GILLESPIE MACANDREW

The Scots Law of Leases

A brief commentary and restatement of the necessary characteristics of a Lease

AUTHOR: MIKE BLAIR

Contents

Introduction

So in Scots Law, what makes a contract into a lease?

Have you sometimes wondered how to tell whether a deal you wish to document, or a document which you are examining, amounts to a 'Lease' or not?

Usually it is clear but not always. There are examples of contracts safely in the Land Register that say 'Lease' 'on the tin', but in reality are not leases at all.

We the profession, and the Registers, need to clearly distinguish what does, and does not, amount to a Lease. There may be some agents out there who imagine that because it broadly looks like a Lease, and describes itself as such, it is. That is not always so. There will be potential for quite a lot of professional risk associated with this subject.

In 2013, and out of the blue, I found myself brought into working with the late Professor Robert Rennie and his colleagues, both academic and practitioner, Professors Brymer, Mullen and McCarthy to produce the SULI book on *'Leases'* which was published in 2015. I well remember him saying to me that he hesitated to provide yet another attempt to define what a lease was, and had contented himself with setting out what earlier authors had written. My own experience, primarily in the rural field, shows me that there are attempts at 'double think' where solicitors have tried to call their contract a 'lease' but properly analysed, it wasn't. I have therefore put my head above the parapet, and offer an analysis which I hope anyone who is involved in leasing, whether in a rural or an urban setting, will find helpful, or at least interesting.

Mike Blair
Partner, Land and Rural Business

Despite there being various textbooks on the subject, it would be helpful if there were a clear understanding of what a lease is and what differentiates it from other contracts.

Looked at using set theory, within the general law of contracts, the contract of lease is a sub-set. Within the set of leases is also a further sub-set, those contracts which are capable of constituting a real right in law.

A *'lease'* is a *nomen juris*, and whether or not a contract is or is not a lease has to be, in modern parlance, a digital and not an analogue question; into which set does it fall? If one cannot identify whether or not a contract is a lease, the operation of, amongst other things, the Land Registration system in Scotland will be ineffective and confusing, at least so far as leases are concerned.

Definitions of a lease

There have been a number of definitions proposed by various authors down the years. The most recent full summary is by Professor Robert Rennie in chapter 1 of *SULI 'Leases'* (W Green & Son 2015).

In that chapter he sets out a number of authors' proposed definitions. I do not wish to compare the various definitions at length, but think that to one in *A treatise on the law of leases in Scotland Third Edition (Rankine, 1916),* page 1 is, despite its age, the most carefully phrased and comprehensive of those discussed by Rennie and it is as follows;

"A lease or tack is a contract of location (letting to hire) by which one person grants and another accepts certain uses, current or definitive or the entire control, of lands or other heritages for a period or periods, definite or indefinite... in consideration of the delivery by the grantee of money or commodities or both, periodically or in lump or in both of these ways."

As a matter of general policy, I take it as a given that society and thus the law needs a right to permit the temporary occupation of immovable property for particular purposes which is more than merely a personal contract between the owner and the occupier. Indeed, the very existence of the Leases Act 1449 [573 years ago] shows as much. The Scots, in the days of King James II, found it necessary to pass that Act, so as to make such rights *'real'* and effective against the landlords' successors. I will not go into any theoretical discussion on whether or not a tenant's interest in a qualifying lease is or is not a *'real right'* in some general jurisprudential sense, but in practice a right, effective against the landowner's successors, can be commonly described as "real".

If the policy of the law is that a right of this character should be recognised, it is necessary that it should be capable of being defined. While we need to be wary of being overly "scientific" it would be helpful to classify leases and similar rights into sets, (like mathematical sets in the venn diagrams of our schooldays) identifying leases of different types, and thereby, those contracts which are not leases. The purpose of the remainder of this article is to set out and briefly analyse the factors which go together to make an agreement a *'lease'* in the law of Scotland, and also to consider the distinction between those leases which are or can constitute real rights, and those which can not. By doing so, I hope to define the 'sets' more clearly and to identify the areas of argument or uncertainty.

Logically, if an agreement does not have all the necessary qualities to qualify it as a lease, it just cannot be a lease whether it has been registered in the Sasine Register or the Land Register of Scotland or not. It is not within the 'set' of 'leases'.

In discussing characteristics of a lease, one comes up against one of the standard problems in all legal analysis, the boundaries between two different situations. Sometimes these boundaries cannot avoid being a bit 'fuzzy' despite our best endeavours to be clear, and that fuzziness as is so often the case, can be the source of difficulty to us as lawyers.

What are the necessary characteristics of a lease?

It is commonly understood that a basic analysis for an agreement to amount to a lease can be taken from **Gray v Edinburgh University** 1962 SC 157.

In that case, the University had been negotiating with Mr Gray to take a lease, but the parties were held to have failed to reach consensus. The Inner House in that case said that it was generally agreed that there were four cardinal elements in a lease: the parties, the subjects, the rent and the duration. Given that the parties in the case had failed to reach consensus on those matters, their agreement was not a lease. That case has since been referred to with approval in other significant cases, for example **Brador Properties Limited v British Telecommunications Plc** 1992 SC 12; **Mountain's Trustees v Mountain** 2013 SC 202; and **Shetland Island Council v BP Petroleum Development Limited** 1990 SLT 82.

