

TENANT FARMING FORUM

(NFUS, RICS, SEBG, SRPBA, STFA, SAYFC)

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SUCCESSION AND ASSIGNATION – TRADITIONAL (1991 ACT) AGRICULTURAL TENANCIES

SUCCESSION

1.1 Testate Succession

1.1.1 General

Because agricultural leases involve personal choice of the tenant by the landlord, at common law there is normally an implied prohibition against legatees.

Most modern written leases also contain outright prohibition of bequests of the tenant's interest.

1.1.2 Statutory Right to Bequeath

The Agricultural Holdings (Scotland) Act 1991 ("the 1991 Act"), section 11(1) allows the tenant of an agricultural holding to bequeath his lease to "his son-in-law or daughter-in-law or to any one of the persons who would be, or would in any circumstances have been, entitled to succeed to [his] estate on intestacy under the Succession (Scotland) Act 1964". This is a wide class of legatees as the 1964 Act provides succession rights to spouses and next of kin (consisting of blood relatives (including illegitimate children) and adopted children) of the deceased person; and section 11(1) extends not only to anyone who is *actually* entitled to succeed to the tenant's estate on his intestacy, but also to any person who would have been entitled *in any circumstances* so to succeed.

However, it has been decided in court that section 11(1) does not override a specific prohibition on assignees or legatees contained in the lease; so where there is such a prohibition, the tenant's right to bequeath his lease under section 11(1) will not apply.

This statutory right of bequest is in practice commonly confined to older written leases and unwritten leases.

1.1.3 Procedure for Legatees and Outcome

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Its membership comprises the National Farming Union of Scotland; the Royal Institution of Chartered Surveyors in Scotland; the Scottish Estates Business Group; the Scottish Rural Property and Business Association; the Scottish Tenant Farmers Association and the Scottish Association of Young Farmers Clubs. It has an independent Chairman, Professor T Jeff Maxwell, OBE FRSE

Where a valid bequest of the lease has been made, the legatee, if accepting the bequest, must intimate the bequest to the landlord normally within 21 days of the deceased tenant's death.

If the legatee accepts the bequest and timeously intimates it to the landlord, the landlord may give the legatee a counter-notice objecting to him becoming tenant. If the landlord does this, the legatee must apply to the Land Court for an order declaring that he is the tenant. If the landlord can establish at the Land Court hearing any reasonable ground for objecting to the legatee, the Court must declare the bequest null and void. Grounds of objection tend to focus on the experience, financial resources or reputation of the legatee.

If the legatee accepts the bequest but fails to intimate it to the landlord timeously, the lease falls.

If the landlord accepts the legatee, or the legatee successfully applies to the Land Court to be declared tenant, he becomes tenant as from the deceased tenant's death.

If –

- a) the legatee does not accept the bequest, or
- b) the Land Court finds the landlord has reasonable grounds for objecting to the legatee and declares the bequest to be null and void,

the lease becomes an item of intestate estate of the deceased tenant. The lease will then be available to be disposed of by the deceased tenant's executors as described below.

1.2 Intestate Succession

1.2.1 General

If –

- a) the deceased tenant has not made a valid bequest of the lease, or
- b) he has done so, but (i) the bequest is not accepted or (ii) the Land Court upholds the landlord's objection to the legatee and declares the bequest null and void,

the lease falls to be dealt with as an item of his intestate estate.

1.2.2 Procedure for Executors

In those circumstances, the deceased tenant's executors must normally transfer the lease to any person entitled to succeed to his intestate estate within one year of his death. This class of transferees consists of next of kin who are *actually* entitled to share in the deceased tenant's intestate estate. This is a narrower class than that referred to in paragraph 1.1.2 above. Failure by the executors to transfer the lease within one year normally enables the landlord to terminate the lease. Pending transfer, the executors are responsible for implementing the tenant's lease obligations.

