Eviction and Rent Arrears

A guide to the law in Scotland

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Cases in bold type are also given in Appendix 2

Preface to electronic edition, 2003

This book has been out of print and practically unobtainable for seven years. Every now and then I am asked if I will write a second edition. I do not at present intend to. I think that it is important that a book on this subject be written, not as traditionally legal texts have been with an emphasis on those points decided by authority, but addressing those issues which in reality cause difficulty and require advice. But I no longer see eviction disputes often enough to think that I have a feel for this.

There have been many changes in the law since 1994. The Housing (Scotland) Act 2001 introduced the status of Scottish secure tenant and, while the broad principles of that act are similar to those of the 1987 Act, there are many differences of detail. Housing benefit law has changed in many ways. There are other statutory changes; for example, the status of accommodation for asylum seekers, a non-issue in 1994; changes in homelessness law; the extension of protection against unreasonable eviction by the Mortgage Rights (Scotland) Act 2001; and so on. Article 8 of the European Convention on Human Rights applies now to eviction actions, and there is a series of decisions in England on its implications. In Scotland, many more eviction cases are now reported, largely in the Scottish Housing Law Reports. These have taken many issues further than the discussion in this book. None of these developments are discussed here. One thing which does not seem to have changed, however, is the inability or unwillingness of many sheriffs to take eviction actions seriously or to pay any proper regard to the consequences of their decisions. I quoted a 1985 report which described what many sheriffs did as "rubberstamping'; it would take great naivety to suggest that this is no longer so.

It seems to me to be time to put this book in the public domain. In reality everybody photocopies texts like this without asking permission anyway. And why not?

This edition has a number of minor corrections, mostly simply of the typography and spelling inflicted on the book by its printers, but others go further. Some, such as the reference to Dysart and South Queensferry in paragraph 5.1, are conceivably capable of affecting the ultimate decision in a case. I leave it to the reader to find these. Nevertheless it is essentially unchanged from the original, except that I have removed the first, second, and third appendices (all largely out of date) to keep the size of the file manageable. The effect of electronic publication may be that page numbers will not match those in the table of contents.

Jonathan Mitchell

May 1, 2003

1 Introduction

1.1 Over 20,000 actions for recovery of possession are brought against tenants in Scotland each year. The vast majority - over 95 per cent. in the public sector, which itself accounts for well over 90 per cent. of all such actions - are brought on the ground of rent arrears. These actions are odd in a number of ways, but perhaps their oddest feature is that the landlord does not normally want the remedy which is apparently sought. As one English survey put it, these cases "are really brought to court in order to add leverage to the tenant to pay off the arrears owed, rather than to gain actual possession".[1] However, rather than seek the debt in a simple action of payment, landlords seek eviction on the theory that only by threatening to evict can they succeed in recovering their debt. Indeed, even in the tiny minority of cases where a decree is actually put into effect, the principal justification - at least in the public sector - is that this is a deterrent to other tenants. Thus, the Accounts Commission has urged local authorities to operate a high level of actual eviction, suggesting that this is causally linked to low levels of rent arrears.[2] Other commentators have disagreed.[3]

1 *Taking Tenants to Court* (1989, Department of the Environment).
2 Accounts Commission 1991. Its evidence appears to have been limited to a rather simple comparison between the performances of Motherwell and Renfrew District Councils in the year 1988-1989.
3 See references in note 1 to the following paragraph.

1.2 However, it is not the purpose of this guide to examine why eviction actions are raised, nor whether they are an efficient tool of housing management in reducing overall levels of rent arrears. A number of other publications have dealt with these questions of policy in recent years.[1]My concern is with individual cases and with the law. This guide is, accordingly, intended to describe the lines of defence which are open to tenants whose eviction is sought for rent arrears. I have not dealt with cases brought on other grounds. There are few such actions in Scotland[2] and different considerations are applicable to them in practice. I have, however, dealt with cases where no ground for eviction need be shown at all.

1 See, in particular, *Rent Arrears Management*, in the Good Practice in Housing Management series published by the Scottish Office Environment Department, 1994; and, for housing associations, *Raising Standards in Housing Management* (SFHA and Scottish Homes, 1993), chap. 4. See also Scottish Development Department Circular 2/1974; Newnham, *Edinburgh: the Unnecessary Evictions* (1977, Shelter); Wilkinson, *Rent Arrears in Public Authority Housing in Scotland* (1980, HMSO); Duncan et al, *Preventing Rent Arrears* (1983, HMSO); Audit Commission, *Bringing Council Tenants' Arrears Under Control* (1984, HMSO); Adler et al, *Public Housing, Rent Arrears and the Sheriff Court* (1985, SOCRU); Department of the Environment, *Taking Tenants to Court* (1989, HMSO); Accounts Commission, *Tenants Rent Arrears - A Problem?* (1991, HMSO); Loveland, "*Housing Debt*", 1993 Journal of Social Welfare and Family Law 113; Housing Management Standards Manual (1993, Institute of Housing); Department of the Environment, *Rent Arrears in Local Authorities and Housing Associations in England* (1995, HMSO). There is a brief synopsis of this material in Appendix 4.

2 Most are in the public sector and are in respect of anti-social behaviour. On this, see O'Carroll, *Neighbour Disputes: Law, the Last Resort?* (1994, Legal Services Agency). For the policy issues involved, see further Karn *et al, Neighbour Disputes* (1993, Institute of Housing), and *Tackling Racial Violence and Harassment in Local Authority Housing : a Guide to Good Practice* (1989, Department of the Environment). Both are of wider value than their titles may suggest. Recent Scots decisions include in particular *Scottish Special Housing Association v Lumsden*, 1984 SLT (Sh Ct) 71; *Glasgow District Council v Brown,* 1988 SCLR 679; *Govanhill Housing Association v O'Neil,* Glasgow Sheriff Court, 25 September 1991, unreported; *Kyle and Carrick District Council v Currie,* Ayr Sheriff Court, 24 January 1984, unreported; *Falkirk District Council v Townsley*, Falkirk Sheriff Court, 1 August and 25 October 1985, unreported; and *Clackmannan District Council v Morgan*, Alloa Sheriff Court, 22 October 1991, unreported (see Appendix 2).

1.3 Although the primary aim of this guide is, therefore, to concentrate on the legal defences open to tenants who are, or are alleged to be, in rent arrears, it has to be emphasised that neither tenants nor their advisers are well advised to take an unnecessarily confrontational approach. If there is one golden rule it is "negotiate - don't litigate". There is, however, a widespread belief - not only among housing authorities, voluntary agencies, and solicitors, but also in the courts - that all that tenant defenders need, if, indeed, they need anything at all, is help in negotiation. Thus, common advice to public-sector tenants with complex problems consists of two exhortations: (a) visit the housing department; and (b) pay your arrears at the rate you are told. Scottish Homes, in its 1992 consultation paper, "Housing Information and Advice", managed somehow to suggest a national strategy for the provision of information and advice to tenants which had no legal input whatsoever. Clearly, negotiation and mediation are of critical importance, and should never be neglected, but something more is required. It should go without saying that successful negotiation requires a knowledge of the strengths and weaknesses in law of one's position.

1.4 For a number of reasons, most of those who advise tenants in this area of law are not legally qualified. Lay representatives are entitled to appear at the first calling of eviction actions,[1] and commonly do so in a number of courts. In Edinburgh, where they have done so since the 1970s, there is a widespread view that this is effective, and that social workers in particular can make a valuable contribution. Courts with less familiarity with non-legal representatives may be more hostile to their appearance.[2] I have assumed a general knowledge of the law and of court procedure in this guide; there are more basic introductions in *Fighting Evictions*,[3] and in *Guide to Money Advice in Scotland*.[4]

1 Unless the sheriff finds that they are not suitable, or that they are not authorised to do so: summary cause rule 17(4). Lay representatives are accordingly well advised to carry a written mandate from the client.

2 An example is the extraordinary account of Paisley Sheriff Court in 1983 given in Adler *et al*, 1985: "We were told.....that representation would only be acceptable if it was carried out by a solicitor and was quite unacceptable if it was carried out ..... by a welfare rights worker. This may be explained by a case which arose just before the interview in which a welfare rights worker obtained an interim interdict against the local authority over the wording of their decree. It was also claimed that he "touted for business on one occasion'": pp. 38 and 45. The case referred to appears to be *Cooper v Renfrew District Council,* noted at para. 3.49 note 1, below.

3 1981, Shelter. A new edition is understood to be forthcoming.

4 1992, Drumchapel COC.

1.5 The Sheriff Courts (Scotland) Act 1907; the Rent (Scotland) Act 1984; the Housing (Scotland) Act 1987; and the Housing (Scotland) Act 1988, all as amended, are referred to throughout as the 1907, 1984, 1987 and 1988 Acts. Other abbreviations are noted in Appendix 4. I have attempted to state the law as at 21 November 1994.

2 Types of Tenancy: The Basic Framework

2.1 It is obviously necessary to determine the precise status of the occupier before it is possible to advise on rights. This will not normally be difficult, and the cases where real difficulty arises in practice are so different from each other as to deserve fuller treatment than is possible in a guide of this length.[1] The most common forms of tenancy in Scotland are these:

(1) Secure tenancies under the 1987 Act, i.e. almost all public sector lettings, and pre-1989 housing association lettings; also some housing association lettings entered into since 2 January 1989. Secure tenancies are over four-fifths of all residential tenancies, and account for well over nine-tenths of all threatened or actual repossession actions for rent arrears. As they, accordingly, represent, for practical purposes, the norm, they are dealt with in this guide as such.

(2) Tenancies which are not regulated by either the Rent or Housing Acts: here referred to as "common-law tenancies". These are uncommon; the main categories in practice are tenants of resident landlords, of the Crown, or of fully mutual housing co-operatives.

(3) Regulated tenancies under the 1984 Act, i.e. broadly speaking, private-sector lettings from before 1989. A "protected tenancy" is a contractual tenancy; a "statutory tenancy" is a right of occupation which may come into existence after the termination of the protected tenancy; a "regulated tenancy" covers both protected and statutory tenancies.

(4) Assured and short assured tenancies under the 1988 Act: most private-sector and housing association lettings entered into from 2 January 1989.

1 For a general survey, see the works noted in App. 4.

Examples:

(i) A housing association enters into a secure tenancy prior to the commencement of the 1988 Act. In 1992, the tenant moves to another house owned by the same association. A new tenancy agreement is entered into, which states that it constitutes an assured tenancy. In law, however, this is a secure tenancy: 1988 Act, ss. 12(2) and 43(3)(c), and Sch. 4, para. 13; *Milnbank Housing Association v Murdoch and Ors.*, 1994 SCLR 684.

(ii) A private landlord enters into a "licence" agreement using the style in *Somma v Hazelhurst* [1978] 1 WLR 1014. It is likely that this will, in law, constitute an assured tenancy: *Brador Properties Ltd. v British Telecommunications plc*, 1992 SLT 490. During debate in the First Scottish Standing Committee on the Bill which became the 1988 Act, the Minister pointed out that "when tenancies purporting to be licences have been brought to attention, the rent officer has taken a robust view and treated the case as a tenancy. The rent officer's view ... has never been challenged": *Hansard,* 23 February 1988, col. 987.

(iii) A district council lets a house to a homeless person. The missives say nothing as to the status of the tenancy, but a covering letter states that the let is temporary and not a secure tenancy by reason of para. 5 of Sch. 2 to the 1987 Act. This is ineffective and a secure tenancy has been created: *Campbell v Western Isles Islands Council*, 1989 SLT 602.

2.2 The common features of all forms of residential tenancies, however, are that, if tenants fail to remove, they cannot be evicted without court action; that, before court action can be taken, notice or warning in a particular form must be given; and that, with limited exceptions, the court must satisfy itself as to the ground of repossession. It is no exception to these principles that the lease is said to be voidable (e.g. because it was obtained fraudulently by the tenants);[1] or that the tenant is in material breach of contract; or that the lease contains the common but meaningless obligation on the tenant to remove without court process.[2]

1 *Brash v Munro and Hall* (1903) 5 F 1102.
2 *Waugh v More Nisbett* (1882) 19 SLR 427.

2.3 Some of the forms of protection are essentially technical, for example those relating to the formalities of a notice to quit. Others are to do with very broad general issues, such as the requirement for "reasonableness" in most eviction actions. The technicalities are often ignored. Thus, although the complexities of common law and statutory regulation of forms of notice and their effect have given rise to a situation in which a very substantial minority of notices are ineffective, the point is rarely taken in practice. For example, in actions by housing authorities to remove persons, who have been determined to be intentionally homeless, from temporary accommodation, it is often forgotten by both sides, in the course of an argument about statutory rights to permanent housing, that a valid notice is necessary so as to terminate the tenancy: the mere fact that the authority has provided accommodation for long enough to comply with its statutory duty under section 31(3) of the 1987 Act is not enough in itself to entitle it to recover possession.

2.4 The eviction of a lawful occupier or former tenant without an order of the court, and the harassment of occupiers, are normally criminal offences under sections 22 to 24 of the 1984 Act. Illegal eviction is also a delict which sounds in damages both at common law[1] and under sections 36 and 37, as amended, of the 1988 Act.[2] The new statutory right to damages may result in very large awards. It has been suggested that damages at common law for solatium and other losses, and under the statute for the value of the property, are alternatives,[3] but this may turn on the exact nature of the loss. In the private sector in Scotland, illegal eviction may well be at least as common as eviction through the courts. Thus, in the period May 1991 to April 1992, 27 homeless applicants to Edinburgh District Council were homeless by reason of a court order; 253 by reason of eviction without a court order.[4]

1 Rankine on Leases, p. 592. For more modern examples, see *Luganda v Service Hotels Ltd.*, [1969] 2 Ch 209; *Drane v Evangelou*, [1978] 1 WLR 455; *McLaughlin v Greater Glasgow Health Board*, 1989 SLT 793.
2 These provisions were extensively amended by the Housing Act 1988, Sch. 17 paras. 86 and 88. The Current Law Statutes reprint incorporates most, but not all, of these amendments. Their practical operation is well illustrated by *Tagro v Cafane* , [1991] 1 WLR 378.
3 s. 36(5) of the 1988 Act: see *Nwokorie v Mason* ,(1993) 26 HLR 60.
4 Report of District Council Housing Advice Centre, 2 June 1992. These figures exclude former owner/occupiers, occupiers of tied housing and other occupiers without tenancies.

Examples:

(i) An assured tenancy is entered into by a formal lease providing that the parties consent to preservation for registration and execution. A notice to remove is served. The landlord's solicitors then instruct sheriff officers to warn the tenants that if they do not remove instantly, they will be physically ejected without further ado. By doing so they render themselves liable to prosecution.

(ii) A landlord wishes to sell a house, formerly let in rooms, with vacant possession, and its value as a dwelling-house if so sold would be £60,000. One room only is still let, so reducing the total value to £40,000. The tenant returns from holiday to find the locks changed and is refused entrance. Alternative accommodation of better quality is immediately provided by the district council. The landlord's liability in damages to the tenant under the provisions of the 1988 Act is £20,000.