In my view, this statement of the necessary characteristics in **Gray** is incomplete for reasons explained below.

The basic requirements for a Lease to exist

Properly considered, there are only the following five:

1. Separate Parties;
2. Heritable Subjects;
3. Rent;
4. An Identifiable Ish; and
5. Possession (or statutorily deemed possession).

The remainder of this paper sets out the reasoning and authority as to why these should be considered to be the necessary characteristics which define what is, (and consequently what is not) a 'Lease' in Scots Law.

Note, writing is not essential for a lease unless it is intended to be for over one year's initial duration. (*Rankine* page 134). Short leases, even if unwritten, if otherwise meeting the legal characteristics of a lease, do however create real rights.

1. Separate Parties

It is axiomatic that one cannot lease property to oneself. This can be clearly seen from **Kildrummy (Jersey) Limited v IRC** 1991 SC 1 and **Clydesdale Bank Plc v Davidson** 1998 SC (HL) 51. In the Kildrummy case, a party had granted a lease in favour of a nominee for themselves. The court had no real difficulty in holding that the purported lease in that case was the equivalent of letting to oneself and ineffectual. In **Clydesdale Bank v Davidson**, the House of Lords held that pro indiviso proprietors cannot grant a lease to one of their number. This is also illustrated in **Serup v McCormack and Others** 2012 SLCR 189, when what had started out as a lease ceased to be such when the party in right of the tenant's interest also came into ownership of the landlord's interest.

There exists a misapprehension among some lawyers that this process of extinguishment of a lease by the same party coming to *'own'* both sides of the contract is in some way optional. This is said to be based on an opinion by the late Professor Halliday [*The Conveyancing Opinions of Professor J. M. Halliday* no. 91 page 378]. A much more carefully reasoned opinion on the topic is given by the late Professor Alistair Macdonald (*McDonald's Conveyancing Opinions* p.198 dated April 1989) and is much to be preferred. Even in his opinion however, Halliday observes that the extinguishment of a lease *confusione* occurs as a matter of law or not at all. He draws several parallels- (a) with debts referring to a case in 1903- (b) where rights other than concurrence of debit and credit are in issue, *confusio* does not extinguish that other right (**Earl of Zetland v Glover Incorporation of Perth** 1870 8M (HL) 144 -which relates to feudal title consolidation) and (c) that sub-tenancies survive the termination of the head lease (but is that always right?[1]). Halliday does however observe that there is no direct authority for the proposition that *confusio* does not apply. If **Kildrummy, Clydesdale Bank v Davidson** and **Serup v McCormack** are correct then contrary opinions including that of Professor Halliday, (which of course pre-dates the cases mentioned), are incorrect. This misunderstanding can sometimes be seen in Title Sheets suggesting that a lease continues to exist despite the same parties being both landlord and tenant [2]. I should comment that it may be thought that this could be awkward for the parties dealing with commercial leases, where chains of leases and sub-leases can sometimes exist. Nevertheless there are other means to get round that difficulty and the basic rule remains, one cannot be one's own tenant. There is also the issue of the status of a security over a lease that might be extinguished *'confusione'* although if the rights of owner and tenant are permitted by the action of the parties or operation of law to merge, then (and I acknowledge this comment is speculative) perhaps the security logically still continues to affect the property. Necessarily when the 'merger of interests' takes place, the existence of the security will be evident from the Registers, so the debtor in the security and if different, the grantor of the security, should be obliged to accept its continued effect and might be personally barred from denying that.

If 'separate parties' were not the rule, by what evidence could one tell that a lease was not continuing in existence in a *confusione* situation? How could one distinguish whether *confusio* applied or not? If the status depended on the wishes of the parties concerned, how can that be determined without asking them? The wishes of parties, (or maybe the wishful thinking of their agents) unconnected with their actions which have some objective consequence, can hardly be the basis for the existence of onerous obligations outside what the law prescribes. What is to stop them changing their wishes at any time? I would assert that the existence of a lease can only be determined by analysing the contractual and practical position, to see whether the contract has the necessary characteristics of a lease. Logically, the Keeper's guidance on this point is incorrect.

2. Heritable Subjects

In many ways this is the least disputable of the characteristics of a lease. The owner of *heritable* property can lease it. All species of heritable property are capable of being let including land; salmon fishings; heritable rights like the right to *'ferry'* or for mussel scalps, and sporting rights which have been constituted as separate tenements under Section 65A of the Abolition of Feudal Tenure (Scotland) Act 2000. It should be noted however that it is understood that one cannot independently lease heritable rights, such as access servitudes, which are only *ancillary* to the ownership of other heritable property and have no *independent* existence. One needs to bear in mind the distinction between the principal subjects of a lease, and the ancillary real rights (such as a shared use of a common stair), that go with exclusive possession of the principal subjects[3]. The best analysis of this is in **Gyle Shopping Centre v Marks & Spencer plc** 2014 CSOH 59 where this distinction is clearly and helpfully set out in the judgment of Lord Tyre[4]. The simple rule is/appears to be; if the property or rights you are purporting to let could not themselves be the subject of a separate Title Sheet, then it is not competent to let them at all.

