn Registers of Scotland Executive Agency, Edinburgh 2000)

U Reichmann 'Towards a Unified Concept of Servitudes' (1982) 55 Southern California L Rev 1177

EC Reid 'Personal Bar: Three Cases' (2006) 10 Edin LR 437

EC Reid & JWG Blackie *Personal Bar* (W Green, Edinburgh 2006)

KGC Reid 'Real Conditions in Standard Securities I' 1983 SLT 169

KGC Reid 'Real Conditions in Standard Securities II' 1983 SLT 189

KGC Reid 'What is a Real Burden?' (1984) 29 JLSS 9

KGC Reid 'Defining Real Conditions' 1989 JR 69

KCG Reid 'The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland' in HL MacQueen (ed) *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (W Green/Sweet & Maxwell, Edinburgh 1996) 39.

KGC Reid 'Obligations and property: Exploring the Border' 1997 AJ 225.

KGC Reid 'The Idea of Mixed Legal Systems' (2003) 78 Tulane L Rev 5

KGC Reid 'Real Rights and Real Obligations' in S Bartels & M Milo *Contents of Real Rights* (Wolf Legal Publishers, Nijmegen 2004) 25

KGC Reid with GL Gretton, AGM Duncan, WM Gordon & AJ Gamble *The Law of Property in Scotland* (The Law Society of Scotland and Butterworths, Edinburgh 1996, being a reprint of Vol 18 of the *Stair Memorial Encyclopaedia*)

KGC Reid & GL Gretton *Conveyancing 1999* (T & T Clark, Edinburgh 2000)

KGC Reid & GL Gretton *Conveyancing 2002* (LexisNexis UK, Edinburgh 2003)

KGC Reid & GL Gretton *Conveyancing 2004* (Avizandum Publishing Ltd, Edinburgh 2005)

KGC Reid & GL Gretton *Conveyancing 2006* (Avizandum Publishing Ltd, Edinburgh 2007)

K Reid & CG van der Merwe 'Property Law: Some Themes and Some Variations' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (Oxford University Press, Oxford 2004) 637

R Rennie 'Requirements of Writing: Problems in Practice' (1996) 1 SLPQ 187

R Rennie (ed) *The Promised Land: Property Law Reform* (W Green & Son Ltd, Edinburgh 2008)

ME Rinne (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* Band VI *Sachenrecht* (4th edn Verlag CH Beck, München 2004)

DW Robertson 'The Doctrine of Anticipatory Breach of Contract' (1959) 20 Louisiana L Rev 119

PWG Robson & S Halliday *Residential Tenancies* (2nd edn W Green/Sweet & Maxwell, Edinburgh 1998)

A Rodger 'Roman Law Comes to Partick' in R Evans-Jones (ed) *The Civil Law Tradition in Scotland* (The Stair Society, Edinburgh 1995)198

A Rodger 'Developing the law today: national and international influences' 2002 Tydskrif vir die Suid-Afrikaanse Reg 1

H Roquette *Mietrecht: Systematische Gesamtdarstellung des Mietrechts nach dem BGB und den mietrechtlichen Sondergesetzen* (5th edn JCB Mohr (Paul Siebeck), Tübingen 1961)

W Ross *Lectures on the History and Practice of the Law of Scotland, relative to Conveyancing and Legal Diligence* (2nd edn Bell & Bradfute, Edinburgh 1822)

MJ Ross & DJ McKichan *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn Butterworths, Edinburgh 1993)

CJ Rossiter *Principles of Land Contracts and Options in Australia* (LexisNexis Butterworths, Australia 2003)

Joint Consultative Committee of the Law Society of Scotland and the Department of the Registers of Scotland *Registration of Title Practice Book* (1st edn, HMSO, Edinburgh 1981 – 1991)

B Rudden 'Economic Theory v Property Law: The *Numerus Clausus* Problem' in J Eekelaar & J Bell (eds) *Oxford Essays in Jurisprudence: 3rd Series* (Clarendon Press, Oxford 1987) 239

