

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT
DUMFRIES**

[2019] SC DUM 34

DUM-SD23-19

NOTE (No 1) BY SHERIFF GEORGE JAMIESON

in the cause

JAMES TAYLOR REID and ROBERT KIRKLAND REID

Pursuers

against

SIAN REDFERN (AP)

Defender

Act: Shields

Alt: Latham

Issue – the prohibition of *brevi manu* ejection in Scots law

[1] This is a revised version of the first Note I wrote in this case. It involves the interesting question of the protection of an occupier from *brevi manu* ejection from heritable property under Scots law, both under statute (section 23 of the Rent (Scotland) Act 1984 (“the 1984 Act”)) and also at common law. The issues under discussion in the case have evolved somewhat from the time the case was first brought into court – hence the need to revise this Note.

[2] At the first contested hearing, the pursuer’s agent did not dispute that, at common law, the defender was protected from ejection *brevi manu*. She did dispute however that the defender was so protected under section 23 of the 1984 Act.

[3] This distinction was of importance to the pursuers’ case because the print of section 23 of the 1984 Act in the Parliament House Book (PHB) suggested that jurisdiction in

respect of section 23 actions had been transferred to the First Tier Tribunal and hence this action should be dismissed because the sheriff court was not the competent forum for the action.

[4] Debate before me proceeded at first on the assumption that the PHB had correctly printed section 23 as currently in force. During that debate, the pursuers' agent conceded that the First Tier Tribunal had jurisdiction in relation to former tenants protected by section 23, but she submitted: (1) the defender in this case did not have the protection of section 23 at all; and (2) even if she did, jurisdiction had not been transferred from the court to the First Tier Tribunal in respect of former occupiers who had never been tenants.

[5] This Note considers parties' submissions on whether the defender was protected from ejection *brevi manu* by section 23 of the Rent (Scotland) Act 1984 or at common law, and the effect of rule 30.2 of the Summary Cause Rules 2002 in respect of summary cause actions of ejection in the sheriff court.

[6] It shall now be necessary for me, firstly, to state the facts in the case, secondly, to discuss: (i) section 23 of the 1984 Act, (ii) the prohibition of *brevi manu* ejection at common law, and (iii) rule 30.2 of the Summary Cause Rules 2002, including parties' submissions on these matters; and, thereafter and thirdly, the reasons for my decisions that: (i) section 23 of the 1984 Act applies to this case; (ii) the prohibition of ejection *brevi manu* at common law also applies to this case, and (iii) the inapplicability of rule 30.2 of the Summary Cause Rules 2002 to the present proceedings.

Facts

[7] The first pursuer and his family have been farming Bengalhill Farm since at least 1965. In 2000, both pursuers entered into a minute of agreement with the landlord whereby the first pursuer and his son, the second pursuer, became joint tenants of the farm.

[8] However, another of the first pursuer's sons occupied the farm from 2000 until November 2018. In December 2014, the second son entered into a relationship with the defender. In 2016 she became pregnant to him. She gave up her own accommodation on his persuasion and went to live with him on the farm, along with her then 10 year old daughter from a previous relationship. On 24 April 2017, the defender gave birth to twins.

[9] The relationship between those parties thereafter deteriorated. The defender reports that her cohabitant assaulted her in around April 2018. They reconciled thereafter. In September 2018, they stopped cohabiting. In November 2018, the defender's cohabitant (the second son) left the farmhouse. She has remained there ever since, with her now twelve year old daughter and two year old twins. On 25 March 2019, her former cohabitant is to stand trial for his alleged assault on her in April 2018.

[10] She avers that the first pursuer and various members of his family have tried to eject her from the farmhouse *brevi manu*, or have so harassed her to leave that an offence has been committed by them under section 22 of the Rent (Scotland) Act 1984 (unlawful eviction and harassment of occupier). While she has reported this complaint to the police, they have so far declined to take action, believing this solely to be a civil matter.

[11] The pursuers have obtained legal advice from their solicitors that they cannot eject the defender and the children from the farmhouse *brevi manu* – they need a court order.

[12] Acting on that advice, the pursuers have brought a summary cause action of removing in the sheriff court, seeking three orders, one of which is that the defender should remove herself from the farmhouse under pain of ejection.