The question of whether a lease of land for sporting purposes can constitute a real right is quite clearly dealt with by the Full Court in **Stewart v Bulloch** 1881 8 R 381[5] where Lord President Inglis says, ***"if indeed it was the law that a right of shooting was a mere personal franchise, as at one time the court appeared inclined to hold, there would be a great deal to be said against the application of the statute (the Leases Act 1449) to the lease of shootings, I think it has now been laid down in a series of decisions that this is not the nature of the right of shooting, but what the tenant perceives under such a lease is the right of occupation of land, as much as in the case of an agricultural tenant. It is for a different purpose no doubt that is not the less a right occupation. A sporting tenant goes onto the land for the purpose of shooting game just as the agricultural tenant goes for the purpose of tilling the ground; and although the object is different the one case just as much as the other is an occupation of land under a contract, and I know no other species of contract which will include the present except the contract of lease."***

If, indeed, it were the law that a right of shootings was a mere personal franchise—as at one time the Court appeared inclined to hold—there would be a great deal to be said against the application of the words of the statute to a lease of shootings; but I think it has now been laid down in a series of decisions that this is not the nature of a right of shootings, but that what the tenant receives under such a lease is a right of occupation of land, as much as in the case of an agricultural tenant. It is for a different purpose no doubt, but it is not the less a right of occupation. The sporting tenant goes on to the land for the purpose of shooting game, just as the agricultural tenant goes for the purpose of tilling the ground; and although the object is different the one ***384** case just as much as the other is an occupation of land under a contract, and I know no other species of contract which will include the present except the contract of lease.

This was also adopted as a correct statement of the law by Rankine, p.505-6.

3. Rent

It is again axiomatic that "no rent = no lease". On the face of it, this seems a line that can quite clearly be drawn, or a distinction that can quite readily be made. Even in the case of rent however, there exists a *'fuzzy'* point of law. The essence of rent however is that it is an obligation to make a periodical payment. Payment of a lump sum at the start of an arrangement purporting to be a lease is not *'periodical'* and thus is not a rent properly so called; **Mann v Houston** 1957 SLT 89. Going back to Rankine's definition, rent can be paid in a variety of ways.

Any kind of rent is sufficient to make an agreement a *'lease'* at common law. According to Erskine, the rent cannot however be *'elusory'* if the 1449 Act is to apply to it. The basis of this rule goes back to Erskine's Principles II.6.10 where, referring to the 1449 Act, it is stated

"to give a written tack the benefit of this statute, it must mention the special tack-duty payable to the proprietor which, though small, if it be not elusory, secures the tacksman; and it must be followed by possession,..."

In Bell's *Principle*s Tenth Edition 1899 Paragraph 1197 to 1199 rent is discussed and the point is made that in a position between the grantor of the lease, or his heirs and the tenant, the rent may be merely nominal, or may not in practice be collected, but the contract can still be a lease. If however a lease is to join the sub-set within the set of leases of those which can enjoy protection as being real rights, the rent cannot be elusory. Bell is in so saying, following Erskine, there is no obligation that the rent should be at a market level however.

The law finds it necessary to make a distinction somewhere. What is sufficient to be a rent, so as to make the contract a lease within the sub-set of leases which are real rights? The law's answer is that 'virtually nil', is treated as the same as nil. One may disagree with the policy on that difference, but it has logic. I would suggest that a rent payable 'if asked' is likely to be elusory.

The most straightforward example of this rule being applied is quite an old one, **Sinclair v McBeath** in Hume's Decisions page 773 where the rent was specified as "one penny Scots, [per annum] if required by me, during the time you continue my factor". The issue in the case was between the factor and his landlord's heirs. It was pled that the rent being elusory, the lease could not continue after one of the parties died. The case contains an acknowledgement that ***"a substantial rent may be requisite to bring a tack under the protection of the statute (1449 Act) in a question with a purchaser of the land"*** but it was recognised that even an elusory rent was sufficient as between the original parties and their universal successors.

An example of a more recent case when this point was not taken, although it might well have been, is in **Palmer's Trustees v Brown** 1989 SLT 128 where a 999 year sporting lease had been granted at a rent of one penny per annum if asked only. The lease was not recorded in the Sasines and the landlord sold out and the incoming owner then said they would afforest that area. The decision in the Outer House was that the lease would have been valid against singular successors had it been registered under the 1857 Act, and in the judgement, it was observed that it was unnecessary to decide whether the lease qualified for the benefit of the 1449 Act. Given that since the passage of the Land Registration (Scotland) Act 2012 s.20B , a lease over 20 years *cannot* amount to a real right *unless* registered in the Land Register of Scotland, the likelihood of legal difficulties arising in situations where the quality of the rent as being elusory or not is material is likely to be very small.