T Ruoff 'An Englishman Looks at the Torrens System' (1952) 26 ALJ 118

V Sagaert 'Les interférences entre le droit des biens et le droit des obligations: une analyse de l'évolution depuis le Code civil' in P Wéry (ed) *Le droit des obligations contractuelles et le bicentenaire du Code civil* (2004) 353

V Sagaert 'Real Rights and Obligations in Belgian and French Law' in S Bartels & M Milo (eds) *Contents of Real Rights* (2004) 47

J Rankine, JL Mounsey & D Murray *The Scots Style Book* (W Green, Edinburgh 1902 – 1911)

Scottish Home and Health Department *Registration of Title to Land in Scotland* (Cmnd 2032 1963, reprinted 1968)

Scottish Home and Health Department *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (Cmnd 4137, 1969)

Scottish Parliament Justice and Home Affairs Committee, 3rd Report 1999

Scottish Law Commission *Discussion Paper on Real Burdens* (SLC DP 106, 1998)

Scottish Law Commission *Discussion Paper on Land Registration: Void and Voidable Titles* (SLC DP 125, 2004)

Scottish Law Commission *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (SLC DP 128, 2005)

Scottish Law Commission *Discussion Paper on Land Registration: Miscellaneous Issues* (SLC DP 130, 2005)

Scottish Law Commission *Report on Requirements of Writing* (SLC Rpt 112, 1988)

Scottish Law Commission *Report on Three Bad Rules in Contract Law* (SLC Rpt 152, 1996)

Scottish Law Commission *Report on the Abolition of the Feudal System* (SLC Rpt 168, 1999)

Scottish Law Commission *Report on Real Burdens* (SLC Rpt 181, 2000)

Scottish Law Commission *Report on Conversion of Long Leases* (SLC Rpt 204, 2006)

RD Sharrock *et al* 'Contract' in LTC Harms & JA Faris (eds) *The Law of South Africa* vol V, pt I (2nd edn, LexisNexis, Durban 2004)

HH Seiler 'Einleitung zum Sachenrecht' in E Bund *et al* (eds) *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Drittes Buch:Sachenrecht* (new edition Sellier – de Gruyter, Berlin 2000)

JC Smith 'Anticipatory Breach of Contract' in EZ Lomnicka & CGL Morse (eds) *Contemporary Issues in Commercial Law* (Sweet & Maxwell, London 1997) 175

RJ Smith 'The Economic Torts: Their Impact on Real Property' [1977] Conv 318

TB Smith *A Short Commentary on the Law of Scotland* (W Green & Son Ltd, Edinburgh 1962)

JM Smits 'Comparative Law and its Influence on National Legal Systems' in M Reimann & R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford 2006)

TJR Stadnik 'The Doctrinal Origins of the Juridical Nature of Lease in the Civil Law' (1980) 54 Tulane L Rev 1094

JE Stake 'Toward an Economic Understanding of Touch and Concern' [1988] Duke LJ 925

SE Sterk 'Freedom from Freedom of Contract: the Enduring Value of Servitude Restrictions' (1985) 70 Iowa L Rev 615

AJM Steven 'Keeping the Goalposts in Sight' 2000 SLT (News) 143

AJM Steven 'Options to Purchase and Successor Landlords' (2006) 10 Edin LR 432

James Dalrymple, Viscount Stair (G Brodie (ed)) *The Institutions of the Law of Scotland* (4th edn Thomas Clark Edinburgh 1826)

James Dalrymple, Viscount Stair (JS More (ed)) *The Institutions of the Law of Scotland* (5th edn Edinburgh 1832)

James Dalrymple, Viscount Stair (D Walker (ed)) *The Institutions of the Law of Scotland* (Tercentenary Edition, Edinburgh and Glasgow University Presses, 1981)

AD Tarlock 'Touch and Concern is Dead, Long Live the Doctrine' (1998) 77 Nebraska L Rev 804

