Scottish Law Commission

promoting law reform

(SCOT LAW COM No 249)

Report on Moveable Transactions Volume 1: Assignation of Claims

report

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Item No 1 of our Ninth Programme of Law Reform

Report on Moveable Transactions

To: Michael Matheson MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Moveable Transactions

(Signed) PAUL B CULLEN, *Chairman*
C S DRUMMOND
D E L JOHNSTON
HECTOR L MACQUEEN
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*
29 November 2017

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Glossary and abbreviations

ABFA. The Asset Based Finance Association (part of UK Finance since July 2017).

Accessoriness principle. The principle that a security right has no independent existence, but is merely accessory to, or parasitical upon, another right, namely the obligation whose performance it secures. An Arizona court put it thus: "The note [= personal obligation] is the cow and the mortgage the tail. The cow can survive without the tail, but the tail cannot survive without the cow" (*Best Fertilizers of Arizona Inc v Burns*, 117 Ariz 178, 571 P 2d 675 (App 1977)). The secured obligation does not have to be an obligation owed by the provider of the security: one person can provide a security for another's debt.

Account debtor or account party. If X owes money to Y, and Y assigns the claim to Z, X is the account debtor or account party. The term is used rather than simply "debtor" because in some cases Y is also a debtor (to Z). Also called the *debitor cessus*.

Accounts. Also called accounts receivable, or receivables, or book debts. See "receivables".

Accretion of title. If X purportedly transfers a right to Y, but in fact X does not have that right, Y does not acquire it: *nemo plus juris ad alium transferre potest quam ipse haberet*. But if X thereafter acquires the right, then that right passes instantly and automatically to Y. This is called accretion of title.

After-acquired property/assets. In general, security rights can affect only assets held by the provider at the time the security right is created. But some security rights can also affect after-acquired assets, ie assets acquired at a later date. Under current law, three types of security right have this power, the most important being the floating charge. (The others are the agricultural charge, and the landlord's hypothec.) After-acquired assets are also known as future assets.

Agricultural charge. A security under the Agricultural Credits (Scotland) Act 1929. It is a non-possessory security over the inventory (including after-acquired inventory) of certain agricultural co-operative associations.

Aircraft mortgage. A non-possessory security over an aeroplane, created by registration. See the Mortgaging of Aircraft Order 1972 (SI 1972/1268).

Alienation. To alienate is to transfer to another person.

Anti-assignation clause. A clause in a contract forbidding the assignation of rights arising under the contract. Also called a non-assignment clause or a *pactum de non cedendo*.

Anticipatory assignation. The assignation of a right that the cedent does not yet have, in the expectation that it will be acquired. Also called *cessio in anticipando.*

Appropriation. A remedy of a secured creditor whereby ownership of encumbered property is acquired and the value acquired is applied towards satisfaction of the secured obligation. If the value is greater than that obligation then the excess must be returned to the provider.

Archive record. The parts of the Register of Assignations and Register of Statutory Pledges in which entries are archived.

Arrestment. See "diligence."

Assignation or assignment. The transfer of incorporeal property from the assignor (also called the cedent), to the assignee (also, though rarely, called the cessionary). "Assignation" is the term generally used in Scotland, "assignment" in England and other common law systems. In many countries it is called "cession". Assignation may be (a) "outright" or "absolute" or (b) in security. Where there is an assignation in security the property is being used as collateral for a debt owed to the assignee. Absolute/outright assignation is sometimes identified with assignation by reason of sale, but this is not accurate, because it may happen for other reasons as well, such as exchange or even donation. Assignation (whether outright or in security) involves three stages, though the first two may be merged in practice: (i) contract to transfer; (ii) act of transfer; and (iii) intimation to the account debtor. The claim is transferred, ie passes from the assignor's patrimony to the assignee's, only at the third stage.

Assignations record. The principal part of the Register of Assignations.

***Assignatus utitur jure auctoris*.** (Literally, an assignee exercises the right of the author. "Author" here means assignor.) The assignee obtains no better right than the assignor had, so that the account debtor can plead against the assignee any defences that could have been pled against the assignor. Example: Seller sells goods to Buyer on credit, and then assigns the invoice to Financier. If the goods are defective, Buyer can plead that fact as against Financier's claim for payment, just as it could have been pled against Seller's claim for payment. This is so even if Financier was unaware of the problem. Thus assignation does not impair the account party's rights. Financier has no active liability for the Seller's obligations (for example to pay damages). Negotiable instruments are a partial exception to the *assignatus utitur* principle.

Assignee. A person in whose favour an assignation is granted.

Assignor. A person who assigns. See also "Cedent".

Attachment. This term has three different meanings. (i) In Scotland, a synonym for crystallisation of a floating charge. (ii) Also in Scotland, the seizing of an asset by an unpaid creditor, an aspect of the law of diligence. (See "diligence".) (iii) Under UCC–9 and the PPSAs a security interest is said to attach when it becomes effective as between debtor and creditor. An attached security that is not perfected is not normally effective against third parties, though this principle is subject to some exceptions.

Australian Statutory Review 2015. *Review of the Personal Property Securities Act 2009: Final Report* (2015) available at

https://www.ag.gov.au/consultations/pages/StatutoryreviewofthePersonalPropertySecuritiesAct2009.aspx. The review, by Bruce Whittaker, considered how well the legislation was operating two years after it came into force.

Automated register. A register that is operated by a computer system with ordinarily no human involvement.

Bill of exchange. A type of negotiable instrument. In the USA called a "draft".

Bill of lading. A document issued by a shipping company when goods are shipped. The goods are later released to the holder, at the time of presentation of the bill of lading. A bill of lading thus constitutes indirect possession of the goods. See also "trust receipt financing".

Bill of sale. A concept of English law. It is not easy to pin down, but (notwithstanding the name) most bills of sale are non-possessory chattel mortgages. There is no equivalent in Scotland. Regulated by the Bills of Sale Act 1878, the Bills of Sale Act (1878) Amendment Act 1882, the Bills of Sale Act 1890 and the Bills of Sale Act 1891. In certain types of case, transactions other than securities over chattels are registrable. For example, the Insolvency Act 1986 section 344 requires the registration of certain assignments. "The masters of the … Queen's Bench Division … shall be the registrar …" (Bills of Sale Act 1878). The Bills of Sale (1878) Amendment Act 1882 section 11 provides for a local registration system, but such registrations do not oust the central registration in the Queen's Bench Division in London. The Law Commission for England and Wales has recommended the repeal of the bills of sale legislation and replacement with a new "goods mortgages" regime and a Bill implementing the recommendations was announced in the 2017 Queen's Speech.

Book debts. Debts owed to a business for goods or services supplied on credit. Synonymous, or roughly so, with "receivables".

Business Finance Report. Business Finance and Security over Moveable Property (Scottish Executive Central Research Unit, 2002).

BRIA. Business and Regulatory Impact Assessment. This accompanies this Report and is available on our website.

Cedent. A person who assigns. See also "Assignor".

Cession. Another word for assignation.

Cessionary. Another word for assignee.

Charge. A term of English law. In a broad sense it means any security right. In a narrow sense it means an "equitable" security right. Nowadays the term is sometimes also used in Scotland, in the broad sense. In Scotland it is also used in the expression "floating charge."

Chargeback. A security granted by a bank customer to the bank over the credit balance on an account with that bank.

Chattel. A concept of English law. Chattels divide into personal chattels (choses in possession) and real chattels (non-freehold non-equitable interests in land, eg leases). If

used without an adjective, "chattel" means personal chattel. A chattel mortgage is a mortgage of a personal chattel effected by a "bill of sale".

Choses in action and choses in possession. Concepts of English law, corresponding fairly closely to incorporeal and corporeal moveable property respectively in Scotland. See "personal property". In statutes, but seldom elsewhere, they are called "things in action" and "things in possession".

City of London Law Society draft Secured Transactions Code. A draft code for English secured transactions law prepared by the Financial Law Committee of the City of London Law Society, first published in July 2015. A revised version was issued in July 2016. See http://www.citysolicitors.org.uk/attachments/article/121/Draft%20Secured%20Transaction%20Code%20-%20Commentary%20-%20July%202016.pdf.

Claim. A personal right to the performance of an obligation, for example to payment of money. A claim is thus a debt, but viewed from the creditor's standpoint. A claim is typically based in contract. For example, the creditor's right arising out of a loan contract, or the seller's right arising out of a contract of sale. But a claim can arise for other reasons, for example a damages claim arising out of a delict. "Claim" is sometimes used to mean the assertion of a right that may be contested by others, such as an insurance claim or a damages claim, but in this Report the word is used in the sense described, ie a personal right to the performance of an obligation.

Close match search. A search system which allows some latitude for mistakes. For example, a search against "Joan Smith" will retrieve "John Smith". Contrast "exact match search".

Collateral. Property that stands as security for a debt. Thus if someone pledges a gold ring to a pawnbroker, the ring is collateral for the loan that the pawnbroker makes. Collateral may be corporeal property, as here, or incorporeal property.

Company charges registration regime. Part 25 of the Companies Act 2006 (and before it its predecessors, most recently Part XII of the Companies Act 1985) requires that certain security rights ("charges") in which the debtor is a company must be registered in the Companies Register within 21 days of their creation, on pain of invalidity against certain parties. Also applies to LLPs. Significant changes were made to the regime with effect from 1 April 2013.

Companies Register. Each company registered under the Companies Acts has its own file. We refer to the totality of these files as the "Companies Register", though that term is not used in the Companies Acts. Most types of security rights granted by a company must be registered in this register: this is the "company charges registration regime". There are three such registers (England and Wales, Scotland, Northern Ireland), each with its own Registrar, though in practice they are closely connected, and share a website at https://www.gov.uk/government/organisations/companies-house.

Completion of title. The final step whereby a right is acquired. For example in the acquisition of land, title is completed by registration. In an assignation of a claim, title is completed by intimation.

Conditional sale. The same as sale with retention of title. The term "conditional sale" tends to be used in consumer transactions.

Corporeal moveable property. Tangible property which is not land, such as equipment and vehicles.

Correction. An alteration or deletion of an entry in the Register of Assignations or Register of Statutory Pledges to reflect the correct legal position, for example to remove an entry which has resulted from a frivolous or vexatious registration.

Crowther Report. The Report of the Committee on Consumer Credit, 1971 (Cmnd 4596), chaired by Geoffrey Crowther. It was partially implemented by the Consumer Credit Act 1974. Part 5 of the Report, recommending the adoption of legislation based on UCC–9, was not implemented.

Crystallisation. The effect of a floating charge is suspended until such time, if any, as it crystallises. Crystallisation can happen in three ways: (i) liquidation, (ii) administration and (iii) receivership. (But whilst liquidation and receivership always imply crystallisation, administration does not necessarily imply it.) "Crystallisation" is the term used in England, and commonly used also in Scotland, though the legislation does not use this word, but rather "attachment".

DBEIS. Department for Business, Energy and Industrial Strategy. Successor Department of the UK Government to "DBIS".

DBIS. Department for Business, Innovation and Skills. Succeeded by "DBEIS" in 2016.

DCFR. C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2010). The full version is in six volumes. A one-volume outline edition is also available in print and at <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf>. Book IX covers secured transactions over corporeal and incorporeal moveable property. Strongly influenced by UCC–9 and the PPSAs.

Debt. The same as a claim, but viewed from the standpoint of the debtor. However, sometimes in practice the word "debt" is used in both senses. For example, one may read of "the sale of a debt", meaning not the sale of the debt by the debtor (which would not be possible) but the sale of the claim by the creditor.

Debtor. The person who owes the debt. Normally this person and the person who grants the security right are the same, as is usually the case. In fact it is competent for one person to grant security in relation to another's debt. For this reason, some legislative texts avoid the word "debtor" to mean the granter of the security, and use other terms, such as "security provider" (DCFR) or "charger" (EBRD) or "obligor" (UNIDROIT Principles of International Contracts (2010)). UCC–9 and some PPSAs use "debtor" but define it to include granter of the security. (Eg UCC § 9–102(28)(A).) The draft Moveable Transactions (Scotland) Bill uses the term "provider" for the granter of a pledge.

***Delectus personae*.** Literally, selection of the person. There are two kinds. (i) *Delectus personae creditoris*. This, "selection of the person of the creditor", means that that person

cannot assign to someone else, so that the other party's obligations are owed solely to the original right-holder. The doctrine thus bars the transfer of personal rights. (ii) *Delectus personae debitoris*. This, "selection of the person of the debtor", bars sub-contracting, ie the obligant must perform personally, and cannot perform by the hand of another. Whether there is *delectus personae* of either type depends on the facts and circumstances of the case.

Department of the Registers of Scotland. Also called "Registers of Scotland" or simply "RoS". A non-ministerial Government department (with a staff of about 1400) that is headed by the Keeper of the Registers of Scotland and holds 18 registers. See https://www.ros.gov.uk/.

Diamond Report. A L Diamond, *A Review of Security Interests in Property* (Department of Trade and Industry, 1989), recommending the adoption of legislation broadly based on Article 9 of the UCC. It was not implemented.

Diligence. The set of procedures whereby an unpaid unsecured creditor can enforce the claim against the assets, corporeal and incorporeal, of the debtor. For example, X owes money to Y and Y owes money to Z. Z obtains decree for payment against Y. The debt owed by X is an asset in Y's patrimony. To enforce this decree, Z can "arrest in the hands of" X, thereby attaching the claim. The subsequent step of "furthcoming" results in payment by X to Z, not to Y. Other forms of diligence also exist, according to the type of asset in question.

EBRD. European Bank for Reconstruction and Development. Its *Model Law on Secured Transactions* was devised as a model for legislation in the post-communist states of central and eastern Europe. It was strongly influenced by the UCC–9 and the PPSAs, but was adapted for use within a corpus of civilian private law. Available at http://www.ebrd.com/pages/research/publications/guides/model.shtml. The *Core Principles for a Secured Transactions Law* underlying the model law can be found at http://www.ebrd.com/pages/sector/legal/secured/core/coreprinciples.shtml. There is also the EBRD publication *Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry*, available at http://www.ebrd.com/downloads/legal/secured/pubsec.pdf.

Effective registration. A successful registration in relation to either (a) an assignation in the RoA which would be required for the relevant claim to be transferred by registration; or (b) a statutory pledge in the RSP which would be required to create (or amend) a statutory pledge.

Encumbered property. The asset or assets burdened by a pledge.

Equipment. See "inventory".

Equity/equitable. In English law, some rights have a double existence: they may exist "at law" or "in equity". (In the ordinary sense of the word "law" they are both part of English law.) Rights in security can be either legal or equitable. In general, equitable security rights are created by simple agreement, without any external act. An equitable security is generally valid in the debtor's insolvency. But it is often defeasible, for example if the debtor sells the property to a *bona fide* purchaser. Thus it is often weaker than a legal security. The

legal/equitable distinction does not exist in Scottish law. "Equity" also means the market value of an asset, less the amount of debt secured over it. Thus if land is worth £1,000,000 and there is a standard security over it, securing a debt of £400,000, the "equity" of the property is £600,000.

Exact match search. A search system allowing little latitude for errors where only the precise words or numbers searched against will be retrieved. Contrast "close match search".

Express security. Also called voluntary security, or security *ex voluntate.* A security deliberately granted by debtor to creditor. The contrast is with securities arising by operation of law.

External act (or overt act). Where X conveys to Y, or grants a subordinate right to Y, the law usually provides that the X/Y contract is not the sole requirement. For the transaction to affect third parties, there must be some additional, "external", act. It may be delivery, or registration, or (in assignation) intimation. Where an external act is not required, the transfer, security etc is said to take effect *solo consensu*, ie by consent alone. An external act is called for to satisfy the publicity principle. "All rights in security … require for their constitution not only an agreement between the parties but some overt act." W M Gloag and J M Irvine, *The Law of Rights in Security, Heritable and Moveable, including Cautionary Obligations* (1897) 8. The term "external" act is used in this Report, but the meaning is the same as "overt".

Extract. Official copy of an entry in the Register of Assignations or Register of Statutory Pledges.

Factoring. Two main transaction types fall under this name. In both cases what is dealt with is the invoice book of a business. (i) The business may use the factoring company simply as an agent, to administer its receivables *etc*. In this type of factoring the invoices are not sold. What is happening is simply an outsourcing of part of the work of the business's accounts department. (ii) The business sells to the factoring company the invoices as they arise. Thus the business first sells the goods (or renders the services) and then immediately sells the invoices for those goods. There is an assignation to the factoring company, with notification to the customers. It is for agreement as to whether the risk of the insolvency of a customer is to be borne by the business or by the factor. (If by the business, the arrangement becomes difficult to distinguish from a secured transaction.) The term "factoring" is sometimes applied to the sale of receivables without notification, but this is more usually known as invoice discounting. The term is also occasionally used to refer to the use of invoices as loan collateral, but at present this practice does not seem to happen in Scotland.

FCARs. The Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226). See "financial collateral".

Fiducia cum creditore. Or more fully *fiducia cum creditore contracta*. Also called fiduciary transfer of title. Transfer of title from debtor to creditor, for the purpose of security. It is an example of improper security.

Filing. The term used in UCC–9 to mean registration. (A distinction is occasionally drawn between filing and registration. See eg Crowther Report para 5.7.13. But this distinction is not generally accepted.) See "registration".

Finance lease. Or financial lease. A lease of moveable property in which the term represents most of the useful life of the property. The contrast is with an "operating" lease in which the lease term is small compared to the lifespan of the property. The hire of a car for a week or for a month would be an example of an operating lease.

Financial collateral. Financial assets used as collateral. The subject is regulated by the Financial Collateral Directive (Directive 2002/47/EC as amended by Directive 2009/44/EC). This is transposed for the UK by the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226) as amended by the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 (SI 2010/2993). The Directive and Regulations recognise two types of financial collateral arrangement: (a) a security financial collateral arrangement (SFCA) and (b) a title transfer financial collateral arrangement (TTFCA). See Chapters 14 and 37 below.

Financial instrument. The type of financial collateral over which a statutory pledge may be granted. Typical examples of financial instruments are company shares and bonds.

Financing statement. See "registration".

Fixed security. A security right other than a floating charge.

FLA. The Finance and Leasing Association.

Floating charge. A security right developed at common law (more precisely, in equity) in England in the nineteenth century and adopted by statute in Scotland in 1961. It can cover all assets of the debtor, present and future. It can cover immoveable as well as moveable property. Only certain entities can grant a floating charge, most importantly companies and LLPs. Unless and until it crystallises its effect is suspended. When the provider disposes of an asset, the charge automatically ceases to encumber the asset. If the provider becomes insolvent, its priority is weaker than that of other securities. Lenders commonly expect to be granted a floating charge, often in combination with other security rights. Governed partly by the Companies Act 1985 and partly by the Insolvency Act 1986. The provisions of the former are prospectively repealed and replaced by Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, but it is now unlikely that this legislation will ever be brought into force.

Floating lien. In UCC–9 and the PPSAs, a security that covers after-acquired property while allowing the debtor to dispose of (at least some types of) assets in the ordinary course of business. (The term itself is not used in the legislation, which does not have a specific term.) It is functionally comparable to the floating charge but it does not cover immoveable property. It does not make use of the concept of crystallisation.

Future assets. See "after-acquired" assets.

Goods. (Almost always used in the plural.) The term can be used to refer to assets of any kind, but usually the term is limited to corporeal moveable property.

Halliday Report. *Report by the Working Party on Security over Moveable Property*, 1986, chaired by Professor John (Jack) Halliday and available on the SLC website. It was not implemented.

Hire-purchase (HP). X (eg a motor dealer) owns a corporeal moveable asset (eg a car). Y, a customer, lacks the resources to buy the car outright. X sells the asset to Z, a financier, and Z then hires it to Y, with an option for Y to acquire ownership by making full payment.

Hypothec. Non-possessory security over corporeal property. Whilst security over land is in principle a hypothec, in practice the term is used in Scotland only for moveable hypothecs ie non-possessory security over corporeal moveables. (By contrast in many countries the term is used mainly for land.) Scottish law does not generally allow moveable hypothecs. Exceptions are ship mortgages, aircraft mortgages, floating charges, agricultural charges and the landlord's hypothec. The last of these arises by operation of law. It is a security over the tenant's goods in the tenanted property, in security of the rent. It has been abolished in relation to residential and agricultural tenancies.

Improper security. See "proper security".

Incorporeal moveable property. Intangible property which does not relate to land, such as financial instruments and intellectual property.

Information request. A request made to a person registered as an assignee in the RoA or as the secured creditor in the RSP for information in relation to the assignation or statutory pledge which has been registered. Limited types of person are entitled to make such a request and to have it answered.

Intellectual property (IP). Examples include patents, trade marks and copyright.

International private law (IPL). Also called private international law, or the conflict of laws. The branch of law that deals with (i) the question of which legal system governs a given matter (eg whether a contract is governed by Scottish contract law or by Texas contract law) and (ii) which country's courts have jurisdiction to hear and determine a given matter (eg whether a dispute arising out of a contract is to be heard and determined by a Scottish court or by a Texas court). Each country has its own IPL. The different IPLs do not always dovetail. IPL operates within non-unitary states. For example, IPL issues arise as between England and Scotland. See Chapters 15 and 39.

Inaccuracy. A misstatement in an entry in the Register of Assignations or Register of Statutory Pledges.

Intimation. Notification of assignation to the account debtor. (Scottish lawyers are used to this term. But others often find it puzzling, for in ordinary speech to "intimate" is to hint, or suggest, as in Wordsworth's *Intimations of Immortality*.)

Inventory. Also called stock in trade. A business's corporeal moveable property intended for sale, or for processing and then sale. The contrast is with equipment, which is the remainder of a business's corporeal moveable property. Office equipment, vehicles etc are normally equipment. (But there are businesses that deal in office equipment, vehicles etc.)

Invoice discounting. The selling of invoices without notification of the account party, so that the invoice will be paid to the original creditor, who will then pass on the payment to the invoice buyer. It is for agreement as to whether the risk of the insolvency of a customer is to be borne by the business or by the factor. (If by the business, the arrangement becomes difficult to distinguish from a secured transaction.) Cf "factoring".

Juridical act. An act with legal consequences, such as an assignation of a claim or the creation, amendment, transfer or extinction of a security right.

Keeper of the Registers of Scotland. The official who heads the Department of the Registers of Scotland and in whose name all acts and decisions are made.

Landlord's hypothec. See "hypothec".

Lien. (i) In its standard meaning in Scottish law, a lien is a security over corporeal moveable property arising by operation of law. It presupposes possession by the creditor. An example would be the lien that a repairer has over the object repaired (eg a car) in respect of the repair bill. But, by way of exception, "maritime liens" are non-possessory. (ii) The word is sometimes used more broadly, especially in the USA, to mean any security right.

Liquidation. The insolvency process for companies and certain other corporations which ultimately results in the extinction of the corporation. The person who administers a liquidation is called the liquidator.

LLP. Limited liability partnership. See the Limited Liability Partnerships Act 2000. Not to be confused with limited partnerships which are regulated by the Limited Partnership Act 1907.

LR(S)A 2012. Land Registration etc. (Scotland) Act 2012. The statute which regulates the Land Register of Scotland.

Mandate. A type of agency where the agent is not paid. Sometimes the mandate may be in the interest of the person (mandatory) to whom it is granted, as, typically, with a mandate to collect a debt.

Mature. If X lends Y money on 1 February, payable on 1 November, the claim "matures" on the latter date. Until then it is "unmatured", unless before that date it is "accelerated." The loan contract may provide for early repayment, in defined circumstances, and this is known as acceleration.

Moveable property. Property other than immoveable (also called heritable) property. The latter means land and what is connected with land, such as buildings, and also rights connected with land, such as the lease of a building. As well as being divided into moveable and immoveable/heritable, property is also divided into corporeal and incorporeal. Examples of incorporeal moveable property include receivables and intellectual property.

Murray Report. *Security over Moveable Property in Scotland: a Consultation Paper* (Department of Trade and Industry, 1994). Produced for the DTI by an advisory group chaired by Professor John Murray. Strictly this was a consultation paper rather than a report, so that "Murray Report" is not an accurate title, but nevertheless the paper came to be known by that name, perhaps because it contained a draft Bill. No final report was

published. No legislation resulted, but some of the ideas were echoed in Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

Negotiable instrument. A document that goes beyond evidencing a debt, and "embodies" it. The main types of negotiable instrument are the bill of exchange (also called the draft) and the promissory note. Negotiable instruments are more easily transferable than other claims. Notification to the account debtor is not required. The doctrine of *assignatus utitur jure auctoris* does not generally apply to them, so that a good faith transferee generally takes free of defences against payment. (The basic law of negotiable instruments is similar in all countries, as a result of their frequent use, over many centuries, in international trade. But the UK is not a party to the 1930 Bills of Exchange Convention. The Bills of Exchange Act 1882 continues in force.)

***Nemo plus juris ad alium transferre potest quam ipse haberet*.** (Ulpian, Dig 50.17.54.) Nobody can grant a larger right than is held by the granter. The same idea is sometimes expressed as *nemo dat quod non habet*. Thus if X borrows a bicycle from Y and then (fraudulently) sells it to Z, Z has no title. The principle applies even if the grantee is in good faith, but subject to certain exceptions, notably sections 24 and 25 of the Sale of Goods Act 1979. See also "accretion of title."

Non-notification security. Security over a claim without notification to the account debtor. This is competent under current law only in the case of the floating charge.

Non-possessory security. Security over corporeal property in which the debtor retains possession. That is always the case for security over corporeal immoveable (heritable) property. Scottish law currently allows this for corporeal moveable property only in certain cases, namely the floating charge, the agricultural charge, the landlord's hypothec and certain maritime security rights.

Noting filing/registration. See "registration".

