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Small Landholdings Legislation

A guide to the law in Scotland



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Introduction

Due to the complexity of the legislation regarding Small Landholdings in Scotland, the Scottish Government's Agricultural Holdings Team commissioned the creation of a Legal Guide to assist those involved or interested in this sector of Scottish agriculture. To do this, they appointed Sir Crispin Agnew of Lochnaw, Bt QC, who is a specialist in law in agriculture, crofting, rural property as well as landlord and tenant issues. He is the author of numerous published legal textbooks including on Agricultural Law and Crofting Law. He is a recognised expert in these legal areas and has been ranked by Chambers as a "Star Individual" for Agriculture and Rural Affairs.

While it is recognised that this very complex area of law needs to be clearly detailed, it is also important that a lay-person can understand the general requirements of Small Landholdings legislation. To assist with this, a shorter Plain English version has been created by condensing the full version of Sir Crispin's Guide.

However, it is important that anyone reading the booklet, where appropriate, should refer to the full version of the Guide so that they clearly understand the fine detail of the applicable legislation and relevant case law. It is also important to state that while the Guide provides detailed references, it should not be solely relied on as the circumstances of each case can differ. Accordingly, it is recommended that specific legal advice is sought for an individual's own situation.

Layout of the Guide

The condensed version of the Guide primarily uses the same subject headings as the more detailed version. However, whilst it is then a summary, it does provide the page numbers of the detailed version to allow the reader to refer to it in more detail. It also provides the relevant legislation and case law.

Links to the legislation can be found on page 5.

Glossary

Conversion of landholding to crofts. Areas designated by the Scottish Ministers are: Moray, Argyll & Bute, North Ayrshire, Kingarth (Bute), Arran, Great Cumbrae and Little Cumbrae.

Crofting Counties – Argyll, Caithness, Inverness, Ross & Cromarty, Sutherland, Orkney and Shetland.

Landholder¹/Tenant – Includes every existing crofter, every existing yearly tenant, every qualified leaseholder, every new holder, and the successors of every such person in the holding.

Landholding – This includes any right in grazing land held by the tenant or landholder whether solely or with others. Also the site of any dwelling-house erected (or to be erected) on the holding, and of any offices or other structure connected with the dwelling-house.

Martinmas – Scottish term day – 28 November.

Pertinents – Everything connected with or that is part of the tenanted land.

Scottish Land Court – Unlike a common law court such as the Sheriff Court or the Court of Session, it does not have a general jurisdiction. Any party considering applying to the Land Court should look at the Court's website – <http://www.scottish-land-court.org.uk/> – which gives advice on procedure, rules and refers to the Court's forms. Recent decisions are also available on the Court's website.

Small Landholding – Where the tenant, or predecessor in the same family, has provided or paid for the whole or greater part of the buildings and/or other permanent improvements without receiving payment from the landlord.

Statutory Small Tenancy (SST) – Any tenancy where the landlord provided or paid for the whole or greater part of the buildings or other permanent improvements on the holding and the holding would otherwise have qualified as a landholding by reason of its size and the rent paid provided it did not come within any of the exceptions in the Acts. A SST is governed by different rules from a small landholding.

Whitsun – Scottish term day – 28 May.

¹ Small Landholders (Scotland) Act 1911, Section 31(5)

The Legislation

All legislation will collectively be referred to throughout the Guide as “the Landholders Acts”.

Links to the Acts:

Crofters Holdings (Scotland) Act 1886 (the “1886 Act”):
<http://www.legislation.gov.uk/ukpga/Vict/49-50/29/enacted>

Crofters Common Grazings Regulation Act 1891 (the “1891 Act”):
<http://www.legislation.gov.uk/ukpga/Vict/54-55/41>

Congested Districts (Scotland) Act 1897 (the “1897 Act”):
<https://www.legislation.gov.uk/ukpga/Vict/60-61/53>

Crofters Common Grazings Regulation Act 1908 (the “1908 Act”):
<http://www.legislation.gov.uk/ukpga/Edw7/8/50>

Small Landholders (Scotland) Act 1911 (the “1911 Act”):
<http://www.legislation.gov.uk/ukpga/Geo5/1-2/49>

Small Holdings Colonies Acts of 1916 (the “1916 Act”):
<https://www.legislation.gov.uk/ukpga/Geo5/6-7/38>

Small Holdings Colonies (Amendment) Act of 1918 (the “1918 Act”):
<http://www.legislation.gov.uk/ukpga/Geo5/8-9/26/enacted>

Land Settlement (Scotland) Act 1919 (the “1919 Act”):
<http://www.legislation.gov.uk/ukpga/Geo5/9-10/97>

Small Landholders and Agricultural Holdings (Scotland) Act 1931 (the “1931 Act”):
<http://www.legislation.gov.uk/ukpga/Geo5/21-22/44>



A Simplified Guide

1. What is a Small Landholding?

Legally, Small Landholdings and Statutory Small Tenancies (SST) are tenanted holdings, subject to the Small Landholders (Scotland) Acts 1886 to 1931 (“the Landholders Act”), that only exist in Scotland outwith the Crofting Counties.

Following consultation by the Scottish Government, it is understood that no tenant claims to hold a SST. However, if you believe you have a SST, please refer to pages 32 and 33 of the Guide.

2. What law governs Small Landholdings and SST?

The relevant Acts of Parliament are collectively known as the Small Landholders (Scotland) Acts 1886 to 1931² and include those listed on page 14.

Case law relevant to Small Landholdings and SSTs is available in the law reports that can also be found on page 14.

3. How and when did Small Landholdings come about?

Crofting was introduced to the Crofting Counties by the Crofters Holdings (Scotland) Act 1886, which secured three key rights for crofters:

- security of tenure provided the crofter observed the statutory conditions;
- a fair rent; and
- payment of compensation for improvements at the end of a tenancy.

A crofter was defined as a tenant of a holding, who resided on the holding, situated within a crofting parish, where the annual rent was no more than £30/acre (£74/ha).

Under the Small Landholders (Scotland) Act 1911, crofting, now called landholding, was then extended to the whole of Scotland. It created two types of new tenancies:

- Small landholding, which included crofts created under the 1886 Act; and
- Statutory Small Tenancy (SST).

To qualify as either, the tenant had to be a crofter under the 1886 Act, or a tenant from year to year living within 2 miles of the holding and who cultivated the holding or who qualified when a lease for a longer term than a year started to run on the same conditions.³ An exclusion under the Act was any holding where rent exceeded £50/acre (£124/ha) unless the area was less than 50 acres.⁴ The rate for Lewis is £30/acre (£74/ha).

After the First World War, the Land Settlement (Scotland) Act 1919, was created to assist suitable people, primarily ex-servicemen, to secure land. The Board of Agriculture compulsorily created a substantial number of small holdings throughout Scotland. In the 1970’s, most of this land, where the Secretary of State for Scotland was the landlord, was sold to the sitting tenants, meaning these holdings were then no longer governed by the Landholders Acts.

The Landholders Acts now only apply to holdings outwith the Crofting Counties.

² 1931 Act Section 26(1).

³ 1911 Act Section 2(ii) & (iii)

⁴ For a more detailed consideration of what did and did not become Small Landholdings or SSTs, see Sir Crispin Agnew of Lochnaw Bt, QC, *Crofting Law* T & T Clark 2000, Chapter 3.

4. Knowing if you're a landholder under the Landholders Acts

You can only be a landholder in Scotland if:

- The land lies outwith the Crofting Counties;
- The holding was created as a landholding on 1 April 1912 under the 1911 Act;
- It was created after the above date by agreement with the landlord, registered in the Scottish Land Court, or under a scheme (1911 or 1919 Acts) promoted by the Board of Agriculture and approved by the Land Court.

A holding, outwith the Crofting Counties, became a landholding where it was held from year to year by a tenant who lived within 2 miles of the holding. The tenant also had to cultivate the holding with or without their family or hired labour. Finally, the tenant, or predecessors within the same family, had to have provided or paid for the greater part of the buildings or permanent improvements without receiving payment or fair consideration from the landlord. Where there was a lease for a longer period of time, that would otherwise have qualified, then on the termination of that lease it became a small landholding.

If you are unsure whether you are a landholder under the Landholders Act, you can check with the Land Court to see if they hold a record of your holding. If they don't, it doesn't necessarily mean that it isn't a landholding.

If the landholder accepted a new lease, then it could cease to be held under the Act.⁵ The purchase of a landholding by the sitting tenant removes it from the Act.⁶

Further information can be found on pages 16 and 17 of the Guide.

5. What are the terms of the lease of your landholdings?

There will be a written lease when:

- Landholdings have been created by the Board of Agriculture; and
- Written terms of the lease have been approved by the Land Court.

Statutory conditions of tenure, supersede any other conditions in a lease the parties may have entered into, when the subjects became landholdings in 1912 or later, unless created under a Board of Agriculture scheme.