3 Secure Tenancies

3.1 Before 1980, public sector and housing association tenants had no special protection against eviction; with a few exceptions of no continuing relevance they were always outwith the Rent Acts. Security of tenure was introduced by the Tenants Rights, etc. (Scotland) Act 1980 (now consolidated into the 1987 Act), as part of the package of rights generally known as the "Tenants Charter", but, unlike much of that package, as a measure with all-party support. The drafter of the 1980 Act took the opportunity to simplify much of the elaborate structure provided by the Rent Acts for the private rented sector, and in particular to sweep away the whole structure of notices to remove by providing that it was the decree of the court, and not any earlier notice, which terminated the tenancy. Repossession proceedings under the 1987 Act are thus fundamentally different from those in the private sector, although many of the issues arising are similar. As in the private sector, notice is served in statutory form; it is then for the landlords, in court proceedings, to establish their ground for recovery and in most cases, in particular if the ground is rent arrears, to establish further that it is reasonable that recovery of possession be granted.

Notice of Intention

3.2 Before any action to recover possession on the grounds of rent arrears can be taken, a notice of intention to take court action must be served in a prescribed form.[1] There is no notice to remove at all, and the provisions relative thereto described in later chapters, which apply to all other forms of tenancy, do not apply. The notice contains prescribed information broadly equivalent to that in a notice to remove given to a protected or assured tenant, but in far more detail and in less intelligible form. It must also, unlike a notice to remove, state the ground on which recovery of possession is to be sought, but it need not give any further detail or specification of this. Thus, in the case of rent arrears, the amount of arrears need not be stated.[2] Decree of recovery of possession may ultimately only be granted on the ground stated in the notice: the court has no power to permit this to be amended.[3]

1 1987 Act, s. 47; the Secure Tenancies (Proceedings for Possession) (Scotland) Order 1980.
2 As it must in the equivalent notice to assured tenants.
3 *Midlothian District Council v Tweedie*, Edinburgh Sheriff Court, 1993 GWD 16-1068.

3.3 The notice must state a date, on which, and for six months after which, repossession proceedings may be raised. It is at this point only that any issue is likely to arise on its form or content. It is often assumed by pursuers (perhaps, particularly, where notices are issued by housing departments rather than the legal section of an authority) that the date need only be 28 clear days from the date of service. However, that is only so if that date coincides with the termination date of the tenancy at common law, which is unlikely; section 47(3)(b) provides that the date stated may not be earlier than that on which the tenancy could have been brought to an end by a notice to remove at common law. In examining such a notice, the ish should therefore be established, in the

same way as in the termination of a tenancy at common law.[1] As there are formal missives of let for almost all secure tenancies,[2] this should not normally be difficult.

1 See para. 4.5, below.
2 1987 Act, s. 53. However, a secure tenancy may be constituted orally or without formal missives; ss. 44 and 82.

Example:

A fortnightly lease is entered into commencing on Wednesday, 9 September 1992. On Friday, 4 June 1993 (which is two days after an ish on which the tenancy was renewed by tacit relocation) a notice is served. The earliest date which may be stated is not Friday, 2 July, but Wednesday, 14 July 1993.

3.4 Service of the notice may be made by personal delivery or by first class recorded delivery post.[1] It appears that if any other method of service is used this is ineffective.[2] As both the contents of the notice, and the fact that it was properly served, will ultimately have to be proved in court if they are not admitted, the well-advised pursuer will keep a copy of the notice with a recorded delivery slip, each authenticated by the person sending and copying the notice.[3]

1 1987 Act, s. 84: summary cause rule 10(1).
2 *Department of Agriculture v Goodfellow*, 1931 SC 556. As this is a requirement of statute, rather than of the rules, the court has no dispensing power.
3 Civil Evidence (Scotland) Act 1988, s. 6(1).

3.5 After the notice, the tenancy continues as before. It is not the notice but the order of the court which terminates the tenancy, with effect from the date set in terms of section 48(4). Thus, for example, the tenant still has the right to buy.[1] If no proceedings for recovery of possession are brought within six months the notice has no further effect whatsoever, although it may well be founded on by the landlord in later proceedings as, in effect, an earlier warning of the possibility of eviction.[2]

1 If missives can be concluded before the tenancy is terminated: *McKay v Dundee District Council,* Lands Tribunal for Scotland, 23 December 1994, unreported.
2 This approach is perhaps not easy to regard as closely connected to the real world if one bears in mind that over one hundred thousand such notices are issued annually in Scotland, four-fifths of which result in no subsequent action at all, and that their issue is usually computer-generated; so that in real life they are not necessarily regarded by tenants as particularly significant. As, however, lawyers may find such an attitude difficult to comprehend, averments of previous notices may have weight in court.

Court Practice and Procedure

The Summons

3.6 Proceedings for recovery of possession may only be brought by way of summary cause.[1] They may be combined with a crave for payment of up to £1,500. It is accordingly incompetent to bring an ordinary action for removing and arrears of £1,500 or over, or to bring an action for declarator of irritancy. However, summary cause procedure is not well-suited to cases where difficult questions of law arise, as is often the case here, and it is suggested that a remit to the ordinary roll should be considered in complex cases at least.[2] This can be done on the motion of either party, or by the court of its own accord.[3]

1 1987 Act, ss. 46 and 47(1); see *Monklands District Council v Johnstone*, 1987 SCLR 480; and *Glasgow District Council v Everson*, Glasgow Sheriff Court, 5 August 1992, unreported (an appeal against which was abandoned; see App. 2). Summary cause procedure as a whole is described in Macphail, "*Sheriff Court Practice*" (1988), Chap. 25 (by Sheriff Stewart). This section is confined to issues of particular importance in repossession actions.
2 *Hamilton District Council v Sneddon*, 1980 SLT (Sh Ct) 36; *Hart v Kitchen*, 1990 SLT 54.
3 Sheriff Courts (Scotland) Act 1971, s. 37(2).

3.7 As noted above, citation of the tenant must be carried out within the six months beginning with the date specified.[1] It has been held, in considering similar English provisions, that compliance with this time-limit was mandatory and accordingly went to the jurisdiction of the court.[2] The implications of this view, if it were to be followed in Scotland,[3] would be that non-compliance should be taken account of by the court of its own accord, even if not pled as a defence by the tenant.

1 See para. 3.3, above; *Edinburgh District Council v Davis*, 1987 SLT (Sh Ct) 33.
2 *Ridehalgh v Horsefield and Isherwood* (1992) 24 HLR 453 (noted at [1994] 3 All ER 848 at 871).
3 In practice it is not.

Example:

On Friday, 4 June 1993 notice is served. The date specified therein is Wednesday, 14 July 1993. On 13 January 1994 warrant to serve the summons is obtained and it is posted by first class recorded delivery mail. Posting that day is still in time; posting on 14 January would not be.

3.8 There are two styles of summons which may be used. The first seeks only recovery of possession, with or without expenses. The second also seeks payment of the arrears.[1] In either case, the pursuer's statement of claim begins with standard-form averments as to the identity of the parties to the action and the jurisdiction of the court. It must then continue to give fair notice of the pursuer's claim, and, in particular, details of its basis and any relevant dates.[2] Two questions arise: what is necessary to give fair notice; and what the consequences are if this is not done and the rule is not complied with.

1 A "combined action".
2 Summary cause rule 2, as amended with effect from 4 May 1992. The previous version of the rule required only that the statement of claim contained a concise statement of the facts and a note of the relevant statutory provisions.

3.9 A number of sheriff court cases determined under the earlier version of rule 2 suggested that, even then, the minimal requirements of a proper summons were a reference to section 48 of the Act; a statement as to the proper service of the section 47 notice; a statement of the existence of rent arrears; and a statement that it was reasonable that decree of recovery of possession be granted.[1] These cases further suggested that, although a summons without such averments was not fundamentally null and could be amended to include them, if it was not so amended the action might be dismissed by the court of its own accord. The prejudice to an unrepresented defender faced with a summons not indicating, in particular, that reasonableness was an issue appears to have been an important factor in these decisions. In the first such case to come before the Court of Session,[2] it was conceded that these matters should be expressly stated and the court commented that "this was a concession which could not have been withheld". However, the court continued, as the tenant (who was legally represented before the sheriff) was not prejudiced by the absence of any averment as to reasonableness, and as the history of rent arrears given in the statement of claim was so unusually bad as to give rise to a prima facie inference that it was reasonable to grant decree,[3] the lack of any averment as to reasonableness was only a technicality. The court apparently accepted that this "could well be material for a party litigant but not for a tenant who was legally represented".

1 *Gordon District Council v Acutt*; *Midlothian District Council v Brown*; *Renfrew District Council v Inglis*, all at 1991 SLT (Sh Ct), at pp. 78, 80 and 83 respectively (and see App. 2).
2 *Glasgow District Council v Erhaiganoma*, 1993 SCOLAG 89 (and see App. 2).
3 There were over four years' rent arrears when the action was raised in 1990; numerous adjournments to allow repayment at an agreed rate resulted in virtually no payments, even towards current rent, and the arrears rose to almost six years' worth. The defence on the merits (surprisingly, no defence at all was ever stated or sought to be stated) was incoherent but appears to have been that the defender was not entitled to housing benefit because he was living elsewhere.

3.10 It is now, on the strength of these decisions, clear that a well-drafted summons should include "at the very least"[1] the standard-form averments described in the previous paragraph. However, with the change in the language of rule 2, it is at least arguable that the summons should now also state the matters on which the landlord relies. If nothing more than the mere existence of rent arrears is relied upon, so be it; but if anything more is put in issue, as almost invariably it is, this should also be averred. In *Erhaiganoma* , the sheriff principal (in a passage with which the Inner House "substantially agreed") commented: "The ground for recovery may in one case be a marginal example of its kind, and thus itself a circumstance tending to indicate that it is not reasonable to order recovery. For instance, it may be a very small sum of arrears. In other cases, it may be an extreme example of its kind, itself tending to indicate that it is reasonable to make the order. For instance, it may be a nuisance of a dangerous kind . . . [accordingly] it would be justifiable for a landlord to rely on the ground for recovery, on a prima facie basis, as the circumstances indicating the reasonableness of granting the order for recovery . . . it seems to me to be a matter for the court, in the circumstances of each case,

to decide whether a statement of the ground for recovery is capable of supporting the conclusion that it is reasonable to make the order; and it is for the court, in the circumstances of each case, to decide what weight to attach to the ground for recovery in deciding whether it has or has not been affirmed that it is reasonable to grant an order for recovery". It would appear to follow that the effect of restricting the averments in a summons to the standard-form matters described would be to de-bar the landlord from putting before the court any further background material.[2]

1 *Glasgow District Council v Erhaiganoma*, 1993 SCOLAG 89.
2 Thus, in *Glasgow District Council v MacDonald*, Glasgow Sheriff Court, 26 April 1993, unreported, Sheriff Galt commented: "It must also follow that, if a pursuer is intent on founding his view that it is reasonable to make an order on facts other than or beyond the actual ground of recovery, the defender should be given some notice of these facts".

3.11 If the summons does not give fair notice it can hardly be possible to exclude the likelihood of prejudice to a defender who is not professionally represented. If a defender is present but not represented, it may be that the summons can be amended, If, however, the defender is not present, so that the effect of a lack of fair notice cannot be known, it is suggested that, in the absence of any offer by the pursuer's agent to amend, dismissal of the action as incompetent under summary cause rule 18(4) will normally be the proper course.

3.12 There is, unfortunately, little analysis in the Scottish decisions as to the policy reasons for insisting on fair notice of the landlord's claim. For a discussion of these, it is necessary to refer to England, where, as in Scotland, there has been central government concern for a number of years as to the practical inadequacies of repossession procedure.[1] In July 1992, the Lord Chancellor's Department issued for consultation a set of proposed amendments to the County Court Rules. It was said by the department that "too many possession orders [are] being made . . . largely attributable to the courts' lack of knowledge about defendants' circumstances, making it difficult to apply the statutory 'reasonableness' test properly in deciding whether or not to grant possession". New rules and forms were accordingly "designed to encourage defendants to attend the hearing and to ensure that the court has as much information as possible . . . possession hearings may therefore become less attractive than before as a first step to recovering arrears, while providing fuller safeguards against inappropriate orders for possession".[2] It appears to be accepted in England that it is both possible and necessary to insist upon landlords giving a fair degree of detailed specification of their claim, and for court documentation to be designed in reasonably clear language. Although none of this has traditionally been the approach in Scotland, there seems to be no good reason why forms of similar quality should not be introduced, and landlords in this country put under a similar duty to state a proper case for eviction.

1 See, in particular, *Taking Tenants to Court* (1989, Department of the Environment).
2 County Court (Forms) (Amendment No. 2) Rules 1993; County Court (Amendment No. 3) Rules 1993, para. 4. These require a claim for possession of a dwelling-house because of

non-payment of rent to "(a) state the amount due at the commencement of the proceedings; (b) give - (i) (whether by means of a schedule or otherwise) particulars of all the payments which have been missed altogether; (ii) where a history of late or underpayments is relied upon, sufficient details to establish the plaintiff's case; (c) state any previous steps which the plaintiff has taken to recover arrears of rent and, in the case of court proceedings, state (i) the dates when proceedings were commenced and concluded and (ii) the dates and terms of any orders made; (d) give such relevant information as is known by the plaintiff about the defendant's circumstances and, in particular, whether (and, if so, what) payments on his behalf are made direct to the plaintiff by or under the Social Security Contributions and Benefits Act 1992, and (e) if the plaintiff intends as part of his case to rely on his own financial or other circumstances, give details on all relevant facts or matters".

Procedure in Court

3.13 Summary cause procedure in repossession actions has always varied enormously between courts and between individual sheriffs. Scottish Office researchers in 1982-1983, and again in 1986, described a minority of courts as "active" and the majority as "passive".[1] They concluded that "the unevenness of impact [of the Tenant's Rights Act] must be regarded as . . . failure. Tenants in some areas are not given the same level of protection by the courts as tenants in other areas". In 1982-1983, "statutory provisions were being implemented in only two courts - Edinburgh and Glasgow"; and, although by 1986 there was some "patchy implementation" elsewhere, the usual approach of most courts could still be described as "rubber stamping".[2] The most obvious form of "rubber stamping" was removed in 1991, when amendment was made to summary cause rule 18(2) to ban the practice in many courts of permitting motions for decree for recovery of possession to be granted by the sheriff clerk without ever calling before the sheriff at all;[3] but it is unlikely that the degree of variation between sheriffs has lessened to any great extent.

1 Thus, in one Lanarkshire court the presiding sheriff was observed reading *The Times* in open court while the sheriff clerk, sitting below, granted decrees without discussion.
2 Adler *et al*, 1985; Himsworth *et al*, 1988.
3 This amendment only refers to secure tenancies. Identical considerations arise in the private sector and it is unclear why the rule is so limited. It remains the case that motions for continuations can still be dealt with by the sheriff clerk without reference to the sheriff, so landlords' agents may avoid sheriffs who are thought to be likely to look at a motion for decree critically by moving to continue the case to a later day. In Lothian and Borders, the practice is that, although motions for continuation are heard before a sheriff clerk depute, there is a "referral to the sheriff in cases where the depute is not happy with the motion being made": internal memorandum of April 1992.