4. An Identifiable Ish

The issue of the duration of lease has of course been significantly changed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 section 67 of which now provides that the term of any lease can no longer exceed 175 years. Also by virtue of the legislation converting long leases to ownership, it is unlikely that many leases predating the 2000 Act will still be in existence. In Rankine, [page 115], it is commented that a lease might, as the law then stood, be for a very long period of time or even in perpetuity, The leading case in relation to failure to agree on the duration of a lease is again, **Gray v University of Edinburgh** 1962 SC 157. There, the parties failed to agree on a duration and no possession had been taken, (as well as failing to agree on a rent!) so the court had no difficulty in holding that there was no lease. There are however judicial statements , including by the Lord Justice Clerk in **Gray** , referring to Stair, II ix 16 which indicate that where no period is specified, but possession has been either expressly agreed (strange as it might seem to agree on possession without also agreeing a term) or actually taken, the lease is perhaps not for that reason alone invalid and in some cases parole evidence has been admitted to prove an agreement as to a term, **Wilson v Mann** (1876) 3 R 527 and Rankine page 115. Again in Erskine's **Institute** II.6.24 it stated that a lease in which the terms of endurance or ish is not expressed, is considered as granted for a year, and if there is some other indication in the lease as to how long its duration should be, it is suggested that the lease be sustained for two years only during which two years it would be effective against singular successors. **Shetland Island Council v BP Petroleum Development Limited** 1990 SLT 82, is another example of a failure to agree a term or an ish resulting in there being no lease.

Lack of an identifiable ish in a 'lease' however will make a contract non-compliant with the 1449 Act and thus incapable of being a real right. see Rankine page 139 and Stair **Institutions** 2.9.16. See also **Stirrat v Whyte** 1967 SC 265 where two fields were 'let' to be cropped by a farmer annually and with an annual payment but with the arrangement to terminate when the fields were sold. This was held by the Inner House not to be a lease at all.

5. Possession: what is the extent of possession required for an agreement to be a lease at all?

At common law, failure to obtain any possession from the granter of a lease prevents the lease taking effect. The usual example is **Miller v McRobbie** 1949 SC 1, where an agreement for a lease was made and signed, but before the start of the lease, when the intended tenant had not yet entered the let subjects, the landlord sold to a 3rd party who refused to acknowledge the existence of the lease. The lease, albeit written, was held not to afford the 'tenant' any rights against the purchaser. Registered leases are different- see below.

Not being mentioned in **Gray**, it is perhaps a contentious assertion that exclusive possession is necessary for a contract to come into the set of 'leases', and this paper diverts to consider that topic more fully. This paper argues that that proposition is indeed the law, and essential to an effective operation of the law of leases

In the academic sphere, in the most recent major text book on the laws of leases, *Leases* (SULI, 2015) the question of the need for exclusive possession is dealt with extensively in Chapter 2 (where the case law on the matter is carefully canvassed) and also in Chapter 5-08, 21-11, 22-57 and 30-22.

In *Gloag & Henderson* Chapter 35 on the general law of leases, the opening proposition is that

"The contract of lease is one whereby an owner or occupier of land grants exclusive possession of it to a tenant in return for rent, in money or goods." (Gloag & Henderson 14th Edition Chapter 35.02)

McAllister 'Scottish Law of Leases' [5th edition] para 1.3 states

"The tenant (or tenants where there is a joint tenancy) must normally be given exclusive possession of the leased subjects. Where the landlord has reserved the right to share occupation in some way, the contract may not be a lease at all but a licence (or right of occupancy)." [6]

In the *Stair Encyclopedia* under 'Landlord and Tenant' section 255 it is stated that

"The possession founded on for the purpose of the Leases Act 1449 must be exclusive"

The comment is also made that a limited reservation in favour of the landowner, or a limitation in use of the occupier is not necessarily inconsistent with the relationship of landlord and tenant.

To reiterate, *Rankine on Leases* (3rd Edition, 1916) page 1, as we should remember from earlier, in describing a lease defines it as

"a contract of location (letting for hire) by which one person grants and another accepts certain uses, current or definitive, or the entire control, of lands or other heritages for a period or periods.....in consideration of ...[rent]".

There is also strong judicial authority for the proposition.

"So far as I can judge on the information before me, each occupier during the period of his let, has exclusive possession, which is one of the tests of a proper lease." Lord Keith (later Lord Keith of Avonholme) in the Inner House in **Chaplin v Assessor for Perth** 1947 SC 373.

This sentence from the judgment of Lord Keith, one of the more distinguished Scottish Judges of the later 20th Century, is perhaps the clearest expression of what level of possession is required to turn a right of occupation of heritable subjects into a lease. This proposition, namely that exclusive possession is necessary for a right of occupation to amount to a lease is thus supported by a wide range of both academic and judicial authority. More recently, the issue has arisen in the Sheriff Courts, where there are examples of the same view being taken.[7]

Let us go back to the *locus classicus* of the definition of a lease in recent case law ie that in **Gray v Edinburgh University** 1962 SC 157. In that case, the Lord Justice Clerk (Thomson) adopted the defender's submission that there were four essentials to contract of lease namely, parties, subjects, rent and duration. **Gray** was a case focussing principally on the lack of consensus as to rent and duration, holding that the agreement in question was not a lease through the lack of that consensus. The issue of possession was not canvassed in **Gray**; unsurprisingly perhaps in that the property in question was two floors of commercial premises at One India Buildings, Victoria Street, Edinburgh. The idea that the exclusive possession would not be necessary to form a lease would, one might well guess, never have crossed the mind of the Inner House in **Gray**. Rather, they may have considered that exclusive possession is more correctly seen as relating merely to the *nature* of the possession of the *subjects* (which were themselves one of the *'cardinal parts'* of a lease).