New holdings created under the 1919 Act are subject to both the statutory conditions and the terms and conditions imposed by the Board – if they are not inconsistent with the Landholders Acts.⁷

Any contract or agreement made by a landholder, whether before or after 1931, which deprives them of any right granted to them by any provision of the Landholders Acts is void – unless the contract or agreement is approved by the Land Court.⁸

Further information can be found on page 17 of the Guide.

5 See *Greg's Exrs v Macdonald* 1991 SLCR 121 where possible protected tenant took new lease as "river watcher"; *Kennedy v Marquess of Breadalbane's Trs* 1933 SLCR 3 where a statutory small tenant entered into new lease for 10 years with landlord of the holding and other land jointly with his wife and son and Court held identity of holding had been lost; *McCull v Beresford's Trs* 1921 SLCR 3 at 16 where court said "abandonment of potential statutory rights may also be affected by the actings of the parties as well as by voluntary agreement".

6 *Highland Primary Care NHS Trust v Thomson* 1999 SLCR 32.

7 *Cumming v Marquis of Bute* 1930 SLCR 67 at p. 71.

8 1931 Act Section 25.

6. What rent must you pay and how can you get it reviewed?

The landholder has to pay a “fair rent”. There are 2 ways that this can be decided:

- by the landlord and landholder agreeing a rent, payable as long as the agreement remains in force or until a new rent is fixed by agreement;⁹ or
- the landlord or landholder can ask the Land Court to fix a “fair rent”, payable from Whitsunday or Martinmas and not altered for 7 years (apart from by written, mutual agreement).

To fix a “fair rent”, the Land Court must consider the circumstances of the case, holding and district, and take into consideration any permanent or unexhausted improvements on the holding carried out or paid for by the landholder or predecessors in the same family”.¹⁰ Things taken into account are:

- The land including its stocking and cropping capacity and whether the landholding is suitable for a subsidiary or auxiliary occupation or the sub-letting of any dwellings;
- The value of any applicable pertinents of the landholding, such as the right to take sea ware or peat;
- The rise or fall in the value of money (particularly inflation);
- The net annual profits taking account of subsidies.

The fixing of a “fair rent” does **not** depend on:

- The landholder’s ability to pay;
- The availability of opportunities for ancillary employment;
- Opportunities for employment in the area.

A landholder cannot credit themselves with an agricultural worker’s standard wage, nor are they entitled to a deduction in rent for any dilapidations they have allowed.

7. What are the lease’s statutory conditions you must comply with?

These are set out in section 10(1) of the 1911 Act and section 1 of the 1886 Act as follows. The landholder shall:

- cultivate the holding or make use of it for subsidiary or auxiliary occupations that in case of dispute, the Land Court may find to be reasonable and not inconsistent with the cultivation of the holding;
- pay the rent by the terms of which it is due;
- not execute any deed appearing to transfer the tenancy;
- not persistently allow dilapidation of buildings or deterioration of the soil;
- not without the landlord’s consent, sublet any of the holding or allow a house to be erected;
- not do anything to become bankrupt, nor execute a trust deed for creditors;
- not persistently breach any written conditions protecting the landlord’s interest (or neighbouring landholders), which the Land Court deem reasonable.

The landlord, or persons authorised by them, has the right to enter the holding for purposes authorised by the Acts.

⁹ 1886 Act Section 5.

¹⁰ 1886 Act Section 6(1).

8. Can you use your landholding for anything other than agriculture?

Section 11 of the 1911 Act allows you to utilize the landholding for other occupations the Land Court would find reasonable as long as it is not inconsistent with the holding's cultivation.

Examples are: holiday accommodation operator (dwelling houses and caravans), craft workshop, acting as a farrier, joiner, builder, fisherman, shopkeeper or artist.

9. How can your lease of the holding be terminated?

The tenancy can be terminated by:

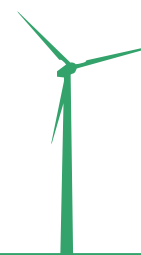
- The landholder purchasing the holding as this would take the holding outwith the Landholders Acts;
- The landholder accepting a new lease outwith the protection of the Act;
- The landholder renouncing the tenancy. This can usually be done with 1 year's written notice to any Whitsun or Martinmas date unless the tenant was a new landholder after 1931. If so, the lease can only be terminated at the same term date that entry was taken;
- Removal of the landholder by order of Land Court. This can happen if the tenant is in breach of one of the statutory conditions: one year's rent is unpaid; the holding is abandoned; they break any condition of repayment of a loan to the Scottish Ministers; or
- The Land Court authorises a resumption of all or part of the whole holding.

10. What compensation can you get when all or part of the tenancy is ended?

In order to apply for compensation, the landholder must renounce their tenancy or be removed. Any landholder who abandons the tenancy or serves an invalid notice of ending it is not entitled to compensation.

The Land Court then has to assess if the permanent improvements which have been made are suitable for the holding. The improvement has to have been carried out or paid for by the landholder or their family predecessors. Improvements carried out in previous tenancies or by sub-tenants do not qualify.

In these circumstances, an improvement is the provision of something new; not the replacement of an existing structure. They are valued on the basis of their value to an incoming tenant. The value of any assistance or consideration given by the landlord is then deducted as is the value of any deterioration (committed or permitted by the tenant in the 4 years before the tenancy ends). Any rent arrears may be off-set against any compensation found due.



11. What can the landlord do on your holding?

The landlord has a number of reserved rights under section 1(7) of the 1886 Act to enter the holding for the purposes set out in the section. This includes the obligation of the landlord to pay reasonable compensation for any damage caused.

The landlord's reserved rights are:

- Searching for, taking, digging for, or mining minerals;
- Quarrying or taking stone, marble, gravel, sand, clay, etc.

The above can be done commercially, i.e. not only for extraction for estate purposes.

- The cutting or taking of timber – unless planted by the tenant or family predecessor or used for shelter;
- Cutting of peat for estate purposes;
- Opening or making roads, fences, drains and water courses. Where a road is opened up, it may be used by the landlord or anyone authorised by them, including other estate tenants;¹¹
- Access to and from the shore of the sea or any loch, with or without vehicles;
- This includes others authorised by the landlord for all purposes;
- Hunting – including vermin control, shooting or fishing;
- Any damage caused is subject to the landholder's rights to compensation;
- A landlord may for any estate purpose, use any water source rising on the holding and not required for the use of the landholding.

12. Who can succeed you in your tenancy?

The landholding can be left to anyone who is related to the landholder, in a way that allows them to succeed if there is no will. There is an allowance for a more remote relative to inherit if others have already died. A landholder is strongly advised to leave the tenancy in their will to their chosen successor to avoid complications.

The landlord (or their agent) must be made aware in writing of the bequest within 2 months of the landholder's death. If the landlord objects, the case would go to the Land Court where it would either be upheld or the new landholder declared tenant.

If there is no bequest, within 1 year of the landholder's death, the executors may transfer the lease to one of the people entitled to succeed the tenancy.

If a landholder is unable to work, they can apply to the Land Court to assign their holding to anyone entitled to succeed their landholding.

¹¹ *Lentran Estates Ltd v MacMillan* 1957 SLCR App 94.

13. Can you convert your landholding (or SST) to a croft?

Section 3A of the Crofters (Scotland) Act 1993 allows the owner of any area of land, but particularly a landholder or SST tenant (subject to some exceptions*) to apply to convert their landholding into a croft – but only if it is in a geographic area designated by the Scottish Ministers.

An application is made to the Crofting Commission after a certificate is obtained from the Land Court that the holding is either a landholding or a SST and the conditions in subsection 3A(12) are met. Compensation will have to be paid from the tenant to the landlord for the conversion.

*The exceptions are that the area of land must be within the crofting counties, no part of the land is tenanted in other ways and it must be a landholding or SST.

Note that the requirement in Section 3A(12)(c) whereby fixed equipment necessary for the landholder to cultivate the crop isn't provided by the landlord, probably can't be met by a SST tenant as the fixed equipment is provided by the landlord.

Further information on applying to convert to a croft is on pages 31 and 32 of the Guide.

14. Common Grazings

A landholding could have shares in a Common Grazing. However it is unlikely there are any remaining for landholdings now outwith the crofting counties. The common graziers may exercise their rights, under the Ground Game Act 1880, to kill and take ground game on the Common Grazings.¹²

¹² 1931 Act Section 23.

Small Landholdings Legislation

A detailed Legal Guide
By Sir Crispin Agnew, Bt, QC

What law governs Small Landholdings and SST?