Operation of law. A security that arises "by operation of law" is one that comes into existence automatically in defined circumstances, without having to be granted to the creditor by the debtor. Also called a security *ex lege*, or a "tacit" security. An example is the repairer's lien. Thus a garage that repairs a motor vehicle has, in respect of the repair bill, a security over the vehicle, arising by operation of law. The contrast is with "express" security.

Outright assignation. See "assignation".

***Pactum commissorium*.** Also called a *pactum legis commissoriae*. A clause in a secured loan contract whereby in the event of default, title to the collateral passes to the creditor. In most legal systems, including probably Scotland, such clauses are normally void.

Part 25 of the Companies Act 2006. See the "company charges registration regime".

Perfection. A term used in UCC–9 and the PPSAs. In those systems, a security interest attaches when it is effective as between debtor and creditor, but at that stage it is not (subject to certain exceptions) effective against third parties. The next step is perfection, whereby the security interest becomes effective against third parties (subject to certain

exceptions). Perfection usually requires either (i) registration or (ii) possession, but there are exceptions.

Person. In law a person is the subject of rights and obligations. So as well as (i) natural persons, such as David Hume or Rob Roy MacGregor, there are (ii) juristic persons (also called legal persons) such as companies.

Personal Property. Or "personality". A term of English law, corresponding closely to the concept of moveable property. Personal property divides into "choses in possession" (also called tangible property) and "choses in action" (also called intangible property), corresponding approximately to the division between corporeal and incorporeal moveable property. The word "personal" in the phrase "personal property" is not the same as the concept of personal right.

Personal Property Security Acts (PPSA). Statutes based on UCC–9 are often called Personal Property Security Acts and in Australia and New Zealand as the Personal Property *Securities* Acts. In this context the word "personal" is used to mean "moveable". Whereas Article 9 is merely one part of a general commercial code, the PPSAs are free-standing enactments. The PPSAs differ to some extent from the UCC and also to some extent vary among themselves, but the similarities outweigh the differences. In Australia the PPSA has been adopted at Commonwealth (ie federal) level so that the law is the same in the different states. In Canada the law has been adopted at provincial level, so there is some variation within Canada. Quebec is the exception, but the legislation there has in fact been much influenced by the PPSAs. The links for the legislation in Australia, New Zealand, Ontario and Saskatchewan are as follows:
http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200944081?OpenDocument;
http://www.legislation.govt.nz/act/public/1999/0126/latest/DLM45900.html;
http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p10_e.htm; and
http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/P6-2.pdf.

Personal right. A right against a person. Also called a claim. Contracts create personal rights, but such rights can also have other sources. A personal right is as good as the person against whom it is held. A personal right against the Bank of England to be paid £1 is better than a personal right for the same amount against a person who has become insolvent. A right may still be personal even if it relates to property. For example if X owns land and contracts to transfer it to Y, Y's right is personal. A real right is a right directly in a thing rather than against a person. Thus when Y's name replaces X's in the Land Register, Y has a real right, and the personal right against X is now spent. Real rights are as good as the thing in which they are held.

Pledge. Under the current law, pledge is a security over corporeal moveable property constituted by delivery to the creditor. For example if Jack goes to a pawnbroker, and borrows money on the security of an antique clock that he hands over the counter, the clock has been given in pledge as security for the loan. Occasionally the term is used in a broader sense to mean any kind of security right. Under our recommendations a new form of pledge, to known as a "statutory pledge" would be introduced to complement the existing (possessory) pledge.

Possession. To be distinguished from ownership. To quote Ulpian: "*Nihil commune habet proprietas cum possessione*." (Dig 41,2,12. "Ownership and possession have nothing in common with each other.") Whilst ownership and possession commonly coincide, there are non-possessing owners and non-owning possessors.

Possessory security. Security over corporeal property in which the security is based on the possession of the creditor. Pledge and lien are the possessory securities under the current law, the difference between them being that pledge is express (voluntary) and lien is tacit (implied by operation of law).

PMSI. See "purchase money security interest".

PPSA. See "Personal Property Security Acts (PPSA)".

PPSR. Personal Property Security Register. See "Personal Property Security Acts (PPSA)".

***Prior tempore potior jure*.** Earlier by time, stronger by right. For example, if there are two securities over an item of property, held by different creditors, the first to be created has a higher rank than (has priority over) the second. That is an example where the competing rights can both exist, and the only question is of ranking. Sometimes the competing rights cannot co-exist, so that the first excludes the second wholly. For example, X assigns a right to A and to B. The first to complete title by intimating to the account debtor excludes the other.

Priority circle. Where ranking rules provide a circular result. For example, creditor A ranks above creditor B, creditor B ranks above creditor C, but creditor C ranks above creditor A. It is necessary in such circumstances is to find a way of breaking the circle.

Proper security. A security right that is a subordinate right, leaving the title in the provider. Also known as a "true security". By contrast in an improper security title is vested in the creditor, and the debtor has a personal right against the creditor to acquire the title when the debt is paid.

Provider. The person granting a security right. Normally, but not always, that person would be the debtor in the obligation secured by the security right.

Publicity principle. The principle that what affects third parties should be discoverable by third parties. It is not an absolute principle. Different legal systems apply the principle with varying degrees of enthusiasm.

Purchase money security interest (PMSI). A right in security that secures the financing of the purchase of the asset over which the financing is itself secured. In UCC–9 and the PPSAs, a PMSI has priority over earlier security rights, held by other creditors, that cover after-acquired assets. Depending on whether the financing is provided by the seller or by a third party, a PMSI can be either (i) a seller-credit PMSI, where the goods are sold on credit or (ii) a lender-credit PMSI, where a lender such as a bank lends the buyer the money.

Quasi-security. This term is sometimes used to describe devices that have an effect similar to security, such as retention of title in sale, and hire-purchase.

R3. The Association of Business Recovery Professionals' (R3) Scottish Technical Committee.

Real right. See also "personal right". Real rights divide into (i) ownership and (ii) the subordinate real rights, or limited real rights, which are real rights held in something that is owned by someone else. For example if X owns land and borrows money from Y, granting a standard security to Y, there are now two real rights in the property, X's real right of ownership and Y's subordinate real right of security. A subordinate real right is also called a *jus in re aliena*.

Receivables. Also called trade receivables, or accounts, or accounts receivable, or book debts. Money due in respect of goods sold, or services rendered, on credit. The term is a commercial rather than a legal one, and its precise scope is open to debate.

Recharacterisation. In UCC–9 and the PPSAs, devices that function as security rights ("quasi-securities") are treated as security rights. Thus function prevails over form. So if X sells and delivers a bicycle to Y, retaining ownership until Y pays, that arrangement is "recharacterised" so that Y is treated as having become owner and X is treated as having a security interest. "Recharacterisation" is not a term used in these statutes themselves, but it is the standard label for this approach.

Register of Assignations. The new register to be administered by Registers of Scotland in which assignations of claims are registrable.

Register of Statutory Pledges. The new register to be administered by Registers of Scotland in which statutory pledges are registrable.

Registration. Also called filing. Sometimes registration is divided into "notice registration" and "transaction registration". The former, a feature of UCC–9 and the PPSAs, involves the registration of a skeletal "financing statement". This is different from the "security agreement" itself. The registered entry merely alerts third parties to the possibility that there may exist, or may exist in future, a security right. "Transaction registration" specifies the security right, and can involve registration of the security agreement itself. But the distinction between notice registration and transaction registration is not sharp. Registration can also vary in its nature in other respects. For example it can be a necessary condition for the creation of the security (the Scottish rule for security over land) or it can merely give notice of a security that has already been created off-register. The latter is the approach both of UCC–9 (and the PPSAs) and of Part 25 of the Companies Act 2006, though the consequences of non-registration are different in each case. One benefit of registration systems is that they can determine priority, and it is a common criticism of Part 25 of the Companies Act 2006 that (subject to certain qualifications) it fails to take advantage of this possibility.

Retention of title. Also called reservation of title, retention of ownership etc. If goods are sold and delivered on credit, the seller's position can be protected by retention of ownership (title). The sale contract says that ownership (title) is retained by the seller, notwithstanding delivery, until the price is paid. Also called conditional sale. In practical terms the effect is somewhat similar to an unconditional sale plus (i) a seller-to-buyer loan of the price, plus (ii)

buyer-to-seller payment of the price (out of the notional loan), plus (iii) with a grant back to the seller, by the buyer, of a security right over the goods, to secure the loan.

Retrocession. If X assigns to Y, and later Y assigns back to X, that re-assignation is commonly called "retrocession". The main case of retrocession in practice is where a right has been assigned in security of a loan, and the loan is later paid off.

RoA. See "Register of Assignations".

RoA Rules. Subordinate legislation which would regulate the RoA and related matters.

RSP. See "Register of Statutory Pledges".

RSP Rules. Subordinate legislation which would regulate the RSP and related matters.

Section 893 order. A security right granted by a company generally has to be registered in the Companies Register under Part 25 of the Companies Act 2006. If the security is registered in another register anyway (for example, a standard security registered in the Land Register), the result is a requirement for double registration. Section 893 of the 2006 Act is an innovation allowing the Secretary of State to make an order whereby registration in the "special" register (eg the Land Register) suffices, though in that case the information is passed on to the Companies Register. The benefit to the parties is that only one registration is needed to protect the validity of the transaction. So far no section 893 order has been made.

Secured Transactions Law Reform Project. A project working to reform the law of secured transactions in England and Wales. See https://securedtransactionslawreformproject.org/.

Securitisation. The sale of financial assets from the original creditor ("originator") to a "special purpose vehicle" (SPV) which funds the purchase by issuing bonds. Sums due on mortgage (heritable security), credit cards, car loans etc are securitised. Securitisation may be effected by assignation, though in current practice this is uncommon. But sale without actual transfer is more common. Securitisation is a business term rather than a legal term. In legal (but not business) terms, securitisation is similar to factoring.

Security agreement. The term used in UCC–9 and the PPSA systems to mean the agreement that constitutes the security right. In those systems it is distinct from the "financing statement", the latter being the document that is registered.

Security. This term has two meanings, which have little connection. (i) A right in security, ie a right that secures some other right, such as a security over land that secures payment of a loan. "Security" in that sense is the subject of much of this Report and we generally therefore use the term "security right". (ii) Company shares, bonds etc ie financial instruments. This second sense is not a precise one. For example the Banking Act 2009 uses the term to include "any … instrument creating or acknowledging a debt." (Section 14.)

"Seriously misleading" test. If there was an inaccuracy in an entry in the RoA or RSP which was seriously misleading at the time of registration the registration would be ineffective. The result would be that the assignation would not transfer the claim or no

statutory pledge would be created. In the RSP there would be protection given to good faith acquirers where an entry had a supervening inaccuracy which was seriously misleading.

Sequestration. Commonly known as bankruptcy. The insolvency process available for types of debtor other than companies and LLPs, for which liquidation is the appropriate process. The person who administers a sequestration is called the trustee in sequestration.

SFCA. Security financial collateral arrangement. See "financial collateral".

Ship mortgage. A non-possessory security over a ship, created by registration. See the Merchant Shipping Act 1995 Sch 1.

Situs. The place where an asset is situated for the purpose of determining which legal system is applicable to it. The *situs* of land is the country where the land is. The same is generally true of corporeal moveable property. Incorporeal property has no *situs* in a literal sense, but a *situs* has to be allocated to it for certain purposes. For example if Scottish company X lends money to Scottish company Y, the resulting monetary claim is an asset of X: it is incorporeal moveable property with a Scottish *situs*. The law of the *situs* is known as the *lex situs* or the *lex rei sitae*.

Solo consensu. By consent alone. A transfer, or a security, that works *solu consensu* is one that requires no external act.

Standard security. A right in security in land is called a "heritable security". (The English equivalent is a mortgage.) The only type of heritable security competent in modern law is the standard security. It gives the grantee a limited right in the property, leaving ownership with the granter. (Conveyancing and Feudal Reform (Scotland) Act 1970.) Created by registration in the Land Register.

Statutory pledge. A new type of pledge which would require registration in the Register of Statutory Pledges for creation. It would be a non-possessory security in relation to corporeal moveables. It would be available for limited classes of incorporeal moveables, namely financial instruments and intellectual property.

Statutory pledges record. The main part of the Register of Statutory Pledges.

Supervening inaccuracy. Where a register entry becomes inaccurate by reason of a subsequent event.

Tacit. See "operation of law".

True security. See "proper security".

Trust receipt financing. Imported goods are often paid for not by the importer but by a bank (under a letter of credit), with the importer later repaying the bank. Under such an arrangement the bill of lading is sent by the exporter not to the importer but to the bank. The bank will not normally release the bill of lading to the importer except in exchange for payment. However, this letter of credit system can be extended by trust receipt financing, in which the importer receives the bill of lading from the bank without first paying. The importer gives the bank a document called a trust receipt (often abbreviated to TR), whereby it holds

the bill of lading, and the goods it represents, on behalf of the bank until payment is eventually made. In UCC–9 and the PPSAs a trust receipt is classified as a non-possessory security interest and therefore subject to the usual perfection requirements.

TTFCA. Title transfer financial collateral arrangement. See "financial collateral".

UCC. **(**The Uniform Commercial Code of the USA.) Available at http://www.law.cornell.edu/ucc/ucc.table.html. The UCC is divided into parts called articles. Article 9 deals with security interests in moveable property and is in this Report cited as "UCC–9". The UCC is a model law, which has been enacted in virtually identical form by all fifty states. (Except Louisiana, which has not adopted the whole of the UCC. But it has adopted Article 9.) It is revised from time to time, and in practice the states adopt the revisions promptly.

UCC–9 and the PPSAs. This term is used in this Report to indicate the PPSA systems, and Article 9 of the UCC, from which the PPSAs took their inspiration. The PPSAs differ to some extent from the UCC, and also differ among themselves. Moreover, all of them are amended from time to time. Hence the expression "UCC–9 and the PPSAs" does not signify some unique and unchanging system, but rather a broad approach.

UNCITRAL. The United Nations Commission on International Trade Law.

UNCITRAL Assignment Convention. The UNCITRAL Convention on the Assignment of Receivables in International Trade. Available at https://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf.

UNCITRAL Guide on the Implementation of a Security Rights Registry. A set of recommendations published by UNCITRAL in 2014 on setting up a security rights registry. Available at http://www.uncitral.org/pdf/english/texts/security/Security-Rights-Registry-Guide-e.pdf.

UNCITRAL Legislative Guide on Secured Transactions. A set of recommendations by UNCITRAL as to what national laws about secured transactions should look like. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/payments/Guide_securedtrans.html. The main Guide dates to 2007 and was supplemented in 2010 by a Supplement on Security Rights in Intellectual Property, available at http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_Ebook_Suppl_SR_IP.pdf.

UNCITRAL Model Law on Secured Transactions. A set of model statutory provisions on secured transactions published by UNCITRAL in 2016 and available for adoption for countries seeking a modern secured transactions law. The approach taken is a functional one similar to UCC–9 and the PPSAs. Available at http://www.uncitral.org/pdf/english/texts/security/ML_ST_E_ebook.pdf.

UNIDROIT Cape Town Convention. International Institute for the Unification of Private Law (UNIDROIT) Convention on International Interests in Mobile Equipment. "Mobile equipment" means "(a) airframes, aircraft engines and helicopters; (b) railway rolling stock; and (c) space assets". Available at http://www.unidroit.org/instruments/security-interests/cape-town-

convention. The Convention itself is a framework convention, which works in unity with its protocols. Three protocols so far exist, for aircraft: (http://www.unidroit.org/instruments/security-interests/aircraft-protocol), railway rolling stock (http://www.unidroit.org/instruments/security-interests/rail-protocol) and space assets (http://www.unidroit.org/english/conventions/mobile-equipment/spaceassets-protocol-e.pdf). There are separate international registries for each of the three categories of asset. The UK acceded to the aircraft protocol on 1 November 2015. Work has commenced on a fourth protocol on agricultural, construction and mining equipment (the "MAC Protocol").

UNIDROIT Factoring Convention. International Institute for the Unification of Private Law (UNIDROIT) Convention on International Factoring. Available at http://www.unidroit.org/english/conventions/1988factoring/main.htm.

Verification statement. A statement issued to an applicant confirming that there has been registration in the RoA or RSP.

Warrandice. A warranty, or guarantee. If X assigns to Y money owed by Z, X is presumed to warrant to Y that the debt is indeed owed by Z. That is known at common law as warrandice *debitum subesse* – warrandice that the debt subsists. Such warrandice is only that the debt is payable, not that it will in fact be paid. For instance, if Z becomes bankrupt, that would not constitute breach of the warrandice. (But an additional guarantee about Z's solvency could be added, if X and Y so agree.) The exact content of warrandice in relation to the assignation of claims is uncertain and in this Report we recommend a clear statutory rule.

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: D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2nd edn, 2005)

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: R C C Cuming, C Walsh and R J Wood, *Personal Property Security Law* (2nd edn, 2012)

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Chapter 1 Introduction

The importance of moveable transactions law

1.1 A successful modern economy is facilitated by a commercial law which meets its needs.[1] Recent years have seen this Commission carry out projects which have had the strategic objective of improving our commercial law. Several of these have now been implemented by legislation. The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and the Contract (Third Party Rights) (Scotland) Act 2017 are the most recent examples.[2]

1.2 It is arguable that the area of Scottish commercial law where reform is longest overdue and most needed is moveable transactions law.[3] We shall explain this term in more detail below, but at the heart of it is the transfer of rights to be paid money, and security over moveable property.

1.3 The law here is of great importance primarily to businesses but also to private individuals seeking to use their assets to raise finance. Thus, a business may wish to acquire funding by selling debts due to it,[4] for example to factoring and invoice discounting houses. Alternatively, it may wish to retain assets such as vehicles, equipment and intellectual property, but use these as collateral to obtain loan finance. The purpose of the collateral is to protect the lender if the business becomes insolvent or otherwise fails to repay the loan. This enables lenders to offer reduced interest rates because the risk to them is lower, meaning reduced costs for the business.[5]

1.4 The internationally-respected UNCITRAL Legislative Guide on Secured Transactions considers that:

> "sound secured transactions laws can have significant economic benefits for States that adopt them, including attracting credit from domestic and foreign lenders and other credit providers, promoting the development and growth of domestic

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[1] See eg Lord Hodge, "Does Scotland needs its own Commercial Law?" (2015) 19 EdinLR 299 at 305 where it is stated that we must ask "how best our law can serve the business community by facilitating commercial activity." See also Lord Thomas of Cwmgiedd, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", The Bailii Lecture, 9 March 2016 para 4: "Clarity and predictability in the law, as well as its ability to develop in a principled manner, is the bedrock upon which businesses, just as much as individuals, order their affairs". Available at https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

[2] The 2015 Act implements our Report on Formation of Contract: Execution in Counterpart (Scot Law Com No 231, 2013). The 2017 Act implements our Review of Contract Law: Report on Third Party Rights (Scot Law Com No 245, 2016).

[3] See eg Gloag and Irvine, *Rights in Security* 187–188; D O'Donnell and D L Carey Miller, "Security over Moveables: A Longstanding Reform Agenda in Scots Law" 1997 *Zeitschrift für Europäisches Privatrecht* 807 and I G McNeil (ed), *Scots Commercial Law* (2014) para 11.94 (J MacLeod).

[4] The Scottish economist Henry Dunning Macleod (1821-1902) has commented: "If we were asked – who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer – the man who first discovered that Debt is a Saleable Commodity." See H D Macleod, *The Principles of Economic Philosophy* (2nd edn, 1872) 481.

[5] See eg G McCormack, "Secured transactions law reform, UNCITRAL and the export of foreign legal models" in N O Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (2013) 33 at 49–50.

businesses (in particular small and medium-sized enterprises) and generally increasing trade. Such laws also benefit consumers by lowering prices for goods and generally increasing trade."[6]

1.5 Our current law falls well short of meeting these standards. It is primarily common law (non-statute law) and is outmoded, inadequate and inflexible.[7] This puts barriers in the way of business and makes Scotland contrast unfavourably with other jurisdictions which have recognised the need for reform to promote more economic efficiency.[8] Deficiencies in our law may significantly hamper access to finance and we understand that some financiers simply do not engage in the Scottish market due to legal difficulties.

1.6 There is widespread dissatisfaction with the current law. CBI Scotland has stated that the "ease of [small and medium-sized enterprises] accessing credit is constrained in a way which would not be the case if they were English based."[9] The Federation of Small Businesses has said: "Today's small businesses need a commercial environment that lets them raise finance against business assets quickly and easily. The current law is rooted in the past and doesn't reflect how business is now done."[10] Lord Reed, a Justice of the UK Supreme Court, has commented that consideration should be given to whether certain Scottish businesses "are well served by legal rules which make it more difficult for them to raise finance" than under English law.[11] The assessment of Bruce Wood of Morton Fraser is more blunt: the law on moveable transactions is "an area of Scots law desperately in need of reform."[12]

1.7 That Scottish law remains unreformed in this area may affect the reputation of our legal system more generally. A Report on Business Finance and Security over Moveable Property for the then Scottish Executive in 2002 notes that solicitors are "embarrassed" to explain the Scottish rules in cross-border or international transactions.[13] Although this is anecdotal it is important. There is evidence to suggest that perceptions of the law as well as the actual underlying rules influence the availability of finance in a country.[14]

1.8 In this Report we make a series of recommendations for legislation to modernise our moveable transactions law. In our view these would enable it to meet the needs of business in the electronic age that is the twenty-first century. The introduction of a new Register of Assignations would enable assignation of rights to payment to be completed by registration, rather than there having to be intimation to the debtor as the current law requires. This

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[6] UNCITRAL Legislative Guide on Secured Transactions 1.
[7] See Chapter 3 below.
[8] See eg M Renaudin, "The modernisation of French secured credit law: law as a competitive tool in global markets" 2013 International Company and Commercial Law Review 385.
[9] Response of CBI Scotland to Discussion Paper on Moveable Transactions.
[10] Statement by Colin Borland, Senior Head of External Affairs, Devolved Nations to the Commission in December 2016.
[11] The types of business he was referring to were football and rugby clubs following the decision in *Joint Administrators of Rangers Football Club Plc, Noters* 2012 SLT 599, which is discussed below at para 3.16. See Lord Reed, "Triremes and Steamships: Scholars, Judges, and the Use of the Past", The Scrymgeour Lecture, University of Dundee, 30 October 2015, pp 9–10, available at https://www.supremecourt.uk/docs/speech-151030.pdf.
[12] *The Scotsman,* 28 August 2011, available at http://www.scotsman.com/news/it-s-an-area-of-scots-law-desperately-in-need-of-reform-1-1816927.
[13] Business Finance Report at 70. On this Report see paras 18.39–18.40 below.
[14] R Haselmann and P Wachtel, "Institutions and Bank Behaviour: Legal Environment, Legal Perception and the Composition of Bank Lending" (2010) 42 Journal of Money, Credit and Banking 966.

would significantly aid invoice financing, as well as allowing security over income streams such as rents to be taken more easily. Our recommendation for a new security right over moveable property, which would require neither transfer of ownership nor transfer of possession of that property, but only registration in the new Register of Statutory Pledges, would facilitate the use of such assets as collateral for loans. Taken together our recommendations would consign the restrictive rules of the current law to history.

1.9 Our overarching policy aims are simple ones: to improve access to finance in Scotland and benefit the Scottish economy by reforming the law of moveable transactions. We believe that this would assist the Scottish Government's National Outcome for Scotland to be the most attractive place for doing business in Europe.[15] For example, Jeff Longhurst, Head of Commercial and Asset Based Finance at UK Finance, has commented to us that a modern statutory framework for moveable transactions law would promote more invoice financing in Scotland and potentially encourage new finance companies to enter the Scottish market.

1.10 As is our usual practice, the Report is accompanied by a draft Bill, which is to be found in volume 3.

The three strands of the project

1.11 In the next section we outline the history of the moveable transactions project, but we think that it may assist the reader first to have an explanation of its three strands. We would refer also to the extensive Glossary at the start of the Report. The strands are:

(i) Outright transfer (assignation) of incorporeal moveable property;

(ii) Security over incorporeal moveable property; and

(iii) Security over corporeal moveable property.

1.12 In brief, "moveable property" is all property other than (a) land and buildings and (b) rights in land and buildings, such as leases. (The equivalent term in common law jurisdictions such as England and Wales, Canada, Australia and New Zealand is "personal property").[16] "Corporeal moveable property" is moveable property that has a physical presence, such as computers, equipment and motor vehicles. (In English law the term "chattels" is used.) "Incorporeal moveable property" is moveable property that does not have a physical presence, for example, company shares and intellectual property rights. (In English law the terms typically used are "choses in action" or "intangibles".)

1.13 Incorporeal moveable property also includes certain rights ("claims") against other persons, most importantly for present purposes, the right to be paid money by another person under a contract. For example, if Andrew sells goods to Barbara, he has a right to be paid the price by her. This right against Barbara can be regarded as a form of incorporeal moveable property.[17] Andrew is normally entitled to transfer that right to another person, for

[15] See http://www.gov.scot/About/Performance/scotPerforms/outcome/business.
[16] Hence the Personal Property Security Acts (PPSAs) which are mentioned throughout this Report.
[17] See Reid, *Property* para 16. But cf G L Gretton, "Ownership and its Objects" (2007) 71 Rabels Zeitschrift 802.

example a factoring company, which buys debts. The method of transfer of incorporeal property in Scotland is assignation. (The English law equivalent is "assignment".)