3.14 Procedure still frequently bears the marks of pre-1980 law and pre-1991 procedure. In many courts, if the defender does not appear, the view is taken or it is assumed that decree should be granted without enquiry. It is, however, now generally accepted that the correct view is that sections 46 to 48 of the 1987 Act go to the jurisdiction of the court and that the court has no power to grant decree if their requirements are not fulfilled.[1] This has the implication that the sheriff is not only entitled but indeed bound, in undefended actions for recovery of possession in which "reasonableness" is an essential ingredient, to consider the whole circumstances, and may only grant decree if satisfied both that a ground for recovery of possession exists and that the grant of decree

would be reasonable. At least some enquiry into these matters is accordingly necessary, even if the action is undefended.[2]

1 *Midlothian District Council v Drummond*, 1991 SLT (Sh Ct) 67; *Edinburgh District Council v Lamb*, 1993 SCOLAG 123 (and see App. 2); and cases noted in para. 3.9, above.
2 The reason why so few tenants appear may not be obvious to the court. Thus the "court officer" [sic] of Clydesdale District Council has been quoted as saying "tenants are dissuaded from going to court since it makes the business of the court much simpler if they are not there": Adler *et al*, 1985, p. 63. This may not be unusual.

3.15 Practice is also not uniform where defenders or their representatives appear to oppose the granting of decree. It is thought that in most courts the procedure usually followed is to continue the case without noting a defence, unless decree is granted forthwith. Although normal summary cause procedure only allows a case to be continued once,[1] section 48 of the 1987 Act gives the court wide powers to adjourn repeatedly or indefinitely, with or without conditions such as the level of payments to be made towards arrears. It has long been accepted that the court may exercise this power of its own accord, even if neither party seeks it.[2]

1 Summary cause rule 18(3). This does not prevent the action being sisted: Macphail, *Sheriff Court Practice,* para. 25-116.
2 See cases noted in preceding paragraph. *In Whiteinch and Scotstoun Housing Association v Walker*, Glasgow Sheriff Court, 6 June 1990, unreported, it was held by the sheriff principal that the power to adjourn under s. 48, or to sist for legal aid to be applied for, was limited to cases where a defence had been stated at first calling under summary cause rule 20. The decision is a healthy reminder that there is no automatic right to any continuation and that defenders should be able to state a defence immediately, but it does not reflect current practice in Glasgow or elsewhere.

3.16 It has been suggested that, if rent arrears are admitted, reasonableness is not a "defence" which can be stated, thus making the fixing of a proof mandatory under rule 18(7) if the case is not adjourned, but a matter for the immediate exercise of discretion, so that decree might be granted at a first calling although the tenant wished to put its reasonableness in issue. This was at one time the general practice in Glasgow Sheriff Court.[1] The fallacy in this approach is that reasonableness under section 48 of the Act is a question of mixed fact and law. In so far as it is a question of law, it cannot (subject to the next paragraph) be decided until the facts are ascertained.[2] In so far as it is a question of fact, it can only be ascertained by evidence at a proof or by admission.[3] In *Murphy v Glasgow District Council*,[4] it was held that the practice described was ultra vires.

1 *Glasgow District Council v Murphy*, 16 October 1987, unreported; see para. 3.48, below.
2 Summary cause rule 18(7); *Davies v Hartley*, 1991 GWD 38-2351.
3 *McLaughlin v Timber Terminals Ltd.*, 1993 SCLR 176.
4 Court of Session, 14 June 1989, unreported. See para. 3.48, below and App. 2.

3.17 In May 1992, however, rule 18 was amended so that, if the court "is satisfied that the facts of the case are sufficiently admitted", the cause may be decided on its merits at first calling, even if a defence has been stated. This

new rule, which is based on Small Claims procedure,[1] appears to contemplate that there might be extensive discussion of the merits at this stage. Few court timetables would permit this.[2] If the power is to be exercised at all, it is submitted that the court should be very slow, particularly where a defender is not represented, to grant decree at this stage in the face of opposition. If matters arise which cannot at once be either admitted or denied, the case should be adjourned: facts are not "sufficiently admitted" merely because a party who has had no proper notice that they are in issue is not immediately able to dispute them.[3] A pursuer cannot, for example, rely on a summons which says nothing of the history of the tenancy as giving "fair notice" of the claim,[4] but then rely for the purposes of this rule on an oral account of previous undertakings to pay arrears being broken.[5]

1 Small claims rule 13(6): it is difficult to see why the amendment was made, standing its failure in small claims procedure, as described in *Small Claims in the Sheriff Court in Scotland,* SOCRU, especially at pp. 79 and 107.
2 See the commentary to *Glasgow District Council v Erhaiganoma*, 1993 SCOLAG 89.
3 *Edinburgh District Council v Lamb,* 1993 SCOLAG 123; see App. 2.
4 See para. 3.10, above.
5 This was however done in *Edinburgh District Council v Sinclair*, Edinburgh Sheriff Court, 25 November 1993, unreported, in which a temporary sheriff granted decree in favour of the pursuers, although the defender's agent had stated a defence on reasonableness. At the time of writing, this decision is under appeal but it is suggested that such an approach is obviously wrong.

3.18 A matter which has caused difficulty in the past was whether anyone but the tenant defender had the power to enter the process and resist the granting of decree. A tenant's spouse obviously has that right in terms of section 3 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, and could perhaps do so in the tenant's name.[1] However, as the effect of a decree is to terminate the rights of all occupants under the tenants, for example, sub-tenants, others might also have an interest to defend and might seek to be sisted as additional defenders.[2] In practice, some sheriff clerks at least refused to accept minutes from such third parties seeking to be sisted as additional defenders. The competency of such a procedure was accordingly put beyond doubt by the introduction of summary cause rule 21A in May 1992, which introduced a procedure by which any interested person could seek to be appointed as an additional defender.

1 In *Glasgow District Council v McGechie* (sic: a typesetter's error for *McKenzie*), 1992 GWD 12-703, it was not accepted that the person who claimed to be the tenant's spouse actually was so, and indeed it was fairly obvious that he was not.
2 *Zurich Insurance v Livingston*, 1938 SC 582.

3.19 In an action where both recovery of possession and payment are sought, the existence of a time to pay order does not prevent decree being taken and put into effect. Its effect is to stop the creditor using diligence; but eviction is not diligence.[1] The court may, and occasionally does, grant decree for recovery of possession although time to pay is allowed on the claim for payment.[2] Representations to the Sheriff Court Rules Council as to the misleading nature of the papers sent to a defender in a combined action have not borne fruit, and

there is a considerable volume of anecdotal evidence of such defenders not appearing to resist decree for recovery of possession because they believe they need only make a time to pay application. A defender who admits the debt and seeks a time to pay order should accordingly ignore the form sent with the summons, attend court, and seek a continuation of the claim for recovery of possession before seeking any time to pay order.

1 Debtors (Scotland) Act 1987, s. 2.
2 I am reliably informed that in Hamilton Sheriff Court this is standard practice, presumably because local public sector pursuers are unaware that they can seek decree for payment while the claim for repossession is continued.

Example:

In a combined action for recovery of possession and payment of rent arrears of £500, the defender seeks a time to pay order at the rate of £10 per week. This is acceptable to the pursuers, who (at a first hearing at which the defender is neither present nor represented) then seek and are granted decree for recovery of possession and, subject to the time to pay order, payment. The defender pays at the rate ordered. The pursuers then refuse to accept this, stating that unless payment of the full £500 is made in seven days they will operate the decree for recovery of possession. The defender's remedy is to appeal against the granting of the decree for recovery of possession, or to minute for its recall.

The Merits of the Action

3.20 The relevant ground for recovery of possession is ground 1 of Schedule 3 to, read with section 48(2)(a) of, the 1987 Act: that "rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy has been broken" and "it is reasonable to make the order". If the service of a notice complying with section 47(3), and the fulfilment of the other conditions of section 47(2), are not admitted, these will also have to be proved.[1] Whether at proof or at first calling, the onus of proof is on the pursuers and it is the duty of the court to take into account all relevant circumstances as they exist at the time of the hearing.[2]

1 See the cautionary tale of *Link Housing Association v McCandless,* 1990 GWD 39-2270. Ordinary cause rule 33.05 does not assist the pursuer, as the notice is not a notice to remove.
2 *Barclay v Hannah*, 1947 SC 245; *King v Taylor* [1955] QB 150.

The First Requirement: Rent Arrears

3.21 The arithmetic of landlords as to the extent of rent arrears should not be accepted without question. It is unusual to see the existence or even the amount of rent arrears disputed, but issues do in fact frequently arise here. The first ten words of ground 1 can be taken in four parts.

3.22 "Rent". Is the debt rent or something else ? It is common practice for housing authorities to debit rent accounts with a variety of unrelated charges due or supposedly due by the tenant, such as repair bills, heating charges,

household insurance premiums, and overpaid housing benefit. Their payment may still be an obligation of the tenancy, rather than of a separate agreement, so as to entitle the landlord to seek decree under this ground; see the missives of let.[1] However, that will not, in practice, be the case if the debt is overpaid housing benefit. That is generally accepted, in theory, by housing authorities.[2] Nevertheless, examination of the landlord's rent payments schedule will frequently show items with opaque descriptions, such as "charge adjustment" or "miscellaneous", which turn out on enquiry to represent a claim for housing benefit repayment, not rent at all, so that there is no ground for recovery of possession.[3] The Accounts Commission found that, in 1991, the vast majority of Scottish housing authorities still failed in practice to distinguish housing benefit overpayments from rent arrears, and commented: "few sheriffs are found to query the actual composition of the amount being pursued and [they] are therefore unaware of the inclusion therein of recoverable housing benefit".[4] The placing of such overpayments on rent accounts is, in turn, frequently related to a failure to appreciate that the decision that there has been an overpayment at all, and that it is recoverable from the tenant, are themselves decisions which must be formally notified and which are subject to appeal to the local review board.[5] In practice, many such overpayments will not be recoverable in law at all.[6]

1 Thus, for example, the missives of let of Cumnock and Doon Valley District Council put an obligation on the tenant to pay "gas and electricity charges and all other expenses normally borne by an occupier", whatever that may mean.
2 Following advice given by the DSS; *Housing Benefit Guidance Manual,* paras. A 7.37-7.41, and by the Accounts Commission; Accounts Commission 1991 .
3 *R. v Haringey London Borough Council, ex parte Ayub* (1993) 25 HLR 566 (QBD) ; *Edinburgh District Council v Lyons,* 1993 SCOLAG 106. It is perhaps worth noting that Edinburgh is an authority with a stated policy of not seeking eviction where the arrears shown on the rent account are wholly due to housing benefit overpayments, as they were in *Lyons*. It is understood that the reason why that policy is not operated is that its computers lack software which can distinguish between different debts on a rent account. The practice of entering an overpayment of housing benefit on a rent account in such circumstances, so that it appeared to be rent arrears, has repeatedly been held to be maladministration by the Commissioner for Local Administration in England (the Ombudsman); e.g.*Wychavon District Council,* Complaint 90/B/2514 (see App. 2) and *Hackney London Borough Council*, Complaint 91/A/0730.
4 At paras. 63 to 68 and 99.
5 See para. 3.31, below.
6 Housing Benefit Regulations, regs. 98 to 101; *R. v Liverpool City Council, ex parte Griffiths* (1990) 22 HLR 312; *Jones v Chief Adjudication Officer* [1994] 1 All ER 225.

Example:

A tenant's rent is rebated from £30 to £2 per week. He pays nothing for a year, at which time a decision is made, properly notified, and not appealed to the housing benefit review board that the rebate should never have been made and that the tenant is liable to repay. The recoverable overpayment is accordingly £1,456 (52 x £28). Recovery of possession can be sought in respect of the £104 rent arrears alone. The existence of the housing benefit overpayment may be relevant to reasonableness. Payment of £104 before citation will have the effect

that there is no ground for recovery of possession: payment after citation, but before the hearing, may do so: see para. 3.27, below.

3.23 "Is lawfully due". Is there a good defence to the payment claimed ? Rent is not "lawfully due" if the tenant is entitled to retain it because the landlord is in material breach of contract.[1] Thus, if the landlord is in breach of the repairing obligations[2] implied under section 113 of and Schedule 10 to the 1987 Act or at common law, that is a defence.[3] A counterclaim for damages may be made if the landlord is claiming payment of arrears as well as repossession, but not if only repossession is claimed. Even if the defence is unsuccessful, if it was presented in good faith, that will frequently be highly relevant to reasonableness.[4]

1 *Fingland and Mitchell v Howie,* 1926 SC 319; *Stobbs & Sons v Hislop*, 1948 SC 216; *Renfrew District Council v Gray,* 1987 SLT (Sh Ct) 70.
2 For the nature and extent of these, see further references noted in App. 4.
3 On the practice of seeking consignation by the tenant of the withheld rent as a condition of being permitted to defend the action, see *Edinburgh District Council v Robbin*, 1994 SCLR 43.
4 For this aspect, see para. 3.40, below.

Example:

There are rent arrears of £500. The tenants have a damages claim in respect of dampness of the house which can be valued at this at least. Action for recovery of possession (but not payment of arrears) is brought. The tenants have a good defence to the action but will require to raise separate proceedings in respect of any damages sought, if they are not content simply to let the matter rest. In any event they would be well advised (unless they are unusually confident of their case), to budget for payment of the arrears to the landlord after proof.

3.24 A line of defence which may sometimes be open is that the rent claimed was not lawfully due because the landlord has acted ultra vires in setting it. This was held by the House of Lords in *Wandsworth London Borough Council v Winder*[1] to be a competent defence. In the light of the very wide power of local authorities, in terms of section 210 of the 1987 Act, to determine whatever rent they consider reasonable it is perhaps unsurprising that such a defence has never been accepted on its facts by a Scottish court. However, the decision in *R. v Ealing London Borough Council, ex parte Lewis*,[2] that a rent fixed, so as to balance a housing revenue account against which a number of improper debits (such as the cost of a homelessness service and the wages of wardens in sheltered housing) had been made, was unlawful, demonstrated that this line of defence could be successfully advanced in a number of Scottish districts which make similar unlawful debits against the housing revenue account. That decision was largely reversed by legislation, but consultation continues on a long-term solution to this question.[3]

1 [1985] AC 461.
2 (1992) 24 HLR 484.
3 Leasehold Reform, Housing and Urban Development Act 1993, ss. 149 to 151.

3.25 There is sometimes an argument, which has achieved wide circulation among insolvency practitioners and has frequently been accepted by landlords,[1] that rent arrears are no longer "lawfully due" if the tenant has been sequestrated. That is incorrect.[2] The fact of sequestration makes no difference to this question, although the bankrupt's discharge from the sequestration will have the effect that pre-sequestration arrears are no longer due[3] and sequestration will be highly relevant to questions of the reasonableness of eviction.[4]

1 See Accounts Commission, 1991, para. 20, which further reports the odd view that even the signing of a trust deed for creditors has this effect.
2 For the reasons given in *Monklands District Council v McAllister*, 1992 SCLR 207.
3 Bankruptcy (Scotland) Act 1985, s. 55.
4 As to which, see para. 3.42, below.