The Acts of Parliament that principally govern the law relating to Small Landholdings and SSTs, are collectively known as the Small Landholders (Scotland) Acts 1886 to 1931¹³ (hereafter “the Landholders Acts”) and include:

- Crofters Holdings (Scotland) Act 1886 (the “1886 Act”)
- Crofters Common Grazings Regulation Act 1891 (the “1891 Act”)
- Congested Districts (Scotland) Act 1897 (the “1897 Act”)
- Crofters Common Grazings Regulation Act 1908 (the “1908 Act”)
- Small Landholders (Scotland) Act 1911 (the “1911 Act”)
- Small Holdings Colonies Acts of 1916 (the “1916 Act”)
- Small Holdings Colonies (Amendment) Act of 1918 (the “1918 Act”)
- Land Settlement (Scotland) Act 1919 (the “1919 Act”)
- Small Landholders and Agricultural Holdings (Scotland) Act 1931 (the “1931 Act”)

Succession to small landholding and SSTs, where the tenancy has not been bequeathed by a Will, is governed by section 16 of the Succession (Scotland) Act 1964.

Case law relevant to Small Landholdings and SSTs is available in the following law reports. While crofting under the Crofters (Scotland) Act 1993 has been a separate regime since 1955, many of the Land Court decisions on crofting are relevant to small landholding law, because many of the provisions of the Crofters Acts, until the radical amendments made by the Crofting Reform etc. Act 2007, were in similar terms to those found in the Small Landholders Acts.

- Scottish Land Court Reports 1912 to 1963;
- Scottish Land Court Reports Appendixes 1912 to 1981;
- Scottish Land Court Reports 1982 to date;
- Scots Law Times 1964 to date;
- Reports of the Court of Session in Session Cases.

The Scottish Land Court’s more recent case law can be found on the Court’s website at – <http://www.scottish-land-court.org.uk/decisions/reported-decisions>, which has (i) a Digest of Cases, (ii) details of the law Reports, and (iii) recent cases and (iv) a search engine.

Useful textbooks include:

- James Scott, *The Law of Smallholdings in Scotland*, 1933 W Green & Sons, Edinburgh;
- Crispin Agnew, *Crofting Law* 2000, T & T Clark, Edinburgh;
- D Flynn & K Graham, *Crofting Law*, 2017, Avizandum Publishing Ltd, Edinburgh.

13 1931 Act Section 26(1).

How did Small Landholdings come about in Scotland?

Firstly, Small Landholdings and Statutory Small Tenancies (SST) governed by the Landholders (Scotland) Acts 1886 to 1931 only exist in Scotland outwith the Crofting Counties.¹⁴

Crofting was introduced to the Crofting Counties by the Crofters Holdings (Scotland) Act 1886 (the “1886 Act”) which secured three key rights for crofters – security of tenure provided the crofter observed the statutory conditions, a fair rent and payment of compensation for improvements at the end of a tenancy.¹⁵ A crofter was defined as the tenant of a holding, who resided on the holding, where the annual rent did not exceed £30/acre situated within a crofting parish. Section 33 provided for specific exceptions of persons who did not come within the definition.

Crofting was then extended to the whole of Scotland under the Small Landholders (Scotland) Act 1911 (the “1911 Act”), which came into force on 1 April 1912. In addition to the crofts created under the 1886 Act, the Act created two types of new tenancies subject to the 1911 Act. The first was the small landholding where the tenant “or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding without receiving from the landlord or any predecessor in title payment or fair consideration therefore” and the second the Statutory Small Tenancy (SST), where the tenant did not qualify as a small landholder.¹⁶ The SST’s are under a different regime, discussed below, to the regime that governs small landholders.

To qualify as either a small landholder or a SST, the tenant had to be a tenant from year to year residing within 2 miles of the holding who by himself or with his family cultivated the holding with or without hired labour or who so qualified when a lease for a longer term than a year started to run on tacit relocation.¹⁷ Section 26 of the 1911 Act set out exceptions to becoming a landholder or SST, in addition to those in section 33 of the 1886 Act. The principle exception (s. 26(3)(a)) was that any holding where the rent exceeded £50/acre (£30 in Lewis),¹⁸ unless the area (exclusive of Common Grazings) did not exceed 50 acres, was excluded from the Act,¹⁹ thus making clear the Act was concerned with tenants of small farms or landholdings.

Following the First World War, the Land Settlement (Scotland) Act 1919, which amended the 1911 Act, was enacted “to facilitate and secure the settlement of suitable persons upon the land, preferably persons who have served in the forces of the Crown in this or in any previous war.”²⁰ The Board of Agriculture, using the provisions of the 1919 Act, then set about compulsorily (or under the threat of compulsion) creating a substantial number of Small Landholdings throughout Scotland either on private estates or on land acquired by the Board of Agricultural. In the 1970s, the Secretary of State Scotland sold off most of their Small Landholdings to the sitting tenants and thus these small holdings ceased to be governed by the Landholders Acts²¹

14 The former counties of Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Zetland – s. 61(1) of the Crofters (Scotland) Act 1993

15 Recent developments in Crofting Law, Iain F. Maclean, Advocate, Terra Firma Chambers, p3

16 1911 Act Section 2(iii) proviso (a) and (b).

17 1911 Act Section 2(ii) & (iii)

18 1911 Act Section 27

19 For a more detailed consideration of what did and did not become Small Landholdings or SSTs, see Sir Crispin Agnew of Lochnaw Bt, QC, *Crofting Law* T & T Clark 2000, Chapter 3.

20 Hansard, HC Deb. 15 August 1919, vol. 119, the Secretary of State for Scotland at cc 1806.

21 *Highland Primary Care NHS Trust v Thomson* 1999 SLCR 32.

Following the Taylor Report 1954,²² Small Landholdings and SSTs in the crofting counties were converted into crofts by the Crofters (Scotland) Act 1955. Thus the Landholders Acts ceased to apply in the Crofting Counties and now only apply to holdings within the rest of Scotland.

How do I know if I am a landholder under the Landholders Acts?

You can only be a landholder in Scotland outwith the Crofting Counties. The holding can only have been created as a landholding on 1 April 1912 under the 1911 Act or created thereafter either by agreement with the landlord, which had to be registered in the Land Court or under a scheme promoted by the Board of Agriculture under the 1911 or 1919 Acts and approved by the Land Court.

A landholder became a landholding under section 2(1) provided the statutory conditions applied which were that it was held by a tenant from year to year who resided within 2 miles of the holding and cultivated the holding by himself or his family with or without hired labour or it became such a holding when a lease, not then running from year to year terminated, provided that the tenant at that date or predecessors in the same family²³ had provided or paid for the whole or the greater part of the building or other permanent improvements on the holding without receiving from the landlord or his predecessors payment or fair consideration therefore. There were a number of exceptions to becoming a landholder as set out in section 33 of the 1886 Act or section 26 of the 1911 Act. Disputes as to whether or not a landholding was created were usually resolved after 1912 by the Land Court.

If the tenant is not sure, a check could be made with the Land Court to see if there is any record of your holding as a landholding in the Court records either as being created under a scheme, or if an application was raised in the Court for, for example a rent review, an assignation or some other reason. If there is no record of your holding in the Land Court that does not necessarily mean that it is not a landholding.

Remember that a landholding could cease to be under the Landholders Acts. For example if it was re-let outwith the Acts and the Board of Agriculture did not declare the let null and void under section 17 of the 1911 Act.²⁴ Section 17 provided that a landholding could not be re-let otherwise than as an enlargement of an existing holding or to a new landholder, without the consent of the Board of Agriculture. It was for the Board to take proceedings under section 17 to declare any let null and void; an applicant before the Court could not take the point that the let was contrary to section 17.²⁵ Until the Board took proceedings, the new lease and not the 1911 Act governed the landlord and tenant relationship.²⁶

²² Report of the Commission of Enquiry into Crofting Conditions, April 1954, Cmd. 9091, HMSO, Edinburgh

²³ 1931 Act Section 9 - "predecessors in the same family" means in relation to a landholder or a cottar the wife or husband of such landholder or cottar and any person to whom such landholder or cottar, or the wife or husband of such landholder or cottar might, failing nearer heirs, have succeeded in case of intestacy.

²⁴ As amended by Section 12 of the 1919 Act.

²⁵ *Troup v Breadalbane's Trs* 1934 SLCR 10 at 12.

²⁶ *Seafield Trs v Sutherland* 1935 SLCR 53; *Murray v Anstruther's Trs* 1940 SLCR 59 at 61.

If the landlord re-let it outwith the Act and the Board of Agriculture did not object to the re-let within a reasonable time, the Board could lose its right to object.²⁷ The Land Court will have regard to the terms of the lease to see if it was a new let under the Acts as provided for by section 17, or if the terms of the lease are not consistent with a let under the 1911 Act.²⁸ If the lease is consistent with the 1911 Act and no consent was obtained from the Board of Agriculture, then there is a presumption that the let was under the Acts.²⁹

If the landholder accepted a new tenant, of the subjects, perhaps combined with additional land or by taking in a joint tenant, then it could cease to be under the Act.³⁰

The purchase of the landholding by the sitting tenant takes the landholding out of the Act.³¹

What are the terms of the lease of my landholdings?

The statutory conditions of tenure, supersede any other conditions in a lease that the parties may have entered into, when the subjects became landholdings in 1912 or thereafter. See “What are the “statutory conditions” of my lease that I have to comply with?” on pages 19 to 22.