1.14 When the project's three strands are considered, there is an obvious lack of symmetry. Outright transfer of corporeal moveable property is not included. The reason for this is that the primary transaction involving such a transfer is sale. Sale of corporeal moveables is governed on a UK-basis by the Sale of Goods Act 1979.[18] In contrast, the other three strands are matters primarily regulated by Scottish common law. It would seem more appropriate to reform the Sale of Goods Act on a UK-wide basis, as indeed has happened by virtue of the Consumer Rights Act 2015.[19]

History of the project

1.15 The law relating to the assignation of, and security over, incorporeal moveable property was first identified as a project in our Seventh Programme of Law Reform, which ran from 2005 to 2009.[20] As can be seen, this project comprised two of the strands identified in the previous section. There was support for the project from several respondents to the consultation on the Seventh Programme. This included the Law Reform Committee of the Law Society of Scotland, which said that this area was "ripe for review". It added that it was important to ensure in cross-border issues that the Scottish legal system would not be ignored or that other systems which do provide some sort of security where Scottish law does not would be preferred over the Scottish system. Work on the project did not commence in earnest until our land registration project was completed. Our Report on Land Registration was published in February 2010[21] and subsequently implemented by the Land Registration etc. (Scotland) Act 2012. When we consulted in advance of our Eighth Programme of Law Reform, which ran from 2010 to 2014,[22] there was substantial support for extending the project to include the third strand identified above: security over corporeal moveable property. The then Lord President, Lord Hamilton, stated that the topic "appears to be in urgent need of consideration".[23] The WS Society said that this should be the first priority for the Commission in its Eighth Programme as there was "no workable fixed security in Scots law."[24]

1.16 The project was commenced under the leadership of Professor George Gretton, whose term of office as a Commissioner concluded in 2011. Our Discussion Paper was published in June of that year.[25] This was followed by our usual consultation period. Forty responses were received.[26] In October 2011 a symposium on the security aspects of the project (strands (ii) and (iii)) was held under the auspices of the Edinburgh Centre for Private Law at the University of Edinburgh. Over forty individuals attended and the speakers were Professor Gretton, Dr Ross Anderson, Dr Hamish Patrick and Professor Hugh Beale. Their

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[18] See Gretton and Steven, *Property, Trusts and Succession* paras 5.16–5.37 for an overview.
[19] This implements the Joint Report of the Law Commission and Scottish Law Commission on Consumer Remedies for Faulty Goods (Law Com No 317, Scot Law Com No 216, 2009) and the Joint Advice of the Law Commission and Scottish Law Commission on Unfair Terms in Contracts (2013).
[20] Scottish Law Commission, Seventh Programme of Law Reform (Scot Law Com No 198, 2005).
[21] Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010).
[22] Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010).
[23] Submission of Lord President Hamilton to Consultation on Eighth Programme of Law Reform.
[24] Submission of WS Society to Consultation on Eighth Programme of Law Reform.
[25] Scottish Law Commission, Discussion Paper on Moveable Transactions (Scot Law Com DP No 151, 2011).
[26] See volume 3 of this Report. Following mergers etc, some of the law firm consultees which responded to the consultation no longer exist now in the same form as at the time of the consultation.

papers were subsequently published[27] and we have found these and the general discussion at the symposium very helpful in preparing this Report.

1.17 Following the end of the consultation period we had numerous meetings with consultees to discuss their responses. We met also with other stakeholders, including Registers of Scotland, Companies House, CBI Scotland, the Federation of Small Businesses, the Asset Based Finance Association,[28] the Finance and Leasing Association and the Consumer Credit Trade Association. These meetings were of considerable assistance, as were the frequent meetings which we had with our advisory group and with Registers of Scotland.[29] The size and complexity of the project led to it being carried forward to be completed as part of our Ninth Programme of Law Reform (2015 to 2017). In July 2017 we carried out a short consultation on the draft Moveable Transactions (Scotland) Bill. The comments of consultees greatly assisted us in preparing the final version of the draft Bill, which is appended to this Report.

Scope of project

1.18 Chapter 1 of the Discussion Paper[30] set out what is included and not included within the scope of the project. We do the same here, albeit more briefly.

(a) Outright assignation

1.19 As we noted above, "assignation" is the method by which incorporeal property is transferred in Scotland. But the project does not look at the law of assignation as a whole. First, its scope is generally restricted to the assignation of incorporeal *moveable* property. For the most part, we do not discuss the assignation of incorporeal *heritable* property, such as assignations of leases of land. Secondly, certain forms of incorporeal moveable property, such as the various types of intellectual property, negotiable instruments[31] and "securities", for example, company shares and bonds[32] have special transfer rules. This project does not seek to deal with these as they are distinct areas of law.

(b) Security rights

1.20 We do not cover tacit security rights, such as the repairer's lien, the seller's lien in the sale of goods and the landlord's hypothec.[33] Nor do we cover security rights created by diligence, such as the attachment of goods, or arrestment.[34] Rights of retention and rights of set off, though they have a security function, are also generally not included in this project, since they belong to the law of obligations.[35] As the project is limited to moveable property,

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[27] At (2012) 16 EdinLR 261.
[28] In July 2017 the Asset Based Finance Association became part of the newly established UK Finance. See https://www.ukfinance.org.uk/.
[29] See para 1.52 below.
[30] At paras 1.5–1.19.
[31] Most types of negotiable instrument are subject to the Bills of Exchange Act 1882, which sets out transfer rules in detail. These rules are largely the same as the common law rules for the transfer of negotiable instruments. A few types of negotiable instrument fall outwith the 1882 Act and the common law rules apply.
[32] See the Stock Transfer Act 1963, the Stock Transfer Act 1982 and the Uncertificated Securities Regulations (SI 2001/3755). The last of these is the legislative basis of the CREST system.
[33] See eg Gretton and Steven, *Property, Trusts and Succession* paras 21.58–21.65.
[34] See eg MacNeil (ed), *Scots Commercial Law* Ch 13 (F McCarthy).
[35] We are conducting a separate general review of contract law. See Scottish Law Commission, Ninth Programme of Law Reform (Scot Law Com No 242, 2015) paras 2.6–2.10. This includes retention and set-off.

security over heritable (immoveable) property is not dealt with. Our Ninth Programme includes a separate project on the law of heritable security and this will be carried forward to our Tenth Programme.[36]

1.21 Whilst, as mentioned above, this project does not deal with the *transfer* of the special types of incorporeal property such as intellectual property and negotiable instruments, we do cover *security* over these assets, in line with the position in comparator legislation.

(c) Quasi-security

1.22 Some transactions operate in a way that is similar to security. Common examples are retention of title, hire-purchase and trusts for security purposes. Such arrangements are sometimes called quasi-securities. Some jurisdictions take a "functional" rather than a "formal" approach to such arrangements and "recharacterise" them as security interests requiring registration.[37]

(d) Floating charges

1.23 The floating charge is a special form of security right generally only available to a limited number of corporate debtors, notably companies. Floating charges have been the subject of significant statutory reform provisions in the form of Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, albeit the relevant provisions have never been brought into force.[38]

(e) International private law

1.24 Corporeal moveables, being mobile assets, can cross borders. As for incorporeals, they often have an international dimension, and moreover the question of how their *situs* (site) is to be determined for the purposes of the law of moveable transactions is problematic in a number of respects. In principle it would have been possible to address the international private law aspects of moveable transactions within this project. But we have taken the view that international private law issues should in general not be dealt with here. We have therefore decided to confine the project to the substantive (or internal) Scottish law of moveable transactions, leaving it to existing international private law to determine when Scottish law applies and when it does not. The reason for this approach was that the project needed to be kept within manageable bounds. We say more on this subject in Chapters 15 and 39.

(f) Comprehensive or selective?

1.25 The law of assignation of claims and the law of security over moveables are large subjects. A comprehensive review would take considerable time and resources. It seems to us preferable to identify the issues most in need of reform. Codification of this area realistically needs to be left to the future.

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[36] See Scottish Law Commission, Ninth Programme of Law Reform (Scot Law Com No 242, 2015) paras 2.15–2.17.

[37] In particular article 9 of the Uniform Commercial Code in the USA and the Personal Property Securities Acts in Canada and elsewhere.

[38] See Chapter 18 below.

(g) Insolvency law

1.26 The law of rights in security is closely linked to insolvency law. Nevertheless, this project is not about insolvency law and is thus intended to leave the policies of insolvency law substantially unaffected. This approach, which we set out in the Discussion Paper, met with opposition from some consultees and we address this in Chapter 18.

Comparative work

1.27 It is a standard part of law reform work to look at other jurisdictions and gain ideas.[39] In the field of moveable transactions law, there has been much to learn. The deficit that there is in Scottish law, when compared with the law of other countries, not least our nearest neighbours, England and Wales, becomes even clearer when this is done.

1.28 The landmark development in moveable transactions law in the twentieth century was the introduction of article 9 of the Uniform Commercial Code (UCC–9) in the USA.[40] This takes a functional approach to security over moveable property. Essentially any transaction carried out for security purposes will not be effective against third parties unless there has been a filing of a notice in a public register. UCC–9 heavily influenced the development of the Personal Property Security Acts (PPSAs), beginning in Canada. The last twenty years have seen PPSA-type legislation enacted in several jurisdictions, including New Zealand in 1999 and Australia in 2009. During a visit to these countries in 2012, the lead Commissioner learnt much about the experience there in relation to personal property security reform. We are particularly grateful to Professor Mike Gedye, University of Auckland, for his assistance with arranging meetings in New Zealand. In 2013 Malawi adopted a PPSA based on the New Zealand model.[41] In 2015, Nigeria enacted legislation which draws significantly on the UCC–9/PPSA approach.[42] And 2017 has seen similarly-influenced legislation passed in Zimbabwe.[43]

1.29 The UCC–9/PPSA approach also heavily influenced the Draft Common Frame of Reference (DCFR) Book IX.[44] The DCFR was an academic project which produced model provisions which might form the basis of a future statement of harmonised European private law. In one of our other current long-term projects, on contract law, we are using the DCFR as a means of providing Scottish law "with a systematic health check, giving a basis for treatment where the law is found to be ailing or otherwise in need of remedial treatment."[45] When one makes a cursory examination of the relevant DCFR provisions on moveable

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[39] See the Law Commissions Act 1965 s 3(1)(f). See also Sir Geoffrey Palmer QC, "The Law Reform Enterprise: Evaluating the Past and Chartering the Future" (2015) 131 LQR 402 at 415.
[40] See Discussion Paper, Chapter 13.
[41] See M Dubovec and C Kambili, "Secured Transactions Law Reform in Malawi: the 2013 Personal Property Security Act" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 183–206.
[42] See I Otabor-Olubor, "Reforming the law of secured transactions: bridging the gap between the company charge and CBN Regulations security interests" (2017) 17 Journal of Corporate Studies 39 and W C Iheme and S U Mba, "Towards reforming Nigeria's secured transactions law: the Central Bank of Nigeria's attempt through the back door" 2017 Journal of African Law 131.
[43] Movable Property Security Interests Act 2017. See https://www.zimlii.org/zw/legislation/act/2017/9.
[44] C von Bar and E Clive (eds), *Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law*, 6 vols (2009). On Book IX, see U Drobnig and O Böger, *Proprietary Security in Movable Assets* (2015).
[45] Scottish Law Commission, Ninth Programme of Law Reform (Scot Law Com No 242, 2015) para 2.6.

transactions law,[46] and then looks at Scottish law it immediately becomes apparent that major surgery is needed.

1.30 The DCFR Book IX has much influenced the new Belgian law on security over moveable property.[47] Even closer to home, Jersey has adopted a similar approach in its recent reform of security over intangibles.[48] The DCFR Book III chapter 5 deals with assignment.[49] We have found it very helpful in relation to assignation.

1.31 Mention should also be made of other transnational instruments which, although non-binding in the United Kingdom, provide models of modern law from which our project draws inspiration. These include the UNIDROIT Convention on International Factoring (1988); the European Bank for Reconstruction and Development's (EBRD) Model Law on Secured Transactions (1994); the UNCITRAL Convention on the Assignment of Receivables in International Trade (2001);[50] the UNCITRAL Legislative Guide on Secured Transactions (2007);[51] the UNCITRAL Guide on the Implementation of a Security Rights Registry (2014) and the UNCITRAL Model Law on Secured Transactions (2016).[52]

1.32 Over a decade ago, the Law Commission for England and Wales proposed reform of English law on the basis of the UCC–9/PPSA approach, but this was opposed by many working in the area and was not taken forward.[53]

1.33 We have also gained much from looking at current unreconstructed English law. It offers three key things which put Scottish law at a disadvantage.[54] First, in English law notification (intimation) to the account debtor is not necessary in order to assign a claim. In equity, C can assign to A his right to be paid money by B, without B having to be told. Intimation is commercially inconvenient as it increases transaction costs. Second, again in equity, it is possible to have a non-possessory security over chattels (corporeal moveables) known as a fixed charge. Thus the debtor can keep possession of the property. In

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[46] The provisions on assignation are in Book III and those on security are in Book IX. On Book IX, see Drobnig and Böger, *Proprietary Security in Movable Assets*.

[47] Pledge Act of 11 July 2013 which introduces a new title XVII to Book III of the Civil Code. This is expected to come into force on 1 January 2018. See E Dirix, "The New Belgian Act on Security Interests in Movable Property" (2014) 23 International Insolvency Review 171; F Helsen, "Security in Movables Revisited: Belgium's Rethinking of the Article 9 UCC System" (2015) 6 European Review of Private Law 959 and M Grégoire, "The Law of 11 July 2013 Amending the Belgian Civil Code with Respect to Security Interests in Movable Assets, and Repealing Various Provisions in this Area" in B Foëx (ed), *The Draft UNCITRAL* Model Law on Secured Transactions (2016) 171–198.

[48] Security Interests (Jersey) Law 2012. This is restricted to intangibles. Legislation on tangible movable property is expected to follow.

[49] See generally E Clive, "The Assignment Provisions in the Draft Common Frame of Reference" 2010 Juridical Review 275.

[50] See N O Akseli, "The United Nations Convention on the Assignment of Receivables in International Trade and Small Businesses" in Gullier and Akseli (eds), *Secured Transactions Law Reform* 465–479.

[51] This, for example, has influenced recent reform in Lithuania. See A Smaliukas, "Secured Transactions Law Reform in Lithuania" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 405 at 410.

[52] The Discussion Paper, Appendix A surveys those instruments pre-dating it. On the contribution of UNCITRAL see generally N O Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (2013). On the UNCITRAL Registry Guide, see G Castellano, "Reforming Non-Possessory Secured Transactions Laws: A New Strategy?" (2015) 78 MLR 611. On the UNCITRAL Model Law see B Foëx (ed), *The Draft UNCITRAL Model Law on Secured Transactions* (2016). And see also S V Bazinas, "The UNCITRAL Legislative Guide on Secured Transactions and the Draft UNCITRAL Model Law on Secured Transactions compared" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 481–502.

[53] This is discussed further in Chapter 18 below.

[54] See Discussion Paper, Appendix B.

Scotland, the only non-possessory security available is the floating charge, which, as we noted above,[55] is only available to certain corporate debtors and has a lower ranking in insolvency. Thirdly, it is also possible to take a fixed charge over incorporeal (intangible) assets such as financial instruments and intellectual property without transferring these to the secured creditor. Any sensible reform of moveable transactions law in Scotland requires to take account of these more business-friendly features of the law in its neighbouring jurisdiction.

1.34 But use of English law requires two health warnings. The first is that the underlying systems of property law north and south of the border are fundamentally different.[56] Caution must therefore be exercised. The importation of the floating charge to Scotland in 1961, whilst almost universally welcomed from a practical perspective, has proven to be problematic in its relation to other relevant areas of law.[57] Secondly, there is general consensus, despite the proposals of the Law Commission for the most part being unimplemented, that English law requires reform.[58] Some favour radical reform along the lines of UCC–9 and the PPSAs. Others favour a more conservative approach. Particular mention must be made of the work of the City of London Law Society[59] and the Secured Transactions Law Reform Project,[60] both of which are separately championing reform. We are grateful to these groups for their engagement with us. Mention must also be made of the work of the Law Commission for England and Wales on reform of bills of sale which has led to the Goods Mortgages Bill announced in the 2017 Queen's Speech.[61]

Two registers

1.35 The moveable transactions project has been one of the largest considered by this Commission. At the core of the scheme proposed in the Discussion Paper was the idea that a new register would be set up, to be known as the Register of Moveable Transactions (RMT), in which (a) assignations of claims; and (b) a new form of security right over moveable property would be registered. The scheme was broadly welcomed by consultees. When, however, we came to work up how the RMT would operate, it became increasingly

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[55] See para 1.22 above.

[56] See eg Reid, *Property* para 2. See also R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 31: "Because of the major role accorded to equity in the English security interest system, English law is of limited utility for Scottish law reformers."

[57] See Discussion Paper, Chapter 9. See also Chapter 17 below.

[58] The literature is large. See eg J de Lacy, "The evolution and regulation of security interests over personal property law" in De Lacy (ed), *Reform of UK Personal Property Security Law* 3 at 81–82; S Worthington, "How Secure is Security?" in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 417–437 and D Sheehan, *The Principles of Personal Property Law* (2nd edn, 2017) ch 15.

[59] See http://www.citysolicitors.org.uk/. The Financial Law Committee of the Society has now published three discussion papers, which are available on its website. On the first, which was published in November 2012 and is general in scope, see A J M Steven, "Secured Transactions Reform" (2013) 17 EdinLR 251. The second, published in February 2014, considered fixed and floating charges on insolvency. The third, published in July 2015, is a draft Secured Transactions Code. In July 2016 a revised version of the code was published for further comment. See also R Calnan, "What makes a good law of security?" in F Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (2016) 451 at 480–484.

[60] See http://securedtransactionslawreformproject.org/. On 17 November 2017, its Executive Director, Professor Louise Gullifer gave the Edinburgh Centre for Commercial Law Annual Lecture, with the title: "Secured Transactions Law Reform: The View from South of the Border". See also Gullifer and Akseli (eds), *Secured Transactions Law Reform*.

[61] See Law Commission, Bills of Sale (Law Com No 369, 2016). On 24 November 2017, when our Report was in the final stages of preparation, the Law Commission published From Bills of Sale to Goods Mortgages (Law Com No 376, 2017) which unfortunately came too late to be referred to elsewhere in our Report.

clear that the assignation and security parts would be distinct in character. This is because an assignation and a security are different types of transaction. An assignation is a *transfer* of a right whereas a security transaction involves the *creation* of a right. A security right once created can then be amended, transferred or extinguished. A register requires to take account of these further possible juridical acts in relation to the right. In contrast an assignation is a single juridical act. We came to the conclusion that rather than having one register with two distinctive parts, it would be preferable to have two separate registers.

Structure and content of the Report

1.36 This report is divided into three volumes. The present volume deals with reform of the law of assignation and the setting-up of the new Register of Assignations. Volume 2 considers reform of the law of security over moveable property and makes recommendations for establishing a new Register of Statutory Pledges. It lists also (a) those who responded to our Discussion Paper; (b) the members of our advisory group; (c) those who responded to our consultation on the draft Moveable Transactions (Scotland) Bill of July 2017 and (d) the considerable number of other people who have assisted us.

1.37 Volume 3 contains the draft Moveable Transactions (Scotland) Bill, which, if enacted, would give effect to the recommendations in the body of the Report.[62]

Legislative competence

Introduction

1.38 We noted in the Discussion Paper that under the Scotland Act 1998 the law of assignation is not reserved to the UK Parliament.[63] Neither is the law of rights in security.[64] They are part of the law of property. It, along with other areas including the law of obligations, is part of Scottish private law as defined in section 126(4) of the 1998 Act and is within the legislative competence of the Scottish Parliament. As Lord Hope of Craighead stated in *Imperial Tobacco v The Scottish Ministers*,[65] when considering the relationship between the law of obligations and the scope of the reservation in Schedule 5 to the 1998 Act, in relation to consumer protection and more particularly the regulation of the sale and supply of goods and services to consumers:

> "It would be surprising if the words used in section C7(a) ["The sale and supply of goods and services to consumers"] had such a wide reach. Responsibility for Scots private law, including the law of obligations arising from contract, belongs to the Scottish Parliament. This is made clear by section 29(4) which deals with modifications to Scots private law as it applies to reserved matters but leaves Scots private law otherwise untouched, and by the definition of what references to Scots private law are to be taken to mean in section 126(4). The sale and supply of goods

[62] There are a small number of technical provisions in the draft Bill which do not require recommendations in this Report.
[63] Discussion Paper, para 1.29.
[64] Note that floating charges and receivers are covered by an exception to the reservation of insolvency matters under the Scotland Act 1998 Sch 5 Part II Head C2 and the Scottish Parliament has already passed legislation on floating charges. See the Bankruptcy and Diligence etc. (Scotland) Act 2007 Part 2 (not in force) discussed in paras 18.23–18.25 below.
[65] [2012] UKSC 61.

is part of the law of obligations and, as such, is the responsibility of the Scottish Parliament."[66]

Consumer Credit Act 1974

1.39 The 1998 Act provides that the "subject matter of … the Consumer Credit Act 1974" is reserved.[67] The amendment to that Act which we recommend, enhancing the rights of consumers dealing with pawnbrokers,[68] would thus not fall within the legislative competence of the Scottish Parliament. But it is not an integral part of the whole reform scheme, which could thus go ahead in the Scottish Parliament whether or not Westminster was inclined to amend the 1974 Act.

1.40 The fact that some of our recommendations would relate to non-business debtors as well as to business debtors would not, to the extent that non-business debtors are consumers for the purposes of the 1974 Act, affect the subject matter of the 1974 Act. For example, the 1974 Act has general rules that cover all types of security right, where the security right is granted by a consumer debtor.[69] Those provisions would automatically apply to any new type of security right that would become competent under our recommendations, in so far as consumer debtors were involved.

1.41 The 1974 Act makes special provision for a pledge over corporeal moveable property (described as a "pawn") as part of the measures in that Act regulating credit agreements between consumers and pawnbrokers. The measures in our draft Bill therefore expressly do not affect the realisation of a pawn for the purposes of the 1974 Act.[70]

1.42 We recommend the creation of a new type of security right, to be known as a "statutory pledge".[71] Although any type of debtor, including consumer debtors, would be able to grant it, we recommend that its scope should be limited so that private individuals would not be able to use it as freely as business debtors. This limitation on the new security would not, in our view, be outwith the legislative powers of the Scottish Parliament.

Business associations

1.43 The law relating to "the creation, operation, regulation and dissolution of types of business association" is reserved.[72] Thus company law is in general terms outwith the legislative competence of the Scottish Parliament. Our recommendations would make it possible for a statutory pledge to affect moveable assets in general, including financial instruments such as company shares and bonds. We consider that where a debtor gives security to a creditor over certain assets, including shares held in a company, the security over the shares does not relate - except in an incidental manner - to "the creation, operation, regulation and dissolution of types of business association". It follows that a statutory pledge can be competently granted over company shares or bonds.

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[66] [2012] UKSC 61 at para 28.
[67] Scotland Act 1998 Sch 5 Part II Head C7.
[68] See paras 25.13–25.16 below.
[69] See para 27.15 below.
[70] See para 27.17 below.
[71] See Volume 2 of this Report.
[72] Scotland Act 1998 Sch 5 Part II Head C1.

Corporate insolvency law

1.44 Corporate insolvency law too is largely reserved.[73] As noted above,[74] insolvency law is in principle outwith our scope, although some of our consultees took issue with this. We have generally held to this approach. The fact that we wish our draft Bill to be within the competence of the Scottish Parliament is also a consideration in this regard.[75] It follows that the measures which we recommend relate only in an incidental manner to the reserved area of insolvency.

Registration of company charges

1.45 The position as regards Part 25 of the Companies Act 2006 is less clear. These provisions, with their predecessors, have been in force since 1961.[76] They require the registration in the Companies Register of certain types of "charge" over the property of a company. That would include, in our view, any charge constituted by a statutory pledge by a company. It follows that a charge of this type would need to be dual-registered in the Register of Statutory Pledges and the Companies Register.

1.46 Whether the provisions about registration of charges created under Scottish law being registered in the Companies Register should be regarded as being about the law of rights in security, and therefore not reserved, or as being (at least in part) about company law, and thus reserved to the UK Parliament, is arguable. This Commission has previously examined the point, and concluded that the position is unclear, but that on balance these provisions are reserved.[77] Any recommendation to deal with the inconvenience of dual registration would on that view be outside competence. We return to this matter in Chapter 36.

Intellectual property

1.47 Intellectual property law is reserved.[78] But the same points can be made here as about company law, which is to say that the law about rights in security relating to IP is not reserved. The measures which we recommend are for the purpose of a new security right over moveable property. Our policy, however, is to make recommendations which can work within the existing registration scheme for certain securities over IP. We discuss this matter in Chapter 22.

Shipping and aviation

1.48 Shipping law[79] and aviation law[80] are also reserved. Ship mortgages are excluded from this project. So for the most part are security rights over aircraft. But we make

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[73] Scotland Act 1998 Sch 5 Part II Head C2.
[74] See para 1.25 above.
[75] While in this Report we make a small number of recommendations on reserved matters which would require legislation by the UK Parliament, our draft Bill could be taken forward by the Scottish Parliament.
[76] They were introduced (from English law) by the Companies (Floating Charges) (Scotland) Act 1961. Over the years there have been numerous changes. The latest and most important came into force on 1 April 2013.
[77] Scottish Law Commission, Report on Registration of Rights in Security by Companies (Scot Law Com No 197, 2004), Part 6. This relates to the immediate predecessor of Part 25 of the Companies Act 2006, namely Part XII of the Companies Act 1985, but this difference is immaterial.
[78] Scotland Act 1998, Sch 5 Part II Head C4.
[79] Scotland Act 1998, Sch 5 Part II Head E3.

recommendations here[81] about purely Scottish aspects. Any legislation to give effect to these recommendations would therefore have to be effected by the UK Parliament. But this is not an integral part of the new scheme, and so if no Westminster legislation were to be enacted, the Scottish Parliament could still go ahead with the main scheme.