Example:

A tenant with rent arrears is sequestrated. The tenant is on invalidity benefit and, his rent not being fully rebated, arrears continue to accrue. In a combined action, the landlord seeks recovery of possession on the basis of the whole rent arrears, and also their payment. The claim for recovery of possession is competent, although there is a good defence on reasonableness: it would be competent even if there were no arrears accrued since sequestration. The claim for payment is also competent, but diligence can only be done for those arrears which have accrued since sequestration, and only against the assets acquired by the debtor post-sequestration. The only practical purpose of the claim for the earlier arrears could be to establish the debt to the satisfaction of the trustee, to whom the claim should have been intimated.

3.26 "From the tenant". At one time it was not uncommon to impose upon separated spouses, as a condition of tenancy transfer or new house allocation, a condition that they pay their spouse's arrears. This practice was made unlawful in 1980[1] but is still occasionally found.[2]

1 Now by the 1987 Act, ss. 19(1) and 20(2)(a)(ii).
2 For example, in *Pirie v Aberdeen District Council*, 1993 SLT 1155, where this was apparently a secret policy not authorised by the housing committee. In a very strange decision (*Hamilton District Council*, 746/1985), the ombudsman accepted such a policy was unlawful but held that it did not constitute maladministration because "it was not unreasonable ... until ... successfully challenged in a court of law". It is doubtful whether such an approach would be followed today.

3.27 "Has not been paid". The question is generally considered to be whether there were arrears at the date of citation rather than at the date of the hearing.[1] The authorities for this proposition are, however, all decisions under the Rent Acts; and the language of those Acts is so different from section 48(2) of the 1987 Act that it may be arguable that there must be arrears at the date of the hearing itself.[2] In any event, however, it has been said by the Court of Appeal that, if the arrears giving rise to the action have been paid by the date of the hearing, it would be "very unusual indeed" to grant recovery of possession.[3]

1 *Bird v Hildage,* [1948] 1 KB 91; *Dellenty v Pellow*, [1951] 2 KB 858; *Mathieson v Hodgkin,* 1949 SLT (Sh Ct) 61.
2 This was assumed in *Gordon District Council v Acutt,* 1991 SLT (Sh Ct) 78.
3 *Hayman v Rowlands* , 1957] 1 WLR 317.

The Second Requirement: the reasonableness of Granting Decree

3.28 So far as questions of reasonableness are concerned, it is well established that it is the duty of the court to take into account all relevant circumstances as they exist as at the date of the hearing.[1] The relevant matters will normally include the extent of arrears; the reason why they arose; the length of the tenancy;[2] any previous history of arrears;[3] the availability of other remedies to the landlord and the possibility of safeguarding the landlord's position for the future;[4] the reason why the landlord seeks recovery of possession;[5] and last, but far from least, the hardship to the tenant's household if decree should be granted.[6] At the very least, the landlord should show whether the court is "dealing with a bad tenant who was persistently in arrears with rent, or a tenant with a good record who had only recently fallen into arrears through misfortune".7

1 *Kemp v Ballachulish Estate Co. Ltd.*, 1933 SC 478; *Rhodes v Cornford* [1947] 2 All ER 601; *Glasgow District Council v Erhaiganoma,* 1993 SCOLAG 89. There is a useful general survey in Megarry on The Rent Acts (11th ed.), vol. 1, pp. 387 to 392. *Woodspring District Council v Taylor* (1984) 4 HLR 95 is a particularly valuable authority because its facts are so typical. *Rent Arrears Management* and *Raising Standards in Housing* are useful background to the policy issues facing the landlord and the court: see para. 1.2, note 1, above.
2 *Midlothian District Council v Drummond,* 1991 SLT (Sh Ct) 67. This, and the case in the following note, are given as examples rather than as establishing any point of principle.
3 *Moray District Council v Lyons*, 1992 SCOLAG 91.
4 *Second W.R.V.S. Housing Society Ltd. v Blair* (1986) 19 HLR 104.
5 *Edinburgh District Council v Lamb*, 1993 SCOLAG 123. The views of the sheriff principal in this case are of particular significance as the reality is that landlords are virtually always seeking decree for the reasons here criticised as improper.
6 For example, *Glasgow District Council v Brown*, 1988 SCLR 679.
7 *Midlothian District Council v Drummond*, supra.

3.29 If nothing is said in the statement of claim as to the history of the tenancy, or of the tenant, the tenant may fairly assume that this will not form part of the landlord's case.[1] As a matter of reality, however, it is likely to be founded upon without notice, and that on the basis of second-hand, or fourth-hand notes from the file. It is not unheard of for decrees to be granted in such circumstances after the landlord's representative at first calling has simply mixed up two files.[2] The records of the tenancy can be recovered by the tenant by court order,[3] or without court order.[4]

1 See para. 3.10, above.
2 As narrated in *Glasgow District Council v Lindsay*, Glasgow Sheriff Court, 24 June 1986, unreported.
3 Ordinary cause rule 28.2.
4 Under the Data Protection Act 1984, for computer-held records, and the Access to Personal Files (Housing) (Scotland) Regulations 1992, for manually recorded material. Scottish Office

Environment Department Circular 33/1992 gives useful guidance on the operation of the regulations. There is a maximum fee of £10.

3.30 An issue of particular importance is the reason why there are rent arrears. This obviously affects a number of questions, and in particular whether landlords actually require recovery of possession to protect their position at all. As virtually all rent arrears cases reflect the financial difficulties of the tenant in paying the rent,[1] some understanding of the housing benefit scheme[2] is essential.

1 See, in particular, Accounts Commission, 1991, vol. 2; Wilkinson, 1980; and *Taking Tenants to Court* (1989, Department of the Environment).
2 Housing Benefit (General) Regulations 1987, as amended; see App. 1 for text of regulations referred to, and App. 4 for commentaries.

3.31 The broad principle of the housing benefit scheme is that tenants on income support will, with a few exceptions, have all their rent paid; others will receive a proportion on a sliding scale. Unlike other benefits, housing benefit is administered by district and islands councils, not by the Department of Social Security. The quality of administration varies and is frequently very poor, and it can never be assumed that procedure has been properly followed or decisions correctly taken.[1] There is an internal appeal system, and all decisions must include a notification of the right of appeal.[2] The ultimate statutory adjudicating body is an ad hoc committee of councillors, the Housing Benefit Review Board. Its decisions are subject to judicial review.[3]

1 Thus, the Audit Commission, in *Remote Control; the National Administration of Housing Benefit* (1993), suggested that about one-third of authorities in England and Wales generally administered housing benefit properly, but that most were either incompetent or misapplied regulations so as to deprive claimants of benefit, or both. The Accounts Commission, in their parallel report, *Managing Housing Benefit* (1993, HMSO), were less scathing about Scottish authorities but a close reading of the report suggests that most authorities were of no more than moderate competence; that most illegalities described in England were equally widespread in Scotland; and that the only major difference was that Scotland did not experience delays on the same scale as England.
2 reg. 77 read with Sch. 6. Failure to include this notification, which is common, has the result that the usual six-week time-limit on appeals does not begin to run: *London & Clydeside Estates Ltd. v Aberdeen District Council*, 1980 SC (HL) 1.
3 Such petitions rarely fail. The general quality of decision making of review boards is probably the lowest of any statutory tribunal: see *"Housing Benefit Review Boards: a Case for Slum Clearance"*, 1992 Public Law 551.

3.32 Housing benefit payable to public-sector tenants takes the form of a rebate from the rent payable, rather than a payment to the tenant as is usual in the private and housing association sectors. The landlord is thus automatically protected for the future, however bad the arrears may be, if benefit has been awarded that covers the whole rent. This will normally be the case if the tenant's household is dependent on income support (the main exception to this generalisation being if a "non-dependant deduction"[1] is being made because an adult who is not a member of the tenant's family is staying in the house and is deemed to be paying rent) but not otherwise.

1 Under regs. 3 and 63. The amount of these deductions has increased substantially in recent years. Their existence, working and amounts are frequently not understood by tenants and they are, in practice, a major source of rent arrears.

3.33 Unlike the private sector, the entire rent payable in the public sector is always eligible for housing benefit unless, exceptionally, it is considered that the tenant occupies unreasonably large accommodation.[1] Payments made with rent (for example, under rent-with-heat schemes or for household insurance premiums) are not, however, generally eligible for benefit. An exception is payment for the use of furniture, where this is paid for under the tenancy agreement.[2]

1 reg. 11(2)(a).
2 reg. 10 and Sch. 1.

3.34 Many arrears cases reflect the failure of the tenant to claim housing benefit, or an increase in benefit, when they could. Normally, benefit is only payable from the week of a claim, or in some cases from up to four weeks before, but if the claimant can show "good cause" for the failure to claim earlier, the claim can be backdated by the authority for up to 52 weeks.[1] A specific application for backdating is usually necessary. In practice, local authorities vary greatly in their willingness to backdate.[2] Some are generous: most are not, because backdated benefits attract only a 25 per cent. subsidy from central government.3 That is not, however, in law a valid reason for a refusal to backdate. A refusal to backdate is subject to appeal to the review board.

1 reg. 72(15). There are a number of decisions of social security commissioners as to what may constitute "good cause" in the similar context of the Social Security (Claims and Payments) Regulations 1987, reg. 19, and its predecessors; see in particular decision R (SB) 6/83. The fullest summary is in Partington, *Claim in Time*, 3rd edition (1995). See also Ogus and Barendt, *The Law of Social Security*, 4th edition (1995) pp 641-644.
2 The Accounts Commission found in 1992 that 24 per cent. of authorities never backdated rent rebates to their own tenants, and an astonishing 45 per cent. never backdated rent allowances to private sector tenants: *Managing Housing Benefit*, Table 12.
3 The point is that if benefit is backdated to cover, say, arrears of £1,000, only £250 is actually received by the authority which must fund the remainder. It may seem a more attractive prospect to look to the tenant for the entire £1,000, whatever the legal right to have the claim backdated. An argument which may (although in law perhaps it should not) sway some housing departments is that any loss from backdating a claim can be put on to the rent rebate account, rather than the housing revenue account, kept under ss. 205 and 203 of the 1987 Act respectively. This has political attractions, in that any loss is relatively invisible; it can be met from the authority's general funds as there is no requirement to balance the rent rebate account; and for accounting purposes it no longer counts as rent arrears.

Example:

A tenant who formerly paid the whole rent is made redundant and claims unemployment benefit. He believes that this will also act as a claim for housing benefit (as a claim for income support does for practical purposes). Six months later, with no rent paid for that period, he realises the true position and makes a claim, which he seeks to have backdated. There may be "good cause" if his mistaken belief was reasonably held, particularly if he was wrongly advised by

someone he was entitled to expect to know the law such as a Citizens'Advice Bureau (R(U) 9/74); or he made some inquiry of the district council and was led to believe he had no claim (R(U) 3/60; R(I) 10/74).

3.35 The backdating of a claim, however, is to be distinguished from the retrospective increase of an award on an existing claim, or the grant of an award on a previously rejected claim. These have no time-limits, and good cause need not be shown; it need only be shown that the decision which is sought to be altered was made in ignorance of, or was based on a mistake as to, some material fact or as to law, or that since that decision there has been a relevant change of circumstances.[1] The distinction between such cases and those mentioned in the preceding paragraph has rightly been described by the Accounts Commission as one which was "not clearly understood by some authorities",[2] and it appears likely that many housing authorities do not operate this very valuable power.

1 reg. 79(1). This is similar to the test for other benefits in the Social Security Administration Act 1992, s. 25(1), and decisions thereon such as *Saker v Secretary of State*, *The Times*, 16 January 1988, may usefully be referred to.
2 *Managing Housing Benefits* (1993), para. 84.

Example:

A private-sector tenant, who was awarded full housing benefit, moves into a council house. She assumes her claim will continue, and makes no further claim. The district council treat her as not entitled to benefit for her new house until the date of a new claim. This can be properly dealt with by reviewing her former claim to take account of her move, so effectively continuing it over a period which would otherwise have rent arrears. Such a decision would have no adverse subsidy implications for the local authority.

3.36 In other cases, the problem may be that the tenant has claimed housing benefit but the claim has not been dealt with. In terms of regulation 88(3), claims should normally be dealt with and the first payment made within 14 days. In some authorities, delays of many months are not unusual. Few local authorities, as opposed to housing associations, will consciously seek recovery of possession while a housing benefit claim is being processed, but legal departments may be unaware that this is the case.

3.37 Existing housing benefit entitlement should be checked. Most local authority statements of entitlement are computer-generated and unintelligible. A request in writing may be made for reasons.[1] There is no time-limit on such a request.

1 reg. 77(3) and (4).

3.38 If the tenant or their partner is in receipt of income support, the Department of Social Security will, on request from the landlord, deduct an amount therefrom and pay this to the landlord if either there are eight weeks rent arrears, or there are four weeks arrears and, in the opinion of the

Department, it is in the tenant's best interests that such payment be made.[1] This deduction, which is small but reflects the tenant's ability to pay,[2] takes priority over all other direct debits from benefits, such as for fuel bills, community charge or council tax arrears, or fines. Direct payments for rent arrears cannot be deducted from any benefit other than income support.[3] In many cases, such deductions should provide an adequate alternative to legal action. Many housing authorities are aware of the "arrears direct" scheme but do not operate it, or do so only patchily or on application by the tenant.[4] Failure to seek "arrears direct" may render the granting of decree of recovery of possession unreasonable.[5]

1 The "arrears direct" scheme - Social Security (Claims and Payments) Regulations 1987, reg. 35, as read with Sch. 9, paras. 5 and 9. Payment is normally made quarterly. There is an odd exception to the scheme if the arrears are constituted by non-dependant deductions: Sch. 9, para. 5(2).
2 Five per cent. of the personal allowance for a single claimant aged not less than 25, rounded up to the next five pence: Sch. 9, para. 5(6). In 1992-1993, this was £2.15 per week; in 1993-1994, £2.20; and in 1994-1995, £2.30.
3 Oddly, however, a deduction may be made from any social security benefit to repay overpayments of housing benefit: Housing Benefit Regulations, regs. 102 and 105.
4 The Accounts Commission, in 1991, commented unfavourably on the low take up of the scheme by housing authorities; they noted, for example, that Glasgow District Council used it in only 25 per cent. of eligible cases at a cost to itself of some £750,000 per year. They noted that administrative difficulties had been largely removed by changes in practice in 1990-1991 (*Tenants' Rent Arrears,* paras. 85 to 91). It is fair to add that a lack of DSS co-operation in many areas continued much later than that.
5 *Midlothian District Council v Brown*, 1991 SLT (Sh Ct) 80. It has further been held by the ombudsman in England that such a failure, coupled with the taking of possession proceedings, constituted maladministration entitling the tenant to compensation: *Birmingham City Council*, Complaint 90/B/1546 (see App. 2).

3.39 The combined effect of these provisions may be that there will be few cases where, on proper consideration, it can be shown to be reasonable to evict a tenant dependent on income support, for rent arrears. Even if the arrears are large, the landlord should be protected for the future and the best hope of recovery of the past arrears will be the operation of the "arrears direct" scheme. If, however, the tenant is not dependent on income support, or is liable for part payment by way of non-dependant deductions or otherwise, negotiation is necessary to establish an affordable level of payment towards arrears with a view to continuation in court under section 48(1). It is essential in such cases to establish a level which can realistically be afforded by the tenant. Most housing departments will look far more kindly upon a tenant who consistently pays an agreed small amount than upon one who sometimes pays an agreed larger amount. It should not need to be said that the tenant should be made fully aware of the nature of such an agreement, and of the possible consequences of default, and that these should be clearly recorded in writing. For these purposes, the usual handwritten note on the file of the housing department representative at court and a brief letter to the tenant are not sufficient.