Where landholdings were created by the Board of Agriculture where written terms of the lease were approved by the Land Court, then there will be a written lease. This is because Section 9 of the 1919 Act, amended section 7 of the 1911 Act to insert a new sub-section (8)(a), which provided that the Board of Agriculture could create new landholdings “to be occupied by new holders upon such terms and conditions not inconsistent with the Landholders Acts as the Board think reasonable”. The effect of this is that new holdings created under the 1919 Act would be subject to both the statutory conditions and the terms and conditions imposed by the Board provided they were not inconsistent with the Landholders Acts.³²

A landholding is “deemed to include any right in pasture or grazing land held or to be held by the tenant or landholder whether alone or in common with others, and the site of any dwelling-house erected or to be erected on the holding or held or to be held therewith, and of any offices or other conveniences connected with such dwelling-house”.³³

Any contract or agreement made by a landholder by which he is deprived of any right conferred on him by any provision of the Landholders Acts is void unless the contract or agreement is approved by the Land Court.³⁴ This applies to any agreement made before or after 1931.³⁵

27 *Board of Agriculture v Countess Dowager of Seafield's Trs* 1916 SLCR 63, where held that Boards failure to object to new tenant outwith the Acts in six months, meant their application too late.

28 *Greg's Exrs v Macdonald* 1991 SLCR 135; *Troup v Breadalbane's Trs* 1934 SLCR 10; *Trs of Caroline, Countess-Dowager of Seafield v Sutherland* 1935 SLCR 53 at 57 and *Board of Agriculture v Countess-Dowager of Seafield's Trs* 1916 SLCR 63 at 65.

29 *Manson v Keith* 1929 SLCR 19; *McGavin v Sir Claud Alexander's Trs* 1939 SLCR 3.

30 See *Greg's Exrs v Macdonald* 1991 SLCR 121 where possible protected tenant took new lease as “river watcher”; *Kennedy v Marquess of Breadalbane's Trs* 1933 SLCR 3 where a statutory small tenant entered into new lease for 10 years with landlord of the holding and other land jointly with his wife and son and Court held identity of holding had been lost; *McColl v Beresford's Trs* 1921 SLCR 3 at 16 where court said “abandonment of potential statutory rights may also be affected by the actings of the parties as well as by voluntary agreement”.

31 *Highland Primary Care NHS Trust v Thomson* 1999 SLCR 32.

32 *Cumming v Marquis of Bute* 1930 SLCR 67 at p. 71.

33 1911 Act Section 26.

34 1931 Act Section 25.

35 *Sinclair v Anstruther's Trs* 1941 SLCR 3.

What rent do I have to pay for the holding and how can I get it reviewed?

The landholder has to pay a “fair rent” for the holding.

The landlord and the landholder may agree the rent to be paid for the holding and the rent so agreed shall be the rent payable so long as the agreement subsists or until a new rent is fixed by the Land Court or by agreement.³⁶

The landlord or the landholder may apply to the Land Court to fix a “fair rent”³⁷ and the rent so fixed shall be the rent payable from the first term of Whitsunday (28 May) or Martinmas (28 November) following the decision and save by mutual agreement the rent fixed by the Land Court shall not be altered for a period of 7 years from that term.

In fixing a “fair rent” the Land Court is required to consider “all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent or unexhausted improvements on the holding and suitable thereto which have been executed or paid for by the crofter or his predecessors in the same family”.³⁸ A landholder is not rented on his own improvements or those executed by predecessors in the same family. In *McKelvie v Duke of Hamilton’s Trs* 1939 SLCR 35 (following *Hamilton v Hamilton’s Trs* 1918 SC 282), the Land Court held that improvements provided or paid for by sub-tenants, who were predecessors in the same family fell to be considered as landlord’s improvements, because “predecessor” did not include a sub-tenant and the tenant was rented on those improvements.

In *Sutherland Estates v Sutherland* 1998 SLT (Land Ct) 37, the Land Court reviewed the proper approach to fixing a fair rent in circumstances, where the majority of the income came from subsidies designed to encourage people to remain living in the crofting area. The Court concluded that the principles set out in earlier decisions no longer provided an adequate guide to the determination of a fair rent under modern crofting conditions and held that an approach based rigidly on a method of assessment of agricultural rent on a profit basis was inappropriate. The Court fixed rents by adopting a comparative approach based on an assessment of the stocking and cropping capacity of the land and by applying a rate to reflect the circumstances of the case, croft and district. While this was a crofting case, the Land Court is likely to follow the same approach for landholdings, because the statutory provisions are very similar.

If the landholding is suitable for a subsidiary or auxiliary occupation or the sub-letting of any dwelling-house to holiday visitors, then the asset [the attractive site for the holiday let or the suitable site for the subsidiary or auxiliary occupation] is taken into account in fixing the fair rent.³⁹ The value of any pertinents of the landholding; e.g. right to take sea ware, peat for fuel or grass or heather for thatching should be included in fixing the rent.⁴⁰ A landholder may not credit himself with the standard wage of an agricultural worker.⁴¹ The fixing of a fair rent does not depend of the landholder’s ability to pay; nor on the availability or otherwise of opportunities for ancillary employment.⁴² Opportunities for employment near to the landholding are not a relevant consideration.⁴³ Any rise or fall in the value of money and in particular the effects of inflation on the

36 1886 Act Section 5.

37 1886 Act Section 6(2).

38 1886 Act Section 6(1).

39 *McNeill v Duke of Hamilton’s Trs* 1918 SC 221; *Ward v Shetland Island Council* 1990 SLCR 119.

40 *Macdonald v Macdougall* (1896) 23 R 941.

41 *Ward v Shetland Island Council* 1990 SLCR 119; *Secretary of State for Scotland v Ramage* 1952 SLCR 29.

42 *Strathconan v MacConnell* 1977 SLCR App 156.

43 *Ward v Shetland Island Council* 1990 SLCR 119.

incomes of both landholder and landlord are relevant factors, although the rent should not be increased by progressive indexation with the retail price index.⁴⁴ The “net annual profits” should take account of available subsidies and EC grants etc. A landholder is not entitled to a deduction in rent for any dilapidations he has allowed either to his buildings or improvements or deterioration he has allowed to the land.⁴⁵ A Division Court held that a landlord’s fixture falls to be rented on the basis of its contribution to the agricultural potential of the croft and not on the basis of its potential contribution to a subsidiary or auxiliary occupation. While this case may be correct on the facts, as a general principle it does not square with *McNeill v Duke of Hamilton’s Trs* 1918 SC 221; *Ward v Shetland Island Council* 1990 SLCR 119, which held that the suitability of the site for such a subsidiary or auxiliary occupation fell to be taken into account. Potential flooding on the landholding and excessive deer grazing are relevant considerations.⁴⁶ Where a crofter is repaying a loan to the Secretary of State (e.g. for the erection of a dwelling-house), the cost of this loan is not a relevant consideration in fixing a fair rent.⁴⁷ If a landholder builds a house, which is in excess of the needs of the holding and the house is rated separately from the holding, this is not a “circumstance” that should be taken into account in fixing a fair rent.⁴⁸

What are the “statutory conditions” of my lease that I have to comply with?

The statutory conditions are set out in section 10(1) of the 1911 Act and section 1 of the 1886 Act. There are 9 as follows:

- (1) The landholder shall, by himself or his family, with or without hired labour, cultivate his holding, without prejudice to the right (which is hereby conferred upon him) to make such use thereof for subsidiary or auxiliary occupations as in case of dispute the Land Court may find to be reasonable and not inconsistent with the cultivation of the holding;**

Provided that the expression “cultivate” in this subsection shall include the use of a holding for horticulture or for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit, vegetables, and the like:

Sub-letting the annual grazing on the landholding is “cultivating” the landholding.⁴⁹ The landholder may engage a contractor to plough the holding without being in breach of the condition.⁵⁰ A landholder who removed to Canada leaving the landholding under the charge of a neighbour was in breach of this condition and removed.⁵¹

The landholder may use the holding “for subsidiary or auxiliary occupations as in case of dispute the Land Court may find to be reasonable and not inconsistent with the cultivation of the holding” – see page 23 “Can I use my landholding for anything other than agriculture?”

44 *Hitchcocks Trs v McCuish* 1982 SLCR 101.

45 *Harrold v Secretary of State for Scotland* 1953 SLCR 37. In *Lawson v Lord Strathcona* 1992 SLCR 67 at p. 70.

46 *Luxmoore v Wilson* 1989 SLCR 56 at 64.

47 *Burnett v Department of Agriculture* 1937 SC 367.

48 *MacRae v Department of Agriculture* 1936 SLCR 34 (cf *Assessor for Zetland v Duncan* 1948 SLT 363, where croft and house entered separately but both de-rated; *Assessor for Highland Region and Western Isles v Campbell* 1995 SLT 1290, crofter not working croft assessed separately for council tax).

49 *Maclaren v Maclaren* 1984 SLCR 43 at 51; *Little v McEwan* 1965 SLT (Land Ct) 3.