The idea that perhaps one can grant a *'lease'* of less than the whole of *'certain uses'* of a property in the form of a lease of *pro indiviso* interests, such that the tenant would have exclusive possession is also, at the least, strongly discountenanced in **Clydesdale Bank plc v Davidson** 1998 SLT 522 (House of Lords). There it was held that the body of the *pro indiviso* proprietors could not grant a lease to one of their number, and it was for **all** the occupiers of common property to consent to all acts of management of that property, subject to a number of recognised exceptions for emergencies etc. From this, it also logically follows, or at any event it is not too much of a stretch to say, that **unless some contract has the appropriate level of possession to qualify as being a lease, it is necessarily a licence and cannot be a real right.** A possible doubt on that rule may be seen in **Whitcombe v Bank of Scotland** 2017 CSOH 58 as part of a scheme arising out of a loan of money to assist a party in his divorce, a question involving a purported lease of a *pro-indiviso* interest to the other *pro indiviso* proprietor was sent to Proof before Answer, but no reference was made to **Clydesdale Bank v Davidson** and the issue of possession.

A Contrary View?

There is however a line of authority which questions the importance, or even the necessity, for exclusive possession and considers that it is all a matter of degree. This is set out in **Cameron v Alexander,** 2012 SLCR 50 and at Scottish Land Court Order of 6 November 2012. In that case, the lease of a farm had been granted in common form, but with the landlord reserving (out of a substantial hill farm)
"(1) the field at the back of the farmhouse being the second field on the Divach side (2) byre accommodation for two or three cows (3) the shed at the steading used as a garage... and (5) one stall in the stable".

These reservations had in fact originally been intended for the use of the outgoing tenant. The landlords contended before the Land Court that the entitlement to share occupation of the byre and stables amounted to a denial of exclusive possession, and thus the agreement as a whole could not qualify as a lease. This was rejected by the Land Court which was not persuaded that there was an additional *'cardinal feature'* of leases that there must be no sharing of the tenanted use. The Land Court's stance, after recognising that farm, sporting and mineral leases could co-exist over the same property, is as summarised in paragraph [54] stating;

"the question is whether it is possible to reserve a right to make the same use of the subjects as the tenant. Put shortly we are satisfied that, a lease where that right is clearly defined and does not in [any/a?] substantive sense derogate from the grant, there is no reason why such reservation should be treated as fatal to the concept of a lease."

The Judgment goes on however to cite the case of **South Lanarkshire Council v Taylor** 2005 1SC 182. The Land Court thought that this was clear authority for the proposition that exclusive possession is not an essential feature of the lease. This is nonsense. In the *South Lanarkshire* case, a Grazing Lease was granted on ground near Lanark Racecourse, contained an obligation on the grazing tenant to vacate from time to time to allow the use of the same ground for other purposes such as car parks for use at Race Meetings. This is an entirely different situation where, in distinction from that argued in *Cameron*, unless instructed to remove for a race meeting, the grazing tenant **did** have exclusive occupation of the pasture ground concerned.

The Land Court in *Cameron* finished in paragraph [59] by suggesting that the extent of shared use should be treated as a matter of degree, rather than needing to focus on the different types of use made of the ground. They did however comment very fairly that they thought that the reservation in the lease in *Cameron* was probably *de minimis* and ***"could not realistically be thought to cast any doubt"*** on the status of the occupier as tenant under an agricultural lease. In *Cameron*, for some surprising and unknown reason, the parties did not argue that the reserved occupation under the lease ought to be seen as *de minimis* reservation; on the contrary the landlord's agent persisted in an all or nothing approach to the effect of shared possession.

But what should the answer be?

To consider the policy issue, if it were the case that exclusive possession was **not** a general requirement for an agreement to attain the status of a lease, all sorts of difficulties and practical problems would immediately arise. On that analysis, a lodger in a room in a house could perfectly well be a tenant entitled to security of tenure perhaps. This is not the way the Rent Acts have worked in the past. Equally, if a landowner grants a right to someone else in return for payment to allow a number of sheep to run with the landlord's own animals in several fields, does this attain the statutory status of a Short Limited Duration Tenancy under the Agricultural Holdings (Scotland) Act 2003? To attempt to leave it to the courts to determine whether 10 sheep out of 100 in a field amount to a lease, or 95 out of 100 do **not** amount to a lease is a recipe for a heap of confusion. Logic extends the same analysis to factories and warehouses, offices and the like. If the tenant does not get *'control'* of some major uses of and rights over the leased subjects, he cannot be a tenant properly so called. How could one determine which of two parties entitled to (a real right to) occupy a house, office or whatever has priority, where one is the owner but has himself also granted an *ex facie* effective right to occupy to someone else? Whatever the arrangement might be, the lack of sufficient possession means a contract cannot be a lease. The knock-on problems for registration of leases are easy to foresee.
The better approach, it is suggested, is that set out in *Leases* (SULI) Ch 2 and Ch 30-22, where it is stated that exclusive possession of some **type or class of rights** over the let property (Rankine's *'certain uses'* in the definition) should be essential to the contract being a lease, with the standard examples being a minerals lease, a farm lease and a sporting lease (being a lease of the land for the purpose of sporting) all subsisting simultaneously in the same piece of ground.