The Law

[13] Section 23 of the Rent (Scotland) Act 1984 (prohibition of eviction without due process of law) re-enacts section 32 of the Rent Act 1965 in Scotland and applies to all former tenants other than those of “statutorily protected tenancies”. Statutorily protected tenants do not need the protection of section 23 as they are protected from *brevi manu* ejection by other statutory provisions. It may therefore be convenient to think of section 23 as applying only to residual categories of “common law tenancies”: those not subject to statutory protections, for example tenancies excluded from the definition of protected or assured tenancies.

[14] Section 23A of the 1984 Act contains a list of “excluded tenancies and occupancy rights” to which section 23 does not apply. It is not necessary or appropriate to discuss these excluded tenancies and occupancy rights in this Note, other than to observe that they are those in respect of which the former tenant or occupier is not protected from *brevi manu* ejection by section 23.

[15] But it is also important to note that section 23(5) of the 1984 Act states that:

“Nothing in this section shall be taken to affect any rule of law prohibiting the securing of possession otherwise than by due process of law”.

[16] Section 23(5) re-enacts section 32(5) of the Rent Act 1965 (which applied to Great Britain), and which stated:

“Nothing in this section shall be taken to affect *any rule of the law of Scotland* prohibiting the securing of possession otherwise than by due process of law”.

[17] The provisions of the Rent Act 1965 anent eviction without due process of law have been re-enacted for England and Wales in the Protection from Eviction Act 1977. This Act is in similar terms to Part III of the 1984 Act in Scotland dealing *inter alia* with eviction without due process of law.

[18] The important difference between English and Scots law is the continuation in force of rules of Scots common law against *brevi manu* ejection (which I shall require to consider later on in this Note).

[19] For now, I shall continue to consider the actual protection afforded to former tenants under section 23(1) of the 1984 Act upon their tenancy coming to an end:

“It shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings..., his right to recover possession of the premises”.

This, in other words, amounts to a statutory prohibition against ejection *brevi manu* of former tenants who continue to occupy the premises after the end of the tenancy.

[20] For the purposes of this case, section 39(2) of the Housing (Scotland) Act 1988 extended the protection under section 23(1) to premises “occupied....as a dwelling other than under a tenancy” by introducing section 23(2A) of the 1984 Act.

[21] Section 23(2A) provides:

“[Subsection] (1) above [applies] in relation to any premises occupied (whether exclusively or not) as a dwelling other than under a tenancy as they apply in relation to premises let as a dwelling under a tenancy, and in those subsections the expressions “let” and “tenancy” shall be construed accordingly”.

[22] Section 23(3) provides two definitions. First, it defines “owner” as used in subsection (1) as “the person who, as against the occupier, is entitled to possession” of the premises. Secondly, it defines “the occupier” as meaning “any person lawfully residing in the premises or part of them at the termination of the former tenancy”.

Pursuers' submissions based on section 23 of the 1984 Act

[23] The pursuers' agent made two submissions.

[24] First, she submitted that the defender was not protected by section 23 at all as section 23(3) defined "the occupier" as the person *lawfully* residing in the premises and she submitted the defender had not been a lawful resident. Secondly, she submitted section 23(3) also stated that the occupier had to be residing in the subjects "at the termination of the *former tenancy*" and therefore as there had been no tenancy in this case, the defender could not be regarded as an occupier for the purposes of section 23(1) conferring jurisdiction on the FTT.

Defender's submissions on section 23 of the 1984 Act

[25] The defender's agent submitted:

- (i) Section 23(2A) applied to the defender as she was a *lawful* occupier for the purposes of that sub-section.
- (ii) A lawful occupier for this purpose was an occupier not occupying unlawfully (such as by force or stealth).
- (iii) Section 23(1), as applied by section 23(2A), conferred jurisdiction on the First Tier Tribunal rather than the sheriff in respect of this action of removing.

[26] She therefore submitted that it was not competent for the sheriff to grant any of the orders craved by the pursuers.

The common law prohibition of *brevi manu* ejection – pursuers' submissions

[27] Although the pursuers' agent submitted that section 23 of the 1984 Act did *not* apply to protect the defender from ejection *brevi manu*, she had nonetheless advised the pursuers to

raise the present proceedings as in her opinion the *common law* protected the defender from ejection *brevi manu*. This was important to the pursuers' position. If the defender was only protected from *brevi manu* ejection at common law, then any statutory protection under section 23 and any consequent jurisdiction of the First Tier Tribunal could not apply.

[28] If that were the case, she accordingly submitted that the present action of removing had correctly been brought before the court.