50 *Georgeson v Anderson’s Trs* 1945 SLCR 44.

51 *Department of Agriculture v Robertson* 1941 SLCR 32.

(2) The [landholder] shall pay his rent at the terms at which it is due and payable:

The obligation to pay the rent is peremptory and there is no requirement for the landlord to send a demand for the rent. The placing of rent on deposit receipt pending resolution of a dispute is not “payment” of rent and there is no statutory entitlement to set off rent against any other debt due by the landlord to the crofter; Where one year’s rent is unpaid then upon the application of the landlord,⁵² the Land Court, after considering any objections stated by the landholder, may order the removal of the landholder.⁵³ The Land Court has held that the failure to pay the rent is the equivalent of a legal irritancy which may be purged before decree is pronounced and invariably allows the landholder an opportunity to rectify the position.⁵⁴

(3) The [landholder] shall not execute any deed purporting to assign his tenancy

The main part of the section provides that the landholder “shall have no power to assign his tenancy” and then statutory condition 2 states that “the crofter shall not execute any deed purporting to assign his tenancy.” However, the Land Court had recognised that a landholder may assign his tenancy with the consent of the landlord.⁵⁵ In *Matheson* the Court held that the landlord’s consent to the assignation of a SST was implied from the parties’ actings and there is no reason why the reasoning in *Matheson* should not apply to a landholding.

NB: Under section 21 of the 1911 Act, a landholder who is unable to work his holding through illness, old age or infirmity may apply to the Land Court for leave to assign his holding to his son-in-law or anyone who could in any circumstances succeed on intestacy – see “Who can succeed me in my tenancy?” on pages 30 and 31.

(4) The [landholder] shall not, to the prejudice of the interest of the landlord, persistently injure the holding by the dilapidation of buildings or, after notice has been given by the landlord to the [landholder] not to commit, or to desist from, the particular injury specified in such notice, by the deterioration of the soil

This standard condition imposes two obligations on the landholder; first not to allow dilapidation of buildings, and secondly not to allow a deterioration of the soil. The condition is written technically so a landlord seeking to rely on the condition for the removal of the landholder has to comply with its technical requirements.

The “prejudice of the interest of the landlord” relates to the interest of the landlord in the landholding and not his interest in the estate or other land. It has been held that an admitted dilapidation of buildings raises a presumption of prejudice to the landlord.⁵⁶ The phrase “persistently injure” has been held to mean continuing the conduct after a warning.⁵⁷

52 *Park v Mackintosh* 1968 SLCR App 103.

53 1931 Act Section 3

54 *Little v McEwan* 1965 SLT (Land Ct) 3.

55 *Matheson v Master of Lovat* 1984 SLCR 82.

56 *Park v Mackintosh* 1968 SLCR App 103.

57 *Burton Property Trust v MacRae* 1989 SLCR 34; *Cheyne v Hunter* 1989 SLCR 38.

The landholder's obligation not to allow the dilapidations of buildings includes both the landlord's and the landholder's buildings,⁵⁸ so the landholder has to prevent the dilapidation of both and this probably includes part of buildings. There is no obligation on the landlord to give notice requiring rectification, because it is one of the statutory obligations of the landholder to keep the buildings in repair, without necessity of his attention being called to the fact.⁵⁹ The obligation to prevent dilapidations under the Act does not extend to maintain or repair a building to bring it up to, or to keep it at "present day standards", even if there might be such an obligation under other legislation, such as the Housing or Health and Safety Acts.⁶⁰ To avoid a removal on the ground of dilapidation of buildings the landholder will have to prove that they were in a poor state of repair at entry,⁶¹ which probably means the original entry date because a tenant usually takes over the assets and liability of his predecessor in the tenancy.⁶²

A notice in writing is an essential prerequisite to found a breach of persistently injury by a deterioration of the soil.⁶³ The notice must specify the particular injury complained of and a general notice against bad husbandry is not sufficient.⁶⁴ In *Bowman*, a crofting case, the Land Court said "it is important that a notice under condition 5 should give the tenant a clear indication of the nature of the injury *to the soil* which is in the contemplation of the landlord". Keeping insufficient stock does not *per se* infer a deterioration of the soil.⁶⁵

(5) The [landholder] shall not, without the consent of his landlord in writing, sublet his holding or any part thereof, or erect or suffer to be erected thereon any dwelling-house otherwise than in substitution for those already upon the holding at the time of the passing of this Act:

The prohibition against subletting was originally "shall not ... subdivide his holding or sublet the same", but the Crofting Reform etc. Act 2007 removed the prohibition against subdivision. It is not clear how a landholder could lawfully divide his holding anyway, because a tenancy is indivisible. The provision against subletting does not debar a landholder from subletting the dwelling-house to holiday visitors.⁶⁶

The "passing of this Act" is construed to mean the date at which the Landholders Acts first applied to the holding.⁶⁷

58 *Holman v Henderson* 1965 SLT (Land Ct) 13; *Secretary of State for Scotland v Petrie* 1966 SLCR App 62; *Park v Mackintosh* 1968 SLCR App 103.

59 *Dudgeon v McIlroy* 1933 SLCR 7 at 11.

60 *McGregor v Garrow* 1973 SLT (Land Ct) 3 at 4.

61 *Secretary of State for Scotland v Petrie* 1966 SLCR App 62.

62 *Ross v Douglas* 1977 SLT (Land Ct) 2.

63 *Burton Property Trust v MacRae* 1989 SLCR 34; *Cheyne v Hunter* 1989 SLCR 38.

64 Johnston, Small Landholders Act 1886-1911, 2nd Ed p. 79 and *Bowman v Guthrie* 1998 SLT (Land Ct) 7.

65 *Stewart's Trs v Meil* (1891) Sh Ct Rep 217.

66 1911 Act Section 10(2) - "... nothing in the said subsection shall be construed as debarring a landholder from subletting his dwelling-house to holiday visitors".

67 1911 Act Section 10(2)

- (6) The [landholder] shall not persistently violate any written condition signed by him for the protection of the interest of the landlord or of neighbouring [landholders] which is legally applicable to the holding, and which the [Land Court] shall find to be reasonable**

Note that it is only the conditions for the protection of the interests of the landlord or the neighbouring landholders which are applicable. With regard to “persistently violate”, the Land Court has doubted if “persistently” required that the landlord should give notice of the breach and demand implement of the condition, before raising removal proceedings.⁶⁸

- (7) The [landholder] shall not do any act whereby he becomes notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, and the Debtors (Scotland) Act, 1880, and shall not execute a trust deed for behoof of creditors:**

This condition has not been updated to reflect the Bankruptcy (Scotland) Act 2016, but the Land Court is now likely to construe bankruptcy in terms of the 2016 Act.

Where a landholder is in breach of this Condition, he will not be given an opportunity to remedy the breach, where an application for removal has been brought under s. 5(2).⁶⁹ The Trustee in bankruptcy has no right to remove a landholder by renouncing the tenancy in order to claim compensation.⁷⁰ The Trustee may be able to require the landholder to execute a notice renouncing the tenancy under s. 64(1) of the 1985 Act and if this is refused, application may be made to the Sheriff.⁷¹ A landholder who grants a trust deed for his creditors is not divested of his tenancy, but remained vested in the radical right subject to the burden of the trust.⁷²

- (8) The landlord, or any person or persons authorised by him in that behalf (he or they making reasonable compensation for any damage to be done or occasioned thereby), shall have the right to enter upon the holding for any of the purposes following (that is to say)**

What can the landlord do on my holding? See pages 28-30.

And the [landholder] shall not obstruct the landlord, or any person or persons authorised by him in that behalf as aforesaid, in the exercise of any right reserved or conferred by this subsection.”

- (9) The [landholder] shall not on his holding, without the consent of his landlord, open any house for the sale of intoxicating liquors.**

This statutory condition is self-explanatory and probably not relevant in the 21st century.

⁶⁸ *MacLeod v MacLean* 1938 SLCR 82 at 85.

⁶⁹ *Secretary of State for Scotland v Robertson* 1991 SLCR 74; *Culfargie Estates Ltd v Leslie* 1957 SLCR 38, but see comments in *Thrumster Estate Ltd v Mindt* (2016) RN SLC/166/13 where suggested that bankruptcy might be remediable

⁷⁰ *Mackenzie v Mackenzie* (1905) 7 F 505

⁷¹ *McAllister v Duke of Hamilton's Trs* 1919 SLCR 88 at 91

⁷² *Irvine v Fordyce* 1926 SLCR 57

Can I use my landholding for anything other than agriculture such as an subsidiary or auxiliary occupation?

Section 11 of the 1911 Act allows a landholder “to make such use thereof for subsidiary or auxiliary occupations as in case of dispute the Scottish Land Court may find to be reasonable and not inconsistent with the cultivation of the holding.” The important point to note is that the activity must not be inconsistent with the cultivation of the holding.