Reasonableness: Some Special Cases

(i) Breach of Repairing or other Obligations by the Landlord

3.40 If the rent was withheld because of the bona fide but mistaken belief that the landlords were in breach of their repairing obligations, or of any other obligations under the tenancy agreement, it will rarely be reasonable to order repossession without at the very least giving the tenant a reasonable opportunity to pay the arrears in issue.[1] This may require a substantial period of time. It is suggested that the court should consider how long it would allow on an ordinary time to pay order for the sum in question, rather than assuming, as is sometimes done, that the tenant has banked the sums in issue.

1 *Lal v Nakum* (1982) 1 HLR 50; *Televantos v McCulloch* (1990) 23 HLR 412. *Haringey London Borough Council v Stewart* (1991) 23 HLR 557, has been quoted as an authority against this proposition, but the tenant in that case had in fact made no proposals for the payment of arrears at all.

(ii) Future Changes in Income or Rebate Entitlement

3.41 In *Second W.R.V.S. Housing Society Ltd. v Blair*,[1] it was said by the Court of Appeal to be "a very important factor", indeed one which was decisive of the case, that arrangements could have been made to ensure that in future the rent was paid direct to the landlord by the Department of Health and Social Security (a mistake: in fact the local authority). That was a private-sector case; as such arrangements are automatic in the public sector if housing benefit is payable,[2] that should be taken into account.

1 (1986) 19 HLR 104.
2 See paras. 3.31 to 3.32, above.

(iii) Sequestration

3.42 As noted in paragraph 3.25 above, it is widely believed among housing authorities that it is incompetent to seek eviction for rent arrears against tenants who have been sequestrated. Although that is incorrect, it is relevant to questions of reasonableness if the rent arrears sought pre-date the tenant's sequestration or signing of a trust deed for creditors. If that is the case, the tenant's only resources will be those left to him by the trustee as sufficient for his needs.[1] Accordingly, by threatening eviction if pre-sequestration debts are not paid, the landlord is in effect seeking an unfair preference over other creditors. Guidance (not binding in law) has been given by the Scottish Office that public-sector landlords should not seek pre-sequestration rent arrears other than by a claim in the sequestration, and that they are therefore "not entitled to make use of the threat of eviction to seek the recovery of rent arrears but rather should pursue this debt by lodging a formal claim against the debtor's estate".[2] It is suggested that that guidance is sound and should be followed by the court.[3]

1 Bankruptcy (Scotland) Act 1985, s. 32.
2 Letter from Scottish Office Environment Department to Directors of Finance of District and Islands Councils, 23 December 1992, published at 1993 SCOLAG 94.

3 In *Smith v Braintree District Council* [1989] 3 All ER 897, the House of Lords considered similar policy questions, in the context of differently-worded English statutory provisions, in coming to the same view.

(iv) Consequences of Homelessness

3.43 The effect on a defender, and on his or her family, of eviction and consequent homelessness is obviously an important factor. A former tenant who has been evicted for failure to pay rent will, in practice, almost inevitably be held to be intentionally homeless and so not entitled to permanent accommodation.[1] The prospects of successfully challenging such a decision are unlikely to be high.[2] An issue in some cases is as to the prospects of a tenant's partner, who was not the defender and was not liable for rent, also being held to be intentionally homeless. This may happen, if it can be held that the partner was in some sense party to the non-payment of rent leading to eviction.[3] The difficulty for a council pursuer in an eviction action against a couple of whom one only is tenant is that it may be forced to give some indication in advance of its position on this issue. If it does so, it can later be criticised for having prejudged the question; if it does not, the court is likely to hold that the non-tenant partner is nevertheless at risk of an unfavourable decision on this question.[4]

1 In terms of ss. 26 and 31(2) of the 1987 Act. The issue is not raised in the current consultation paper *Tackling Homelessness*.
2 But see para. 4.5.5 of the Code of Guidance issued under s. 37, and *R. v Wyre Forest Borough Council, ex parte Joyce* (1983) 11 HLR 73; and *R. v Wandsworth LBC ex parte Hawthorne*, The Times 14 July 1994 (CA).
3 Reported decisions on this issue are not easy to reconcile with each other or with the statute, which requires a deliberate act or omission on the part of the applicant rather than mere acquiesence in the acts or omissions of others: see Watchman and Robson, *Homelessness and the Law in Britain* (1989), pp. 136 to 144, and cases there cited.
4 *Clackmannan District Council v Morgan*, Alloa Sheriff Court, 22 October 1991, unreported, is noted in App. 2 as illustrating this dilemma in an unusually careful decision.

Court Action: Conclusions

3.44 From the landlord's point of view, it follows that the landlord's representative at the first calling in court (who may, of course, be unqualified) should have enough information as to the case to satisfy the court that it is reasonable that recovery of possession be granted if no defence is stated, if the landlord actually wishes to evict; or, alternatively, if the landlord wishes to use the action as a lever to extract rent arrears, that the case should be continued rather than dismissed without further ado. Equally, the tenant's representative should be able to state a defence at this point, if required, without seeking time to lodge a supplementary note of defence or a further continuation.[1] If the case is one in which there is some prospect of a continuation by agreement with a condition as to payment of arrears, both parties should have instructions as to the appropriate rate of payment and the tenant's financial circumstances. In reality, of course, pursuers' agents are often without any information beyond the nature of their motion and the extent of current arrears; and unrepresented defenders in particular rarely know whether what they are doing is stating a

defence or not. Nor, for that matter, do some representatives. Of course the court has the safe options of either continuing for further investigation, or of extracting a defence from what is said for the defender and fixing a proof. It should not, however, be taken for granted that either will be done.

1 Defences are noted in App. 3.

After Decree: Last-Minute Remedies

3.45 The sheriff court has no general power, as it has in the case of private-sector evictions, to suspend or recall a decree which has been granted under section 48 of the 1987 Act. There are three legal remedies which may be available to the defender against whom decree for recovery of possession has passed. The first is to minute for recall; the second is to appeal; the third is to seek suspension and interdict.

3.46 Minutes for recall are dealt with by summary cause rule 19. There are a number of limitations on their availability, but the procedure is generally appropriate to most of the vast number of cases where the tenant only takes advice after decree has been pronounced. A minute may be lodged seeking recall of a decree which was pronounced at a first calling, in terms of summary cause rule 18(6).[1] It is of no significance whether the tenant was present or represented at any earlier hearing; or whether a time to pay direction was sought. A minute may be lodged at any time up to the actual execution of the decree by the physical eviction of the tenant, and has the effect of preventing eviction until further order of the court and thus giving the tenant a further opportunity to appear in court to state his position before a new order for recovery of possession can be made. The court has no power to refuse to recall the decree; but, having recalled the decree, it may then immediately grant decree of new if that is otherwise proper. The procedure cannot be used more than once in any action by any one party, although it appears that if there are joint defenders each may use it once on different occasions, and it is accordingly important to realise that after its use the defender must be represented at every hearing. It is common to see lay representatives use this procedure and then fail to ensure that the tenant is represented at later hearings or has clearly understood that there are no more second chances.

1 But not if decree was granted under rule 18(9) or at a proof. In *Edinburgh District Council v MacPhail*, Edinburgh Sheriff Court, 10 April 1993, unreported, decree had originally been granted at a calling when a solicitor appeared for the tenant but did not seek to defend or contribute to the proceedings. A minute for recall was refused as incompetent by the sheriff on the ground that the defender had been represented. The sheriff principal allowed an appeal, apparently holding (no written opinion being issued) that rule 18(6) covered two cases: first, where the defender was not present or represented and had not stated a defence; and, secondly,where the court was satisfied that the defender did not intend to defend the case, whether or not he was present or represented.

3.47 There is a right of appeal, in terms of summary cause rule 81, against any final decree, whether granted at first calling or after proof, and whether or not the defender was present or represented, to the sheriff principal by way of stated case. The time-limit is 14 days, subject to the general dispensing power. The

effect of an appeal is to suspend execution of the decree. Appeals are open on questions of law only. They are discouraged on questions which were essentially for the discretion of the sheriff, such as reasonableness.[1]

1 *Moray District Council v Lyons*, 1992 SCOLAG 91, is an example.

3.48 In limited circumstances, there is a right to seek reduction or suspension of the decree, and interdict against its use, in the Court of Session. An example of reduction being pronounced is *Murphy v Glasgow District Council*.[1] In that case, the sheriff at Glasgow had refused to allow a defender to state a defence that it was not reasonable that decree be pronounced, on the theory that this was not a defence, and had granted decree without further ado. An appeal to the sheriff principal was unsuccessful and leave to appeal to the Court of Session was refused. A petition for judicial review of the decision of the sheriff principal was successful.[2] In another case, interim suspension of, and interdict against operating, a decree which had been granted in absence after a tenant's lay representative had failed to appear after missing the bus to court was initially granted but was recalled on appeal by the Second Division in *Nairn v Edinburgh District Council*.[3] There are other, similar, examples. By far the most common case, however, where Court of Session procedure is appropriate, is where a pursuer seeks to put into effect an out-of-date decree. This raises an important question, which in some ways goes to the root of the procedure.

1 14 June 1989, unreported.
2 Unfortunately, no written opinion was issued.
3 6 May 1983, unreported. See 1983 SCOLAG 44 for decision at first instance. The court does not appear to have issued any written opinions.

3.49 In terms of section 48(4) of the 1987 Act, the effect of the decree is to terminate the tenancy on the date appointed by the court for recovery of possession. There is only one form of decree specified by the summary cause rules for recovery of possession, and only one date is stated therein.[1] Thus it is the court, not the housing authority, which decides the date of termination of the tenancy: if no date is stated in the decree, as has happened, the tenancy is not terminated at all.[2] That date cannot be changed subsequently, except of course following an appeal, unless the decree itself is recalled. The court has no powers corresponding to its powers under section 12(2) of the 1984 Act (in the case of regulated tenants) to suspend or discharge the decree. These distinctions from Rent Act practice are not without a reason. When the legislation was enacted in 1980, it was assumed that public-sector landlords would not seek decrees from the court unless they had made up their minds they wanted to use them, and that, accordingly, decrees which were granted would be implemented. That assumption is indeed explicitly stated in the notes to the statutory notice under section 47.[3] In reality, of course, public-sector landlords go to court to put pressure on the tenant far more often than they do because they are set on eviction, the remedy which, on the face of the summons, they are seeking. There has been a widespread, albeit far from universal, failure since 1980 of Scottish housing authorities to think through the practical implications of the legislation for the practice of seeking repossession in

straightforward rent arrears cases where there is no wish to operate the decree at all.[4]

1 Form U3.
2 Thus in *Cooper v Renfrew District Council*, Evening Times, 24 June 1982, unreported, Lord Kincraig granted interdict against the use of a Paisley Sheriff Court decree which did not state any date.
3 Paragraph 4: "if a possession order is granted against you your landlord will have to evict you once the date given in the order is passed, unless it decides to grant you a new tenancy of your home".
4 Adler *et al*, 1985; *City of Edinburgh District Council v Lamb*, 1993 SCOLAG 123.

3.50 In practice, most public-sector landlords will usually, after obtaining decree, seek to enter a new agreement with the former tenant for payment of arrears by instalments. The reason for this is, of course, that it is widely thought, probably correctly, that maximum negotiating pressure is put on the tenant in arrears by the knowledge that decree has been granted and the decision to evict put within the unfettered discretion of the housing department (although there is some evidence that this can lead to more abandonments of tenancies and thus less being paid). In practice, a current rent liability is almost always assumed to exist so that, even at common law, the landlord will normally, by demanding rent, have waived the right to rely on the decree.1 Many housing authorities, indeed, operate rent payment schemes which are based on a form of recording which automatically attributes payments firstly to current rent and only thereafter to arrears. But, in any event, the effect of any such agreement is, as a matter of law, that a new secure tenancy is thereby created in terms of section 44 (read with the definition of tenancy in section 82) of the 1987 Act, and a physical eviction based on the old decree thus becomes unlawful. Those responsible may, indeed, be criminally liable.[2]

1 *H.M.V. Fields Properties v Bracken Self-Selection Fabrics*, 1991 SLT 31.
2 1984 Act, s. 22; see para. 2.4, below.

3.51 The effect of entry into a new agreement, whether expressly or by implication from the parties acting, is not to render the decree of the court null; it is either to create a new secure tenancy, or to waive the right of the pursuers to operate the existing decree. The proper remedy, accordingly, is not reduction of the decree of recovery of possession but suspension and interdict. This can be sought in the sheriff court, but as the issues in the case may be interrelated with matters which might justify reduction, it would normally be prudent to seek suspension and interdict in the Court of Session.

3.52 It has been suggested that if decrees cannot be held over tenants heads as a threat, but must be used or discarded, this will "drive hard-pressed councils to use decrees as soon as they get them. No arrangement and no negotiation. This will result in more evictions".[1] The true solution, it is suggested, is that negotiations should precede the seeking of decree; and that a decree should only be sought if negotiations have finally broken down and a decision to evict has already been taken. This, of course, would imply that evictions were not being sought as a debt collection mechanism but because they were actually wanted.[2]

1 Letter from the Principal Rents Officer of a city council, 16 March 1993.
2 *City of Edinburgh District Council v Lamb*, 1993 SCOLAG 123.

3.53 It is not, however, uncommon to see cases where decrees which are years old, sometimes where the whole original arrears have long been paid off, are sought to be used by public-sector landlords. This is rarely based on any considered view of the law on the part of the housing authority in question. In 1985, it was noted that while many authorities were aware that such a procedure was unlawful, others had not considered the effect of statutory changes at all.[1] In 1991, the Accounts Commission found that "various opinions were offered concerning the life of a decree for recovery of possession, but it is commonly considered to be valid for a year and a day".[2] This view, which is presumably based on a supposed analogy with the obsolete concept of actions falling asleep, has no substance.

1 Adler *et al*, 1985, at pp. 67 to 68.
2 Accounts Commission, 1991, para. 101.

3.54 The use of old decrees has long been a particularly live issue in Edinburgh, where an approach which might be thought to be unusually cynical has been taken by the district council. As early as November 1981, the Director of Housing reported to the housing committee that "past practice has been ... to use the existence of a decree to extract payment ... a decree, if it is used at all, may be exercised some months after it has been granted." After correctly advising that "the fact that a possession order terminates the tenancy ... means ... that on that date the landlord must either evict the tenant, or create a new tenancy. If neither happens, and the tenant is simply left the house, a new tenancy will be implied by law", the report continued "if an interdict is brought there can no longer be any defence ... the Legal Services Division advises that more professional advisers are aware of this and the fact that decrees cannot be used late, [and] there is now a much greater likelihood of interdict proceedings ... it would not be to the district council's credibility [sic] to lose cases where there is no possibility of defence and the district council was therefore seen to be openly flouting the law." Thereafter, attempts to use out-of-date decrees were occasionally made, but abandoned when challenged. Court hearings were avoided in the 1980s by the giving of undertakings on behalf of the district council. In *Watson v Edinburgh District Council,*[1] however, interim interdict was resisted successfully on the basis of an argument that the effect of the decree was to terminate the tenancy on the actual date of eviction, as appointed by the district council rather than by the court, so that no new tenancy could ever be created by any agreement whatsoever, or by any length of delay, after the decree. This fallacious argument ignores the terms of section 48(4) and the form of decree granted by the court. However, it is unclear what, if any, argument was presented on behalf of the petitioner; the petition did not apparently rely upon anything more than the mere passage of some two months, without rent passing or being sought, or any other communications except the retention of housing benefit between the decree and the attempt to enforce it. It was noted by Lord Mayfield that he had not heard proper argument and that the effect of section 48(4) had not been explored. The case cannot be regarded as

authoritative. It is perhaps unsurprising that, having successfully resisted the grant of interdict against eviction, the district council were nevertheless prudent enough to give an undertaking that they would not proceed to evict the tenant petitioner. Its approach more recently appears to be that it will back down if persuaded that legal action is otherwise likely; but will proceed to evict if the tenant is financially ineligible for legal aid, or if it otherwise appears that no action will be taken.