The common law prohibition of *brevi manu* ejection – defender's submissions

[29] The defender's agent agreed that the defender was protected from *brevi manu* ejection by the pursuers by virtue of the common law of Scotland.

Pursuers' submissions based on rule 30.2 of the Summary Cause Rules 2002

[30] The pursuers' agent had submissions based on the terms of rule 30.2 of the Summary Cause Rules 2002 which I must now consider.

[31] Rule 30.2(1) states that rule 30.2 is concerned with an action for recovery of possession of heritable property brought under summary cause procedure in the sheriff court:

“against a person or persons in possession of heritable property without right or title to possess the property.”

[32] However, rule 30.2(2) also provides that rule 30.2 does not apply:

“with respect to a person who has or had a title or other right to occupy the heritable property and who has been in continuous occupation since that title or right is alleged to have come to an end.”

[33] The pursuer's agent submitted that it was necessary for the court to determine the nature of the present action – in other words, did this action fit within rule 30.2?

[34] In her submission, rule 30.2 applied to this action and conferred jurisdiction on the court as:

- (i) The defender was in possession of the farmhouse without right or title to possess it; and
- (ii) She had never had a title or other right to occupy the premises.

Defender's submissions on rule 30.2 of the Summary Cause Rules 2002

[35] The defender's agent replied as follows:

- (i) Rule 30.2(1) did *not* apply to the defender as had she had originally acquired a right to occupy the farmhouse from the permission, agreement or licence conferred on her by the pursuers.
- (ii) Conversely, rule 30.2(2) of the Summary Cause Rules *did* apply to the defender (thus excluding the application of rule 30.2) as the defender *had* had a right to occupy the premises by virtue of the permission, agreement or licence of the pursuers.

Discussion on parties' submissions on section 23 of the 1984 Act

[36] In my opinion, it is plain that section 23(2A) of the 1984 Act *only* applies to those who *lawfully* possess a dwellinghouse. According to Stalker at page 23 of *Evictions in Scotland*, page 23), the section 23 protection applies where:

- (i) There was a right to occupy by virtue of which the occupation was *originally lawful*.
- (ii) The occupier was resident in the premises at the point of termination of that right, and she continues to reside there.

(iii) She occupies the premises as a dwelling.

(iv) Her right to occupy is not one of the exceptions set out in section 23A.

[37] Only the first of these requirements is in serious dispute in this case. It is not disputed that if the defender had any right of occupation, that she was in occupation at the time any such right was terminated by the pursuers, that she continues to reside in the premises, that she occupied and continues to occupy the premises as a dwellinghouse, and it has not been suggested that her occupation is covered by any of the exceptions to section 23 set out in section 23A.

[38] Thus, the application of section 23 to the present case turns entirely on whether the defender had been *lawfully* occupying the farmhouse at the time the pursuers revoked her right to occupy.

[39] In my opinion, the relevant principles are those set out by Erskine, *An Institute of the Law of Scotland*. He divides possession of heritable property into two sorts. The first is that acquired *lawfully*, “i.e by fair and justifiable means”; and the second is “that which is got *vi aut clam*, by violence or stealth. Possession is got *clam*, when one, conscious that his right in the subject is disputable, and apprehending that he will not be suffered to take open possession, catches an occasion of getting into it surreptitiously, or in a clandestine manner, without the knowledge of the owner” (II,I,23).

[40] On the other hand, “Where one possesseth at his own request, by the tolerance or bare licence of the proprietor, it is called possession *precario*.” Barrowman, *Residential Evictions*, states that such possession, “is by licence, in which case, it will be by right, and the procedural rules applicable to actions where the occupier has not right or title will not apply to actions involving such possession” (page 18, paragraph 1.61).

[41] The law therefore makes the following distinction.

[42] First, the occupier *vi clam aut precario*, that is one who has acquired possession and occupies by stealth or violence, and who has no *lawful* right of occupancy; and, secondly, those persons acquiring occupancy fairly, justifiably, and with the tolerance of the owner. The second category of occupier possess lawfully, with right. It is of course a precarious right, one that can be brought to an end when the owner revokes the licence to occupy, but it is a right of occupancy nonetheless.

[43] As section 23(3) applies if the defender was and continues in *lawful* occupation of the dwellinghouse, and “owner” includes the pursuers as tenants entitled to possession, it seems to me the submissions made by the defender’s agent are to be preferred.