Common auxiliary or subsidiary occupations could include, for example, letting dwelling houses on the holding for holiday lets, acting as a farrier, carpenter, mason, fisherman, postmaster, keeping a small shop, spinning and weaving, keeping caravans for holiday lets, provision of a camping ground and arts and crafts.⁷³ Section 10(2) of the 1911 Act specifically provides that “nothing in the said subsection shall be construed as debarring a landholder from subletting his dwelling-house to holiday visitors”.

How can my lease of the holding be terminated?

The tenancy may be terminated by:

- the landholder purchasing the holding;
- the tenant accepting a new lease outwith the protection of the Act;
- the tenant renouncing the tenancy;
- the landlord obtaining an order for removal from the Land Court;
- the Land Court authorising a resumption of the whole holding by the landlord.

The landholder purchasing the holding

If the landholder purchases the holding, this takes the holding outwith the Landholders Acts.⁷⁴ This is different from crofts, where a croft owner-occupier remains subject to the Crofting Acts.

The tenant accepting a new lease outwith the protection of the Act

If the tenant accepts a new lease outwith the Landholders Acts, perhaps with the grant of additional land or by taking in a joint tenant, then the holding ceases to be under the Landholders Acts.⁷⁵

If a vacant holding is let outwith the Acts and the Scottish Ministers do not object within six months of the new let, then the holding ceases to be under the Acts.⁷⁶ If there was a break in the family succession to the tenancy of a landholding then it is worth checking whether the next let was a new let outwith the Acts.

⁷³ *Mackintosh v Lumsden* 1913 1 SLCR 92

⁷⁴ *Highland Primary Care NHS Trust v Thomson* 1999 SLCR 32.

⁷⁵ *Kennedy v Marquess of Breadalbane's Trs* 1933 SLCR 3; *Greg's Exrs v Macdonald* 1991 SLCR 121.

⁷⁶ *Fea Mortification v Cursiter* 1966 SLCR App 53; *Troup v Breadalbane's Trs* 1934 SLCR 10.

The tenant renouncing the tenancy

Under section 7 of the 1886 Act the landholder may renounce the tenancy “upon one year’s notice in writing to the landlord” at any term of Whitsunday (28 May) or Martinmas (28 November). But under section 22 of the 1931 Act if the tenant was a new holder post 1912, then the lease, except by agreement, can only be terminated at the same term date as that at which entry was taken. However, under section 18 of the 1911 Act such a notice is not effective, without the consent of the Land Court, unless within 2 months from the date of the notice the landlord or the landholder intimates the notice in writing to the Scottish Ministers. A landholder is not entitled to renounce the tenancy, without the consent of the Scottish Ministers so long as there is any outstanding liability to the Scottish Ministers for a loan or the like, which has not been discharged. It is unlikely that there are any outstanding obligations.

Removal of landholder by order of Land Court

The tenant of a Small Landholding cannot be removed from the landholdings unless he is in breach of one of the statutory conditions of the lease. Section 1(1) of the 1886 Act provides that:

“(1) A [landholder] shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions), but he shall have no power to assign his tenancy.”

A landholder can also be removed from the holding “(w)here one year’s rent of a holding is unpaid” or where he abandons the holding or breaks any condition of repayment of a loan to the Scottish Ministers.⁷⁷

The Land Court, with limited exceptions, always allows the tenant an opportunity to remedy a breach of a statutory condition unless it is clearly not remediable. In *Little v McEwan* 1965 SLT (Land Court) 3 the Land Court said:

“It is well established in this Court that a tenant may purge an irritancy of a statutory conditions of let and indeed it has been the Court’s invariable practice to allow a tenant in breach of such a condition an opportunity of rectifying the position (when it is capable of being rectified) before pronouncing an order for removal”.

It has been held that the tenant cannot purge statutory condition (6) “Bankruptcy”, but a recent Land Court decision indicates that this might be open to reconsideration.⁷⁸

⁷⁷ 1931 Act Section 3(1).

⁷⁸ *Secretary of State for Scotland v Robertson* 1991 SLCR 74; *Culfargie Estates Ltd v Leslie* 1957 SLCR 38, but see comments in *Thrumster Estate Ltd v Mindt* (2016) RN SLC/166/13 where suggested that bankruptcy might be remediable.

Resumption of all or part of the holding

The landlord has the right to apply to the Land Court to resume all or part of the holding “for some reasonable purpose, having relation to the good of the holding or of the estate” and if an order is granted this will effectively remove the tenancy from all or part of the holding.⁷⁹

Note that the reasonable purpose has to be in relation to the good of the holding or the estate, whereas under the Crofters (Scotland) Act 1993 the reasonable purpose can also be in relation to the public interest or the interests of the crofting community in the locality, so the grounds for resumption of a landholding are narrower than for a croft. For example a resumption to sell a small area to a relative was held to be for the benefit of the relative and was not in relation to the good of the estate.⁸⁰

It has to be a resumption that is for a reasonable purpose in the whole circumstances.

Reasonable purpose includes using, letting, or selling the land for the building of dwellings, or for small allotments or for harbours, piers, boat shelters, or other buildings or for churches or other places of religious worship, or for schools, or for planting, or for roads practicable for carriages from the landholding to the high road or the sea shore, the protection of an ancient monument or other object of historical or archaeological interest from destruction or injury.⁸¹ The occupation by landlord of the holding where he intends to reside personally on the holding and it is his only landed estate ceased to be a reasonable purpose in 1931.⁸² More modern purposes such as for renewable energy generation could also be a reasonable purpose.⁸³

Where the resumption is for a reasonable purpose to be carried out by another party other than the landlord, then the Land Court will require evidence of a completed agreement with the other party. This usually arises where the land is required for selling to a third party for house building where the Land Court requires to see the missives.⁸⁴

Where there has been a resumption the Land Court may adjust the rights of the parties on an application under section 14 of the 1911 Act.

The resumption can be authorised upon such terms and conditions as the Land Court thinks fit and these usually include conditions. Fencing off the resumed area or access conditions are the most usual. The conditions have to reasonably relate to the purpose of the resumption and not be imposed for an ulterior motive.⁸⁵

79 *Gibson's Trsa v Telfer* SLC/86/17 (decision awaited at time of publication).

80 *Walker v MacEwan* 1946 SLCR 14; *Lewis Islands Crofters Ltd v Mackay* 1940 SLCR 69

81 1886 Act Section 2 and 1911 Act Section 19.

82 1931 Act Section 8.

83 See Crofting Law by Agnew s. 20 fn 14 for examples of what are and are not reasonable purposes, bearing in mind that the right to resume is narrower under the Landholders Acts.

84 *Lands Improvement Holdings Landmatch S.a.r.l. v Cole* 2014 SLCR 85.

85 *Foljambe v Crofters of Melness* 1979 SLT (Land Court) 9; *British Airports Authority v Secretary of State for Scotland* 1979 SC 220, LP at 210.

When a landlord resumes all or part of a holding the tenant is entitled to “adequate compensation to the crofter, either by letting to him other land of equivalent value in the neighbourhood, or by reduction of rent, or by compensation in money, or otherwise”.⁸⁶ This compensation is for loss of agricultural rights, including income from the loss of income from subsidiary and auxiliary occupations, in the croft. The loss of agricultural rights is assessed in relation to (i) if other land of equivalent value is not leased to the crofter or an abatement of rent is not adequate compensation then compensation is assessed in relation to the loss of profits calculated by taking the net annual profit and capitalising this by an appropriate multiplier (ii) compensation for waygoing losses; e.g. growing grass, seed, ploughings, unexhausted manurial values etc. and (iii) forced sale of stock, redundancy of buildings, disturbance and consequent loss.⁸⁷ In addition the landholder has a claim for permanent and non-permanent improvements, which can be valued on the basis of the value to an incoming landholder, but could be valued so that “adequate compensation” is paid.

What compensation am I entitled to when all or part of my tenancy is ended?

Section 8 of the 1886 Act provides that:

“8. When a [landholder] renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements, provided that—

- (a) The improvements are suitable to the holding;
- (b) The improvements have been executed or paid for by the [landholder] or his predecessors in the same family;
- (c) The improvements have not been executed in virtue of any specific agreement in writing under which the crofter was bound to execute such improvements.”

As the landholder has to renounce his tenancy or be removed to be able to apply for compensation, a landholder who abandons the tenancy or serves an invalid notice of renunciation is not entitled to compensation.⁸⁸ Compensation is assessed at that date even if the landholder stays on the holding as a squatter. The Land Court has to assess that the permanent improvement is suitable for the holding e.g. a dwelling house “was much too good for the croft” and compensation assessed accordingly.⁸⁹ The improvement has to have been executed or paid for by the landholder or his predecessors in the same family, which means that improvements carried out in previous tenancies or by sub-tenants do not qualify for compensation.