Financial markets

1.49 Regulation of financial markets is reserved.[82] Our recommendations affect the assignation of claims in respect of financial collateral, and the creation and realisation of security over financial instruments as a form of moveable property, including in the making of financial collateral arrangements.[83]

1.50 We consider that assignations and security rights of this type, including financial collateral arrangements, do not relate except in an incidental manner to the subject matter of any financial reservation. In saying this, we have regard in particular to the lack of any effect on the operation of any market as a financial market. We do recommend that in some cases a purchaser in a market will take a financial instrument free from any statutory pledge, but again this limitation on the effect of the statutory pledge for the purposes of acquirer protection would not in our view be outside competence.

1.51 Section 255 of the Banking Act 2009, once commenced, will confer on the Treasury power to legislate, by statutory instrument, on the subject of "financial collateral arrangements". But no change was made to the Scotland Act 1998, so that the Scottish Parliament's legislative competence in relation to that area of law was not altered.[84]

1.52 Section 104 of the Scotland Act 1998 states that "subordinate legislation may make such provision as the person making the legislation considers necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament…". Section 104 orders are made by the Secretary of State from time to time, and it is not impossible that legislation emerging from the Scottish Parliament following this Report might be supplemented by a section 104 order in the UK Parliament.

Human rights

1.53 We do not consider that our recommendations raise any human rights issues. We believe that they would be compatible with the European Convention on Human Rights.

EU law

1.54 Following the formal notice of intention to leave the EU made by the UK in March 2017, legislation is to be passed by the UK Parliament to incorporate much of EU law into UK law.[85] In the future that law may be amended or repealed by the UK Parliament or

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[80] Scotland Act 1998 Sch 5 Part II Head E4.
[81] See Chapter 21 below.
[82] Scotland Act 1998 Sch 5 Part II Head A4.
[83] See para 1.54 below.
[84] On financial collateral arrangements see further para 1.54 below.
[85] The European Union (Withdrawal) Bill is at the time of writing undertaking its Parliamentary passage. Other Bills are to follow.

perhaps in some cases the Scottish Parliament.[86] In Chapters 14 and 37 we consider the impact of the Directive on Financial Collateral Arrangements (2002/47/EC). This was implemented in the UK by regulations and we proceed on the basis, notwithstanding the pending exit of the UK from the EU, that the draft Bill requires to comply with these regulations.

Business and Regulatory Impact Assessment (BRIA)

1.55 In line with the Scottish Government's requirements for regulatory impact assessments of proposed legislation,[87] we have prepared a BRIA in relation to our recommendations, which is published on our website. The main points are:

- Scottish moveable transactions law is widely considered to be out of date, inflexible and inadequate.
- Competing jurisdictions, in particular England and Wales, have moveable transactions laws which are more commercially friendly than is the case in Scotland.
- There is significant support for reform and modernisation of Scottish moveable transactions law amongst those who use it. The benefits would be very wide-ranging.
- If implemented, our recommendations for reform would make various types of commercial transactions more efficient, less expensive and less complicated than they currently are. This would lead to greater access to finance for individuals and businesses in Scotland.
- The recommendations would also clarify the existing law, encouraging people and businesses in Scotland to use Scottish law with confidence.

1.56 As all Bills introduced in the Scottish Parliament require an accompanying BRIA there is likely to be a need to update our version when a Moveable Transactions (Scotland) Bill is brought forward. It will be examined as part of the Parliamentary process, especially at Stage 1. We would encourage all those who may be affected by the reforms, or otherwise with an interest in them, to consider engaging with that process at the appropriate time in the future. The task of assessing the likely impact of reform such as the present one, which in large part aims to keep the law up to date and in line with modern demands and commercial expectations, is as crucial as assessing any other legislative or regulatory proposal.

Acknowledgements

1.57 We are grateful to all our consultees and others who have assisted us in various ways, whose names are given in Volume 2. Also listed there is the membership of our advisory group, which we significantly extended as we worked on the draft Bill and this Report. During the course of 2014 to 2017 we had a series of meetings with the advisory

[86] For discussion in a Scottish context see A Page, "Brexit, the Repatriation of Competences and the Future of the Union" 2017 Juridical Review 39 and N Burrows and M Fletcher, "Brexit as Constitutional 'Shock' and its Threat to the Devolution Settlement: Reform or Bust" 2017 Juridical Review 49.

[87] See https://beta.gov.scot/policies/supporting-business/business-regulation/.

group at which we discussed difficult areas of policy and reviewed draft Bill provisions. These meetings and advice given to us at other times by advisory group members, many of whom are practitioners working day by day on moveable transactions, was invaluable. We are grateful to Dr John MacLeod, who assisted us in relation to registration aspects. Significant help was received too from Martin Corbett and his colleagues at Registers of Scotland. We thank also our former Chairman, Lord Drummond Young and former lead Commissioner Professor George Gretton for joining the advisory group and continuing to give us their expertise following their departure from the Commission.

Chapter 2 Outline of the scheme for reform of the law of assignation of claims

Introduction

2.1 This chapter provides an outline of the scheme which we recommend for reform of the law of assignation of claims. The Discussion Paper did the same for the provisional scheme for reform of moveable transactions law.[1] We understand that this was helpful to consultees. As mentioned in Chapter 3 below there was significant support in principle for that scheme. Hence what follows here is broadly similar. It should also be appreciated that the following does not attempt to address all the numerous points of detail discussed elsewhere in this Report.

The scheme in practice

2.2 The difficulties caused by the restrictive nature of the current law are set out in Chapter 3. These affect numerous commercial transactions involving assignation of claims, including (1) notification invoice financing; (2) non-notification invoicing; (3) project finance; (4) assignation of rents; and (5) securitisations. The introduction of the scheme which we recommend would free business from these restrictions and ease the ability to access finance. In the words of one law firm: "the increased efficiencies of the new regime seem bound to decrease transaction costs and likely to increase availability of funding from those slightly deterred by the current Scottish legal uncertainties and inefficiencies."[2]

Claims

2.3 For the purposes of the scheme, a claim would be defined as the right to the performance of an obligation. Typically this would be the right to be paid money. Monetary claims relating to land such as rents would be included.

Completion of title

2.4 Assignation of claims would be completed *either* by intimation to the debtor/account party (as now) *or* by registration in the new Register of Assignations ("RoA"). This reform would significantly assist the invoice financing sector in Scotland because the registration option would allow the effective assignation of claims which have yet to come into existence where intimation is thus not possible.

2.5 Here are some examples. (i) W owes money to X. X can assign this to Y, Y's title being completed by registration, without intimation to W. Y can later assign to Z, this

[1] See Discussion Paper, Chapter 3.
[2] Shepherd and Wedderburn LLP in response to the consultation on the draft Moveable Transactions (Scotland) Bill of July 2017.

assignation being completed by intimation. Thus in a chain of assignations, different methods of completion could be used. (ii) W owes money to X. X fraudulently assigns to Y and also to Z. Y completes title by intimation and Z by registration. Whichever completes title first would prevail.

Intimation

2.6 Intimation could be made in person, by post or courier, or electronically. Either the assignor or the assignee or a representative could do this. It would not be necessary to include a copy of the assignation. The Transmission of Moveable Property (Scotland) Act 1862, which does not meet the needs of modern commerce, would be repealed. It would be made clear that an instruction by the assignee for the debtor to continue to perform to the assignor would not invalidate the assignation. This issue is particularly important in practice in relation to assignations in security.

Register of Assignations

2.7 The RoA would be comparable, in broad terms, with the registers used under UCC–9 and the PPSAs. The main difference would be that the assignation document would be registered.

2.8 We envisage that the RoA would be principally used by banks and other institutions which provide finance in return for the assignation of claims, for example invoices and income streams such as rents and IP royalties. Registration would protect the assignee in the event of the assignor's insolvency, whereas under the current law such protection can only be achieved by intimation.

2.9 The RoA would be a public register. Registration and searching would be completed online. It would, in general, be automated and require minimum human intervention by registers staff.

2.10 The new register would be added to the stable of registers administered by the Keeper of the Registers of Scotland in the Department of the Registers[3] and on the same self-financing basis as most other registers, such as the Companies Register and the Land Register. The costs of the register would be covered by fees for registration, for searches etc. Thus there should be no cost to the taxpayer.

2.11 Registration would be by the name of the assignor. The rules would be fairly demanding as to the identity of the assignor. For companies, not only company name and registered office address would be required, but also company number, because whereas names and addresses can change, the company number stays the same. For natural persons, we recommend that date of birth should be required as well as name and address.

2.12 Where an entry in the register for an assignation contained a seriously misleading inaccuracy, for example the wrong name was given for the assignor, the registration would be ineffective.

[3] Such as the Land Register, the Register of Sasines, the Register of Inhibitions and Adjudications, the Books of Council and Session, etc.

2.13 Registration would have third-party effect. But there would be defined exceptions where a third party would be unaffected. For example, W (the account debtor) owes money to X and X (the assignor) assigns the claim to Y (the assignee). Y completes title by registration. W, unaware of the assignation, pays X. W would be discharged.

2.14 It would be possible for inaccurate entries in the RoA to be corrected. The Keeper, for example, could remove entries which resulted from frivolous or vexatious registrations.

2.15 There would be limited information duties owed to certain persons in relation to assignations which had been registered. For example, a third party with a right to execute diligence against a claim could check whether it had been assigned, if this was not clear from the face of the RoA.

2.16 Registration would not be required for assignations of financial collateral which constituted a security financial collateral arrangement or a title transfer financial collateral arrangement within the meaning of the Financial Collateral Arrangements (No. 2) Regulations 2003.[4]

Assignation of claims not yet in existence

2.17 An assignation of a claim which did not exist when the assignation was registered would not be effective until the claim was acquired by the assignor. It is currently not possible to assign these types of claim, as the assignee cannot intimate to an as-yet non-existent debtor. But private individuals would be unable to assign rights to their salary and similar payments.

Assignation subject to condition

2.18 It would be made clear that an assignation can be made subject to a condition which requires to be satisfied before the assignation transfers the claim.

Anti-assignation clauses

2.19 The law would remain as it is, namely that such a clause would invalidate a purported assignation. But this would be subject to any other statutory provisions, such as sections 1 and 2 of the Small Business, Enterprise and Employment Act 2015.[5]

Protecting the account debtor

2.20 As mentioned above,[6] in an assignation, a debtor who acted in reasonable ignorance of an assignation (for example by paying the previous creditor) would be protected. The debtor would not be deemed to know the contents of the new register.

2.21 The assignee would be subject to information duties, so as to ensure that the debtor was not put in a difficult position. For example, where intimation was by the assignee (who may be unknown to the debtor), evidence of the assignation could be demanded.

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[4] SI 2003/3226.
[5] Sections 1 and 2 of the 2015 Act allow regulations to be made which would render bans on assignation in certain contracts ineffective. See para 13.10 below.
[6] See para 2.13 above.

Assignation in security

2.22 Assignation in security of a claim would continue to be competent, that is the transfer of a claim to the assignee, the latter to hold for the purpose of security. Such assignations would, like other assignations, be completed by intimation or by registration.

Some other issues about assignation

2.23 The rule that an assignee may sue in the assignor's name would be abolished.

2.24 The rule that a mandate can constitute an assignation would be abolished.

2.25 The assignation of a secured claim would carry the security too except in so far as otherwise provided in the assignation document, provided that the security was restricted to the claim.

Codification of the law of assignation

2.26 The law of assignation would not be codified. But the possibility of codification in the future would exist.

Chapter 3 The current law and the case for reform

Introduction

3.1 In the Discussion Paper we outlined the current law in relation to outright assignations.[1] While it is unnecessary to restate that in full here, we do consider it essential to give a brief summary of these areas and the shortcomings of the present law which justify reform.

The current law

3.2 Assignation is the method of transferring incorporeal property in Scotland. With the major exception of Dr Ross Anderson's book published in 2008,[2] it is an area which has been relatively under-researched in modern times.[3] "Outright" or "absolute" assignation means assignation not for the purpose of security, but in practice the rules on outright and security assignations are broadly the same.

3.3 The project in general is limited to the assignation of incorporeal moveable property.[4] Thus assignations of leases are not within its scope. It is furthermore restricted to the assignation of claims (personal rights), in other words rights to the performance of an obligation by another person.[5] Normally that obligation will be to pay money. For example, Jane sells goods to Lauren. Jane's right to be paid for the goods amounts to a claim against Lauren and Jane could transfer that claim to a third party, Kevin.

3.4 What the project does not cover is assignation of other types of incorporeal moveable property, such as corporate shares and bonds, negotiable instruments and intellectual property. Here transfer is normally regulated by specialist legislation,[6] which operates on a UK-basis. In contrast, the transfer of claims is for the most part regulated by the common law.[7]

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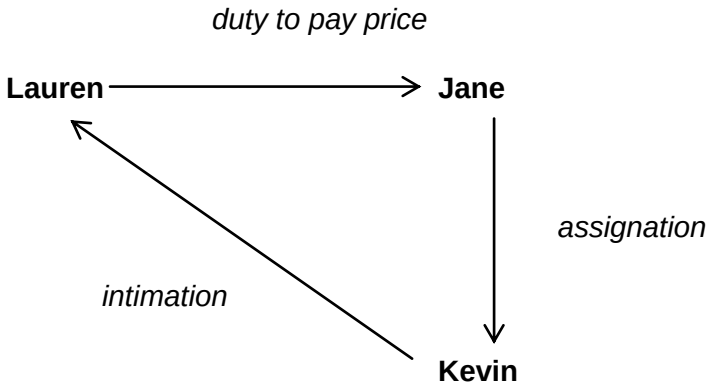
[1] Discussion Paper, Chapter 4.
[2] Anderson, *Assignation*. Dr Anderson was a member of our advisory group.
[3] But see also W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) ch 27; P Nienaber and G Gretton, "Assignation/Cession" in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 787–818; W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007) ch 12; and R B Wood in Ruddy, Mills and Davidson, *Salinger on Factoring* paras 7.39–7.73.
[4] But see paras 4.10–4.11 below.
[5] That is to say the correlative of a claim is an obligation, or in Hohfeldian terms, a duty. See further W N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919). See also Scottish Law Commission, Review of Contract Law: Report on Third Party Rights (Scot Law Com No 245, 2016) paras 3.11–3.13.
[6] Eg the Stock Transfer Act 1963, the Bills of Exchange Act 1882 and the Copyright, Designs and Patents Act 1988.
[7] The main exception is the Transmission of Moveable Property (Scotland) Act 1862, of which we recommend the repeal. See paras 5.29–5.37 below.

3.5 In the assignation of a claim, the transferor (Jane in the above example) is known as the "assignor" or "cedent". The transferee (Kevin) is known as the "assignee" or "cessionary". The debtor (Lauren) is sometimes also known as the "account debtor" or "account party". This is because the assignor is also often a debtor to the assignee (such as in a security assignation) and it is convenient to have a term that distinguishes the debtor in the assigned right.

3.6 In the same way as transfers of land are often preceded by a contract of sale (missives), assignations often give effect to a contract to assign. In terms of the Requirements of Writing (Scotland) Act 1995 writing is neither required for the contract to assign nor the assignation itself. Where writing is used, as is invariably the case in practice, no special words are required,[8] but it must be clear that the grantor of the document intends to assign. The standard wording is "I/We do hereby assign."

3.7 There are normally three stages in the assignation of a claim. First, there is the contract to assign. Secondly, there is the act of assignation, which is typically a formal document. These first two steps are often in practice combined. Thirdly, there is intimation (notification) to the account debtor. It is this final step which actually transfers the claim, in the same way as land is only transferred on registration of the deed of transfer in the Land Register.[9] In the example above, the right to be paid the price is only transferred to Kevin on intimation being made to Lauren.[10] A diagram may assist:



3.8 Intimation is a longstanding feature of Scottish law. Thus, here is Viscount Stair, writing in the seventeenth century: "The assignation itself is not a valid complete right, till it be orderly intimated to the debtor".[11] Hence, it is intimation by means of which the assignee "completes title" to the claim.[12]

3.9 Prior to the passing of the Transmission of Moveable Property (Scotland) Act 1862, normally the only form of intimation was notarial intimation, which required the involvement

[8] See eg *Laurie v Ogilvy* 6 Feb 1810, FC; *Carter v McIntosh* (1862) 24 D 925; *Brownlee v Robb* 1907 SC 1302.
[9] LR(S)A 2012 s 50(2).
[10] In the diagram intimation is made by the assignee, Kevin. As we note in para 3.10, it is also probably competent for the assignor to intimate.
[11] Stair 3.1.6.
[12] See eg *Bank of Scotland Cashflow Finance v Heritage International Transport Ltd* 2003 SLT (Sh Ct) 107.

of five people.[13] The 1862 Act introduced a less cumbersome form of notarial intimation and the following non-notarial method:

> "An assignation shall be validly intimated . . . by the holder of such assignation, or any person authorized by him, transmitting a copy thereof certified as correct by post to such person."[14]

As can be seen, this method requires delivery of a copy of the assignation.

3.10 We understand that nowadays both common law and notarial intimation are rare. The postal method introduced by the 1862 Act is widely used, but not universally. For example, although notice is given by post, a copy of the assignation is not sent. Whether this is an acceptable form of intimation given the pre-1862 stringencies of the common law is unclear. In *Christie Owen & Davies plc v Campbell*[15] the view was stated by the Inner House of the Court of Session that to intimate is simply to inform and that therefore it was unnecessary to use one of the two forms of notarial intimation or the postal method authorised by the 1862 Act. But most of what was said was not essential to decide the case and there was no competing claimant. Thus what is necessary to achieve a valid intimation is unclear. A further point is that while intimation is normally made by the assignee, it is also probably competent for the assignor to intimate, although the law here is also not free from doubt.[16]

3.11 A particularly difficult area in the current law is the assignation of claims which are not yet in existence. For example, a company may wish to raise finance by selling to a finance company the sums due under its future invoices to customers. Thus the claims to be paid the sums would be transferred to the finance company by assignation. But here there is a problem. The identity of future customers may not be known and thus there cannot be intimation to such individuals. Without intimation, there cannot be an assignation.

3.12 Even the doctrine of accretion cannot assist in such cases, although it might help if the identity of the customer can be guessed and there is intimation to him or her following the assignation, but before the claim comes into existence. Accretion of title is a doctrine whereby if X ostensibly conveys to Y a right that X does not have, but X later acquires that right, the right will, at that stage, pass immediately and automatically and without the need for any further act of transfer, from X to Y.[17]

3.13 A fundamental rule of the law of assignation is generally referred to by the Latin tag *assignatus utitur jure auctoris* (the assignee takes the right of the assignor).[18] Thus defences available by the account debtor against the assignor can also be pled against the assignee. For example, Gwyneth owes Henry £1,000 but Henry owes Gwyneth £250. Gwyneth would be entitled to plead the defence known as compensation and set off the £250, so that she

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[13] A procurator (lawyer) acting on behalf of the assignee, a notary public, two witnesses and the debtor. See Anderson, *Assignation* para 6-23.
[14] 1862 Act s 2.
[15] [2009] CSIH 26, 2009 SC 436. And in the Outer House decision of *Promontoria (Ram) Ltd v Moore* [2017] CSOH 88 at para 96 Lord Bannatyne stated that the 1862 Act is "permissive not prescriptive" but without further discussion.
[16] See Anderson, *Assignation* para 6-30.
[17] See *Buchanan v Alba Diagnostics Ltd* 2004 SC (HL) 9, discussed in R G Anderson, "*Buchanan v Alba Diagnostics*: Accretion of Title and Assignation of Future Patents" (2005) 9 EdinLR 457.
[18] See Anderson, *Assignation* ch 8.

only pays Henry £750. Imagine that Henry assigns the £1,000 claim against Gwyneth to Isabel. Gwyneth is still entitled to exercise her right of compensation and only pay Isabel £750. (Provided that the claim for £250 arose before the £1,000 claim was transferred).

3.14 Not all claims can be assigned. For example, the assignation of the right to social security payments is forbidden by statute,[19] as is the assignation of pension rights.[20] Further, the parties to a contract which gives rise to the claim may agree that it cannot be assigned. This is known as an "anti-assignation clause" (or in England, "non-assignment clause"). The Scottish and English courts have both upheld the validity of such clauses.[21] Nevertheless, very recent Westminster legislation allows the Scottish Ministers to declare these invalid in relation to trade receivables.[22]

3.15 It is competent but uncommon to assign part only of a claim. So if Alan owes Beth £100,000, she could assign £60,000 to Charles and the balance she could retain, or could assign it to Dora. But the exact rules are underdeveloped, in particular as to where partial assignation is incompetent.[23] Another area which suffers from a lack of clarity is assignations subject to a suspensive condition, that is to say an assignation which is not to take effect until a future event happens. There is little authority on this matter.[24] There are also uncertainties in relation to the circumstances in which a mandate can operate as an assignation.[25]

The case for reform

3.16 Without a doubt, the part of the law of assignation of claims which is regarded as most unsatisfactory, as well as outmoded and inflexible, is intimation.[26] Most other legal systems do not require intimation as a pre-requisite for transfer.[27] The need for intimation in Scotland is particularly detrimental as regards the invoice discounting sector, which wishes to have the ability to assign claims which do not yet exist.[28] More generally, it is very cumbersome to have to intimate to hundreds if not thousands of separate customers of a business that their invoices have been assigned. The result is that workarounds need to be used, in particular to protect against the risk of the assignor becoming insolvent prior to intimation. One is to write contracts under English law, so that an equitable assignment (which does not require intimation) can be used. This increases the transaction costs of Scottish-based parties, who otherwise would want to use Scottish law. Further, it is not entirely clear following the case of *Joint Administrators of Rangers Football Club Plc, Noters*,[29] which involved the sale of receipts from future season tickets, that the use of

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[19] Social Security Administration Act 1992 s 187.
[20] Pensions Act 1995 s 91.
[21] *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228; *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85.
[22] Small Business, Enterprise and Employment Act 2015 ss 1 and 2. See paras 13.2–13.11 below.
[23] See Anderson, *Assignation* para 2-22 to 2-24.
[24] But see Anderson, *Assignation* paras 10-55 to 10-66.
[25] In other words where A mandates (authorises) B to collect a claim. See Discussion Paper, paras 4.46-4.50.
[26] For a valuable recent account in response to the Discussion Paper, see A McAlpine, "Raising finance over claims to payment and reform to the law of outright assignation" 2015 Juridical Review 275.
[27] See Discussion Paper, Appendix B. See also R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 28.
[28] On the benefits of factoring to businesses, see I Istuk, "The potential of factoring for improving SME access to finance" in F Dahan (ed), *Secured Financing in Commercial Transactions* (2016) 212–234.
[29] [2012] CSOH 55, 2012 SLT 599. See para 15.28 below. See also G L Gretton, "The Laws of the Game" (2012) 16 EdinLR 414 and Lord Reed, "Triremes and Steamships: Scholars, Judges, and the Use of the Past",

English law in such circumstances is effective.[30] Another workaround is to use trust structures,[31] although these too are vulnerable to the problems identified in the *Rangers* case.[32] Moreover, the use of trusts in debt financing transactions principally rests on the authority of one decision of the Inner House of the Court of Session from 1987[33] and a decision of the same court a few years before in 1981 expressed deep concern about the use of trusts in the context of security transactions.[34]

3.17 A further difficulty with intimation, identified above, is that it is not clear exactly what is needed for a valid intimation. Parties to transactions require as much certainty as possible and then current law does not give them this. As we have seen, there is uncertainty in areas other than intimation. Assignations subject to suspensive conditions play an important role in certain commercial transactions[35] but the lack of clear legal authority in relation to these has, we understand, led to disputes in relation to what the law actually is. Other areas where the law is unclear, as mentioned earlier, include the operation of mandates as assignations, and partial assignation.

3.18 Reform is also justified by the current structure of the law of assignation of claims not being user-friendly. The law is a mix of common law (including the institutional writings of the late seventeenth to the early nineteenth centuries, such as those of Viscount Stair, and case law often dating from before 1900) and the Transmission of Moveable Property (Scotland) Act 1862. There is a considerable amount to be said for placing the key rules in modern statutory form. Providing a clear legal framework would be a considerable benefit to business. Moreover, the existing law developed in social and commercial conditions very different from those now prevailing, hence its unsatisfactory state in certain areas.

Previous attempts at reform

3.19 Unlike our law on security over moveables, the law on assignation as such has not hitherto been reviewed. But the Crowther Report,[36] the Diamond Report[37] and the Halliday Report[38] recommended the adoption of a UCC–9/PPSA-type system.[39] Under such a system the rule is that in certain types of case an assignment (the equivalent of an assignation), even where not for the purposes of security, must be the subject of a registered financing

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The Scrymgeour Lecture, University of Dundee, 30 October 2015, pp 9–10, available at https://www.supremecourt.uk/docs/speech-151030.pdf.

[30] See R B Wood in Ruddy, Mills and Davidson, *Salinger on Factoring* paras 7.40–7.44.

[31] See Scottish Law Commission, Report on Trust Law (Scot Law Com No 239, 2014) paras 2.13–2.15.

[32] See Lord Hodge, "Does Scotland need its own Commercial Law?" (2015) 19 EdinLR 299 at 307. See also *Akers (and others) v Samba Financial Group* [2017] UKSC 7 at paras 36 to 37 per Lord Mance.

[33] *Tay Valley Joinery Ltd v C F Financial Services Ltd* 1987 SLT 207. See K G C Reid, "Trusts and Floating Charges" 1987 SLT (News) 113; G L Gretton, "Using Trusts as Commercial Securities" (1988) 33 JLSS 53; D P Sellar, "Trusts and Liquidators" 1989 SLT (News) 143 and W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) ch 4.