In the rural world, the clear distinctions of exclusive possession applicable in the case of buildings such as were in contemplation in **Gray** or, to take an older example **Webster v Lyell** 1860 22D 1423[8], are not always so clear. In the rural sphere, where a variety of uses can co-exist, it will be found much more practicable/ satisfactory to consider rights reserved to a landlord in a lease to use the let property for the same purpose as the tenant, as *personal* reservations which may or may not be *inter naturalia* of a lease, depending on their nature, and further, cannot be so extensive as to amount to a derogation from the grant.

[see *SULI Leases* Chapter 14] Rankine discusses contractual ('conventional') reservations at page 211, and addresses the topic focussing on rights of resumption, and the *ex lege* reservations in farm leases of minerals, sporting rights and woods, but does not canvass reservations for the same use as that for which the lease was granted. *Leases (SULI)* treats of landlord's reservations at 14-03 in the context of the landlord's obligation to put the tenant in possession, citing **Baxter v Paterson** (1843) 5D 1074 (a dispute over a landlord's access to the garden of a let house, and similar to Webster) and the comment in the judgement that ***"the tenant's right of exclusive possession, so long as the lease endures, must, it is conceived, receive effect as the rule, and liability to give access... to the landlord being to be regarded as the exception..."***. Derogation is also covered at 14-05 but more in the context of action by the landlord which interferes materially with the use of the leased subjects. None of these suggest that it is legitimate for a contract to be a lease where the landlord and tenant share the **same use** of the property.

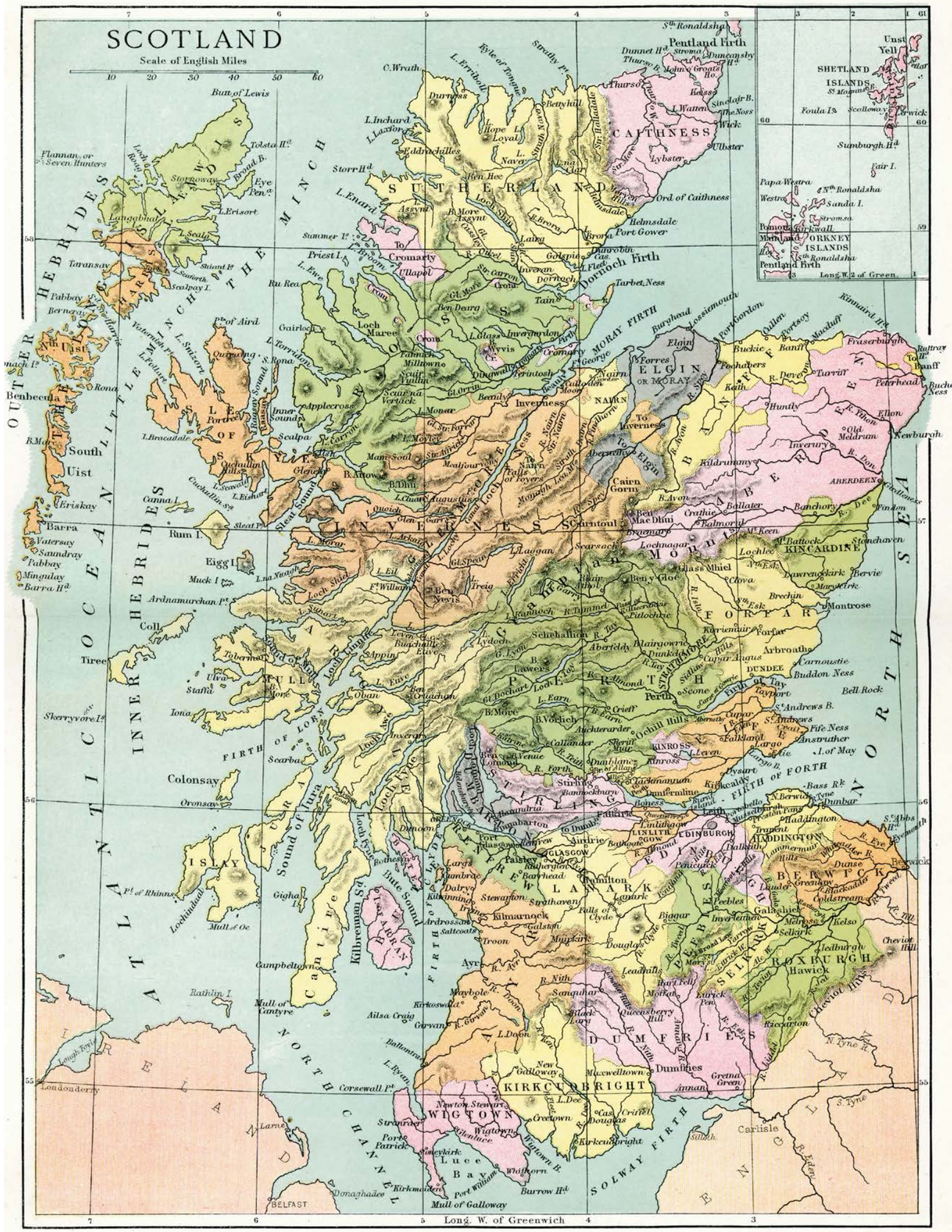
Repugnancy

Clearly, repugnancy in a contract or other legal document makes it ineffective. In succession, for example one cannot grant somebody of full capacity an absolute vested right and then direct trustees to keep the beneficiary from receiving the benefit for a period. [**Millers Trustees v Miller** *(1890) 18R 301].* Similarly, one cannot grant a lease of house and reserve the right to live in it oneself. Similarly again, when one 'lets' a field for the grazing of sheep and retains the right to put one's own livestock onto the field for grazing, it is hard to see how the right granted could amount to a *'lease'* notwithstanding that it might meet all the other characteristics of a lease.