⁸⁶ 1886 Act Section 2

⁸⁷ *Macdonald v Macdonald* 1950 SLCR 14; *Killermont and Gascadden Estate Ltd v Colquhoun* 1945 SLCR 7; *Andreae v Macdonald* 1961 SLCR 15; *Secretary of State for Scotland v Ramage* 1961 SLCR 35; *MacRae v Secretary of State for Scotland* 1981 SLT (Land Ct) 18, where expert’s fees allowed.

⁸⁸ *Mackay v Keith* 1928 SLCR 76.

⁸⁹ *Humbert v Macluer* 1961 SLCR 29

The list of improvements in the Schedule that may be claimed includes:

1. Dwelling house;
- 1A. Work carried out in implementation of an HRA action plan included in an HRA designation order made under section 1 of the Housing (Scotland) Act 2006 (asp 1);
2. Farm Offices;
3. Subsoil or other drains;
4. Walls and fences;
5. Deep trenching;
6. Clearing the ground;
7. Planting trees;
8. Making piers or landing stages;
9. Road practical for carriages from the holding or holdings to the public road (within the meaning of the Roads (Scotland) Act 1984 or seashore);
10. All other improvements, which in the judgement of the [Land Court], shall add to the value of the holding to an incoming tenant.

An improvement is the provision of something new and not the replacement of an existing structure.⁹⁰ A second dwelling house does not usually count as an improvement unless it fulfils some other purpose.⁹¹ The catch all of “All other improvements” will cover anything that adds value to the holding to an incoming tenant and probably includes improvements that benefit a subsidiary or auxiliary occupation.

Improvements are valued on the basis of “the value of the improvement to an incoming tenant”, deducting the value of any assistance or consideration given by the landlord and deducting the value of any deterioration committed or permitted by the tenant within the four years preceding the end of the tenancy.⁹²

Any arrears of rent may be set off against any sum found due to the landholder by way of compensation.⁹³

⁹⁰ *Secretary of State v Greig* 1972 SLT (land Ct) 3.

⁹¹ *Smith v Cameron* 1947 SLCR 42; *Thomson v Stewart* 1972 SLCR App 105.

⁹² *Strachan's Trs v Harding* 1990 SLT (Land Court) 6.

⁹³ 1911 Act Section 23.

What can the landlord do on my holding?

The landlord has a number of “reserved rights” under section 1(7) of 1886 Act to enter on the holding for the purposes set out in the section, which includes the obligation to pay reasonable compensation for any damage to be done or occasioned thereby. There are also additional rights in the 1911 Act noted below. The preamble to section 1(7) of the 1886 Act states:

The landlord, or any person or persons authorised by him in that behalf (he or they making reasonable compensation for any damage to be done or occasioned thereby), shall have the right to enter upon the holding for any of the purposes following (that is to say):

It is of note that 1886 Act provides for “... compensation for any damage to be done or occasioned thereby” suggesting a right to fix future compensation, whereas the Crofters (Scotland) Act 1993 refers to “damage done”, ie past damage.⁹⁴ In *Crofters Sharing in the Keil Common Grazings v MacColl*⁹⁵ which concerned damage to Common Grazings from sand extraction the Land Court held (i) that it was incompetent to award an annual sum, (ii) that each crofter was entitled to a separate claim, although it is competent for the claimants to join together in one claim and have the Grazings Clerk represent them, (iii) assessed past compensation on the basis of loss per share in the Common Grazings to average £10 per annum over the past 5 years and (iv) reserved to the crofters to re-apply in respect of any future loss. The Land Court has awarded compensation for injury to a pony, including vets fees and the costs of hiring another pony, where the pony fell into a quarry which the landlord had not fenced in terms of a Court order.⁹⁶ The Land Court has awarded compensation for quarrying damage done to the Common Grazings to “cover the loss which the tenants have sustained in being deprived of the use of this part of the Common Grazings for all time.”, but reserved to parties the right to claim for any further damage.⁹⁷

The reserved rights are:

- (1) Mining or taking minerals, or digging or searching for minerals;**
- (2) Quarrying or taking stone, marble, gravel, sand, clay, slate, or other workable mineral;**

In exercising these rights, the landlord may not exercise them so as to prejudice the essential security of tenure of the landholder.⁹⁸ The rights may be exercised for a commercial purpose and is not limited to extraction for estate purposes.⁹⁹ The right to quarry includes the right to excavate the surface to reach the underlying material and to use areas of the landholding for the accommodation of buildings, tools, shelters and parking of vehicles.¹⁰⁰

94 see *Crofters Sharing in the Keil Common Grazings v MacColl* 1986 SLCR 142 for a comment on this change.

95 1986 SLCR 142.

96 *MacLennan v Secretary of State for Scotland* 1947 SLCR 40.

97 *Hitchcock v Tenants of Northton* 1942 SLCR 15.

98 *Strathern v MacColl* 1992 SC 339 and *MacAskill v Basil Baird & Sons Ltd* 1987 SLT (Land Ct) 34.

99 *Strathern v MacColl* 1992 SC 339.

100 *Cameron of Locheil v MacLaren* 1949 SLCR 32 at 35; *Trs of the 10th Duke of Argyll v MacCormick* 1991 SLT 900 (2nd Div).

- (3) Cutting or taking timber or peats, excepting timber and other trees planted by the landholder or his predecessors in the holding, being of the same family, or that may be necessary for ornament or shelter, and excepting also such peats as may be required for the use of the holding;**

Growing timber belongs to the landlord unless it was planted by the landholder or his predecessors as an improvement.¹⁰¹ The right to cut peat is only for estate purposes and not commercially, provided it does not interfere with the landholder's right to take peat.¹⁰²

- (4) Opening or making roads, fences, drains, and water-courses;**

This power must be exercised reasonably.¹⁰³ It is not competent to use this reservation to create a turning and parking space for the benefit of adjacent house plots.¹⁰⁴ A landlord may use this reservation to open up an access road to the foreshore for the benefit of a croft over a neighbouring croft.¹⁰⁵ Where a road is opened up it may be used by the landlord or anyone authorised by him, including other estate tenants.¹⁰⁶

- (5) Passing and re-passing to and from the shore of the sea or any loch with or without horses and carriages for exercising any right of property or other right belonging to the landlord;**

This right may be used for all purposes and the landlord may authorise others to make use of the road to get to the foreshore.¹⁰⁷

- (6) Viewing or examining at reasonable times the state of the holding and all buildings or improvements thereon;**

This right is to view the holding to see that the landholder is abiding by the terms of the lease. It is not a general right to come on to the holding at any other time for any other purpose.¹⁰⁸

- (7) Hunting, shooting, fishing, or taking game or fish, wild birds, or vermin. The word "game" for the purposes of this subsection means deer, hares, rabbits, pheasants, partridges, quails, landrails, grouse, blackgame, capercaillie, ptarmigan, woodcock, snipe, wild duck, widgeon, and teal;**

And the landholder shall not obstruct the landlord, or any person or persons authorised by him in that behalf as aforesaid, in the exercise of any right reserved or conferred by this subsection.

¹⁰¹ *Gilmour v Master of Lovat* 1979 SLT (Land Court) 2; *Fraser v Carnegie* 1927 SLCR 46.

¹⁰² *MacAskill v Basil Baird & Sons Ltd* 1987 SLT (Land Ct) 34; *Leverhulme v Board of Agriculture* 1919 SLCR 78, and *Smith v Bruce* 1927 SLCR 83 at 85.

¹⁰³ For a full discussion of the right see - *MacDonald v West Minch Salmon Ltd* 2003 SLCR 43; *Nicholson v Sinclair* 1968 SLCR App 121.

¹⁰⁴ *Cameron v MacKinnon* 1996 SLT (Land Ct) 4.

¹⁰⁵ *Bridger v Macrae* 1963 SLCR App 53.

¹⁰⁶ *Lentran Estates Ltd v MacMillan* 1957 SLCR App 94.

¹⁰⁷ *MacDonald v West Minch Salmon Ltd* 2003 SLCR 43 and 25 June 2004 Court of Session unreported.

¹⁰⁸ *Landholders of South Scorrybreck v Secretary of State for Scotland* 1953 SLCR 39 at p. 44.

This reservation is self-explanatory, but is subject to the landholders rights under the Ground Game Act 1880 to shoot rabbits and hares and under section 26 of the Deer (Scotland) Act 1996 to shoot deer causing damage “to crops, pasture or human or animal foodstuffs on that agricultural land, or to that woodland, if the deer are not taken or killed”. The landholder is entitled to recover compensation for damage by game.¹⁰⁹

(8) A landlord may, on payment of compensation for any surface damage, use for any estate purpose any springs of water rising on a holding and not required for the use thereof:

Provided that any dispute as to the requirements of the holding or the amount of compensation under this section shall be determined by the Land Court; and provided further that nothing herein contained shall be construed as affecting the rights of any persons other than the landlord and the landholder.

Note that this relates to the use of water rising on the holding that is not required for the use of the holding and the landlord’s use is for estate purposes only.

Who can succeed me in my tenancy?