[44] In other words, *lawfully* in the context of section 23 of the 1984 Act means not unlawful. As Erskine recognised, possession is got unlawfully only where it is obtained by stealth or violence. That did not happen in this case. The defender’s possession was obtained fairly and justifiably, with the tolerance of the pursuers, as she went to live there as a cohabitant of the first pursuer’s son at his wish, and went on to give birth to his children while still permitted to occupy the premises. In those circumstances, she and the children are to be regarded as having been in lawful occupation for the purposes of section 23(3).

Discussion on the common law prohibition of *brevi manu* ejection

[45] As to the prohibition of ejection *brevi manu* at common law, I have already noted that section 23(5) of the 1984 Act provides that section 23 does not “affect any rule of law prohibiting the securing of possession otherwise than by due process of law”.

[46] Does the common law therefore provide a general rule against ejection *brevi manu*? I have carried out some research on this point. In my opinion, the position adopted by the

pursuers' agent appears to be correct – in other words, as a general rule, the law of Scotland does appear to prohibit *brevi manu* ejection of former tenants or occupiers.

[47] The prohibition first seems to appear in a statute of King James II of 6 March 1457 (chapter 78) “Against them that occupys Lords’ Lands against their Wills”. This Act (now repealed) required the dispossessed landowner “to come to the King’s sheriff and ask his ground for to be [dispossessed], or to see what reason” the occupier had for occupying. The sheriff was enjoined to enquire as to the reason for occupation and to grant decree for removing of the occupier if he had “no reason” to occupy.

[48] An Act of Queen Mary dated 4 August 1546 provided that tenants should only be removed “in quiet manner, without convocation”. As well as prohibiting convocation (i.e. violent gatherings to dispossess occupiers), the Act reiterated that “putting and laying forth any tenants” was to be done “orderly, conform to the laws of the realm”.

[49] Erskine, *An Institute of the Law of Scotland* discusses the relevant principles in detail at II, I, 23. Thus, whether or not a person has lost possession violently, “he cannot use force to recover it, unless he do so *ex continenti*, but must apply to the judge, that he may be restored by the order of law: for society could not subsist if it were permitted to private men *jus sibi dicere*, to do themselves right by the methods of force”.

[50] More modern authorities are to the same effect: see Paton and Cameron, *Landlord and Tenant* (1967), pages 248 and 251,252; *Fairbairn v Miller* (1878) 15 SLR 705.

Discussion on rule 30.2 of the Summary Cause Rules 2002

[51] In my respectful opinion, the pursuers’ submission in relation to rule 30.2 is misconceived. As Erskine makes plain in his *Institute* at II, I, 23, the law distinguishes

between the ejection of unlawful occupiers (those possessing *vi clam aut precario*) and the removing of those occupiers who had, but have ceased to have, lawful occupation.

[52] Rule 30.2 is therefore to be understood as stating this common law distinction. It provides for accelerated procedures in respect of those possessing *vi clam aut precario*, but not those possessing lawfully in the sense previously discussed in this Note.

[53] The equivalent Court of Session rule uses the same wording as do the summary cause rules in relation to the application of the rules to actions of removing in the Court of Session (see rule 45A.1), but in contrast to the summary cause rules expressly state in rule 45A.3 that application may be made to the Court to shorten the period of notice where the action “is directed against a person in occupation of the heritable property *vi clam aut precario*”.

[54] Accordingly, as the defender in this case was lawfully occupying the farmhouse, rule 30.2 does not apply to her. It confers no independent right of action on the pursuers as it is only concerned with accelerated procedural rules in actions of ejection of occupiers *vi clam aut precario*.

Conclusions

[55] The defender is protected from ejection *brevi manu* by the pursuers both under section 23 of the 1984 Act and at common law. While an action for ejection of a person occupying heritable property *vi clam aut precario* is competent in the sheriff court, this is not such an action as the defender originally obtained possession of the farmhouse with the permission, agreement, or licence of the pursuers.

[56] The pursuers require either a court decree or a First Tier Tribunal order to lawfully remove the defender from the farmhouse. The answer to which of the court or the First Tier

Tribunal has jurisdiction to grant that decree or order depends on whether the sheriff's jurisdiction in section 23 of the 1984 Act been transferred to the First Tier Tribunal. I shall consider parties' agents submissions anent the competent forum (*forum competens*) in respect of this action in subsequent Notes addressing the relevant issues.