1 1992 GWD 17-991.

3.55 The issue has also arisen in other areas. Thus, for example, in Glasgow in the early 1980s it was appreciated by the district council that if, following decree, the tenant was not then evicted, a new tenancy would have been created.[1] However, in late 1991, the housing department claimed to be unaware that there could be any time-bar on using old decrees. Since then, the view of the law which I have described has again been accepted, with an unusual variation in that it appears to be wrongly believed by the district council that the right to housing benefit terminates with the end of the tenancy; however, as the tenant is liable for violent profits in place of rent, and these are eligible for benefit,[2] the right to housing benefit continues.

1 Adler *et al*, 1985, p. 67.
2 reg. 10(1)(c) of the Housing Benefit Regulations.

3.56 A particularly cold-blooded variation, apparently confined to certain housing associations, is to obtain decree for recovery of possession together with payment under a time to pay order; wait until the time to pay order has been fully complied with and all arrears cleared together with current rent; and then evict.[1]

1 For remedies, see para. 2.4, above.

4 Common-Law Tenancies

4.1 Residential tenancies outwith the protection offered by the Housing and Rent Acts, here described as "common-law tenancies" although that is not a phrase used in the textbooks or law reports, are not common in Scotland. The circumstances which may result in such exclusion, however, are many and various. Thus, for example, the tenancies offered by certain housing co-operatives will fall within this category; so will some long-standing tenancies granted by health boards or police authorities; and tenancies of most resident landlords, or of local authorities where the tenancy is excluded from security under Schedule 2 of the 1987 Act. In practice, however, a substantial proportion of cases which appear at first sight to be common-law tenancies are for one reason or another statutorily protected, and great care should be taken before it is concluded on behalf of a tenant that a lawful residential occupancy falls into this category. The landlord pursuer will not need to prove any reason for seeking recovery of possession, and the rights and wrongs of any dispute between the parties leading to court action will normally have no relevance.[1] There are two lines of defence open: firstly, that no valid notice to quit has been served; and secondly, that the landlord has departed from any such notice. Such defences can do little more than buy time against a determined pursuer.

1 However, it is not uncommon for co-operative housing associations to provide in their leases that they will not seek to repossess except on limited grounds. Thus, for example, in a typical clause, Possil Housing Co-operative agrees "not to evict the tenant except on one or more of the grounds of non-payment of rent or breach of any other obligation of the tenancy or one of the other grounds for repossession set out in the Tenant's Rights, Etc. (Scotland) Act 1980 or any legislation amending or substituted for same". Such a clause is binding: *Errington v Errington* [1952] 1 KB 290 at p. 299. A possible further exception exists if the landlord is a public sector body: see para. 4.11, below.

Notice to Quit

4.2 The tenancy is brought to an end by the service of a valid notice to quit, otherwise known as a notice to remove. The requirements of a valid notice are subject to the Sheriff Courts (Scotland) Act 1907, sections 34 to 38A, and ordinary cause rules 34.5 to 34.9. Of these confused and ill-written provisions, it has been said of the drafter that he "certainly did not deserve a pass in the Scottish Leaving Certificate Examination".[1] It appears that, with the exception of section 38A, these provisions do not apply if the landlord pursuer is, exceptionally, able to proceed by way of an ordinary action, and chooses to do so, by way of an action of removing.[2] However, in the usual case, the requirements are as follows.

1 *Brown Ltd. v Collier*, 1954 SLT (Sh Ct) 98.
2 *MacDougall v Guidi*, 1992 SCLR 167 and authorities there cited: see also article at 1970 SLT (News) 101. The reasoning and decision in this case do not, however, appear to take into account the effect of s. 35(1) of the Sheriff Courts (Scotland) Act 1971, which renders such a form of action incompetent unless at least £1,500 is also sought: see *Tennent Caledonian Brewery v Gearty*, 1980 SLT (Sh Ct) 71.

4.3 There is no set form of words for a notice to quit.[1] However, the notice must be in unconditional terms[2] and must properly describe the subjects.[3]

1 Section 37 and ordinary cause rule 34.7 suggest that form H4 is mandatory. Rule 34.7 is, however, the direct descendant of rule 112 in the 1907 edition of the rules, which was disapplied from residential leases by s. 38A in 1979 (by the Housing Act 1979, Sch. 13, para. 1, which for no apparent reason was repeated by Sch. 23, para. 4 to the 1987 Act). Sense can only be given to s. 38A by reading "rule 112" as "rule 34.7".
2 *Gilchrist v Westren* (1890) 17 R 363. See Stair Memorial Encyclopaedia, vol. 13, para. 484 and cases cited there.
3 *Scott v Livingstone*, 1919 SC 1; *Watters v Hunter*, 1927 SC 310.

4.4 The period of notice given must be at least 28 clear days; 40 if the lease is from year-to-year.[1] That is so whether or not the term date, in terms of section 37, is Whitsunday or Martinmas or any other day of the year.[2] In calculating the number of clear days, the date of service (which would normally be the date the notice would be received in the ordinary course of post) and the date stated in the notice must both be excluded.[3]

1 *Gray v Edinburgh University*, 1962 SC 157; *Shetland Islands Council v B.P.*, 1990 SLT 82; *Crawford v Bruce*, 1992 SLT 524.
2 *Automobile Association Travel Services v Galbraith*, Inverness Sheriff Court, 3 February 1984, unreported.
3 *Wilson, Petr.* (1891) 19 R 219; *Sickness and Accident Association* (1892) 19 R 977; *MacMillan v H.M. Advocate*, 1983 SLT 24.

4.5 The date upon which the tenant is called upon to remove must be stated in the notice. This must be an ish of the tenancy.[1] With a written lease stating a date of entry, there is no difficulty establishing this. Difficulties arise, however, if the original lease was verbal. If no agreed date of entry can be established, the lease may be held to have run from the date the agreement was completed, or the date the tenant actually took possession.[2] The date from which rent was payable or paid may be decisive.

1 Unless the landlord is exercising rights under an irritancy clause: *Earl of March v Dowie (*1754) Mor 13843; *Campbell's Trs. v O'Neill,* 1911 SC 188; *Hamilton District Council v Maguire*, 1983 SLT (Sh Ct) 76.
2 *Christie v Fife Coal Co.* (1899) 2 F 192; *Watters v Hunter*, 1927 SC 310; Rankine on Leases, p. 338.

Example:

A tenancy is granted on 24 August 1992. Nothing is said as to its terms except that rent is payable monthly. In the summer of 1994, the landlord seeks to give notice. This is probably an annual tenancy so that the last date notice, stating 24 August 1994, could be posted is 13 July 1994.

4.6 One of the forms of service permitted by ordinary cause rule 34.8 must be used; i.e. personal service by a sheriff officer, or a registered letter or first class recorded delivery letter. If by letter, this must be signed by a person entitled to

give notice[1] or by their agent, addressed to the tenant, and bearing the address of the tenant. No other form of service is valid.[2]

1 Their entitlement to do so is probably presumed, but see *Becker v Crosby Corporation* [1952] 1 All ER 1350 for a contrary view.
2 *Department of Agriculture v Goodfellow*, 1931 SC 556. However, the dispensing power of the court would now be available.

4.7 There is at this stage one speciality applying to a limited group of tenants or licensees protected by Part VII of the 1984 Act, whose rights of occupation were created before 1 December 1980. They have the right to apply to the rent assessment committee to postpone the effective date of the notice for up to six months.[1]

1 1984 Act, ss. 71 to 76. There can be few such cases; if their contractual rent has been varied since 2 January 1989, they will have ceased to be protected by Part VII: 1988 Act, s 44 (2) (a).

After the Notice but before Court Action

4.8 On the taking effect of the notice, the contractual rights of the parties are at an end. It follows that the tenant is no longer liable for rent (although there may be a liability for violent profits or for payment of a reasonable sum in lieu of rent).[1] It follows that any demand for, or acceptance of, rent in respect of a period after the end of notice will set up a powerful inference that the landlord has departed from the notice and that tacit relocation continues to run.[2] Similar principles would apply in the case of any duty that could only be owed in terms of the lease. It is doubtful whether the acceptance of housing benefit by the landlord directly from the housing authority could have this effect: it is thought that it could not, because housing benefit may be payable in respect of violent profits after the tenancy has come to an end.[3] It is sometimes suggested that the mere fact that the tenant remains in the subjects for a considerable time after notice has expired may be sufficient to infer a new lease. This view is, it is suggested, mistaken. The true question in this context is whether the principles of waiver or personal bar can be held to prevent the landlord continuing to found on the notice.[4] A lengthy period of occupation in the absence of any explanation may, however, give rise to an inference that a relationship of landlord and tenant exists.[5]

1 *H.M.V. Fields Properties Ltd. v Skirt 'n' Slack Centre of London Ltd.,* 1987 SLT 2.
2 *H.M.V. Fields Properties Ltd. v Bracken Self-Selection Fabrics,* 1991 SLT 31; *Central Estates Ltd. v Woolgar* [1972] 1 WLR 1048 at p. 1054.
3 Housing Benefit (General) Regulations 1987, reg. 10. Thus, in *Westminster City Council v Basson* (1990) 23 HLR 225, the landlords had made it plain that they did not recognise the existence of any tenancy. Their granting and receiving housing benefit was held insufficient to set up the inference that a tenancy had nevertheless been created.
4 See cases cited in note 2, above, and *Taylor v Earl of Moray* , (1892) 19 R 399.
5 *Glen v Roy*, (1882) 10 R 239; *Shetland Islands Council v B.P.*, 1990 SLT 82; *Crawford v Bruce*, 1992 SLT 524.

Court Action

4.9 Unless the crave for recovery is combined with one for payment of at least £1,500, only summary cause procedure is competent under the Sheriff Courts (Scotland) Act 1971, section 35(1)(c).[1]

1 *Tennent Caledonian Brewery v Gearty*, 1980 SLT (Sh Ct) 71.

4.10 If the action has been competently raised, the tenant will normally have no defence to the action except by taking a point on the service, or invalidity, of the notice to remove, or on the creation of a new right of occupancy. It will not be a good defence that the landlord has no good reason to end the tenancy, if in fact it has been brought to an end.[1] If, however, the landlord is a public body, it may be a good defence that the decision of the landlord to take eviction proceedings is bad on administrative law grounds.[2] If this line of defence is to be considered, it would be prudent at least to consider seeking judicial review in the Court of Session, as, in some circumstances, the underlying decision sought to be challenged may not be challengeable otherwise,[3] and there is, on the authorities, no obvious distinction between those cases in which administrative law defences are open and those in which they are not. In any event, it would normally be appropriate to remit the action to the ordinary roll.[4] If such a claim is made, a complaint of maladministration might also be made to the ombudsman. While complaints relating to the decision to bring proceedings for recovery of possession against secure tenants have consistently been rejected as outwith his jurisdiction, he has exercised his discretion to accept such a complaint where the tenant has no legal security on the basis that, in such circumstances, the merits of the decision to evict could not be decided in a court of law.[5]

1 In the case, however, of co-operative housing associations see para. 4.1, note 1, above.
2 *Bristol District Council v Clark* [1975] 3 All ER 976; *Cannock Chase District Council v Kelly* [1978] 1 All ER 152; *City of Edinburgh District Council v Parnell,* 1980 SLT (Sh Ct) 11; *Aberdeen District Council v Christie*, 1983 SLT (Sh Ct) 57; *Wandsworth London Borough Council v Winder* [1985] 1 AC 461; *West Glamorgan District Council v Rafferty* [1987] 1 WLR 457; *R. v South Hams District Council, ex parte Gibb* (1993) 26 HLR 307. (an appeal against which was refused: *The Times*, 8 June 1994). The English authorities are well reviewed in 1990 LQR, p. 277.
3 As in *Avon County Council v Buscott* 1988] QB 656, and *R. v Tower Hamlets London Borough Council, ex parte Abdi* (1992) 25 HLR 80.
4 *Hamilton District Council v Sneddon,* 1980 SLT (Sh Ct) 36.
5 *Glasgow District Council*, Complaint 62/77.

Examples:

(i) Homeless persons are determined by a local authority to be in priority need but intentionally homeless in terms of Pt. II of the 1987 Act, and are temporarily let a district council house under a tenancy which is not a secure tenancy by operation of paragraph 5 of Sch. 2 to the 1987 Act. After a period, recovery of possession is sought. The tenants seek to defend on the basis that, not being intentionally homeless, they are entitled to be secured permanent accommodation in terms of s. 31(2). This is not a good defence; the tenant

should seek judicial review in which interim orders against eviction can be sought (cf. *Midlothian District Council v Tolmie*, Edinburgh Sheriff Court, 2 October 1980, unreported; *R. v Tower Hamlets London Borough Council, ex parte Abdi* (1992) 25 HLR 80).

(ii) A group of gypsies are given a temporary permission to occupy derelict land owned by a district council. The permission is withdrawn and recovery of possession sought. If the district council has failed to provide sufficient caravan sites in its district it is conceivable that this might provide a good defence: cf. *ex parte Gibb*, cited in note 2, above; but s. 6 of the Caravan Sites Act 1968 does not apply to Scotland: see also Scottish Development Department circulars 34/1984 and 5/1989; s. 37 of the 1987 Act; and Chap. 3 of the Code of Guidance.

The Decree and Thereafter

4.11 The court's powers on granting decree are limited to superseding extract for a period at common law, as is commonly done in some sheriff courts. In the very limited class of contracts under Part VII of the 1984 Act created between 1 December 1980 and 2 January 1989, the sheriff has a statutory power to postpone the date of possession for a period of not more than three months.[1] Otherwise, if extract is not superseded, no minute for recall is lodged,[2] and no appeal is marked,[3] the decree becomes operative 14 days thereafter in terms of summary cause rule 89. If thereafter it is not enforced, the tenant may be able to argue that it has been departed from.[4]

1 1984 Act, s. 76(1).
2 See para. 3.46, above.
3 See para. 3.47, above.
4 See para. 4.8, above.