[34] See *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111 at 116 per Lord President Emslie: "if a condition . . . designed only to freeze assets of a debtor and to keep them out of other creditor's hands until a particular creditor's debt is paid in full, were to be regarded as constituting a proper trust in accordance with the law of Scotland, and were to be adopted widely by sellers of goods, the damage which would be done to the objectives of the law of bankruptcy and liquidation would be incalculable."

[35] For example, in receivables financing where conditions for the purchase of the receivables have to be satisfied before the assignation is to take effect.

[36] Report of the Committee on Consumer Credit (Cmnd 1017, 1960).

[37] A L Diamond, A Review of Security Interests in Property (Department of Trade and Industry, 1989).

[38] Report by the Working Party on Security over Moveable Property (1986) (available on the SLC website).

[39] See Chapter 18 below.

statement in order to be effective against third parties. In the Discussion Paper we discussed whether a UCC–9/PPSA-type system should be introduced in Scotland.[40] Our view was that it should not be.

Consultation

3.20 Our consultees also opposed the UCC–9/PPSA approach.[41] In Chapter 3 of the Discussion Paper we set out our alternative proposed new scheme for reform of moveable transactions law which was similar to the final version of the scheme now set out in Chapters 2 and 16 of this Report. We asked whether such a scheme would be appropriate. To this question, we received a considerable number of thoughtful responses.

3.21 The vast majority of consultees expressed strong support in principle. Thus the Asset Based Finance Association (ABFA) stated:

> "Invoice finance is becoming one of the most necessary routes to finance for businesses in the UK, whether Scottish or anything else. We feel that the capacity of the Scottish legal system to deal with what is required to enable the offering of invoice finance to Scottish businesses has not kept pace with the developments in other western European legal systems, far less than with English law which has always offered a benign environment for this. This is a reform whose time not only has come but, in fact, came a long time ago and is very much needed."

3.22 It also commented:

> "We see the provisional proposals in the Discussion Paper as, for the first time, giving our members a real basis to work confidently within Scots law."

3.23 CBI Scotland said:

> "We welcome the proposals in the Paper and wish to endorse what we see as an overdue reform of the law, which will improve our members' access to credit in Scotland. We consider that Scots law at present puts difficulties in the path of banks and finance companies offering credit facilities to businesses based in Scotland and, while ways round that have been devised over the years - usually involving the use of English law and the submission to the jurisdiction of the English courts - this has not been a panacea and difficulties remain. This can be more challenging for SMEs than for major corporates, the latter having greater ease of organising their credit lines furth of Scotland than SMEs may do. To put it another way, while we have no mandate for stating that Scots law and English law should be the subject of wholesale harmonisation, it is detrimental to Scottish SMEs competing in what is now a UK-wide market, if not a wider one, to find that their ease of accessing credit is constrained in a way which would not be the case if they were English based."

3.24 The Committee of Scottish Clearing Bankers (CSCB) stated:

> "The CSCB welcomes the principle of reform of the law in this area as it will benefit businesses in Scotland."

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[40] Discussion Paper, Chapter 21.
[41] See further Chapter 18 below.

3.25 The Federation of Small Businesses commented: "From reading your recommendation it does look like this area of Scots Law could well benefit from review from the point of view of the business community." We subsequently met twice with Colin Borland, its Head of External Affairs, Devolved Nations as we worked on this Report. He made the following statement on our scheme for assignation:

> "A lack of cash is fatal to a business – and too much of it is tied up in unpaid invoices. We calculate that 3,500 businesses go bust in Scotland every year while waiting to be paid for work they've already done. Using the sort of simple process proposed to make it easier to assign claims will help smaller firms get cash into the business while perhaps encouraging new players to enter the finance market in Scotland."

3.26 ICAS/R3[42] said: "In principle both organisations are broadly in favour of the proposals considering them to be business friendly."

3.27 The Scottish Council for Development and Industry stated:

> "SCDI has received input from members on the Discussion document. We were especially interested to note that a number of proposals have been made aimed at improving the way in which security over moveables can be created in Scotland. To the extent that such proposals support the more efficient running of commerce or have the effect of encouraging commerce in Scotland (and therefore sustainable economic prosperity) by enabling Scottish-based businesses to raise finance as efficiently as possible, such amendments would be welcomed.
>
> The report usefully highlights certain aspects of Scots law which currently either restrict our ability to effect certain security arrangements equivalent to those elsewhere in the UK and beyond or, are so cumbersome in their requirements as to make their creation impractical. We would support amendments to the law which would have the general effect of removing some of the barriers and restrictions which arguably put businesses in Scotland at a disadvantage."

3.28 As we worked towards completion of this Report we endeavoured to consult other business interests to gauge their views. The scheme was supported by members of ABFA and the Finance and Leasing Association (FLA) who we surveyed.

3.29 The Law Society of Scotland responded to the Discussion Paper and broadly were in favour of the proposed scheme, but had some concerns on points of detail in relation to security rights.[43] When we subsequently consulted on our draft Bill in July 2017 the Society said:

> "We are aware that there is strong support for these changes across the profession and would encourage the Scottish Government to bring forward legislation in this area in line with the Commission's recommendations. The time dedicated by many legal professionals to the Commission's reform project further evidences the importance of the reforms to ensure that the Scottish legal system is fit for purpose and reflects modern commercial realities, in particular in relation to the increasingly electronic nature of communications and commercial transactions. We consider that the Bill as a whole presents a modern, balanced and practical set of reforms that

[42] Institute of Chartered Accountants of Scotland/Association of Business Recovery Professionals.
[43] We address these in Chapter 18 below.

should provide benefits to Scottish businesses – including, and perhaps, especially, SMEs – while protecting consumers."[44]

3.30 In its response to the Discussion Paper the WS Society said:

> "We welcome the Law Commission's Discussion Paper and very much hope that at last some legislative reform will be forthcoming in this area – Scots law is in our view out of kilter with the requirements of the commercial world and the rules in other Western legal systems and reform has been neglected for too long. We applaud the Law Commission's decision to limit its remit in the belief that this may remove controversial issues from the proposals, giving them more chance of enactment."

3.31 There was also support from a number of law firms and practising solicitors. One law firm[45] stated:

> "We believe that the Commission's paper is an excellent starting point in improving Scotland as a commercial jurisdiction."

3.32 Professor Stewart Brymer wrote: "Overall, I would simply like to commend the conclusions of the Discussion Paper. It is time for Scots law to develop in this area."

3.33 When we consulted on an advanced version of our draft Bill in July 2017 there was again strong general support from stakeholders. For example, Dr Hamish Patrick of Shepherd and Wedderburn commented that reform was "very much overdue" and that his firm "very much support[ed] the draft Bill."

3.34 Any broad concerns raised by consultees to the Discussion Paper, for example, the interaction with insolvency law were directed at the part of the scheme dealing with security over moveable property and we deal with these in Chapter 18 below.

[44] See also E Arcari, "Corporate Briefing" (2017) 62 JLSS 29 at 30 which discusses the draft Bill consultation, stating that the Commission "has been working to provide much sought-after reform".
[45] Dundas & Wilson. Now CMS Cameron McKenna Nabarro Olswang.

Chapter 4 Assignation: general

Introduction

4.1 This chapter and the following three chapters address the first strand of the project: outright transfer (assignation) of incorporeal moveable property, in other words transfer of moveable property that does not have a physical presence.

4.2 It is necessary to define the scope more precisely. First, following the Discussion Paper,[1] we do not address the transfer rules for special types of incorporeal moveable property, such as negotiable instruments, company shares and intellectual property. The law governing such property typically has UK-wide application[2] and Scotland-only reforms would not be sensible. Our recommended reforms instead relate to reform of assignations of claims, that is to say rights of one person against another in respect of the performance of an obligation, typically contractual rights to be paid money.

4.3 Secondly, as will be discussed further below, in response to representations from consultees we think it appropriate to cover the assignation of certain claims relating to heritable property (land), in particular assignation of rents, where the current law is also unsatisfactory.

4.4 Thirdly, while for the most part we deal with outright assignation here, our recommendations also apply to assignation in security. For example, a debtor might assign sums owing to it in security to a creditor. The sums would be used by the creditor to pay the debt if the debtor defaults. Where there are special issues relating to assignation in security we will highlight them.

4.5 We begin with a general recommendation:

1. There should be legislative reform of the law of assignation of incorporeal moveable property consisting of the right by a person against another person to the performance of an obligation.

Assignor and assignee

4.6 The traditional term for the party granting an assignation in Scottish law is the "cedent".[3] It originates from the same linguistic source as "cession", another word for assignation.[4] Under English influence, the term "assignor" has also come to be used.[5] This

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[1] Discussion Paper, para 14.2.
[2] For example, the Bills of Exchange Act 1882, the Stock Transfer Act 1963 and the Copyright, Designs and Patents Act 1988.
[3] See, for example, Stair 3.1.4; Anderson, *Assignation* para 1-02 and R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 26.
[4] It is the standard term in France and South Africa today. Note also *cessione* in Italian law.
[5] See, for example, P Nienaber and G Gretton, "Assignation/Cession", in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004) 787 at 788 and *Apollo Engineering Ltd v James Scott Ltd* [2012] CSIH 88 at para 15.

also tends to be the term found in international instruments, such as the DCFR.[6] We consider in addition that this is a more accessible term to the layperson and we therefore use it in the draft Bill. The grantee of an assignation is an "assignee".[7]

4.7 We recommend:

2. The party granting an assignation should be referred to as the "assignor" and the grantee should be referred to as the "assignee".

(Draft Bill, s 1(2)(a) & (b))

Subject matter of assignation: claims

Terminology

4.8 We require also a term for the property that is being transferred by the assignation. As noted above,[8] our scope does not extend to special types of incorporeal moveable property. Rather, we recommend reform in relation to what are conceptually termed "personal rights", in other words the right of one person enforceable against another person to the performance of an obligation. For the reasons set out in Chapter 3 we consider that the law here is unsatisfactory and requires reform.

4.9 For example, Iris owes Joanna £1,000, payable next year. Thus Joanna has a personal (contractual) right against Iris to be paid £1,000. Imagine that Joanna requires money now. She could sell her right against Iris to Kenneth. (This would normally be at a discount, because Kenneth has to wait until next year to be paid.) The way in which the personal right would be transferred would be by *assignation* and under the current law the assignation would be completed by intimation to Iris by Kenneth.[9] Frequently reference is made to "assignation of debts". Thus Joanna can be said to be assigning Iris's debt. But strictly this is incorrect. It is rights which are assigned and not obligations.[10]

4.10 In relation to terminology for our draft Bill there are several options. The first is "incorporeal moveable property", but this can be ruled out as being too wide for the reasons given above.[11] The second is "right", but again this seems too wide.[12] The third is "personal right" but we think that this may cause confusion for the layperson, as it could be viewed as meaning something like a human right to privacy. The fourth is "claim". This is a term which can be used to describe the personal right of one person against another, for example a monetary claim.[13] It has been criticised by Professor Eric Clive on the basis that it can also be used to mean the assertion of a right that may be contested by others, such as an

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[6] DCFR III.–5:102(1).
[7] See, for example, Stair 3.1.4; Anderson, *Assignation* para 1-02. But sometimes the term "cessionary" is used, particularly in older texts. Thus Balfour, *Practicks* 169 (Stair Society vol 21, (1962) edited by P G B McNeill) refers (in Scots) to "cessioner".
[8] See para 4.2 above.
[9] Joanna could intimate rather than Kenneth, but normally it is the assignee who intimates.
[10] Discussion Paper, para 4.15.
[11] See para 4.2 above.
[12] Cf DCFR Book III chapter 5.
[13] Anderson, *Assignation* para 1-02; R G Anderson and J Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 26. It also fits with Hohfeldian terminology.

insurance claim or a damages claim.[14] Nevertheless it has the advantages of brevity and of being narrower than "right". It is also familiar internationally[15] and has a good historical pedigree in Scotland.[16] It is the term which we use in the draft Bill.

4.11 We recommend:

3. The subject matter of the assignation should be referred to as a "claim".

(Draft Bill, s 1(1))

Definition of "claim"

4.12 It is also necessary to define "claim" more particularly. In general terms, it is the right to the performance of an obligation, typically an obligation to pay money.[17] It therefore does not include special forms of incorporeal moveable property, such as intellectual property. A patent is not the right to the performance of an obligation.

4.13 Our original intention was that the scope of our recommended reforms would be limited to claims which are "moveable", in other words in essence do not relate to land. While Scottish property law is ultimately unitary in nature,[18] there is of course a well-established distinction between heritable (immoveable) and moveable property. A project on moveable transactions concerns the latter and not the former.[19] On consultation, however, we received strong support for reform of the law in relation to assignation of rents. In practice, it is common for lenders to take an assignation in security of rents from borrowers who are the landlords of commercial premises, perhaps of a shopping centre with multiple units. It is cumbersome and expensive to have to intimate the assignation to the tenants of all the units. As Dr Hamish Patrick has noted:

> "Assignation of rents [presents] very similar issues in practice to assignation of book debts, particularly for large portfolios of leased properties where there is a frequent turnover of leases in the period during which a fixed security is to operate."[20]

4.14 We have considered these representations from consultees. We have concluded that the assignation of rents is little different from the assignation of the right to any other sums and that there would be great practical benefit in widening the scope of our recommended reforms to include these. In particular, we note that it is not competent for an assignation of rents to be registered in the Land Register.[21] In fact only leases of land exceeding twenty years can be registered there.[22] Short leases (twenty years or less)

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[14] See E Clive, "The Assignment Provisions of the Draft Common Frame of Reference" 2010 Juridical Review 275 at 277. Such claims, however, can be viewed as illiquid claims and are similarly capable of assignation.
[15] See eg the Rome I Regulation, discussed in Chapter 15 below.
[16] See Hume, *Lectures* III,1.
[17] Less usually, it will be the right to the performance of a non-monetary obligation, under which the debtor is obliged to do or not to do something.
[18] Reid, *Property* para 1.
[19] Although in the Discussion Paper we did propose one reform relating to standard securities. See paras 13.34–13.35 below.
[20] H Patrick, "A View from Practice" (2012) 16 Edin LR 272 at 277.
[21] See LR(S)A 2012 s 49 as to what is registrable. Dr Patrick (see previous footnote) moots registration in the Land Register as a possibility but we think that registration in the RoA would be more suitable, not least because only long leases can be registered in the Land Register.
[22] Registration of Leases (Scotland) Act 1857 s 1.

cannot. Therefore our recommendation below, which would allow assignations of claims to be registered in the new Register of Assignations, would not lead to an untidy overlap with the land registration law. We consider, however, that only monetary rights relating to land should fall within the definition of "claim". Allowing assignation of non-monetary rights relating to land to be registered in a register dealing primarily with moveable property seems a step too far. We think that these should be excluded. Ultimately whether a right relates to land has to be determined on a case by case basis. There is a statutory precedent in the Prescription and Limitation (Scotland) Act 1973, under which obligations relating to land are subject to the long negative prescription.[23] A lease of land itself would not fall within the definition of a claim because a lease is not the right to the performance of an obligation.

4.15 Rights under negotiable instruments are rights to the performance of obligations, but as negotiable instruments are a special area of the law, our reforms to the law of assignation should not apply to them.

4.16 We therefore recommend:

4. "Claim" should be defined as:

(a) a right to the performance of an obligation; but

(b) excluding a non-monetary right relating to land or a negotiable instrument.

(Draft Bill, s 42(2))

Debtor

4.17 In the example above,[24] Iris owed Joanna £1,000 and Joanna assigned her claim against Iris to Kenneth. Joanna is the assignor and Kenneth is the assignee. It is also necessary to have a term for Iris. She could be referred to as the "account debtor" or "account party". These terms are used for precision as an assignation might be in security and in such a transaction there are two debtors: (a) the assignor who is granting the assignation in security of a debt; and (b) the debtor against whom the claim being assigned is enforceable. But we consider it possible for the draft Bill simply to use the term "debtor" as the obligant in the claim.[25] This is because the term "assignor" is used to denote the granter of the assignation, albeit in the circumstances of the transaction as a whole that person is also a debtor.

4.18 We recommend:

5. The party against whom the claim is enforceable should be referred to as the "debtor".

(Draft Bill, s 1(2)(c))

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[23] Prescription and Limitation (Scotland) Act 1973, Sch 1 para 2(e). For discussion, see D Johnston, *Prescription and Limitation* (2nd edn, 2012) paras 6.54–6.62.
[24] See para 4.9 above.
[25] As is the case in the DCFR Book III chapter 5.

Writing

4.19 An assignation will often be preceded by a contract to assign. This is typical of the contract/conveyance distinction recognised by property law.[26] Thus in the transfer of land there will be a contract of sale, known as missives, followed by the actual conveyance, known as a disposition. Before the Requirements of Writing (Scotland) Act 1995, the law was that writing was not required for the contract to assign a claim, but was required for the assignation itself.[27] In other words a contract to assign could be entered into orally, but an assignation had to be signed by the assignor. The 1995 Act,[28] implementing a 1988 Report of this Commission,[29] provided that assignations no longer had to be in writing. In the Discussion Paper we expressed the view that with the benefit of hindsight, the Report may not have fully considered the issues.[30] Thus the requirement under the current law to intimate (notify) the assignation to the debtor presupposes that there is a written document that can be exhibited. Without writing it will be difficult to satisfy the debtor that the claim has been transferred. But it can be argued in contrast that an assignee who is so foolish as to take an oral assignation must bear the consequences.

4.20 We asked consultees whether they shared our view that agreements to assign should not be subject to any requirement of form. There was unanimous agreement from the consultees who responded to this question.

4.21 Our next question was whether assignations should require to be in writing. If they should, we asked whether they should require to be signed by the granter only, or by both parties. Writing and signature could be electronic as well as paper-and-ink. Consultees were generally supportive of the need for writing. ABFA noted that as far as its members were concerned "assignations will always be in writing, though that writing may be electronic." Dr Ross Anderson wrote: "No formalities need be required for the contract to assign. But the translative agreement – the assignation as transfer – does, I think, require *some* formality." The Faculty of Advocates, noting the issue of information duties owed by the assignee to the debtor,[31] felt that the balance was tilted in favour of requiring writing. It further noted that if reform is to proceed on the basis of offering registration as an alternative to intimation to the debtor in order to complete an assignation,[32] this presupposes the need for writing. We agree.[33]

4.22 As to the matter of who should sign the assignation, most supported signing by the assignor only. David Cabrelli wrote: "As a unilateral act of the cedent, I'm not sure why the

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[26] In German, the *Trennungsprinzip* or *Trennungsgrundsatz.* See eg K Schreiber, "Die Grundprinzipien des Sachenrechts" 2010 Jura 272–275 and M-R McGuire, "National Report on the Transfer of Movables in Germany" in W Faber and B Lurger (eds), *National Reports on the Transfer of Movables in Europe Vol 3: Germany, Greece, Lithuania, Hungary* (2011) 1 at 20.

[27] McBryde, *Contract* para 12.52 and references therein.

[28] Requirements of Writing (Scotland) Act 1995 s 11(3).

[29] Scottish Law Commission, Report on Requirements of Writing (Scot Law Com No 112, 1988) paras 2.51 and 2.52.

[30] Discussion Paper, para 4.29.

[31] See paras 12.17–12.26 below.

[32] See paras 5.1-5.22 below.

[33] More generally, we note that under the reforms to the French Civil Code which came into effect on 1 October 2016 writing is required for assignment. Article 1322 states: "La cession de créance doit être constatée par écrit, à peine de nullité." (The assignment of a claim must be in made in writing on penalty of nullity.") Writing is also required in the Netherlands. See R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 42.

assignee should be required to sign too." Dr Anderson noted: "Although the deed need be subscribed only by the cedent, the assignee must agree. In the ordinary case, acceptance is implicit and evidenced by acceptance of delivery of the deed of assignation." But John MacLeod argued that both assignor and assignee's signatures should be required as transfer is a bilateral act. In contrast, Brodies and the Law Society of Scotland favoured signature by the assignor only on the basis that execution in counterpart (the ability of the parties to sign separate versions of the document) is not recognised in Scotland. This form of execution is now competent by virtue of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, based on our Report on Formation of Contract: Execution in Counterpart.[34] Nevertheless, we agree with our consultees that there is not a compelling case to change the position under the current law, whereby only the assignor is required to sign. This mirrors the position for dispositions of land, which only require to be signed by the granter.

4.23 As to the methods of signing, subscription in ink is well-understood. The Requirements of Writing (Scotland) Act 1995 refers to this as execution of a "traditional document".[35] In relation to electronic signature, the 1995 Act describes this as "authentication"[36] and under the relevant regulations made under the Act only an "advanced electronic signature"[37] is permissible. This is a sophisticated type of signature "(a) which is uniquely related to the signatory, (b) which is capable of identifying the signatory, (c) which is created using means that the signatory can maintain under his sole control, and (d) which is linked to data to which it relates in such a manner that any subsequent change of data is detectable".[38] The policy reason is to provide the signature with an appropriate level of evidential value and having the definition in regulations enables future-proofing because these can be more easily changed to take account of technological developments.[39] We consider that electronic signature of assignations should be subject to these provisions, but that the Scottish Ministers should have the power to vary this requirement, if, for example, they consider in the interest of facilitating commerce that a less strict approach is justified. In the interests of further flexibility we think that they should have power to amend the meaning of "execution" in relation to a traditional document.

4.24 We therefore recommend:

6. (a) Agreements to assign claims should not be subject to any requirement of form.

(b) Assignations of claims should require to be in writing signed by the assignor only. Writing and signature may be electronic as well as paper-and-ink under the rules in the Requirements of Writing (Scotland) Act 1995. The Scottish Ministers should have power to modify the rules as regards execution and authentication in relation to assignations.

(Draft Bill, ss 1(1), 118(1) & (5))

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[34] Scot Law Com No 231, 2013.
[35] Requirements of Writing (Scotland) Act 1995 ss 1A and 2.
[36] 1995 Act s 9B(2).
[37] 1995 Act s 9B(1) and the Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83) reg 1(1) and (2).
[38] The definition is from the Electronic Signatures Regulations 2002 (SI 2002/318).
[39] K G C Reid, *Requirements of Writing (Scotland) Act 1995* (2nd edn, 2015) 32–33.

Identification of the claim

4.25 The specificity principle is one of the underpinning principles of property law. To transfer property, or create rights in that property which are good against the world, the property must be properly identified.[40] Like many principles, there are qualifications. For example, a floating charge can be granted over a company's "property and undertaking"[41] ie all its assets without the need for further specification. As the company trades, assets will be sold and new assets acquired. The floating charge attaches on the appointment of a receiver or on the company's liquidation to the property owned by the company at that time.[42]

4.26 Clearly, the assignation document should require to identify the claim, because otherwise the document would be meaningless without it stating what is to be transferred. In commercial practice, however, it is normal to assign multiple claims. For example, a company might assign its customer invoices to an invoice discounter. To require every invoice to be individually described in the assignation document would be cumbersome. Moreover, it would be impossible in the case of future invoices where the supply of goods or services which results in the rendering of the invoice has not yet been carried out. The customer may well be unknown too. To facilitate commerce, it should be made clear in the new legislation that the specific description of a claim is not required in the assignation document. Rather, identification by reference to a particular class, for example "all plumbing invoices" or "all plumbing invoices issued in July 2018" should be permissible.

4.27 Moreover, the claim would not be transferred by the assignation until it becomes identifiable as a claim to which the assignation document relates, in other words a claim which falls within the relevant class. The commentary to the relevant DCFR article[43] on this subject gives the following example:

> "S, a furniture manufacturer, supplies furniture to retail shops and department stores. S agrees to sell to F, a factoring company, such of its existing and future rights to payment as are listed in schedules from time to time sent by S to F. There can be effective assignments as to all rights so listed."[44]

4.28 Thus it is the listing of the rights to payment in the schedules and the sending of these to the factoring company which enables the rights to be transferred. Until then there can be no transfer. A broad parallel can be made with the floating charge. For it to be enforced by receivership or liquidation requires the process of attachment at which point it becomes a fixed security encumbering the specific property held by the company at that time.

4.29 It may be helpful to give some further examples. Example 1. A multi-trade company decides to assign all its current invoices[45] for plumbing jobs to a finance company. As long as an invoice is current and is for plumbing work it will be assigned. Example 2. As well as

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[40] See Gretton and Steven, *Property, Trusts and Succession* paras 4.13–4.15.
[41] Companies Act 1985 s 462(1).
[42] Although ordinarily now floating charges are enforced by administration, where attachment is not automatic but at the option of the administrator. See D Cabrelli, "The curious case of the 'unreal' floating charge" 2005 SLT (News) 127. See also A D J MacPherson, *The Attachment of the Floating Charge in Scots Law* (PhD Thesis, University of Edinburgh, 2017).
[43] DCFR III.–5:106. See also the UNIDROIT Principles of International Contracts (2010) article 9.1.6.
[44] DCFR Commentary, p 1028.
[45] A claim of course can exist without an invoice being issued.

assigning current invoices for plumbing jobs, the assignation document also assigns current invoices for jobs in any other areas "to be agreed by the parties". There is subsequently an agreement to include current invoices for electrical work. These invoices are now assigned. The parties should of course careful records of such agreements and schedules of invoices which are to be assigned in case the assignor subsequently becomes insolvent.

4.30 We recommend:

7. (a) The assignation document should require to identify the claim.

(b) Where an assignation document assigns multiple claims these should not require to be individually identified provided that they are identified as a class.

(c) For a claim to be transferred it should require to be identifiable as a claim to which the assignation document relates.