All considered, the view of the law set out in **Cameron v Alexander** 2012 ought to be "utterly cryit doun"[9] as perhaps giving the correct result but by incorrect reasoning. It makes for coherence and practicality in the law of leases if the rule is accepted such that, the absence of exclusive possession without material reservation or derogation, (and which immaterial reservations and derogations may only amount to a personal right) **of a particular use** of the heritable subjects will be fatal to the qualification of the contract as a lease at all, never mind one conferring a real right (whether registered or not) and the contract will instead be recognised as a licence.

The Right Answer

Given that that proposition is sound law, the statements in *Rankine, Gloag* and *Henderson, McAllister* and the *Stair Encyclopaedia* that for the right to be a lease, exclusive possession is required are to be understood in the sense that it is exclusive possession of what Rankine referred to as ***"certain uses current or definitive"*** as opposed to *'the entire control'* are correct. McAllister takes a similar view, albeit with reservations, when considering the other side of the coin , namely, what are 'licences'[10]. The same point is made in SULI *Leases* paragraph 30-22).



Impact of Statute

We have already canvassed the Leases Act 1449. The other major innovation of statute is the Registration of Leases (Scotland) Act 1857 ("1857 Act") as most recently amended by the Land Registration etc (Scotland) Act 2012. This has a number of direct effects on the law of leases namely:-

1. A lease of over 20 years or containing obligations to require it to be extended to a period of over 20 years can only become a real right by registration. - 1857 Act Section 20B(2).
2. For a lease to be registered, it has to be valid and binding in a question with the original landlord. If then registered it is effectual against a singular successor whose title is completed after registration of the lease. Note that this has the effect that some leases (for example those with elusory rents) which would have been incapable of being real rights under the 1449 Act can become so by virtue of registration. This does not however make a 'lease' without exclusive possession, or a 'lease' of non-heritable subjects, or a lease by A in favour of himself, into a lease in law
3. The 1449 Act does not apply to registrable leases granted after the county concerned became an operational area for the Land Register. 1857 Act Section 20C.

Note that 1857 Act Section 16, which makes registration under the 1857 Act the equivalent of entering into possession, does not apply to leases capable of registration in the Land Register (Section 16(3)), and therefore will apply to leases still registered in the Sasines.

The net effect of these provisions therefore is the following:-

1. A lease with an elusory rent can be registered and thus become a real right.
2. Since the fact of registration makes a lease (supposing that it otherwise **is** a lease) a real right, actual possession may not be required, although see Section 20B(3) which requires a lease to be *'valid'* (*sic*. as a lease?) before registration will make any difference to it.

Recapitulation

Going back to the five factors proposed earlier in this paper as the necessary characteristics of a lease, these therefore can be stated as:-

1. Separate parties.
2. Heritable subjects.
3. Rent.
4. Identifiable ish.
5. Possession at least of a distinct type of *'uses'* of the property concerned.

Applying these to some practical situations, what follows?

In **The United Kingdom Advertising Co Ltd v Glasgow Bag-wash Laundry** 1926 SC 303 advertising contractors undertook to display the company's adverts inside a number of Post Offices. The advertising contractors sued for the "rent". The defence was that the contract to *'lease'* the space was improbative , but since the contractors were not themselves tenants and required the consent to the Post Office to put the adverts up in the first place, the Sheriff and indeed the Inner House had no difficulty in holding that the agreement was not a lease.

In the two rating cases, **Broomhill Motor Co v the Assessor for Glasgow** 1927 SC447 and **Chaplin v the Assessor for Perth** 1947 SC373 the standing of contracts for the occupation of lock-up garages was in question. In one case these were inside the premises of a functioning garage and held not be leases because the arrangement was taken to be part of a larger deal with the garage providing the accommodation, whereas in **Chaplin** these were standalone lock-up garages and held capable of being let.

Consider a lease of a farm with a provision entitling the landlord to plant a few acres of ground for *'game crop'* to encourage game for shooting. This is most easily characterised as a personal contractual reservation to what would otherwise be a clear case of a lease.

Consider a contract providing for the granting of a succession of 360 day grazing lets in the grazing season in successive years. Each of those lets is a real right while it subsists, but in the gaps between the grazing leases, the right to the next lease in the series is only personal.

Summary and Consequences of this analysis

From the above analysis, it seems apparent that there are indeed five requirements for an agreement to fall into the *'set'* of leases. Any documents registered in the Land Register of Scotland and described as *'leases'* which do **not** conform to this are therefore not leases properly so called. Logically they cannot be real rights notwithstanding that they have been registered and there will be a number of *'non-leases'* already in the system. Those examining leasehold title should be alert to look for cases where Registers of Scotland have incorrectly registered agreements as 'leases' and seek to have the situation corrected where that can be done. The principal examples of these situations will include:-

1. *'Leases'* where the Registers have ignored the effect of *confusio* and pretended that a head lease will exist when the head tenant has acquired the landlord's interest or vice versa.
2. *'Leases'* where there is no rent whatever disclosed.
3. *'Leases'* granted over subjects which are inherently incapable of being let on their own such as ancillary heritable rights which do not afford any kind of exclusive possession.