Trayner's Latin Maxims (W Green, Edinburgh 1993, being a reprint of the 4th edn, 1894)

S Tromans 'Options: as safe as houses?' (1984) 43 CLJ 55

CG van der Merwe 'Things' in LTC Harms & JA Faris (eds) *The Law of South Africa: First Reissue* vol XXVII (Butterworths, Durban 2002)

S van der Merwe *et al Contract: General Principles* (3rd edn Juta & Co Ltd, Lansdowne 2007)

B Vial-Pedroletti 'Droits du locataire: nature juridique' (Fascicule 230) in Juris-Classeur Civil Code, vol «Art 1708 à 1762» (Juris-Classeur, Paris, updated to 2 Feb 2001)

B Vial-Pedroletti 'Fin du bail: vente de la chose louée' (Fascicule 289) in Juris-Classeur Civil Code, vol «Art 1708 à 1762» (JurisClasseur, Paris, updated to 30 March 2005)

J Voet (P Gane (tr)) *The Selective Voet being the Commentary on the Pandects* (Butterworth & Co (Africa) Ltd, Durban 1956)

HWRW 'Rights of Pre-Emption: Interests in Land' (1980) 96 LQR 488

DM Walker *Principles of Scottish Private Law* (4th edn Clarendon Press, Oxford 1988)

DM Walker *The Law of Contracts and Related Obligations in Scotland* (3rd edn T & T Clark, Edinburgh 1995)

DM Walker *The Scottish Legal System* (8th edn W Green/Sweet & Maxwell, Edinburgh 2001)

WT Watson 'Contract' in Viscount Dunedin (ed) *Encyclopaedia of the Law of Scotland* vol IV (W Green & Son Ltd, Edinburgh 1927)

H Weiß *Ist die Grundstücksmiete ein dingliches Recht?* (Inaugural Dissertation der juristischen Fakultät der Friedrich-Alexanders-Universität Erlangen, 1932)

W Wiegand 'Numerus clausus der dinglighen Rechte. Zur Entstehung und Bedeutung eines zentrales zivilrechtlichen Dogmas' in G Köbler (ed) *Wege europäischer Rechtsgeschichte* (Verlag Peter Lang, Frankfurt am Main 1987)

H Wieling 'Die Grundstücksmiete als dingliches Recht' in J Jickeli, P Kreutz & D Reuter (eds) *Gedächtnisschrift für Jürgen Sonnenschein* (De Gruter Recht, Berlin 2003)

S Wilken *Wilken and Villiers The Law of Waiver, Variation and Estoppel* (2nd edn Oxford University Press, Oxford 2002)

A Wilson 'The Constructive Trust in Scots Law' 1993 JR 99

WA Wilson *The Scottish Law of Debt* (2nd edn W Green & Son, Edinburgh 1991)

M Wolff & L Raiser *Sachenrecht: Ein Lehrbuch* (10th edn JCB Mohr, Tübingen 1957)

The Hon Mr Justice Lewison (ed) *Woodfall's Law of Landlord and Tenant* (Thomson/Sweet & Maxwell, London; looseleaf updating)

S Wortley 'Double Sales and the Offside Trap: Some Thoughts on the Rule Penalising Private Knowledge of a Prior Right' 2002 JR 291

S Wortley 'Real Burdens and Personal Bar' in R Rennie (ed) *The Promised Land: Property Law Reform* (2008) 25

R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (paperback edition Oxford University Press, Oxford 1996)

R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press, Oxford 1996)

R Zimmermann & KGC Reid (eds) *A History of Private Law in Scotland: 2 vols* (Oxford University Press, Oxford 2000)

R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property & Obligations in Scotland and South Africa* (Oxford University Press Oxford 2004)

R Zimmermann *Comparative Foundations of a European Law of Set-Off and Prescription* (Cambridge University Press, Cambridge 2002) 20

T Weir (tr) K Zweigert & H Kötz *Introduction to Comparative Law* (3rd edn Clarendon Press, Oxford 1998)