(Draft Bill, ss 1(3) & (4) and 3(1) & (2)(c))

Partial assignation

4.31 Usually a whole claim will be assigned. So if Alan owes Beth £100,000, Beth could assign the claim to Charles. But it would also be possible for her to assign only £60,000 of the claim to Charles. She could retain the rest, or indeed assign it to Dora.[46]

4.32 Partial assignations can be burdensome to debtors. Instead of having to perform to one person, they have to perform to two or more. In the Discussion Paper[47] we set out the rule in the DCFR:

> "(1) A right to performance of a monetary obligation may be assigned in part.
>
> (2) A right to performance of a non-monetary obligation may be assigned in part only if:
>
> (a) the debtor consents to the assignment; or
>
> (b) the right is divisible and the assignment does not render the obligation significantly more burdensome.
>
> (3) Where a right is assigned in part the assignor is liable to the debtor for any increased costs which the debtor thereby incurs."[48]

4.33 We thought that this was a sound approach, and a natural development of our existing law. We asked consultees whether they agreed that the rule should be adopted. Those who responded were all supportive, but several emphasised that the rule requires to be subject to any express provisions in the agreement giving rise to the claim. We agree. The statutory rule should be a default one. In particular it should be possible for the parties

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[46] See Anderson, *Assignation* paras 2-22 to 2-24. In English law, partial assignment is not competent, except in equity. See *In Re Steel Wing Co Ltd* [1921] 1 Ch 349.
[47] Discussion Paper, para 14.71.
[48] DCFR III.–5:107.

to the claim to exclude assignation in part or to limit its competence.[49] If the claim arises from a unilateral undertaking, that is to say a promise, the promisor too should be able to impose conditions which are different from the default rule. Finally, the debtor and assignor should also be able to depart from the default rule that the assignor is liable to the debtor for additional expense arising out of the assignation being in part.

4.34 We recommend:

8. (a) It should be competent to assign a claim in whole or in part.

(b) But if the claim is not a monetary claim, the claim should only be assignable in part where either:

(i) the debtor consents, or

(ii) the claim –

(a) is divisible, and

(b) assigning it in part does not result in its becoming significantly more burdensome for the debtor.

(c) But these rules should be subject to:

(i) any agreement of the parties to the claim or,

(ii) where the claim arises from a unilateral undertaking, any statement by the person giving the undertaking,

in relation to the extent to which the claim is assignable.

(d) Except in so far as the debtor and the assignor otherwise agree, the assignor should be liable to the debtor for any expense incurred by the debtor because the claim was assigned in part rather than in whole.

(Draft Bill, s 6)

[49] See paras 13.1–13.11 below.

Chapter 5 Assignation: completion of title

Introduction

5.1 Completion of title is probably the single area where there is most dissatisfaction with the current law of assignation of claims. For an assignation to be completed, intimation to the debtor is required. Imagine that a company wishes to assign to a factor payments due to it from customers. While the same assignation can be used to assign multiple claims, the individual assignations cannot be completed unless there is intimation of the assignation to each customer. There are thus three stages to the transfer: (a) the contract to assign; (b) the execution and delivery of the assignation document; and (c) the intimation to the debtor. Without intimation there is no transfer. Intimation can be described in property law terms as an "external act", because it publicises the transaction beyond the parties.[1]

5.2 For the assignation of multiple claims, the current law is costly and cumbersome. Undoubtedly reform is needed. The question is how best to effect that. In many other legal systems such as Germany and South Africa, and under international instruments such as the DCFR no external act is required to complete an assignation.[2] This is the position too in English law for equitable assignment,[3] as well as now being the law in France following amendments to the French Civil Code in 2016.[4] In the Discussion Paper, we set out a number of arguments against abolishing the need for intimation and not requiring any external act.[5] In the first place, the assignee is generally going to have to intimate anyway so as to obtain payment from the debtor. But this is not a conclusive argument. In many commercial arrangements, for example securitisations and invoice discounting, the parties wish the assignor to continue to collect the receivables which are assigned but remit the proceeds to the assignee.

5.3 In the second place, dispensing with an external act runs contrary to the publicity principle of Scottish property law, but it is not clear that this argument is as strong for claims as, say, for land. The existence of a piece of land is self-evident, land is permanent and it is in the public interest that its ownership is registered. Claims, however, have no physical existence, are ephemeral and arise without publicity. Moreover, intimation is a very weak form of publicity.[6]

5.4 Thirdly, requiring an external act makes fraud more difficult. The time of the intimation is the time that the debtor is told. Without participation in the fraud by the debtor, the time cannot be falsified. Economic efficiency is also promoted, because third parties can

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[1] But compared with registration the level of publicity is very limited.
[2] See Discussion Paper, Appendix B. See also A F Salomons, "Deformalisation of Assignment Law and the Position of the Debtor in European Property Law" (2007) 5 European Review of Private Law 639 and C Lebon, "Property Rights in Respect of Claims" in S van Erp and B Akkermans (eds), *Cases, Materials and Text on Property Law* (2012) 365 at 387–403.
[3] See eg G Tolhurst, *The Assignment of Contractual Rights* (2nd edn, 2016) ch 4.
[4] See French Civil Code art 1323 (in force 1 October 2016).
[5] Discussion Paper, paras 14.5–14.12.
[6] See R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 34.

check the position by reference to the external act.[7] Thus a would-be purchaser of a claim can inquire with the debtor as to whether any preceding assignation has been intimated to him or her.

5.5 We noted also in formulating our policy that a link requires to be made between assignation of claims and security over claims. This is the approach in the USA, because in practice an outright assignation and an assignation in security can appear indistinguishable. UCC–9 and the PPSAs require registration for the outright assignment of certain types of claim, such as receivables, but not for all types of claim, for *priority* purposes.[8] Under these systems a distinction is drawn between "attachment" (effectiveness between the parties, here the assignor and assignee) and "perfection" (priority in a question with third parties, for example, another assignee of the same claim). Scottish property law does not recognise the attachment/perfection distinction.[9] One of its general principles is that the creation, transfer, variation or extinction of a property right is good against the world or it is good against nobody. We noted also that requiring registration in some cases but not others introduces an element of complexity, which may be undesirable.

5.6 We canvassed the possibility of the way forward in Scotland being to give assignees the option of intimation or registration. The approach would be more flexible than UCC–9 and the PPSAs. The law would thus accommodate both large-scale transactions as well as small one-off transactions. In the former, registration would typically be used. Where the registration option was taken, good faith debtors would be protected. Debtors could not be expected to check the register as to do so would involve time and expense and there is a fundamental principle, which we discuss later,[10] that the debtor is not to be prejudiced by the assignation. We mentioned also an alternative possibility of requiring registration in all cases, but considered that to be unwise, not least because it is not the approach of UCC–9 and the PPSAs.

Consultation

5.7 After setting out the various options, the Discussion Paper put four to consultees:

(1) Keep the current law, which requires intimation, albeit with certain revisions.

(2) Abandon the need for intimation. Transfer should happen solely by the mutual consent of the cedent and the assignee. (But with protections for the account debtor who acts in good faith.)

(3) Adopt something like the UCC approach: abolish the requirement of intimation, and introduce registration for some cases; for other cases transfer would

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[7] But cf A McAlpine, "Raising finance over claims to payment and reform to the law of outright assignation" 2015 Juridical Review 275 at 314.

[8] The UNCITRAL Convention on the Assignment of Receivables in International Trade in its optional annex also contemplates a system of priority by registration. See N O Akseli, "The United Nations Convention on the Assignment of Receivables in International Trade and Small Businesses" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 465 at 475–479.

[9] In the Discussion Paper, we consulted on the introduction of such a distinction as regards security rights. Consultees did not support this. See volume 2 of this Report.

[10] See paras 12.27–12.34 below.

happen solely by the mutual consent of the cedent and the assignee. (But with protections for the account debtor who acts in good faith.)

(4) Maintain the requirement of an external act in all cases, but give the parties the choice of registration or intimation.

We said that we provisionally inclined towards the fourth option.

5.8 Consultees were split on this question. Perhaps unsurprisingly, no-one favoured option (1), keeping the current law. Only David Cabrelli supported option (3). A slim majority of those who responded to the question favoured option (4). These included ABFA, the Law Society of Scotland, the WS Society and several law firms. In contrast, Chris Dun, John MacLeod and Scott Wortley favoured option (2). Dr Ross Anderson originally supported an approach which would replace intimation with a requirement for notarial execution or registration in the Books of Council and Session,[11] but subsequently favoured option (2).[12]

Policy

5.9 We have found this policy matter a difficult one and we have discussed it in some detail with our advisory group. Ultimately we hold to the view to which we inclined in the Discussion Paper and which had most support from consultees. We believe that an assignation should either be completed by intimation to the debtor,[13] or by the assignee registering the assignation in the new Register of Assignations.[14] Our reasoning is developed from some of the above discussion. First, the approach offers flexibility.[15] Undoubtedly factors and invoice discounters would prefer the registration option but one-off transactions could continue to be completed by intimation. The approach also provides continuity with the existing law in still requiring an external act, either intimation or registration. This prevents fraudulent ante-dating.

5.10 Our view is that since registration would be the normal method of assigning multiple receivables and future receivables[16] this would promote economic efficiency because it would allow other parties dealing with the assignor to know whether the claims have already been assigned for financing purposes. Registration, which would be online,[17] should be easy and inexpensive, and therefore we think it is attractive because of the benefits it would offer.

5.11 We are also influenced by the fact that the intimation/registration approach was favoured by ABFA (now part of UK Finance) which represents the factoring and invoice discounting industries in the UK and Ireland. We think that its view commands particular weight here.

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[11] See R G Anderson, "A Critique" (2012) 16 EdinLR 267. See also R G Anderson and J Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24.
[12] Dr Anderson was a member of our advisory group.
[13] On intimation, see paras 5.23–5.63 below.
[14] See Chapters 6 to 11 below.
[15] But for an important counter argument see para 5.19 below.
[16] See paras 5.81–5.97 below. In particular because intimation is impossible in the case of a future claim where the debtor is unknown.
[17] See paras 6.33–6.39 below.

5.12 Moreover, a "no-registration-at-all" approach is unusual when comparative models are considered. UCC–9, the PPSAs, the DCFR and the UNCITRAL Model Law on Secured Transactions require assignations in security by anyone to be registered for the purposes of priority.[18] Indeed, under UCC–9, the PPSAs and the UNCITRAL Model Law registration of the outright assignation of certain types of claim, typically receivables, is also required for these purposes.

5.13 One of the main counter-arguments against registration is that it means a lack of confidentiality.[19] But, in its response on this issue, ABFA viewed the desire for confidentiality as not being strong.[20] Many of the other current ways in which a business obtains funds have to be registered (eg the granting of a floating charge or standard security). And any assignation in security granted by a company has to be registered in the Companies Register under the current law.[21]

5.14 Another concern, highlighted in particular by Scott Wortley, is that because registration is not a requirement for equitable assignments in England, parties would continue to write contracts under English law. But we understand from another member of our advisory group, Bruce Wood, that having to write contracts involving only Scottish parties under English law results in increased costs and that the factoring and invoice discounting industries would prefer the new registration option. Moreover, there is uncertainty as to the efficacy of using English law following the decision in *Joint Administrators of Rangers Football Club Plc, Noters.*[22]

5.15 There is also pressure to reform English law here because the current law is regarded as unsatisfactory. In a Discussion Paper on Secured Transactions Reform published in 2012 the City of London Law Society's Financial Law Committee recommended that consideration should be given to establishing a register of outright transfers of receivables. Its purpose would be to regulate the priority of such transfers against third parties.[23] In other words, the assignment would be effective as between assignor and assignee by mere agreement, but registration would be needed to make it effective against third parties. The draft Secured Transactions Code subsequently issued by the Committee makes provision for the registration of assignments of receivables for priority purposes.[24]

5.16 In 2014 the Secured Transactions Law Reform Project held a seminar to explore and discuss the merits of an online register for all security interests, including outright assignments of receivables.[25] In a Discussion Paper issued in 2017 the group proposed

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[18] In the UK this of course is currently required only for companies etc.
[19] This point is made forcefully in A McAlpine, "Raising finance over claims to payment and reform to the law of outright assignation" 2015 Juridical Review 275 especially at 313–315.
[20] Although elsewhere ABFA stated that there were confidentiality issues with supplying a copy of the assignation as part of intimation. See para 5.46 below. Elsewhere we recommend a power to allow certain information within the assignation document to be redacted. See para 11.46 below.
[21] Companies Act 2006 Part 25. See Chapter 36 below.
[22] [2012] CSOH 55. See para 3.16 above and paras 15.30-15.32 below.
[23] See http://www.citysolicitors.org.uk/attachments/article/121/20121120-Secured-Transactions-Reform---discussion-paper.pdf.
[24] City of London Law Society draft Secured Transactions Code ss 35 and 38.
[25] See http://securedtransactionslawreformproject.org/past-events/.

reform along broadly the same lines as the Committee's draft Code.[26] Registration of an assignment of receivables would be required for priority purposes. We note also that the Security Interests (Jersey) Law 2012 introduced registration of assignments of receivables and that the assignment registered first normally has priority.[27]

5.17 Scottish law could be reformed along similar lines, so that registration is only needed for third party effectiveness. In response to our draft Bill consultation of July 2017 Professor Hugh Beale and Professor Louise Gullifer, two leading experts in English law, strongly advocated this approach and criticised requiring registration for "constitutive" as opposed to priority purposes. They pointed out that assignations, unlike security rights, will generally not engage insolvency law and that requiring registration to effect transfer between assignor and assignee is undesirable. But adopting a "priority" approach would be to introduce "limping"[28] rights, that is to say a right enforceable against some parties and not others. As we have noted already, this approach is contrary to the general principles of our property law. Here is Professor Kenneth Reid, writing on the current law: "What an unintimated assignation cannot do is to transfer the property in a question between [assignor] and assignee but not in a question between the assignee and third parties. That is an impossibility in our law of property. Ownership is either with one party or it is with another party. It cannot be with one party for some purposes and with another party for other purposes. There is no such thing as a personal right of ownership: ownership is necessarily a real right."[29] And in the words of Lord Hodge: "There is no such thing as a 'quasi real right'".[30]

5.18 We think that adopting an approach which runs counter to the underlying principles of our law would be problematic. It is worth observing that this also rules out the following possibility: (a) assignation effective without intimation or (b) assignation effective by registration. If an assignation is effective against the world by mere contract there can logically be no purpose in registering.

5.19 We are aware also that in its 2017 Discussion Paper, the Secured Transactions Law Reform Project criticises the "combined system" of intimation/registration on the basis that a third party cannot solely rely on the register. They have to make enquiries with the account debtor too, which "defeat[s] the purpose of the register".[31] This point has also been made to us directly by Professor Beale and Professor Gullifer. It is perhaps the main counter-argument to the proposition stated above that the intimation/registration approach offers flexibility. While this argument has some force, we think that it overstates the problem. Under our scheme we expect that assignations of receivables in favour of financiers would invariably be registered because this would be much simpler and cheaper than intimations to multiple debtors. Moreover, intimation would not be an option for future claims. We

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[26] Secured Transactions Law Reform Project, Discussion Paper Series: Sale of Receivables (2017) available at https://securedtransactionslawreformproject.org/2017/01/03/january-2017-discussion-papers/. The author is Professor Hugh Beale.
[27] Security Interests (Jersey) Law 2012 art 29(1)(a).
[28] See G L Gretton, "Security over moveables in Scots law" in De Lacy (ed), *The Reform of UK Personal Property Security Law* 270 at 278. In this regard Scottish property law is like German property law and contrasts with English law as well as property law in France and jurisdictions based on French law. Cf French Civil Code arts 1323 and 1324.
[29] K G C Reid, "Unintimated Assignations" 1989 SLT (News) 267 at 269.
[30] *3052775 Nova Scotia Ltd v Henderson* [2006] CSOH 147 at para 11. There are a few exceptions to this. For example, occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Civil Partnership Act 2004 are enforceable against some parties, but not others.
[31] Secured Transactions Law Reform Project, Discussion Paper Series: Sale of Receivables para 3.D.iii.

anticipate that the register would be definitive in such cases. Moreover, a prospective assignee is effectively only at risk from a fraudulent or negligent assignor who does not disclose that the claim has already been assigned by intimation. Our advisory group were of the view that financial institutions factor in such risks. Indeed under the current law there is the risk that the same claim is assigned more than once and an intimation of a rival assignation reaches the debtor first.

5.20 The Secured Transactions Law Reform Project's proposals (and indeed those of the City of London Law Society) are aimed only at receivables. Broadly speaking, this means invoices under contracts for goods, services or incorporeal assets, in other words the types of claim which are usually the subject of factoring and invoice discounting. Other claims are excluded. On the other hand, our recommendations relate to claims in general. We think therefore that there would be merit in giving Scottish Ministers the power to specify types of claim for which registration would be compulsory to transfer the claim. In such cases, intimation would be ineffective.[32] Thus if registration for assignation of receivables effectively became compulsory in England and Wales, albeit there only to achieve priority against third parties, there might be support for this in Scotland too.

5.21 Finally, it should be mentioned that the claim would not necessarily transfer at the time of intimation or registration. It might not yet be identifiable as a claim to which the assignation document relates, it might not yet be held by the assignor or the assignation might be subject to a condition which requires to be satisfied for there to be transfer.[33]

5.22 We recommend:

9. A claim should be transferred on:

(a) the assignation being intimated to the debtor, or

(b) the assignation being registered in the Register of Assignations,

but the Scottish Ministers should have the power to specify categories of claim where registration is required for transfer.

(Draft Bill, s 3(1), (2)(b) & (6))

Intimation: terminology

5.23 We have recommended that it should continue to be possible to complete an assignation by intimation to the debtor (as well as there being the alternative of registration in the RoA). A further question is whether the term "intimation" should continue to be used. In English law and in international instruments the relevant term is "notification".[34] The debtor is "notified" of the assignment. We asked consultees whether "intimate/intimation" should be replaced by "notify/notification". A range of views was expressed here. For

[32] In relation to transfer, but we think that the debtor should be discharged where they perform in good faith to an assignee who intimates but does not register. See paras 12.12–12.15 below.
[33] See paras 4.25–4.30 above and paras 5-73–5.97 above.
[34] See, for example, Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* paras 7.90–7.99; DCFR III.–5:119 and 120.

example, ABFA and the WS Society supported replacement. The Aberdeen Law School disagreed, referring to the fact that "intimations" are read out in churches to convey information to congregations. The Judges of the Court of Session did not think that "the present language creates any real problems." The Law Society of Scotland saw "no compelling reason for such a change." The Faculty of Advocates said that the term "intimation" is established legal terminology, well understood and used without difficulty." Others did not have a strong view.

5.24 In the absence of strong support for change, we recommend:

10. "Intimate/intimation" should not be replaced by "notify/notification".

5.25 As will be seen, however, we recommend below that serving a notice of the assignation on the debtor is a method (indeed the usual method) by which intimation is effected.[35]

Intimation: rationale

5.26 Dr Ross Anderson has identified three rationales for the requirement of intimation to the debtor.[36] The first is to provide *publicity*. But, as we have noted already,[37] this rationale is weak because the level of publicity is low. Only the debtor requires to be told and not the world via a register. The second is *debtor protection*. Until the debtor is informed of the assignation, performance can continue to be made to the assignor. The third is certainty on insolvency and competition, or to put it another way, *priority*. The requirement for intimation enables a court to decide who the creditor in a claim is, when that creditor became the creditor, and to how much that creditor is entitled. In the case of two or more fraudulent assignations of the same debt, intimation determines priority. The first assignee to intimate prevails.[38]

5.27 There has been some tendency in Scotland to conflate the rationales.[39] We think, however, that the better approach is to separate the issues of priority and debtor protection. In the words of Dr Hamish Patrick in his response to the Discussion Paper: "A possible distinction may be drawn between notice as a means of completing title (ie as an external provable priority point) and notice as a means of protecting an account party who pays the assignor. The knowledge and understanding of the account party is irrelevant to the former." For example, the assignee may duly post the intimation by recorded delivery to the debtor, but it may be signed for by someone living with the debtor who does not hand it over. Certainly, the debtor should be protected if performance is made to the assignor, but it would also seem fair that the assignee should prevail against the assignor's creditors in the event of the assignor's insolvency, if the assignee can prove that the intimation was posted.

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[35] See paras 5.38–5.57 below.
[36] Anderson, *Assignation* paras 6-04 to 6-13. See too B Stephen, "Scotland" in W Johnston (ed), *Security Over Receivables: An International Handbook* (2008) para 30.10 and, in an Australian context, G Tolhurst, *The Assignment of Contractual Rights* (2nd edn, 2016) 77–78.
[37] See para 5.3 above.
[38] But arguably subject to the rule on "offside goals". See Anderson, *Assignation* paras 11-04–11-31.
[39] As noted by R G Anderson, "Intimation 1862-2008" (2008) 12 EdinLR 275. See also G Lubbe, "Assignment" in H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006) 307 at 313–318 and R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 Edin LR 24 at 29.

Another example is where the intimation physically reaches the debtor but the debtor does not bother to open the envelope. A third is where the intimation is in small print in the midst of a long document which the debtor does not understand.

5.28 We consider therefore that the law would be improved by having (a) rules on what is necessary for intimation to achieve priority and (b) separate rules on debtor protection. Under the recommendation which we made above,[40] it would also be possible to achieve priority by registration, but the rules on debtor protection would apply in that situation too.

Intimation: current law

5.29 As we saw above, at common law it was necessary for intimation to be carried out notarially, although there were certain exceptions.[41] The Transmission of Moveable Property (Scotland) Act 1862 introduced a less onerous form of notarial intimation as well as a non-notarial method.[42] The latter involves sending a certified copy of the assignation to the debtor by post.

5.30 We understand that the common law notarial method is unknown in practice today, although it remains competent. The less onerous notarial method introduced by the 1862 Act is, we understand, occasionally used, in cases where evidence of intimation is wanted but it is thought that the debtor is unlikely to give a written acknowledgement. In its response to the Discussion Paper, the WS Society commented: "Notarial intimation is a dead letter and only resorted to in a few serious situations."

5.31 The 1862 Act postal method is used, but not always. Often, notice is sent by post, but without a copy of the assignation.[43] In *Christie Owen & Davies plc v Campbell*[44] the court said that to intimate is to inform. If this is correct then none of the three methods just mentioned[45] is necessary. Bruce Wood has written that following this "judicial comment (though perhaps obiter) at Appellate Court level, it seems reasonably clear that intimation can be made without having to give the debtor a copy of the assignation and the debtor's acknowledgement is not required."[46] But since there was no competing third party in the case the effectiveness of the intimation was not tested.[47] It is unsatisfactory that the law should be uncertain, whatever view is taken as to what the law should be.

5.32 While intimation is traditionally made by the assignee, there is also authority for intimation by the assignor being permissible.[48] This is sometimes done in practice and has

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[40] See paras 5.1–5.22 above.
[41] See para 3.9 above.
[42] 1862 Act s 2.
[43] Often the notice is in small print, and often the account party is not asked to make any arrangements to pay the transferee, because the assignor and assignee arrange for the latter to take control of the account into which the account party is paying.
[44] [2009] CSIH 26, 2009 SC 436. *Libertas-Kommerz GmbH v Johnson* 1977 SC 191 is often cited as supporting a low threshold for intimation. But much proceeded on concessions by counsel. See footnotes 30, 38 and 39 in ch 7 of Anderson, *Assignation*.
[45] See para 5.29 above.
[46] R B Wood in Ruddy, Mills and Davidson, *Salinger on Factoring* para 7.57. And see also *Promontoria (Ram) Ltd v Moore* [2017] CSOH 88.
[47] R G Anderson, "A Strange Notice" (2009) 13 EdinLR 194.
[48] Anderson, *Assignation* para 6-30.

the advantage that the assignor is the party with whom the debtor has the existing relationship.

5.33 There are also two equivalents[49] to intimation clearly recognised by the common law. The first is actings of the debtor acknowledging the assignation. For example, if the debtor, having heard informally of the assignation, performs to the assignee then this dispenses with the need for intimation.[50] The second is founding on the assignation in judicial proceedings.[51] For example, the assignee raises an action against the debtor for performance. In *Carter v McIntosh*[52] the production of an assignation in a multiplepoinding was described by Lord Justice-Clerk Inglis as "the best of all intimations, because it was a judicial intimation."[53]

Reform of intimation: general

5.34 The uncertainty in the current law is unsatisfactory and detrimental to the needs of business. We consider that there should be clear modern statutory rules. In discussions with our advisory group we have concluded that there should only be three ways in which an assignation can be intimated. First, this may be done by written notice to the debtor. This would be the usual method and would include electronic notice. The second would be the debtor acknowledging to the assignee that the claim is assigned. This might be by performance by the debtor to the assignee, or a promise to perform to the assignee by the debtor of something which the assigned claim obliges the debtor to perform. The third would be by the debtor being party to judicial proceedings in which the assignation is founded on. We describe these in more detail in the following sections.

5.35 We reflected on whether to retain notarial intimation, given that currently it is recognised at common law and under the 1862 Act. But our advisory group advised that its rarity of use did not justify that. Moreover, there would be nothing to stop our recommended method of intimation by written notice being effected by a notary, although no special status would be given to such an intimation.

5.36 The effect of our reforms would also be that the 1862 Act would no longer be needed and could be repealed.

5.37 We therefore recommend:

11. Intimation of the assignation of a claim should be effected and only effected:

(a) by there being served on the debtor written notice of the assignation,

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[49] Or "equipollents". See Anderson, *Assignation* para 7-11.
[50] See McBryde, *Contract* para 12-96 citing *Inverlochy Castle Ltd v Lochaber Power Co* 1987 SLT 466.
[51] For title to sue all that is required is that the pursuer has a contract to receive an assignation. The assignation can be subsequently produced during the proceedings. See *Morris v Rae* [2012] UKSC 52, 2013 SC (UKSC) 106 at paras 52 to 55.
[52] (1862) 24 D 925.
[53] At 934. But compare Anderson, *Assignation* paras 7-16 to 7-23. See also *Promontoria (Ram) Ltd v Moore* [2017] CSOH 88 at paras 43 and 94 per Lord Bannatyne.