Keeping my head above the parapet, I, like most authors, think this analysis is correct. Without specifically endorsing it, as the errors are mine, Robert Rennie and Professor Stewart Brymer thought enough of the earlier drafts to be kind enough to say that it was worth consideration. It might not be correct, but if it is wrong, then I think we have some problems with the law of leases, which will have important uncertainties in it, and which the Law Commission would need to consider.

Endnotes

1. See Scottish Law Commission Discussion Paper No 165 , Termination of Leases, para 8.51 et seq

2. See the Keeper's Registration Manual – *Leases- Confusio*, at this the following link (atlassian.net)https://rosdev.atlassian.net/wiki/spaces/2ARM/pages/1056866305/Leases#Leases-Whatisa'registrable'lease%3F which is as follows... This is a rule of general application to obligations in Scots Law. Where the same person in the same legal capacity becomes both the debtor and the creditor in such an obligation, that obligation is said to be extinguished *confusione*. In relation to leasehold property, where the same person in the same legal capacity becomes both landlord and tenant in the same lease (e.g. by succession or by disposition or assignation as appropriate), there is now a generally accepted presumption that *confusio* operates to extinguish the lease, unless the proprietor acts in such a way as to rebut that presumption. It is settled that a lessee who obtains a disposition of his leasehold subjects need only look thereafter to his title as owner for his rights and obligations.

   Notwithstanding the foregoing, agents differ in their ways of dealing with property where their client has acquired both leasehold and heritable titles. Many continue to dispose the subjects and assign the lease, while others dispose the subjects omitting the assignation of the lease and not excepting the lease from warrandice.

   The intention of the agents will normally be evident from the application for registration (e.g. a statement that the applicant is already proprietor of the other interest), in which case the absorption should be given effect to as part of the registration process - see Absorptions guidance. If there is no indication in the application that an interest has been extinguished by the operation of *confusio* then the application should be processed as normal; it would then be open to the proprietor to seek rectification of the register if they consider it inaccurate on the basis absorption has operated. (and also as formerly set out at Keeper's Guidance section 19-15-4) (i.e. for the '1979 Act') at this link; L19 Leasehold Interests - 1979 Act Registration Manuals - Confluence (atlassian.net)

19.15.4 ***Confusio***

- This is a rule of general application to obligations in Scots Law. Where the same person in the same legal capacity becomes both the debtor and the creditor in such an obligation, that obligation is said to be extinguished *confusione*. In relation to leasehold property, where the same person in the same legal capacity becomes both landlord and tenant in the same lease (e.g. by succession or by disposition or assignation as appropriate), there is now a generally accepted presumption that *confusio* operates to extinguish the lease, unless the proprietor acts in such a way as to rebut that presumption. It is settled that a lessee who obtains a disposition of his leasehold need only look thereafter to his title as owner for his rights and obligations.

- Notwithstanding the foregoing, agents differ in their ways of dealing with property where their client has acquired both leasehold and heritable titles. Many continue to dispose the subjects and assign the lease, while others dispose the subjects omitting the assignation of the lease and not excepting the lease from warrandice.

- The intention of the agents will normally be evident from the application for registration, but it will on occasion be necessary to obtain written confirmation from them as to the intended position. Where doubt exists, the case should be referred to a senior caseworker for consideration.

- Where it is considered that a lease has been extinguished *confusione* but that third party rights exist in relation to some of the conditions of let, a burdens entry should be prepared which shows the subsisting conditions (see 3rd example in section 19.19 on *confusio* suggesting the general rule that *confusio* applies can be rebutted..)

3 **Gyle Shopping Centre v Marks & Spencer plc** 2014 CSOH 59

4 See also Mike Blair article in JLSS in July 2015

5 Referred to with approval in **Palmer's Trustee v Brown** 1989 SLT 128

6 *McAllister* in 1.3 and 1.16 mentions that sporting and mineral leases do not give exclusive possession and appears not to distinguish that they are nevertheless capable of being proper leases and real rights as explained in this paper. Where *McAllister* uses the word 'normally' about exclusive possession, he appears to have in mind the idea of mineral and sporting leases co-existing with a lease of the ground for some other purpose. *McAllister* does not perhaps pick up on the fact that a farm lease is only a lease of 'Certain uses' of the property, leaving other uses to be let separately. In **Maxwell v Copland** (1868) 9M (HL) 1, it was held by the Court without difficulty that sporting rights were not included in an agricultural lease and could be separately let. This ability to let different natures of interest separately is acted upon in practice without doubts arising and understood to be correct.].

7 **Conway v Glasgow City Council** 1999 SCLR 248 (possibly obiter), and **St Andrews Forest Lodges v Grieve**, 2017 GWD 14-224 and 2017 SC DUN 25, where the Sheriff was clear on the point.

8 In **Webster** the fact that some rooms within a let house were locked up and not accessible to the tenant was held not to be an excuse to get out of the lease on the grounds of not being put in possession

9 Wappenshaws Act 1457

10 *McAllister* op cit . Para 2.58

GILLESPIE MACANDREW

Find out how we can help you

GILLESPIEMACANDREW.CO.UK

Edinburgh | Glasgow | Perth