5 Regulated and Assured Tenancies

5.1 Regulated tenancies were introduced by the Rent Act 1965:[1] assured tenancies by the Housing (Scotland) Act 1988. As, in general, no agreement entered into after 1 January 1989 can be a regulated tenancy,[2] the 1988 Act is increasingly the more significant. The broad scheme of both Acts, as in earlier Rent Acts, is that the court may only grant decree for recovery of possession if a ground exists,[3] and wide procedural powers are given to the court. However, the question of recovery of possession of assured tenancies under the 1988 Act is, in a number of respects, more complicated than under earlier Acts. From the lay client's point of view, the most significant differences are that, in some rent arrears cases, repossession becomes mandatory, and that if rent arrears are persistent there need not necessarily be any arrears when the case is in court at all. From a legal point of view, perhaps the most significant difference is the obscurity of the statutory provisions compared to earlier legislation. A number of questions of interpretation of the 1988 Act cannot be answered with any degree of confidence.

1 Now consolidated into the Rent (Scotland) Act 1984, which has itself been extensively amended.
2 But see example (i) to para. 2.1, above, and s. 42 of the 1988 Act. Misunderstanding of the effect of the transitional provisions of the 1988 Act as they apply to tenants transferring from one tenancy to another is common.
3 Or the tenancy is a short assured tenancy properly established as such, and decree is sought under s. 33(1). There are some anomalous further exceptions under the 1987 Act. These are:

(i) the property is situated in a Housing Action Area; see section 103 of the Act;
(ii) a closing or demolition order has been made; see section 128;
(iii) overcrowded houses in Dysart and South Queensferry; see section 145 (these being the only parts of Scotland where orders have been made under section 151 of the Act or its predecessors so that the overcrowding of a house is an offence).

In these three cases, it is provided that nothing under the Rent Acts shall prevent recovery of possession. The practical effect is that they can for present purposes be considered as common-law tenancies, although they are not in law such.

Notices Preceding Court Action

Regulated Tenancies

5.2 If a protected (that is to say a contractual) tenancy is in existence, this must be terminated by a notice to remove before court action can be taken. The requirements of a valid notice under a common-law tenancy continue to apply.[1] In addition, the notice must contain prescribed information as to the tenant's rights.[2] If it does not, it is invalid. The form need not be precisely correct if the information is substantially there.[3]

1 See paras. 4.2 to 4.6, above.
2 1984 Act, s. 112; Rent Regulation (Forms and Information) (Scotland) Regulations 1991.
3 *Swansea City Council v Hearn* (1991) 23 HLR 284; *Mountain v Hastings* (1993) 25 HLR 427.

Example:

A copy of the information prescribed under the earlier, 1980, regulations is served with the notice. There is no practical difference between the two sets of regulations. The notice is not invalid.

5.3 No notice to remove is necessary at all if the tenant is a statutory tenant, for example, as surviving spouse to the deceased contractual tenant.[1] The logic of this is that there is, in the nature of the case, no contractual tenancy to bring to an end before court action can be taken. It should not, however, be readily assumed that a tenancy is only statutory even if it was so when it began; later dealings between the parties, such as an agreement to increase the rent, may have made it a contractual tenancy requiring to be terminated by notice.

1 1984 Act, s. 15(5).

Example:

One of two joint protected tenants gives notice and leaves. This terminates the contractual tenancy (*Smith v Grayton Estates*, 1960 SC 349) and the remaining tenant thus becomes a statutory tenant. Years pass. There is no further communication between the landlord and the statutory tenant other than the payment of rent. Court action for recovery of possession can be taken without any further warning. If, however, over the years, the rent had been increased by agreement, the landlord might find it difficult to dispute that a new contractual tenancy had been entered into so that notice to remove was required.

Assured Tenancies other than Short Assured Tenancies

5.4 Again, notice to remove is generally necessary if the tenancy is contractual, but not if it is merely statutory.[1] However, no notice to remove is required at all in the case of an assured tenancy if (a) the ground for possession is one of the rent arrears grounds,[2] and (b) the terms of the tenancy between the parties provide that the tenancy may be brought to an end on these grounds.[3] What is meant by the second of these requirements is unclear. It is fairly plain that if there is a written lease which refers specifically to these grounds and provides that, if they arise, the tenancy shall automatically come to an end, that is sufficient. It is not so obvious that anything short of this would be sufficient. If the landlord has failed to draw up a formal lease[4] it is suggested that it would be wrong to infer that any agreement to this effect had been reached.

1 1988 Act, s. 16(3).
2 1988 Act, Sch. 5, grounds 8, 11, and 12.
3 1988 Act, s. 18(6).
4 As is his duty under the 1988 Act, s. 30(1).

5.5 When a notice to remove is necessary, the requirements of a valid notice under a common-law tenancy again continue to apply.[1] The notice must, as in the case of a regulated tenancy, contain prescribed information.[2]

1 See paras. 4.2 to 4.6, above.
2 1984 Act, s. 112; Assured Tenancies (Notices to Quit) (Prescribed Information) (Scotland) Regulations 1988: see para. 5.2, note 3, above.

5.6 What, however, is necessary before court action can be taken is a notice, under section 19, that the landlord intends to take proceedings. It should be emphasised that this is not a notice to remove, although the two may be sent together. In an action based upon grounds 11 (persistent delay in payment of rent) or 12 (rent arrears), the court has an unfettered discretion to dispense with the requirement for such a notice.[1]

1 1988 Act, s. 19(1)(b). If, however, the landlord seeks to recover possession under ground 8, the court cannot dispense with the notice: s. 19(5). Andrew Arden, Q.C., (in *Megarry on The Rent Acts*, vol. 3, p. 140) comments: "this power seems unlikely to be exercised unless the tenant has in some way become aware of the intended proceedings for possession, unless, perhaps, his misconduct has been so grave as to invite proceedings for possession, in the sense of making such proceedings so likely that he may be taken to have expected them".

5.7 A section 19 notice must be in a prescribed form.[1] There are two important requirements. Firstly, it must state not only the ground on which possession is sought, but particulars of it.[2] The purpose of the notice is to enable the tenant to consider what to do and, with or without advice, "to do what is in their power to prevent the loss of their home".[3] In a rent arrears context, accordingly, the actual extent of rent arrears must be stated,[4] although, if there is a bona fide error in this, that will not invalidate the notice.[5] Secondly, it must state the earliest date upon which proceedings can be taken. That is, depending upon the ground on which possession is sought, either 14 clear days or two clear months from the date of service. In all three rent arrears grounds, the period is 14 days. This is without regard to the date on which a notice to remove might be effective.

1 Assured Tenancies (Forms) (Scotland) Regulations 1988, Form AT 6.
2 1988 Act, s. 19(2) as amended.
3 *Mountain v Hastings* , (1993) 25 HLR 427.
4 *Torridge District Council v Jones* , (1985) 18 HLR 107.
5 *Dudley Metropolitan Borough Council v Bailey* , (1990) 22 HLR 424.

5.8 The service of a section 19 notice is subject to section 54 of the 1988 Act. It can, accordingly, be served by hand delivery; by leaving it at the tenant's last known address; or by sending it to that address by recorded delivery mail. As in the case of a notice to remove, defective service would appear to make the notice invalid,[1] although, in cases in which the court may dispense with the requirement of notice altogether,[2] a defect in service is unlikely to form the basis of a successful defence.

1 *Department of Agriculture v Goodfellow*, 1931 SC 556. As this is a requirement of statute rather than of the sheriff court rules, the court has no dispensing power.
2 See para. 5.6, above.

Short Assured Tenancies

5.9 Notice to remove is necessary, as in the case of a common-law tenancy, and subject to the same requirements,[1] together with the information prescribed for assured tenancies.[2] Where recovery of possession is sought under section 33 of the 1988 Act,[3] no section 19 notice is required; but a notice stating that possession is required must be given at least two months before any court action.[4] This may, of course, be combined with the notice to remove; but so far as a section 33 notice is concerned, there are no restrictions on the mode of service and no set form. It has even been suggested that the notice need not be in writing.[5] The practice of including the notice in the tenancy agreement itself has rightly been described as "highly doubtful".[6] There is no reported authority on its validity.

1 See paras. 4.2 to 4.6, above.
2 Para. 5.5, above.
3 It might of course be sought under s. 18, but in practice this will only be the case if possession is sought well before the original period of the tenancy has come to an end.
4 1988 Act, s. 33(1)(d).
5 By Andrew Arden, Q.C., in *Megarry on The Rent Acts*, vol. 3, p. 164. However, Hill and Redman, *Law of Landlord and Tenant*, at para. C. 2156, suggest that the use of writing "may be implicit". These are English commentaries, but the wording of the English and Scottish provisions is identical. It is my own view that the the requirement for writing is indeed implicit; it is difficult to believe that Parliament can have contemplated a notice of this kind being given by word of mouth alone .
6 Stair Memorial Encyclopaedia, vol. 13, para. 758, by Professor Peter Robson.

After Notice but before Court Action

5.10 At common law, the effect of a valid notice to remove would be to terminate the tenancy.[1] Under the 1984 and 1988 Acts, however, so long as the tenant retains possession there is a statutory tenancy[2] which is subject to the same terms and conditions as the original contractual tenancy.[3] As the tenant is under a continuing obligation to pay rent, its acceptance (or the performance of any other contractual duty by either party) does not set up a new tenancy as it would at common law, and the common practice of landlords of refusing current rent is mistaken.[4] Payment of an increased rent, however, may suggest that there has been some new agreement so that there is, again, a contractual tenancy.

1 See para. 4.8, above.
2 1984 Act, s. 3(1)(a); 1988 Act, s. 16(1). The 1988 Act uses the phrase "statutory assured tenancy" rather than "statutory tenancy".
3 1984 Act, s. 15(1); 1988 Act, s. 16(1).
4 *Morrison v Jacobsen* [1945] KB 577; *Stobbs & Sons v Hislop*, 1948 SC 216; *Kerr v Toole* (1950) 66 Sh Ct Rep 116.

Court Action

5.11 If the tenancy is assured (as opposed to short assured), the defender must be cited within six months of the date stated in part 4 of any section 19 notice.[1]

1 1988 Act, s. 19(7). This provision corresponds to the 1987 Act, s. 47(4); see para. 3.7, above.

5.12 Unless a crave for payment of at least £1,500 is made, only summary cause procedure will be competent.[1] Ordinary actions for removing and payment are not unheard of but are sufficiently rare to require no further special attention. Whichever procedure is adopted, the court has no power to make an order for recovery of possession unless there are grounds for doing so.[2] These provisions go to the jurisdiction of the court, as in the case of secure tenancies; it is thus equally incumbent upon the pursuer to satisfy the court of the existence of a ground for recovery of possession and, where this is in issue, of reasonableness.

1 See para. 4.9, above.
2 1984 Act, s. 11(1); 1988 Act, ss. 18(1) and 33(1).

5.13 Court procedure is in general similar to that applicable to secure tenancies.[1] The powers of the court to adjourn proceedings, with or without conditions being attached, are similar to those under the 1987 Act.[2]

1 See paras. 3.6 to 3.19, above.
2 1984 Act, s. 12; 1988 Act, s. 20. However, s. 20(6) provides that the court has no such power if "satisfied that the landlord is entitled to possession" under ground 8 (three months' rent arrears) or under s. 33(1) (short assured tenancies). Presumably, if so satisfied at first calling, the court would normally then grant decree forthwith; but it would retain the power to continue on a single occasion under summary cause rule 18(3) or to sist, for example to enable a legal aid application to be made.

The Merits of the Action

5.14 The 1984 Act provides one ground for the recovery of possession for rent arrears; the 1988 Act, three. Under the 1984 Act,[1] the court "shall not make an order for possession ... unless the court considers it reasonable to make such an order"; and "any rent lawfully due from the tenant has not been paid ...". Under the 1988 Act,[2] there are three overlapping but distinct rent arrears grounds. Ground 8 is that "at least three months' rent lawfully due from the tenant is in arrears" when the section 19 notice was served, and is still so at the date of the hearing. In this case, repossession is mandatory if the ground is established and issues of reasonableness do not arise. Ground 12 is that "some rent lawfully due from the tenant is unpaid", both when the section 19 notice was served[3] and when the proceedings began by citation (but not necessarily at the date of the hearing). Under ground 11, there need be no arrears at all; it is sufficient if "the tenant has persistently delayed paying rent which has become lawfully due." Under each of these two cases, the court shall not make an order for possession unless it considers it reasonable to do so.

1 s. 11(1), read with ground 1 of Sch. 2.
2 s. 18, read with Sch. 5.
3 Unless the court dispenses with the requirement for such a notice under s. 19(1)(b); see para. 5.6, above.

5.15 Under an assured tenancy, accordingly, the landlord may have an incentive, if arrears are mounting, to wait until they represent three month's rent before serving notice and thereafter make no effort to minimise them. The tenant has an incentive, if there are three months arrears when the action is raised, to delay matters at first calling in the hope that arrears can be brought down thereafter and reasonableness put in issue.

The First Requirement: Rent Arrears

5.16 A number of questions relating to the existence of rent arrears are dealt with under the heading of secure tenancies[1] and need not be repeated here.

1 See paras. 3.20 to 3.27, above.

5.17 Rent will not be "lawfully due", in the case of a regulated tenancy, if it is at a rate in excess of that set by the rent registration system.[1] As fair rents are determined in respect of the property, and not merely in respect of a particular tenancy, the rent register should be checked.

1 1984 Act, Pt. IV; *Rakhit v Carty* [1990] 2 All ER 202.

5.18 Failure by the landlord to provide a rent book does not have the effect that rent is not lawfully due.[1] Nor does a failure by the landlord to comply with section 327 of the 1987 Act, which requires landlords to disclose their full names and addresses when called upon to do so.[2] A failure in either respect may, of course, be relevant to questions of reasonableness; and if no rent book (the purpose of which is to serve as a record of when and to what extent payments were due and were made) was provided when it should have been, it ma be difficult for a landlord to establish that there are in fact rent arrears.

1 Even if mandatory under the 1984 Act, s. 113, or the 1988 Act, s. 30(4); *Shaw v Groom* [1970] 2 QB 504.
2 This effectively supersedes s. 108(3) of the 1984 Act. In England the contrary is true by reason of specific statutory provision; Landlord and Tenant Act 1987, s. 48.

5.19 The liability of the tenant to make payment of rent to the landlord may have been extinguished by the direct payment of housing benefit by the landlord to the housing authority.[1] If it later emerges that there was, for some reason, an overpayment, and this is sought to be reclaimed from the landlord, this will not constitute rent arrears for the purpose of recovery of possession.[2] There may, perhaps depending on how the overpayment arose, be some claim by the landlord against the tenant on the principles of unjustified enrichment; but such a claim would not form the basis of a claim for recovery of possession under either the 1984 or 1988 Act.

1 See para. 5.23, below.
2 *R. v Haringey London Borough Council, ex parte Ayub* (1993) 25 HLR 566.

5.20 Ground 11 of the 1988 Act, which continues to require a history of rent arrears but does not require that any exist when the action is in court, is novel

and has not as yet been authoritatively explained. The words "persistently delayed" clearly raise questions of fact and degree. "Persistently" is an ambiguous word:[1] it may involve nothing more than repeated delays, but in ordinary use it would normally carry the meaning that the person delaying was not only doing so repeatedly but was doing so of their own free will and quite deliberately. It would appear likely that some degree of deliberate delay, repeated on a number of occasions, is required. However, on one view, a single act of delay is sufficient if obstinately continued.[2] It is probably relevant to consider whether blame attaches to the tenant; if there has been no fault, it is difficult to describe any delay as "persistent", however long it may have been. Delays caused by late payment of housing benefit, for which the tenant is not responsible, raise particularly difficult questions. Obviously such issues may be considered under the head of "reasonableness", but if the ground is not set up in the first place, that question need never be considered at all.