(b) by the debtor acknowledging to the assignee that a claim is assigned, or

(c) by it being intimated to the debtor, in judicial proceedings to which the debtor is a party, that the assignation is founded on in the proceedings.

12. The Transmission of Moveable Property (Scotland) Act 1862 should be repealed.

(Draft Bill, ss 9(1) and 41)

Intimation by written notice to the debtor

By whom?

5.38 As under the current law, written notice would be the usual form of intimation. We have considered whether this should be capable of being given only by or on behalf of the assignee, or also by or on behalf of the assignor. Under general property law principles it is the transferee who completes the steps necessary to transfer property. Thus in the transfer of land the disposition is always registered by or on behalf of the transferee in the Land Register and not by or on behalf of the transferor. This suggests therefore that only assignees should be able to intimate and thus "press the button" to acquire the claim.

5.39 But for assignation there is a strong counter-argument. It is the assignor whom the debtor knows. It is the assignor with whom there is an existing contractual relationship. The assignee on the other hand may well be a stranger. The debtor may well accept the fact of the assignation more easily if he or she is informed of it by the assignor. Intimation by the assignor appears competent at common law[54] and our advisory group strongly supported it being available under the new statutory regime. They commented that the arrangements for intimation would normally be governed by contractual provisions entered into by the assignor and an assignee. Therefore an assignor who "jumped the gun" and intimated prematurely would be liable for breach of contract. Intimation should of course also be competent by means of an agent, such as a solicitor.

5.40 We recommend:

13. Where intimation is by means of written notice to the debtor, it should be possible for the notice to be served by or on behalf of either the assignor or assignee.

(Draft Bill, ss 9(1)(a) and 118(4))

Content of notice

5.41 We asked consultees whether notification, to be effectual, should be in such a form as to bring home its meaning to a reasonable account party. Consultees generally agreed.

[54] See para 3.10 above.

While, as set out above,[55] we have refined our thinking to draw a distinction between intimation for the purpose of priority and intimation for the purpose of debtor protection, we consider that there should be certain pre-requisites for the notice, without which it should fail.

5.42 As under the current law, the notice should be in writing. We think it self-evident that it should include the name and address of the assignor and the assignee, and provide details of the claim (or part of claim) being assigned. The debtor requires this information. Where the notice is sent electronically[56] we think that it should be possible for it to supply an electronic link to a website or portal where the details of the assignation are set out.[57]

5.43 We consider that the notice could be signed by the assignee, assignor or a third party such as an agent, but do not think that this is essential. We understand that factoring of invoices is commonly done by a sticker being added to the invoice informing the debtor of the assignation and that payment should be made to the assignee. The stickers are not signed. We are doubtful of any benefit that would be gained by insisting on such stickers being signed, particularly given the recommendations which we make below, in relation to debtors having rights to information and being protected where the wording of a notice is unclear.[58]

5.44 Where factoring is carried out by means of stickering, the details of the claim will be on the invoice and the details of the assignation on the sticker. We see nothing objectionable in this.[59] It should be possible for the notice to consist of, or be contained within, a single document or more than one document. "Document", in this context, should include an e-mail or an attachment to an e-mail.

5.45 There was support from several consultees for a form of model notice. This would not be compulsory but, if used, the parties would have the comfort of the wording being approved by statute and therefore not open to argument about being insufficiently clear. We agree and the draft Bill provides the Scottish Ministers with the power to prescribe a model notice. This notice is for assignation of monetary claims, which is the paradigm case. But it would be possible to adapt it for an assignation of a non-monetary claim.

5.46 As we have seen, under the postal method in the 1862 Act it is necessary to send the debtor a copy of the assignation. This requirement was roundly criticised by ABFA in its response. It commented that it was "completely impractical" in bulk transfers to give copies of the assignation document to individual debtors as the document may be very lengthy and full of confidential information.[60] The WS Society made similar points. We accept the force of these submissions and agree that a copy of the assignation should not require to be

[55] See paras 5.26–5.28 above.
[56] See para 5.51 below.
[57] We were advised by Burness Paull LLP that portals are often used in certain commercial transactions to provide information to relevant parties.
[58] See Chapter 12 below.
[59] We expect that factors would register assignations in the Register of Assignations too, but there may be circumstances in which they do not or that due to a mistake the registration is ineffective. Therefore ensuring that intimation by stickering results in transfer of the claim remains important.
[60] As to how the desire for confidentiality would operate in relation to registration, see paras 6.21 and 6.28 below.

served with the notice. Instead the assignee should have certain information duties to the debtor, which we set out below.[61]

5.47 We therefore make the following recommendations in relation to content of the notice:

14. A notice of an assignation:

(a) should

(i) set out the name and address both of the assignor and assignee, and

(ii) provide details of the claim assigned (or, in the case of a claim assigned in part, both of the claim and of the part assigned),

but where the notice is transmitted electronically it can provide an electronic link to a website or portal containing this information,

(b) should not require to be executed or authenticated,

(c) if the claim is a monetary claim, may but need not be in a form prescribed by the Scottish Ministers, and

(d) may consist of, or be contained within:

(i) a single document, or

(ii) more than one document,

and "document" should be defined to include an e-mail or an attachment to an e-mail.

(Draft Bill, s 9(3) & (5))

Service of notice

5.48 The notice requires to be given to the debtor. The formal legal word is "served". Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 makes general provision for where a document requires to be served under an Act of the Scottish Parliament. We think that it makes sense to adopt its provisions, but with some amendments.

5.49 There are three methods by which service may be effected under section 26. First, the document can be delivered personally to the debtor. We consider that this rule should apply without amendment.

[61] See paras 12.17–12.26 below.

5.50 Secondly, section 26 enables the document to be sent by a registered or recorded postal service to the "proper address" of the debtor. The "proper address" for bodies corporate is the address of the registered or principal office of the body, for partnerships is the address of their principal office[62] and, in any other case, is the last known address of the debtor. We consider that for the purposes of intimation ordinary post should be permissible rather than recorded delivery being mandatory. We are advised that factors currently use ordinary post and we do not consider that insisting on registered or recorded post is necessary. That said, using ordinary post is more difficult to prove, but that is a risk for assignees to weigh up. Alternatively, we think that it should be possible for a private courier to be used.[63] In current factoring practice intimation will be made to the address of the debtor which appears on the relevant invoice, in other words the address which the debtor has provided to the assignor when contracting with the assignor. We consider that intimation to that address should also be permissible.

5.51 Thirdly, section 26 allows the document to be sent electronically if the person authorised or required to serve the document and the person on whom it is to be served agree in writing (a) that electronic service is possible; (b) as to the form of electronic service; and (c) the address to which the service is made. We consider that a relaxation of this is appropriate for present purposes and that the notice may be transmitted electronically where the debtor has provided the assignor with an e-mail address for electronic communication purposes. Nowadays this will often be the typical route of communication.

5.52 Section 26 also has provisions deeming when service has taken place. In the case of postal service on an address in the United Kingdom,[64] or in the case of electronic delivery, this is 48 hours after the document was sent, unless the contrary is shown. Our present subject is that of priority of assignations (we deal with debtor protection separately in Chapter 12 below). Certainty is an important aspect of that. We therefore consider there should be a more objective rule that postal or electronic service is taken to be effected 48 hours after the notice was sent, unless it can be shown to have been received earlier.

5.53 For example, Laura owes Kirk £1,000. On Monday, Kirk fraudulently assigns the claim twice, first to Max and then to Neil. On Tuesday, Max posts a notice of intimation to Laura. On Wednesday, Neil posts a notice of intimation to Laura. Max's notice will be taken to be served on Thursday and Neil's on Friday. Therefore Max will be successful, unless Neil can prove that Laura received his notice first. The difficulty with the "unless the contrary is shown" formula in section 26, is that it might be proven that neither of the notices actually reached Laura. In these circumstances, we consider that Max should still have effected a valid assignation provided he can prove that he sent the notice (but Laura would be protected by the debtor protection rules discussed below in Chapter 12).

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[62] In its response to our draft Bill consultation of July 2017 ICAS argued that "any established place of business of the partnership" would be preferable. In its response R3 suggested that "principal office" should be defined. We are, however, reluctant to deviate much from the wording used in section 26 of the 2010 Act. Further, our recommendation made below that effective intimation can be made to an address (postal or electronic) provided to the assignor by the debtor should assist here.

[63] Although we note that in *Hoe International Ltd v Andersen* [2017] CSIH 9, the Inner House interpreted a contractual provision to the effect that delivery by means of the DX system used by solicitors qualifies as "personal delivery". Compare *Ener-G plc v Hormell* [2013] 1 All ER (Comm) 1162.

[64] The legislation is silent on addresses outside the United Kingdom, where evidence of the addressee actually receiving the notice is presumably required.

5.54 For electronic intimation, notwithstanding the fact that section 26 provides for a period of 48 hours as to when service is deemed to take place, following discussions with our advisory group and others,[65] we consider that a 24 hour period is more appropriate given the faster speed of electronic communications. Once again it will always be open to the assignee to prove that delivery was effected more quickly. A delivery receipt for an e-mail would be useful evidence in this regard.

5.55 We believe also that it should be open to the debtor and holder of a claim (or a party whose unilateral undertaking (promise) gives rise to the claim) to have some autonomy with regard to the notice provisions. They should be able to specify that only one (or more) of the methods of service is competent. Thus they might decide that the intimation notice may only be sent electronically. They should also be able to specify a particular address to which an intimation notice must be sent, rather than the "proper address"[66] or an address that has been previously provided by the debtor to the assignor.

5.56 Finally, we think that it should be possible for intimation to be made or received by duly authorised representatives of the parties, such as their solicitors.

5.57 We therefore recommend:

15. (a) A notice of an assignation should require to be served:

(i) by being delivered personally to the debtor,

(ii) by being sent by post or by courier either to the proper address of the debtor or to an address for postal communication provided to the assignor by the debtor,

(iii) by being transmitted to an electronic address provided to the assignor by the debtor.

(b) The proper address of the debtor should be:

(i) in the case of a body corporate, the address of the registered or principal office of the body,

(ii) in the case of a partnership, the address of the principal office of the partnership, and

(iii) in any other case, the last known address of the debtor.

(c) Where a notice is posted to an address in the United Kingdom, it should be taken to have been received 48 hours after it is sent unless it is shown to have been received earlier.

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[65] Notably Professor Andrew Murray of the London School of Economics, an expert in information technology law.

[66] See para 5.50 above.

(d) Where a notice is sent electronically, it should be taken to have been received 24 hours after it is sent unless it is shown to have been received earlier.

(e) The debtor and the holder of the claim (or the person whose unilateral undertaking gives rise to the claim) should be able in writing to determine that:

(i) only certain of the above methods of service are to apply as respects the claim, or

(ii) postal service is to be to a specified address of the debtor.

(f) It should be competent for intimation to be made or received by authorised representatives of the parties.

(Draft Bill, ss 9(4) & (6) to (13) and 118(4))

Notice by assignee instructing the debtor to perform to the assignor

5.58 The parties to the assignation may wish, notwithstanding the assignation for the debtor to continue to perform to the assignor. For example, it might be convenient in an invoice finance transaction for the customers of the assignor to make payment to that party rather than to the finance company. The assignor would then arrange for the money to be transferred. Protections such as trusts would be put into place to protect the assignee in the event of the assignor's insolvency. Another situation is project funding where income streams are assigned in security to a bank. But the bank only needs to collect the income if the debtor company defaults. In the meantime the streams should continue to be collected by the company.

5.59 There is currently some doubt in Scottish law as to whether it is permissible for an intimation to instruct the debtor to perform nevertheless to the assignor.[67] We consider that in the interests of commercial certainty the position should be clarified. There seems no compelling reason why the notice, while alerting the debtor to the fact of the assignation, should not be able to state that performance must still be made to the assignor. In the case of money being payable, the assignor may be viewed as the assignee's agent in relation to the collection of that money.

5.60 The inter-relationship between such an arrangement and the law of diligence is one of some nicety. What happens if a creditor of the assignee seeks to arrest in the hands of the debtor, who has been instructed to pay to the assignor? There is an arguable difference between an outright assignation and an assignation in security here, on the basis that in the latter the assigned claim is protected from the assignee's personal creditors.[68] But it is impossible to state the position with certainty. A debtor faced with an arrestment in such a situation would therefore be best advised to seek a multiplepoinding.

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[67] In the Discussion Paper, para 11.14 fn 28 we highlighted Hume, *Lectures* III, 5 and *Hope and McCaa v Wauch* 12 June 1816, FC. For criticism of *Hope* see R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 Edin LR 24 at 29–30.

[68] *Purnell v Shannon* (1894) 22 R 74.

5.61 We recommend:

16. Any rule of law whereby an assignation is rendered ineffective by an instruction by the assignee to the debtor to perform to the assignor should be abolished.

(Draft Bill, s 17(1)(b))

Intimation by the debtor acknowledging to the assignee that the claim is assigned

5.62 Intimation should also be effected by the actings of the debtor towards the assignee, acknowledging the assignation. The debtor, having heard informally of the assignation, might promise to the assignee that performance will be made to the assignee, or performance might actually be made to the assignee.[69]

Judicial intimation

5.63 The final form of intimation should be where the debtor is party to judicial proceedings in which the assignation is founded on. Thus the assignee may sue the debtor for payment of the debt due under the claim which has been assigned. Of course, under the current law it would be normal to expect a notice of assignation to have been sent first and intimation to have already taken place by virtue of that.[70] Even under our recommendations, whereby assignations may be effected by registration in the RoA, we would still anticipate that intimation (to require the debtor to pay to the assignee) would usually take place by notice rather than court action. Nevertheless, we consider that this form of intimation should remain competent as an option. Something may have gone wrong with the notice of assignation (for example, it might never have been sent) which does not transpire until later on. Judicial intimation gives the assignee an alternative means of establishing the priority of the assignation.[71]

5.64 The time at which intimation would take place would be when intimation is made to the debtor in judicial proceedings that the assignation is founded on in those proceedings. It must be remembered that the rule here only concerns completion of the assignation. The question as to whether the debtor should be protected if they still perform to the assignor is a separate one.[72] It would depend on whether the debtor can be regarded as being in good faith.[73]

Co-debtors

5.65 A claim may be enforceable against more than one person. For example, Jules and Jim might borrow £10,000 from Kevin. Kevin would then have a claim against them both for repayment of the £10,000. He might assign that to Lena. The current law as to intimation to co-debtors is expressed succinctly by Professor Reid: "in the case of joint debtors, intimation

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[69] See para 5.33 above.
[70] Anderson, *Assignation* para 7-23.
[71] Where the parties have entered into arbitration rather than judicial proceedings, it would of course be possible for intimation to take place by notice under the recommendations made in para 5.45 above.
[72] See Hume, *Lectures* III, 9 doubting whether mere citation not followed by judicial production of the assignation amounts to judicial intimation. See also Anderson, *Assignation* para 7-17.
[73] See paras 12.1–12.8 below.

to one completes the transfer, but intimation to all is necessary to prevent payment to the cedent".[74] In other words, in our example, if intimation is made by Lena to Jules alone, this will transfer the claim. But if Jim, in ignorance of the assignation, pays Kevin the £10,000 rather than Lena, the debt will be discharged and payment will not require to be made to Lena.[75] We think that this policy is correct and should continue to be the law.

5.66 We therefore recommend:

17. Where there are co-debtors, intimation to any one or more of them should be treated as intimation to all of them.

(Draft Bill, s 9(2))

Priority

5.67 The current law is that priority/ranking of assignations is tied to completion of title. Thus in the case of competing assignations the one which is intimated first wins. In a competition between an assignation and an arrestment, the priority point for the former is the time of intimation.[76]

5.68 In legal systems which do not require intimation the priority point is often the act of assignment (the parties' agreement that the claim is assigned).[77] Another possibility, particularly in relation to certain types of claim such as receivables, is that the act of assignment is only effective as between assignor and assignee, and priority against third parties depends on registration. This, as we have already seen, is the approach under UCC–9, the PPSAs and the systems that they have influenced.[78] But in some other legal systems priority is defeasible and reversible. English law has this approach,[79] and, following it, the DCFR. If, in England,[80] Lorraine assigns to Magda and later to Norman, Magda has priority, because notification is not needed. But if Norman notifies first, priority is reversed. This rule is a priority rule, and not merely a rule for protecting debtors who act in good faith. For example, if Magda notifies Winnie (the debtor) the day after Norman notifies, and before Winnie has acted in reliance on Norman's notification, Norman still prevails over Magda. In the DCFR this rule is explained as part of the doctrine of good faith acquisition.[81]

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[74] K G C Reid, "Unintimated Assignations" 1989 SLT (News) 267 at 269. See also Anderson, *Assignation* paras 7-05 to 7-06.

[75] But Lena would be able to claim the money from Kevin. See Stair 4.40.33 and Scottish Law Commission, Discussion Paper on Recovery of Benefits Conferred Under Error of Law (Scot Law Com DP No 95, 1993) vol 1, para 3.59.

[76] Stair 4.35.7 expressed the view that there had to be a discernible gap of three hours between the intimation and the arrestment for one to have priority over the other, but as Anderson, *Assignation* para 6-37 states, under reference to *Wright v Anderson and Laurie* (1774) Mor 823, *Cameron v Boswall* (1772) Mor 821 and *Gibson & Balfour v Goldie* (1779) Mor 824, the better view is that priority can be by minutes and hours if the times can be clearly established.

[77] See eg German Civil Code arts 398 and 399; Swiss Civil Code art 164 and French Civil Code art 1323.

[78] See para 5.5 above. See eg the Security Interests (Jersey) Law 2012 s 29 and the UNCITRAL Model Law on Secured Transactions arts 1 (kk) and 29.

[79] Although, as discussed at paras 5.15–5.16 above there are proposals to reform English law to require registration of assignments of receivables for priority against third parties.

[80] Under the rule in *Dearle v Hall* (1828) 3 Russ 1. For discussion, see Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* paras 14.09–14.20.

[81] Cf Sale of Goods Act 1979 s 24. For criticism, see E Clive, "The Assignment Provisions of the Draft Common Frame of Reference" 2010 Juridical Review 275 at 282. See also, for discussion of a similar approach taken in

5.69 This approach tends to produce more complex cases than Scottish law. Take the following example,[82] assuming that the DCFR rules apply. Deirdre owes money to Chris. Chris assigns the claim for its repayment to Alastair on 10 May. He also, fraudulently, assigns to Aileen on 20 May. Aileen intimates on 25 May, and Alastair on 30 May. Under the DCFR rules, title passes to Alastair on 10 May, and then passes from him to Aileen on 25 May. What if Fraser, a creditor of Chris, arrests in the hands of Deirdre on 15 May? Then it would seem that Fraser prevails over Aileen (because he arrests before Chris assigns to her). But Aileen prevails over Alastair (because she notifies before he does). And Alastair prevails over Fraser (because when Fraser arrests, title has already passed from Chris to Alastair). Perhaps this priority circle could be resolved, but in the Discussion Paper we inclined to think that it was better to have a simple rule that priority is determined by priority of completion of title, and that this should be so regardless of *how* title is completed (with no external act, by means of intimation, by means of registration, etc). The rule would not be about the position of the debtor, which we deal with separately below.[83]

5.70 Almost all the consultees who responded to our question on this matter agreed that priority should continue to be determined simply by date of completion of title. This included the Faculty of Advocates, the Judges of the Court of Session and the Law Society of Scotland. Thus under our scheme if there are two competing assignations the assignee who is first either to intimate to the debtor or to register the assignation in the RoA would prevail. We are of the view that express provision is not required in the draft Bill because once an assignation is completed then it automatically follows that any competing assignation cannot be completed. If, in contrast, our policy were that a subsequent assignation in certain circumstances could trump an earlier one (as is the position under English law or under the DCFR) express provision would be required.

5.71 One final matter worth noting is that Scottish law, unlike English law does not recharacterise assignations (assignments) in security as security interests.[84] Like assignations other than for security purposes, they are *transfers*. Thus once a claim has been assigned in security to one assignee, it cannot be effectively assigned in security to a second assignee. There can be no "ranking" of assignations in security.

5.72 We recommend:

18. Priority of assignations should continue to be determined by time of completion of title.

Assignation subject to a condition

5.73 In certain transactions the parties wish to make an assignation subject to a condition, so that it does not take effect until that condition is satisfied. For example the parties may want to postpone the transfer of a claim to a *certain* date in the future rather than have transfer take place on intimation/registration. Sometimes it will be *uncertain* whether the

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the Principles of European Contract Law (PECL), a predecessor of the DCFR, G Lubbe, "Assignment" in H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006) 307–330.

[82] See also Discussion Paper, para 14.31.

[83] See paras 12.1–12.8 below.

[84] See generally Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* ch 4.

condition will ever be fulfilled. For example, the assignation might be conditional on the grant of planning permission or on the assignee getting married. The latter type of condition is traditionally referred to as a "suspensive condition".[85]

5.74 A suspensive condition can be contrasted with a "resolutive condition", the effect of which is to bring something to an end. Resolutive conditions in assignations only place an obligation on the assignee to re-assign (or "retrocess") the claim to the assignor if the condition is satisfied. The claim is not retrocessed automatically.[86]

5.75 It may be worth stressing that our concern here relates to a condition relating to the assignation. The claim itself may be the subject of a suspensive or resolutive condition. This matter is discussed later.[87]

5.76 While, in principle, suspensive conditions in assignations appear to be competent, the common law here is under-developed[88] and we understand that this has led to disputes in practice. We therefore asked consultees whether there should be legislative clarification of the effect of a suspensive condition in an assignation. There was support for this from most of the consultees who responded and universal support from the practitioner respondents. John MacLeod, however, argued that transfer subject to a suspensive condition was a general principle of property law and a rule in legislation for assignation might create doubt in relation to the transfer of other kinds of property.

5.77 Our view is that given the relative lack of authority in relation to assignation, a statutory rule would be helpful. This would confirm that an assignation may be made subject to a condition which requires to be satisfied before the claim is transferred. Such a condition might be suspensive but would not have to be. Thus it might relate to something happening which is certain to happen, or to a period of time elapsing during which something must not happen, for example the assignee failing to comply with certain obligations.

5.78 We have been informed that one of the disagreements in practice is whether the condition requiring to be satisfied can be written into a document other than the assignation itself. We consider that as the assignation is the conveyance it should require to go in the assignation document. It should be possible, however, for the condition to make reference to another document. Thus the assignation may be provided to be dependent on terms set out in a separate document being satisfied.

5.79 It may be that a debtor does not know that the condition has been satisfied (purified) and therefore performs to the assignor rather than the assignee. In such circumstances the debtor should be protected under the good faith rules set out in Chapter 12 below.

5.80 We recommend:

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[85] See eg Stair 1.3.7 ("the condition must necessarily be uncertain, either as being in the power of man's will, or as an accidental event"). See also H L MacQueen and J Thomson, *Contract Law in Scotland* (4th edn, 2016) paras 3.60–3.62.
[86] See Anderson, *Assignation* para 10-57.
[87] See paras 5.84–5.85 below.
[88] See Anderson, *Assignation* paras 10-55 and 10-56.

19. (a) It should be competent to make the assignation of a claim subject to a condition which must be satisfied before the claim is transferred. Such a condition could depend on something happening or not happening (whether or not it is certain that that thing will or will not happen) or on a period of time elapsing during which something must not happen (whether it is certain or not that the thing will happen at some time.)

(b) Any such condition should require to be specified in the assignation document.

(c) It should be permissible for the specification to include reference to another document the terms of which are not reproduced in the assignation document.

(d) The claim should not transfer until the condition is satisfied.

(Draft Bill, ss 2 and 3(1) & (2)(d))

Assignation of future and contingent claims

General

5.81 Due to the requirement of intimation, it is impractical under the current law to assign claims which do not yet exist at the time the assignation is granted. Thus imagine that a business assigns its future invoices to a financing company. As regards each invoice, the assignation is only effective upon the invoice being issued and there being intimation to the individual customer. This is cumbersome. Where intimation is not required, as is the case under other legal systems and international instruments, the assignation of as-yet non-existent claims is facilitated. But the area is a difficult one both conceptually and in policy terms.

5.82 Before going any further, we need to say something about terminology. This is best done by means of examples. Say Ann owes Bernie £10,000 but the debt is not repayable until 2020. This is a claim which already *exists*, albeit payment cannot be demanded until 2020.[89] Bernie could assign to Colin and Colin could complete the assignation today by intimating to Ann. But Ann's obligation to repay can be referred to as a "future obligation" since it is not until 2020 that she must perform.[90] And in turn the claim might be described as a "future claim" because performance is not required until a future date. Despite this, the assignation of the claim to Colin does not present particular difficulties because intimation can be made to Ann. Both she as debtor and the claim itself are readily identifiable.

5.83 Contrast the following. A plumbing company assigns its invoices present and future to a factor on 1 February. On 1 March the company carries out work for Mrs Jones and bills her. At the time of the assignation nothing was owed by Mrs Jones. No work had been

[89] In the words of Stair 1.3.7: "But obligations to a day as such as are presently binding, but the effect or execution thereof is suspended to a day."
[90] MacQueen and Thomson, *Contract Law in Scotland* para 3.60; W M Gloag and R C Henderson, *The Law of Scotland* (14th edn, by Lord Eassie and H L MacQueen, 2017) para 3.12.

carried out for her. There was no claim and indeed no identifiable debtor. Through the lens of the assignation such a claim can be described as a "contingent claim".[91] It depends on the work being carried out for Mrs Jones. Thus the work may have been to carry out a repair to her shower. But for her shower breaking no work would have been needed and there would have been no invoice. Given that the claim does not arise until after the assignation, it is also possible to refer to such a claim as a "future claim". This is the approach which was taken in the Discussion Paper under reference to the DCFR[92] and indeed by a number of Scottish commentators.[93] In this Report, however, we do not use the term in this way because of the potential for confusion with future obligations, as described above.