Testate succession

Under section 16 of the 1886 Act a landholder “may, by will or other testamentary writing, bequeath his right to his holding to one person being his son-in-law or any one of the persons who would be, or would in any circumstances have been, entitled to succeed to the estate on intestacy by virtue of the Succession (Scotland) Act, 1964”. This effectively means that that the landholding can be left to anyone who is related to the landholder in a way that allows that person to succeed on intestacy. The “in any circumstances” means that one can assume that various people might be dead and so allowing in a remoter relative than one who could actually succeed under the laws of intestacy on the landholder’s death.

A landholder is advised to leave the tenancy by Will to his chosen successor because that saves complications and the legatee does not have to account to the deceased’s estate for the value of the lease which he has to do if it is transferred by the executors – see page 31.

The legatee has to intimate the bequest to the landlord or his known agent within two months after the death, unless he is prevented by some unavoidable cause from making the intimation in time, which is a difficult test to pass. This should be done in writing, although a verbal intimation has been accepted as sufficient.¹¹⁰ A will not found within the time limit despite a good search might be an unavoidable cause,¹¹¹ but poor health or exhaustion following the death is probably not an unavoidable cause.¹¹² Following intimation, the landlord may intimate to the legatee that he objects to receiving him as the landholder. If no such intimation is made then the legatee becomes the landholder.

¹⁰⁹ 1911 Act Section 10(1).

¹¹⁰ *Irving v Church of Scotland General Trs* 1960 SLCR 16 where intimation given in telephone call; *Budge v Gunn* 1925 SLCR 74 where conversation at funeral held to be intimation.

¹¹¹ *McKinnon v Martin* 1958 SLCR 19.

¹¹² *Wight v Marquis of Lothian’s Trs* 1952 SLCR 25.

If there is an objection, then the landholder can apply to the Land Court to be declared landholder from the date of the death of the last tenant. If the Land Court upholds the objection, then the bequest is declared null and void and the tenancy becomes available for transfer by the executors as intestate estate under section 16 of the Succession (Scotland) Act 1964.

Intestate succession

Where the landholder does not make a valid bequest of the tenancy or the legatee does not accept the bequest or the Land Court upholds an objection, then the lease of the landholding is available to the executors to transfer under section 16(1) of the Succession (Scotland) Act 1964.

The executors have to confirm to the lease within a year of the death and then under subsection (2A)(b) may transfer the lease “to one of the persons entitled to succeed to the deceased’s intestate estate or to claim legal rights or the prior rights of a surviving spouse or civil partner out of the estate, in satisfaction of that person’s entitlement or claim”. The executors have to transfer the lease to the transferee within one year from the date of the death of the former landholder, or from the date that the Land Court declares the bequest to null and void following an objection by the landlord, otherwise the executors lose the right to transfer the lease.¹¹³ The executor may agree with the landlord a longer period of time or may apply to the Sheriff Court for an extension of time, but the application must be made before the end of the year.¹¹⁴

The fact that the transfer is in satisfaction of that person’s entitlement or claim means that the transferee has to account to the deceased’s estate for the value of the lease in the division of the estate.

Assignment of holding where landholder unable to work the holding

Where a landholder is unable to work his holding through illness, old age, or infirmity, he may apply to the Land Court for leave to assign his holding to his son-in-law or any one of the persons who would be, or would in any circumstances have been, entitled to succeed to the estate on intestacy by virtue of the Succession (Scotland) Act, 1964.¹¹⁵ After such inquiry as it thinks fit the Land Court may grant leave to assign on such terms and conditions, if any, as may seem fit, if the Court is satisfied that the assignment would be reasonable and proper.

Can I convert my landholding or SST to a croft?

Section 3A of the Crofters (Scotland) Act 1993 (introduced by the Crofting Reform etc. Act 2007) allows the owner of any area of land (subject to exceptions), and in particular, a landholder or SST tenant to apply to convert their landholding into a croft in an area designated by the Scottish Ministers in a Statutory Instrument. The Scottish Ministers have designated the local government areas of, Moray; Argyll and Bute, parishes of Kingarth, North Bute and Rothesay; and North Ayrshire, the islands of Arran (including Holy Island and Pladda), Great Cumbrae and Little Cumbrae as areas where landholdings may be converted into crofts.¹¹⁶

113 *Nelson v McGrath* 2011 SLT 107.

114 *Gifford v Buchanan* 1983 SLT 613.

115 1911 Act Section 21. The limitation to “son-in-law” alone may not be compatible with equality and human rights legislation.

116 Crofting (Designation of Areas) (Scotland) Order 2010.

The application is made to the Crofting Commission after a certificate is obtained from the Land Court that the holding is either a landholding or a SST and the conditions in subsection 3A(12) are met, which are (i) the applicant is a natural person, and (ii) that such fixed equipment on the holding as is necessary to enable the tenant to cultivate the croft is not provided by the landlord. Requirement (ii) probably cannot be met by a SST tenant, because the essence of a SST is that the fixed equipment was provided by the landlord. The section sets out that the Crofting Commission must give public notification of the application and consider any representations, the public interest and whether any social or economic benefits might be expected as a consequence of constituting the holding as a croft.

Before the holding can be registered as a croft, under sections 3AA and 3B, either the landlord and tenant have to agree the amount of compensation that has to be paid by the tenant to the landlord for the conversion or the value has been fixed by a valuer under section 3B and that sum has been paid. There is an appeal under section 3C against the assessment of value to the Lands Tribunal for Scotland.

Common grazings

A landholding could share in a Common Grazings, but it is unlikely that there are any Common Grazings remaining for landholdings which are now outwith the Crofting Counties. If there are, then they should be regulated by Regulations made by the Land Court under the powers in the Crofters Common Grazings Regulation Act 1891 and 1908 and under section 24 of the 1911 Act, which would include the appointment of grazings committees.

The common graziers may allow one or two of their number to exercise the rights under the Ground Game Act 1880 to kill and take ground game on the Common Grazings.¹¹⁷

Statutory Small Tenancies (SST)

It is understood that, following the consultation by the Scottish Government, no tenant claims to hold on a SST. Therefore minimal information is provided in this Guide.

Under section 2(1)(b) of the 1911 Act, a statutory small tenancy (SST) is any tenancy where the landlord provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding and the holding would otherwise have qualified as a landholding by reason of its size and the rent paid provided it did not come within any of the exceptions in the Acts.

The statutory regime for a SST is different from that of a landholder and is set out in section 32 of the 1911 Act. Except as expressly applied by this Act, the Landholders Acts do not apply to SSTs. Except as provided by the Landholders Acts, SSTs are governed by the Agricultural Holdings (Scotland) Acts 1908 and 1910. The principle rights of an SST tenant is that the tenant is entitled, if the Land Court so find, to a renewal of the tenancy when it ends; to have a fair rent fixed; if the landlord fails to provide such buildings as will enable the tenant to cultivate the holding in terms of the lease, the SST may apply to the Land Court to declare the tenancy to be a small landholding tenancy.

¹¹⁷ 1931 Act Section 23.

The landlord has a right of resumption similar to that which applies to a landholding.¹¹⁸ The tenant is entitled to compensation for improvements and an agricultural loss claim for the land resumed and in addition is entitled to a disturbance payment under the Agricultural Holdings (Scotland) Act 1923.

A SST tenant may apply to become a landholder by serving a notice on the landlord one month before the expiry of the tenancy, which is probably running on tacit relocation from year to year. The holding can be converted provided the landlord lodges in the Land Court an undertaking that the tenant will have the likely claim to compensation for permanent improvements.¹¹⁹

A SST tenant may apply for the holding to be converted to a croft if it lies in a designated area – see page 31. However the requirement in section 3A(12)(c) that “such fixed equipment on the holding as is necessary to enable the tenant to cultivate the croft is not provided by the landlord” probably cannot be met by a SST tenant, because the essence of a SST is that the fixed equipment was provided by the landlord.

The Scottish Land Court

Jurisdiction

The Landholders Acts confer certain jurisdictions on the Land Court. Because the Land Court is created by statute, its jurisdiction and powers are confined to those granted by the Acts. The Land Court, unlike a common law court such as the Sheriff Court or the Court of Session, does not have a general jurisdiction.

Procedure in the Land Court

Any party considering applying to the Land Court should look at the Court’s website¹²⁰ which gives advice on procedure, provides the Rules of the Land Court and refers to the Court forms. Recent decisions are also available on the Court’s website.

Where the Acts apply, an application is made to the Land Court on the relevant Court form, which has to be applied for as they are not currently on the Scottish Land Court website and thereafter the procedure is in terms of the Rules of the Scottish Land Court. A potential applicant to the Court should look at the Land Court website for details of the procedure and for a copy of the Rules and ask the Court for any relevant landholder’s forms.

See: K Graham, *Scottish Land Court, Practice and Procedure*, 1993 Butterworths, Edinburgh for a discussion of the Court’s practice and procedure.

118 1911 Act Section 32(15).

119 1931 Act Section 14.

120 <http://www.scottish-land-court.org.uk/>



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