1 When this ground was discussed in Parliament, the minister responsible was reduced to saying: "I cannot do better than the dictionary definition ... 'persistently' means 'repeatedly' or 'over a long time'": *Hansard,* First Scottish Standing Committee, 16 February 1988, col. 704.
2 *Elsey v Smith*, 1982 SCCR 218.

The Second Requirement: the reasonableness of granting decree

5.21 In almost all cases there will be an issue as to reasonableness. The broad approach of the court should be similar, whether under the 1984 or 1988 Act, to that under the 1987 Act: much of the case law, indeed, can be cited indiscriminately.[1] The practical issues are, however, different in the private sector from those arising in the public sector. In particular, while a public landlord will normally have sought decree with no intention of using it, this cannot be assumed to be true of a private landlord or of a housing association.

1 See para. 3.28 and following.

5.22 As in the public sector, the availability of housing benefit is often an important factor: the more so as the landlord will normally have no knowledge of, or interest in, difficulties with the local authority. Delays in housing benefit payments have been estimated as to blame for 37 per cent. of housing association rent arrears of four weeks or more.[1] The housing benefit scheme is similar in the private and public sectors, but material differences are noted below.

1 *Getting the Benefit* (1992, Housing Corporation); a survey of 70 housing associations in England and Wales. However, it seems unlikely that this problem is equally widespread in Scotland.

5.23 In the private sector, housing benefit usually takes the form of a payment by the housing authority to the tenant: a rent allowance rather than a rent rebate. If, however, there are rent arrears of at least eight weeks, the landlord can insist on direct payment.[1] If there are no rent arrears, or less than eight weeks' worth, the authority has a discretion to make payments direct.[2] Some district councils have developed detailed policies as to when they will operate that discretion,

typically by tying this to acceptable conditions in the premises.[3] Others will do so if the tenant consents but not otherwise. The tenant or landlord can, within six weeks of its notification, seek review of a decision as to whether to make payment direct.[4] This right is significant, both because its exercise may protect the landlord against future rent arrears and because the existence of the right has been considered by the Court of Appeal to be decisive of reasonableness.[5] The refusal or failure to operate these provisions on the part of a local authority has repeatedly been held by the ombudsman in England to constitute maladministration.[6]

1 Housing Benefit (General) Regulations 1987, reg. 93. Exceptionally, it may be held to be in the overriding interest of the tenant that the benefit be retained by the authority under reg. 95.
2 reg. 94. If there is a dispute as to the existence or extent of arrears for this purpose, either the landlord or the tenant may require the authority to make a determination on this matter which is appealable: *R. v Haringey London Borough Council, ex parte Ayub* (1993) 25 HLR 566.
3 A doomed attempt to challenge such a policy was made in *Edinburgh Property Managers Association v Edinburgh District Council*, 1987 GWD 38-1848.
4 reg. 79(2). The landlord's right to do so has not always been accepted; it was held to exist by Sheriff Macphail in *Edinburgh District Council v Marinello Properties*, Edinburgh Sheriff Court, 14 December 1989, unreported; and in *R. v Manchester City Council, ex parte Baragrove Properties* (1991) 23 HLR 337, and this was made clear (with effect from 3 October 1994) by regulation 2(b) of the Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) (No. 2) Regulations 1994.
5 *Second W.R.V.S. Housing Society v Blair* (1986) 19 HLR 104; see also *Midlothian District Council v Brown*, 1991 SLT (Sh Ct) 80.
6 e.g. *Wyre Borough Council*, Complaint 90/C/1552 (see App. 2); *Norwich City Council*, Complaint 90/A/0669; *Manchester City Council*, Complaint 90/C/2218; *Plymouth City Council*, Complaint 90/B/0874. The usual recommendation appears to be payment to the landlord of the sum wrongly not paid together with a small sum as solatium. In *Manchester City Council*, it was argued by the city council that it was not their responsibility to make any enquiries as to the existence of rent arrears. The ombudsman took the view in a further report that, although there was no duty in law to make enquiries on the matter, a failure to do so when put on notice that there might be arrears constituted maladministration. In *Aberdeen City Council,* Complaint 98/1220, a complaint by tenants that payment of benefit direct to a landlord had been terminated with notice to neither, leading to a threat of eviction, was discontinued on an *ex gratia* payment of £200.

5.24 Benefit is normally calculated on the whole rent payable under the lease. There are a few exceptions, of which the most important is that, if the housing authority considers that the "rent payable ... is unreasonably high by comparison with the rent payable in respect of suitable alternative accommodation", it is in some circumstances under a duty to assume that only a reasonable rent is payable.[1] This is a power which is widely abused. Many councils operate unlawful policies by which benefit is limited to an arbitrary figure, for example, that on which a subsidy at 95 per cent. would be paid by central government.[2] Others ignore the protections given by the regulation to families with children, the sick and disabled, and pensioners. No decision so to limit the eligible rent should ever be accepted without seeking a review under the regulations, and if the final decision is to sustain a reduction in the eligible rent, judicial review should be considered.[3] However, as any such decision will have been taken

following non-binding advice from a rent officer,[4] an application for rent registration for the future should also be considered if the tenancy is regulated or, perhaps, a short assured tenancy. Meanwhile, an application for a sist or continuation of the eviction process should be considered.

1 reg. 11.
2 This is maladministration; *Hackney London Borough Council*, Complaint 91/A/1182; *Plymouth City Council*, Complaint 90/B/0874.
3 *McLeod v Banff and Buchan Housing Benefit Review Board*, 1988 SLT 753; *Malcolm v Tweeddale Housing Benefit Review Board*, 1994 SLT 1212; *R. v Sefton Metropolitan Borough Council, ex parte Cunningham* (1991) 23 HLR 534; *R. v East Devon Housing Benefit Review Board, ex parte Gibson ,* (1993) 25 HLR 487.
4 Under the Rent Officers (Additional Functions) (Scotland) Order 1990 (SI 1990 No 396), as amended, with effect from 1 April 1994, by SI 1994 No 582 (neither reproduced here).

5.25 As in the public sector, in terms of regulation 88(3) claims should normally be dealt with and the first payment made within 14 days. If this is impracticable, private sector and housing association tenants have an absolute right to a payment on account unless the impracticability arises out of the failure of the claimant.[1] These provisions are not generally operated: a Housing Corporation survey of English authorities in the autumn of 1991 found only 19 per cent. carrying out their duty to make interim payments.[2] The legal remedy for refusal on the part of a local authority to reach a decision or to make payment is judicial review. In one Scottish case, the ombudsman held that a delay in payment entitled the aggrieved tenant only to an apology.[3] However, there are numerous English cases in which it has been held that the failure to operate these provisions constitutes maladministration justifying the payment of compensation to affected tenants.[4] Again, a sist or continuation of court action should be considered.

1 reg. 91(1). It is sometimes claimed by housing authorities that a separate claim must be made for an interim payment. There is no such requirement: *R. v Haringey London Borough Council, ex parte Ayub* (1993) 25 HLR 566: see also DSS circular HB/CCB(90)1.
2 Getting the Benefit, cited at para. 5.12, above. In January 1993, the Audit Commission found the worst English authorities did not so much as open their mail for over a year.
3 *Edinburgh District Council*, Complaint 83/649.
4 For example, *Liverpool City Counci*l, Complaint 90/C/1966, where the policy was not to make interim payments unless eviction was imminent; *Hackney London Borough Council*, Complaint 91/A/1182; *Plymouth City Council*, Complaint 90/B/0874; and *Nottingham City Council*, Complaint 90/C/0640, where the legal expenses of unnecessary repossession proceedings were reimbursed. In a very full report on 361 complaints in *Birmingham City Council,* Complaint 89/B/0818, the ombudsman decided that "the remedial payment should be £25.00 for delays of under three months, £50.00 for delays of three to six months, and £100.00 for delays of over six months" together with a payment ranging from £50 to £150 to each complainant "to recognise the time and trouble involved in pursuing their complaint". A payment of £500 was also recommended to a local welfare rights centre "to reflect the effort, time and trouble which they put into acting as advocates for the complainants and collating information and pursuing the complaints with me".

After the Decree

5.26 At this stage no contractual tenancy exists. The drafter of the 1988 Act appears to have assumed that the effect of the decree was to terminate the

contractual tenancy if that had not already been done.[1] There is, however, a continuing obligation on the statutory tenant to pay rent so long as possession is retained;[2] so it cannot be argued that a new tenancy has come into being by reason of the payment or acceptance of rent.

1 Section 18(6); although this is not expressly stated, as in s. 48(4) of the 1987 Act, it is difficult to make sense of this subsection unless the contractual tenancy is to be held as terminated by the order of the court with effect from the date stated in the decree.
2 See para. 5.10, above.

5.27 The two primary forms of remedy against a decree for recovery of possession, namely minuting for recall and appeal, are available as in the case of secure tenancies.[1] The court has a further power, which it does not have in the case of secure tenancies, to suspend execution of the decree or to discharge it absolutely before it has been put into effect.[2] This may be appropriate if, for example, the arrears in consequence of which decree was granted have now been paid. The power may be exercised by incidental application to the court under summary cause rule 92; so suspension in the Court of Session is not normally necessary, as it might be in the case of a common law or secure tenancy. There are, however, two exceptions in the case of assured tenancies:[3] where decree was granted in terms of ground 8, or under section 33(1), the court has no powers under section 20. In such a case, reduction or suspension in the Court of Session may, exceptionally, be appropriate if neither a minute for recall nor an appeal can be used.[4]

1 See paras. 3.46 and 3.47, above.
2 1984 Act, s. 12(2); 1988 Act, s. 20(2).
3 s. 20 (6).
4 See paras. 3.48 to 3.50, above.

[Appendices 1, 2, and 3 not here reprinted]

APPENDIX FOUR

ABBREVIATIONS USED

Abbreviations of law reports:

AC: Appeal Cases
All ER: All England
EG: Estates Gazette
EGLR: Estates Gazette Law Reports
GWD: Green's Weekly Digest
HLR: Housing Law Reports
LGR: Local Government Reports
QB: Queen's Bench
SC: Session Cases
SCOLAG: Bulletin of the Scottish Legal Action Group
SCLR: Scottish Civil Law Reports
SLT: Scots Law Times
WLR: Weekly Law Reports

Case references in the style of R(U) 9/74 are decisions of the Social Security Commissioners; those described as "Complaint" are decisions of the Local Government Commissioners.

Abbreviations of other references:

Accounts Commission 1991:*Tenants Rent Arrears: A Problem?* (first volume unless otherwise stated)

Adler *et al*, 1985: *Public Housing, Rent Arrears, and the Sheriff Court.*

SOCRU: Scottish Office Central Research Unit

Himsworth *et al*, 1988: chapter 5 in *Socio-Legal Research in the Scottish Courts.*

Wilkinson, 1980: *Rent Arrears in Public Authority Housing in Scotland.*

FURTHER REFERENCE

Policy Issues

Rent Arrears Management, which is the second issue of the *Good Practice in Housing Management* series issued by the Scottish Office Environment Department, is an essential overview of the policy issues involved and the research (free from 031 244 2858 or 2105).

Further material on policy issues is noted at para. 1.02 (and see abbreviations above). SOCRU publications are available from the Librarian, Scottish Office, New St Andrew's House, Edinburgh, EH1 3TG. Accounts Commission and other Government publications can be obtained from HMSO.

Statutory Provisions

The Rent (Scotland) Act 1984, the Housing (Scotland) Act 1987, and the Housing (Scotland) Act 1988 are all published, with annotations, by W. Green; the latter two include later amendments. The only up-to-date prints of the 1984 Act, however, are those in the Parliament House Book (vol. 4, Division L) and Butterworths Scottish Housing Law Handbook, which includes all the Acts and also all relevant statutory instruments. The Current Law Statutes print of the (English) Housing Act 1988 is also useful, on issues related to assured tenancies and illegal eviction in particular.

Law Reports
Scotland

Cases in this field of law are now reported in the Scottish Civil Law Reports, and to a lesser extent the Scots Law Times, more frequently than they once were. However, the fullest and fastest reporting of relevant cases is, in general, that in SCOLAG (whose reports I have cited in preference on a number of occasions when other reports are incomplete). A series of Scottish Housing Law Reports by Shelter/Legal Services Agency is planned.

England

Almost all significant modern cases are reported in the Housing Law Reports, published by Sweet and Maxwell, and there alone. These are virtually unobtainable in Scotland. There are brief notes of cases in the Legal Action Group Bulletin and in the English and Empire Digest.

Reports of the Ombudsman

These are not reported in any form. Scottish decisions are obtainable (free) from the Commission for Local Administration in Scotland, 23 Walker Street, Edinburgh. English decisions are obtainable from the Commission for Local

Administration in England, 21 Queen Anne's Gate, London, SW1 (free, for 5 or fewer reports; 50p per report for more; or on subscription).

Landlord and Tenant Law

The historic background is to be found in Rankine on *Leases* (4th edn., 1916), and Duncan, *Actions of Ejection and Removing* (1984, Scottish Law Commission). These remain valuable on questions of common law and its interaction with the 1907 Act. There are a number of modern Scottish texts. MacAllister, *The Scottish Law of Leases* (1989), is a basic introduction; Himsworth, *Housing Law in Scotland* (1994, Butterworth); Robson, *Residential Tenancies* (1994, W. Green); and the articles on "Housing" (for the public sector) and "Landlord and Tenant" (for the private sector) in volumes 11 and 13 of the Stair Memorial Encyclopaedia are fuller descriptions. Brown *et al, Dampness and the Law* (1987, Shelter), covers rights to housing repair and maintenance (although these have since been significantly improved by the 1988 Act). English texts should be used with great care. However, there are numerous useful guides to the Rent Acts in particular. The leading English text is Megarry on *The Rent Acts* (11th edn.), in three volumes with periodical supplement.

Court Procedure

Macphail, *Sheriff Court Practice,* (1988, W. Green/SULI), Chapter 25 is the only useful description of summary cause procedure as a whole. The reader without background knowledge might, however, be better advised to go to *Fighting Evictions* (1981, Shelter/Citizen's Rights Office) - a new edition should be forthcoming in 1996; or to Chapters 6 and 8 of Gray, *Guide to Money Advice in Scotland* (1992, Drumchapel COC).

Housing Benefits

The whole statutory provisions are published in a number of formats; the most convenient by far is *Housing Benefit and Council Tax Benefit Legislation*, which contains full annotations and is published by the Child Poverty Action Group. The fullest, if not perhaps the most readable, commentary is, however, the *Guide to Housing Benefit and Council Tax Benefit* published by Shelter and the Institute of Housing. The *National Welfare Benefits Handbook*, published by the Child Poverty Action Group, is also valuable and describes other means tested benefits. These are all published annually, the *Legislation* also with a half-yearly updating supplement.

General Index