1.2.3 Procedure for Transferees and Outcome

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Transferees normally have 21 days from the date of transfer to intimate this to the landlord, failing which the lease terminates. The landlord can give the transferee counter-notice objecting to him as tenant. If the landlord does this, he can apply to the Land Court for an order terminating the lease, which the Court will grant if satisfied that his objection to the transferee is reasonable. If the landlord does not object or is unsuccessful at the Land Court, the transferee becomes tenant as from the date of transfer.

1.3 Additional Grounds for Lease Termination on Succession

1.3.1 General

Grounds for lease termination on testate and intestate succession are available under section 25 of the 1991 Act in addition to the landlord's right of objection to a successor as tenant described in paragraphs 1.1.3 and 1.2.3, even if the successor tenant has withstood such an objection. These additional grounds are described in paragraphs 1.3.2 and 1.3.3 below. Lease termination here is by notice to quit of not less than one year nor more than two years given to the successor tenant and normally taking effect not less than one year nor more than three years after his acquisition of the lease.

1.3.2 Non-Near Relative Successors

If a successor tenant is not a near relative of the deceased tenant, the lease can be terminated by the landlord giving him an incontestable notice to quit. Unlike other notices to quit, an incontestable notice to quit cannot be resisted by the tenant. Near relatives are presently defined as the surviving spouse or civil partner or a child (natural or adopted) of the deceased tenant. In practical terms, this restricts succession to one of the near relatives of the deceased tenant.

1.3.3 Near Relative Successors

If a successor tenant is a near relative of the deceased tenant, additional grounds for termination of the lease by notice to quit may be available to the landlord beyond those otherwise available. Broadly, these additional grounds relate to the landlord's intended amalgamation of the holding, or the tenant already having a holding or insufficiency of the tenant's experience or financial resources.

2. ASSIGNATION

2.1 General

Because agricultural leases involve personal choice of the tenant by the landlord, at common law there is normally an implied prohibition against assignees.

Most modern written leases also contain a specific prohibition of assignation of the tenant's interest.

A tenant has a limited statutory right to assign his lease (see paragraph 2.2 below).

2.2.1 Tenant's Statutory Right to Assign

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Its membership comprises the National Farming Union of Scotland; the Royal Institution of Chartered Surveyors in Scotland; the Scottish Estates Business Group; the Scottish Rural Property and Business Association; the Scottish Tenant Farmers Association and the Scottish Association of Young Farmers Clubs. It has an independent Chairman, Professor T Jeff Maxwell, OBE FRSE

Under section 10A of the 1991 Act, a tenant may assign his lease to anyone who would be entitled to succeed to his intestate estate under the Succession (Scotland) Act 1964, if following him giving the landlord notice detailing the proposed assignation, the landlord consents to it. The potential assignees are therefore restricted to the spouse or one of the next of kin of the tenant. This is the same class as referred to in paragraph 1.2.2 above (i.e. that applies in the context of intestate succession). This right to assign applies notwithstanding anything to the contrary in the lease or otherwise and cannot be contracted out of.

2.2.2 Withholding of Consent

The landlord can withhold consent to the proposed assignation on any reasonable ground. Reasonable grounds specifically mentioned are the proposed assignee's lack of sufficient financial resources or lack of adequate skills or experience. If the landlord fails to intimate to the tenant that he is withholding consent within 30 days of receiving the tenant's notice, the landlord is deemed to have consented to the proposed assignation. If the landlord timeously intimates withholding of consent, the tenant can have this overturned at the Land Court if the Court decides the ground for withholding consent is unreasonable.

2.2.3 No Additional Grounds for Lease Termination on Assignment

There are no additional grounds available to the landlord following assignation of a lease, for terminating the lease by notice to quit given to the assignee. This contrasts with the position on succession (see paragraph 1.3 above) where additional grounds for lease termination are available to the landlord under section 25 of the 1991 Act even if the successor tenant has withstood the landlord's objection. Accordingly in the case of assignation under section 10A of the 1991 Act-

- (a) the only opportunity for the landlord to prevent the proposed assignation is if he has reasonable grounds for withholding consent to this and does so; and
- (b) there is no practical restriction to assignees who are near relatives of the tenant (as defined in paragraph 1.3.2 above).