5.84 A further example of a contingent claim is a claim which is the subject of a suspensive condition. For example, Gordon promises to give Harriet £1,000 if she gets a place on a particular university course. Harriet assigns her right to Ian, to whom she is indebted. The claim only arises if Harriet obtains the place. Only then can it be transferred to Ian.

5.85 The position as regards resolutive conditions is different. Suppose that the Ann/Bernie contract referred to above had this clause: "But Ann's obligation to repay shall be extinguished if, before 2020, Ann dies." The claim is still assignable but if Ann dies before 2020 Colin will be owed nothing from Ann's estate under the *assignatus utitur jure auctoris* rule.[94] Ann's obligation relates to her contract with Bernie and not the transfer of Bernie's claim to Colin by means of the assignation which is effective immediately.

5.86 Another example familiar in practice of a contingent claim is an unvested right under a will or trust. Thus Nicola may be entitled to a sum of money as a beneficiary under a will if she survives the testator by six months. The right remains unvested until the six months passes. But it may be that the right can be assigned by intimation to the executor and this case is less problematic than the assignation of a claim which does not yet exist.[95]

5.87 It is of course possible to contract to sell a contingent claim, in the same way as a baker might contract to sell a birthday cake that has not yet been baked. Similarly, copyrights which do not yet exist (because, for example, the relevant book has not yet been written or relevant picture has not yet been painted) are commonly assigned.

Accretion

5.88 Under the current law it is arguable that an assignation of a claim which does not exist at the time that the assignation is granted can be completed by a doctrine known as accretion. It provides that if X ostensibly conveys to Y a right that X does not have, but X subsequently acquires that right, the right will at that stage pass immediately and automatically without the need for any further act of transfer, from X to Y.[96] In determining

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[91] See generally G L Gretton, "The Assignation of Contingent Rights" 1993 Juridical Review 23.
[92] See Discussion Paper questions 15 and 16; DCFR Book III and Commentary, p 1027.
[93] See S Mills, N Ruddy and N Davidson, *Salinger on Factoring* (5th edn, 2017) para 7-49 (R B Wood); Anderson, *Assignation* paras 11-52 to 11-53 and A McAlpine, "Raising Finance over Claims to Payment" 2015 Juridical Review 275.
[94] See paras 12.27–12.32 below.
[95] See Gretton, "The Assignation of Contingent Rights" (n 91 above).
[96] On accretion generally see Reid, *Property* paras 677-679. For the applicability of the doctrine to assignations see Anderson, *Assignation* ch 11.

whether it can apply to assignation, we noted in the Discussion Paper that different types of case must be distinguished.[97]

5.89 The first type of case is where a claim exists against Z and is assigned by X to Y, who intimates to Z. But X was not in fact the holder of the claim. The holder was A. The assignation is therefore ineffective. But if A later assigns to X, then Y's title will be validated by accretion.[98] Of course, cases of this sort are unusual.

5.90 Whereas in the first type of case the claim existed, but was assigned by the wrong party, in the second type of case the claim does not exist at the time of the ostensible assignation. J assigns to K a claim that does not exist. This possibility itself sub-divides into two sub-cases.

5.91 The first sub-case is where the identity of the account party is not known and so no intimation is made. Here accretion cannot operate. An essential requirement of accretion is that the original transfer is fully valid in all respects *except* that the granter has no title. But if there is no intimation, there is not even a *purported* transfer.[99]

5.92 The second sub-case is where a good guess can be made as to the identity of the account party. For example, a company, J, often sells goods to a buyer, L. J assigns its claims against L in favour of K. Intimation is made to L, in respect of claims that it does not yet owe but may hereafter owe. If, later, a debt does arise, owed by L to J, does accretion operate so as to validate the assignation? Whereas the law is clear in the first sub-case (above), it is not so clear in this second sub-case.[100] We inclined to the view in the Discussion Paper that an assignation of a claim which does not yet exist cannot be completed by accretion on the basis that at the time intimation is made the person to whom it is made is not the account party.[101] This is all unsatisfactory for commerce, which desires certainty and the ability to assign claims arising subsequent to the granting of the assignation.

Reform

5.93 The current law in Scotland in relation to the assignation of claims arising after the assignation is granted contrasts unfavourably with the position in England and Wales, and elsewhere, where such assignations (assignments) are competent in equity.[102] Clearly our earlier recommendation that registration should become an alternative to intimation for completion of an assignation should assist matters. But if we were to recommend that the details of not only the assignor and assignee, but also the account debtor, should be

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[97] Discussion Paper, paras 4.60–4.63.
[98] Y's title would also be validated if A were to convey to Y.
[99] *Buchanan v Alba Diagnostics Ltd* 2004 SC (HL) 9 has *dicta* about accretion in relation to assignations of intellectual property rights. But these dicta seem to overlook the fact that accretion cannot operate unless there has been a purported transfer. See R G Anderson, "*Buchanan v Alba Diagnostics*: Accretion of Title and Assignation of Future Patents" (2005) 9 EdinLR 457.
[100] Cf *Bank of Scotland Cashflow Finance v Heritage International Transport Ltd* 2003 SLT (Sh Ct) 107, on which see the Discussion Paper, para 4.63.
[101] Discussion Paper, para 4.65.
[102] *Tailby v Official Receiver* (1888) 13 App Cas 523.

registered then the scope for assignation of future rights would remain limited. We do not recommend this.[103]

5.94 We drew attention in the Discussion Paper to the relevant DCFR provision. It provides that "a future right to performance may be the subject of an act of assignment but the transfer of the right depends on its coming into existence and being identifiable as the right to which the act of assignment relates."[104]

5.95 Accordingly we asked consultees whether the law should allow a future claim[105] to be assigned (subject to the right in due course coming into being and being identifiable as the claim to which the assignation relates). All the consultees who responded to this question agreed. The WS Society said that this is "the single reform of the law which is probably the one most fundamentally required to make Scots law a usable system for invoice finance and securitisations." ABFA said that because of the current law "much of the Scottish business [carried out by our members] is artificially channelled through English law to avoid Scots law difficulties." Brodies and the Law Society of Scotland said that the reform would "greatly facilitate security arrangements in respect of for example multi-let investment properties and securitisations of trade and autoloan receivables."

5.96 As well as the claim coming into being and being identifiable as the claim to which the assignation relates it must be necessary of course for the assignor to become the holder for otherwise it cannot be transferred by the assignation.

5.97 We therefore recommend:

20. It should be competent to assign a claim which does not exist at the time that the assignation document is granted, but for the claim to be transferred it should require to have come into being and be held by the assignor.

(Draft Bill, ss 1(5) and 3(2)(a))

5.98 In practice we expect that invoice financing would almost always proceed by means of registration. This is because it is invariably of claims arising subsequent to the assignation and therefore the details of account debtors are not known. Intimation is not possible.[106] The RoA would therefore be a near-definitive source of information as to whether invoice financing has taken place.

5.99 We mentioned above the uncertainty as to whether the doctrine of accretion was relevant to the assignation of claims which arise subsequent to the assignation. We

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[103] See Chapter 7 below.

[104] DCFR III.–5:106. See also French Civil Code art 1323(3): "Toutefois, le transfert d'une créance future n'a lieu qu'au jour de sa naissance, tant entre les parties que vis-à-vis des tiers." (However, the transfer of a future right takes effect only on the day when it comes into existence, as between the parties and as regards third parties.)

[105] In the sense of a claim that is not in existence when the assignation is granted. Cf para 5.80 above.

[106] Until the debtor becomes known, but intimation made at that point may not be sufficient to achieve priority, in particular where the assignor has become insolvent. See N O Akseli, "The United Nations Convention on the Assignment of Receivables in International Trade and Small Businesses" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 465 at 478–479.

consider that the law should be made clear and that it be provided that it has no application here.

5.100 We recommend:

21. In relation to the transfer of claims which arise after the assignation document is granted, any rule of law as to accretion should be disregarded.

(Draft Bill, s 3(3))

Restriction in respect of wages or salary where assignor is an individual

5.101 In the Discussion Paper, we noted that there are existing statutory provisions preventing the assignations of pensions and social security rights.[107] We asked whether there should be a general restriction on the ability of consumers to assign future rights.[108] In the context of reforming the law to make it easier to assign future rights, our concern was whether greater protection for consumers was required. A restriction on the ability of consumers to assign future rights was generally supported by consultees. But several law firms commented that care should be taken not to interfere with financial planning transactions where, for example, contingent rights under wills and trusts are assigned.

5.102 We have therefore decided to recommend a more limited rule to prevent individuals from assigning their salary or wages.[109] People should not be able to assign away their core income. Attempting, however, to make clear definition in this regard is not easy. There is a comprehensive definition of "wages" in section 27 of the Employment Rights Act 1996, but as a matter of general usage the term is not applied in relation to payments to officeholders such as Ministers and judges. We consider, however, that it would be helpful to draw on section 27 in part to make it clear that related income, namely fees, bonuses, commissions, holiday pay and other emoluments are to be included in the prohibition.[110] On one view, these go beyond core income but we are minded to take a wider rather than narrower approach. Existing statutory restrictions on the assignation of income would also continue to apply,[111] including the prohibitions in relation to pensions and social security payments. In addition, however, we consider that the new prohibition should also apply to expenses payable to the individual in relation to the individual's employment and redundancy payments.[112]

5.103 We recommend:

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[107] Discussion Paper, paras 18.40–18.41. See the Pensions Act 1995 s 91 and Social Security Administration Act 1992 s 187. See generally Anderson, *Assignation* para 10-30.
[108] Discussion Paper, para 14.68.
[109] For a broadly similar rule in relation to the granting of security, see the DCFR IX.–2:107. See too the Dutch Civil Code art 7:633(1).
[110] Employment Rights Act 1996 s 27(1)(a). Much of the rest of the definition concerns social security payments, an area in which some provision has already been made. See para 5.92 above.
[111] For example, the Merchant Shipping Act 1995 s 34.
[112] Notwithstanding the Employment Rights Act 1996 s 27(2). The question of whether "expenses" was included within the definition of salary and wages was raised by R3 in their response to our draft Bill consultation in July 2017.

22. (a) Individuals should be prohibited from assigning a claim in respect of wages or salary, including any fee, bonus, commission, holiday pay or other emolument referable to their employment, or to expenses or a redundancy payment.

(b) This rule should be without prejudice to any other enactment.

(Draft Bill, s 8)

5.104 We also gave careful consideration as to whether such protections should be extended to sole traders to prevent them from assigning future invoices (perhaps below a certain threshold). This was a matter which we found difficult. There is arguably little difference between an employee plumber with a spouse and family, and a sole trader plumber with a spouse and family. Both require income to support them. We discussed the issue in some detail with our advisory group and with insolvency experts. The difficulty with such a rule is that sole traders would be debarred from using invoice financing, which we understand can be of great commercial benefit to them. We think that a threshold provision (for example, a sole trader could not assign in any year the first £25,000 of invoices issued) would be too complex to operate.[113] In practice we were told that invoice finance providers would not enter into an arrangement under which someone assigned away all their future invoices. And in cases where someone was duped to do so, common-law remedies such as fraud and undue influence could be invoked. We have therefore concluded against extending the prohibition to sole traders.

Assignation of subsequently-arising claims and commencement of insolvency

5.105 There remains to be discussed the issue of the effect of the assignor's insolvency on the assignation of a claim which comes into existence subsequent to the grant of the assignation. In the Discussion Paper we noted the DCFR provision that: "an assignment of a right which was a future right at the time of the act of assignment is regarded as having taken place when all requirements *other than those dependent on the existence of the right* were satisfied."[114] The commentary to that provision notes: "The main policy reason behind the rule . . . is that in the case of an act of assignment of future rights, the assignee, who will very often have paid for the rights, should be preferred to the creditors of the assignor."[115] Nevertheless, this seems to involve re-writing the past. For example, X assigns to Y an as-yet-non-existent claim against Z on 1 May. The claim comes into existence on 1 November. The provision just quoted seems to mean that Z is deemed to have owed the money to Y as from 1 May.[116] We thought that this was unsatisfactory. We therefore asked consultees whether they agreed that the transfer of a claim should not be deemed to take place before the claim comes into being.

5.106 Consultees generally agreed. The Law Society of Scotland, however, also made the valuable point that problems will arise in the event of the supervening insolvency of the assignor and that a rule should be formulated in relation to that. Insolvency law is a huge

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[113] For example, the net income to the sole trader from the gross invoice will vary from case to case.
[114] DCFR III.–5:114.
[115] DCFR Commentary, p 1053.
[116] Cf DCFR IX.–4:101 which allows security rights to have a priority that is *earlier than their creation*. This approach derives from UCC–9/PPSAs.

and complex area as regards which this project has generally taken the approach that it is outwith its scope.[117] We therefore did not consult on insolvency law in the Discussion Paper. This leaves a difficulty in formulating the rule as to the effect of insolvency on the assignation. We have been assisted in this regard by our advisory group and insolvency experts.

5.107 As a result of these discussions, we have concluded that the assignation of certain subsequently-arising claims should not be rendered ineffective as a result of the claim coming into being after the commencement of an insolvency process. There should be a direct rule to this effect, rather than the fictional back-dating of the DCFR. The types of claims which we consider should continue to be transferred to the assignee should be claims to income deriving from property. For example, if someone assigns the future royalties from a patent or the future rents under a lease, the assignation should continue to be effective. But this rule should not apply to any income attributable to anything agreed to by, or done by, the assignor after the assignor becomes insolvent. For example, if John is a self-employed chauffeur with a limousine who assigns future invoices in respect of driving jobs, any invoices in respect of jobs carried out after he is sequestrated would not be assigned. While these derive from the use of his vehicle, they required work, namely driving, on his part. In a similar vein, claims in respect of income from property which is not existence at the time the assignor became insolvent should not be transferred. For example, Joan assigns the royalties from her books. She writes a new book after she becomes sequestrated. The royalties from that book would not transfer.

5.108 There are many different types of insolvency (and similar) processes both within Scotland and elsewhere. Moreover, there are variations within some of the processes. For example, not all liquidations are "insolvent liquidations". Deciding on exactly which processes should be subject to the above rules is not an easy matter, not least without the benefit of formal consultation. We have therefore included in our draft Bill a relatively comprehensive list of Scottish processes.[118] But we have given the Scottish Ministers the power to amend the provisions by secondary legislation, for example to add further cases such as equivalent processes in other jurisdictions. We would expect the Scottish Government to consult specifically on this matter as part of any future consultation on this Report.

5.109 We recommend:

23. (a) An assignation granted before the assignor becomes insolvent should be ineffective as regards a claim if the assignor is insolvent at the time of becoming the holder of the claim.

(b) An assignor who is an individual, or the estate of which may be sequestrated, becomes insolvent when:

(i) the assignor's estate is sequestrated,

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[117] See para 1.26 above.

[118] We have included only administrative receiverships as receiverships over only a part of the assignor's property are different in nature to an insolvency process.

(ii) the assignor grants a trust deed for creditors or makes a composition or arrangement with creditors,

(iii) a voluntary arrangement proposed by the assignor is approved, or

(iv) the assignor's application for a debt payment programme is approved under section 2 of the Debt Arrangement and Attachment (Scotland) Act 2002.

(c) An assignor which is not an individual becomes insolvent when:

(i) a decision approving a voluntary arrangement entered into by the assignor has effect under section 4A of the Insolvency Act 1986,

(ii) the assignor is wound up under Part 4 or 5 of the 1986 Act or under section 367 of the Financial Services and Markets Act 2000,

(iii) an administrative receiver, as defined in section 251 of the 1986 Act, is appointed over all or part (being a part which includes the claim) of the property of the assignor, or

(iv) the assignor enters administration, ("enters administration" being construed in accordance with paragraph 1(1) and (2) of schedule B1 of the 1986 Act).

(d) The above rule should not apply as regards a claim in respect of income from property but only in so far as the claim:

(i) is not attributable to anything agreed to by, or done by, the assignor after the assignor becomes insolvent, and

(ii) relates to the use of property in existence at the time the assignor became insolvent.

(e) The Scottish Ministers should have power to amend the definition of "insolvent".

(Draft Bill, s 5(1) to (4), (7)(a) & (8))

Effect of discharge in sequestration etc

5.110 The above rules deal with the effect of the *commencement* of an insolvency process on the assignation of a claim arising subsequent to the assignation. There is also the question of what is to happen after the end of an insolvency process. In the case of a winding up (liquidation) the assignor company will cease to exist so it can no longer hold any claims, future or otherwise. In practice, we understand that administrations and receiverships typically end in a winding up, although not always. The question is most

pressing as regards a sequestration. A sole trader may have assigned certain claims, for example, in respect of sums due by customers for certain types of services, in all time coming. It does not seem appropriate that this assignation should survive the trader's discharge following a sequestration. We consider that the assignation should be ineffective as regards claims which come into being following the discharge. The effect of this rule, coupled with the rule outlined above, is that an assignation of royalties or rents while remaining good despite the assignor being sequestrated, would not carry any royalties or rents arising post-discharge. At that point the assignor would have a completely fresh start.

5.111 We think that a similar rule should apply to protected trusts deeds and that the Scottish Ministers should also have the power to make regulations to apply the rule to other insolvency processes. Again we would expect there to be consultation on this issue as part of the consultation on this Report.

5.112 We recommend:

24. (a) Where a person who has assigned a claim in whole or in part is discharged following either sequestration or the granting of a protected trust deed the assignation should be ineffective as regards the claim (or part) to which it relates if, as at the time of discharge, the claim has not come into being.

(b) The Scottish Ministers should have the power to amend the above rule to apply it to other insolvency processes.

(Draft Bill, s 5(5), (6) & (7)(b))

Chapter 6 Register of Assignations: general

Introduction

6.1 In this chapter we make recommendations in relation to the establishment, management and nature of the new Register of Assignations (RoA). It would be the register in which assignations of claims could be registered. An important matter is what exactly is to be registered and, for reasons which we set out below, we recommend document registration. We consider too that the RoA should be electronic and for the most part automated.

Establishment of the RoA

6.2 In the Discussion Paper we suggested that registration should be (i) an optional alternative to intimation as a method of transferring claims; and (ii) the method by which a new security right over moveable property (called the "statutory pledge" in this Report) would be created.[1]

6.3 The Discussion Paper went on to propose that a new public register should be established for these purposes, provisionally to be called the Register of Moveable Transactions (RMT). This proposal had the general support of consultees, although understandably some said that this was subject to their comments on other questions in the Discussion Paper. Naturally those such as John MacLeod and Scott Wortley, who did not support registration of assignations, made that point once again. They accepted, however, that if the policy decision was to have registration, then the RMT would be the appropriate place for this. Dr Ross Anderson advocated a different approach of registration in the Books of Council and Session.[2] After due reflection, however, we concluded that it is preferable to make provision for a new register which can best deliver our recommendations on searching etc rather than to try to adapt an existing register which is used far more widely than for moveable transactions.

6.4 As we worked on the draft legislative provisions which would establish the new register it became clear that the assignation and the statutory pledge parts of the register would have significant differences between them. For example, only assignations would be registrable in the assignations part. An assignation as a *transfer* or event is a one-off transaction. It requires a single registration. In contrast, a statutory pledge involves the creation of a new *right* which can be transferred, varied or extinguished. The register must be able to take account of such juridical acts and therefore must be more complex.

6.5 The approach under UCC–9 and the PPSA systems is rather different. One register is used in which typically (a) any transaction which functions as a security and (b) outright

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[1] Discussion Paper, para 20.1.

[2] See R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 36 and R G Anderson, "A Critique" (2012) 16 EdinLR 267 at 269–270. But, as noted at para 5.8 above, Dr Anderson subsequently favoured not requiring registration.

assignments of receivables are registrable.[3] This form of registration is notice filing and registration is only needed to achieve priority against third parties. For the reasons set out below in Chapter 18 we do not recommend notice filing or a functional approach to security rights. Nor do we recommend relative effectiveness.[4] In addition, registration in the RoA would be available for any claim (as defined)[5] and not only receivables. As a consequence, our approach can be seen to contrast materially with that of UCC–9 and the PPSAs.

6.6 We have reached the conclusion therefore that it would be preferable to have two separate registers. The result of this approach is that the relevant draft Bill provisions on (1) registration of assignations and (2) registration of statutory pledges are separated. We think that this will make matters easier for the reader of the legislation. It would even enable the assignations reforms to be taken forward separately from our recommendations on security over moveable property which we set out in volume 2 of this Report.

6.7 For assignations, we think that the register should be known as the Register of Assignations (RoA). We therefore recommend:

25. A new public register should be established, to be called the Register of Assignations, in which assignations of claims can be registered.

(Draft Bill, s 19(1))

Management of the RoA

6.8 The obvious candidate for the management of the RoA is the Department of the Registers of Scotland, which is already responsible for eighteen Scottish registers, notably the Register of Sasines, the Land Register and the Books of Council and Session. In the Discussion Paper, however, we said that it made sense to follow the flexible approach taken for the Register of Community Interests in Land.[6] That register must be kept by the Keeper of the Registers of Scotland or by such other person as the Scottish Ministers may appoint. This proposal had strong support from consultees.

6.9 We have subsequently had detailed discussions with Registers of Scotland as to the establishment of the register. As a result of this we are convinced that the Keeper is best placed to manage the register rather than any other person and that a more flexible approach is unnecessary.[7]

6.10 We therefore recommend:

26. The register should be under the management and control of the Keeper of the Registers of Scotland.

(Draft Bill, s 19(2))

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[3] See eg UCC § 9-202; NZ PPSA 1999 s 17; Security Interests (Jersey) Law 2012 s 4 and UNCITRAL Model Law on Secured Transactions art 2(kk).
[4] See para 5.17 above.
[5] For the definition of "claim" see above paras 4.9–4.13 above.
[6] Land Reform (Scotland) Act 2003 s 36(9).
[7] This mirrors the position as regards the Land Register. See LR(S)A 2012 s 1(2).

Costs

6.11 The RoA, like the Land Register and other registers under the Keeper's control, should be self-financing. It should not be a burden on the taxpayer. Clearly, there would be start-up costs. Registers of Scotland have estimated that in total for the RoA and the new Register of Statutory Pledges these would be around £500,000 to £1m.[8] Such costs would be recouped from future income generated by the registers. The income would consist mainly of (i) registration fees and (ii) search fees. In UCC–9/PPSA jurisdictions these fees are relatively modest because of the number of registrations and the fact that the register is automated.[9] We return to the subject of automation later.[10] The number of registrations in the RoA would be lower than under a UCC–9/PPSA system, because only assignations of claims would be registered. Nevertheless, we believe that the frequency of registrations would still allow the start-up costs to be repaid within a relatively short period, without high fees for registration and searching being required.[11]

Not a title register

6.12 A title register in principle allows someone checking it to determine who has the ownership of an asset. The best Scottish example is the Land Register.[12] Needless to say, title registers are not infallible. The information in them can be inaccurate. Nevertheless, their purpose remains to identify ownership.[13] The RoA in contrast would not be a title register. It would only be a register of assignations of claims.[14] The fact that Neil has assigned a claim in favour of Orinoco and that this assignation has been registered in the RoA would not confirm that Neil has title to the claim. Nor would the fact of registration of itself mean that Orinoco would acquire title.[15] In practice of course it is likely that Neil does hold the claim as people do not usually assign the claims of others. But that is only a matter of fact.

What is to be registered?

6.13 The Discussion Paper canvassed in some detail what type of registration should be made.[16] Essentially, it identified two possibilities (i) notice filing and (ii) transaction filing, by means of registering the assignation (or security) document. We discuss the differences between these in the following paragraphs, but it may be helpful first to quote a short summary from one of our previous publications which has been drawn on internationally:

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[8] This is broadly in line with the US $1,180,300 which it cost to establish the NZ PPSR in 2002. See Law Com Report No 296 para 2.9 fn 11.

[9] For example, in New Zealand the fee is currently NZ$20 (about £11). See http://www.ppsr.govt.nz/cms/customer-support/fees. In Australia the fees vary depending on the time-period of the registration chosen. For a registration of up to 7 years the fee is A$6.80 (about £4). See https://www.ppsr.gov.au/fees.

[10] See paras 6.39–6.44 below.

[11] See further the BRIA for this Report, available on our website.

[12] See Reid and Gretton, *Land Registration* para 1.13.

[13] And of course subordinate rights held over the property which require to be registered, such as standard securities.

[14] Or, more precisely further to our recommendations later in this Chapter, a register of assignation documents.

[15] There would no Keeper's "Midas touch" as there was under the Land Registration (Scotland) Act 1979. See Gretton and Steven, *Property, Trusts and Succession* para 7.77.

[16] Discussion Paper, paras 20.8–20.20. While the discussion was made in the context of the new security right, the same principles apply to assignation.

> "The most characteristic difference between notice filing and traditional systems of registration is that notice filing is parties-specific rather than transaction-specific. What is filed are not the details of a particular security but notice that certain parties have entered into, or may in future enter into, a secured transaction in relation to specified property. This approach has certain implications. A notice may be filed in advance of the transaction and the proposed transaction may never take place. The same notice may serve a series of connected transactions. And the information given on the register is necessarily rather general in character, being an invitation to further inquiry rather than a full account of the right in security."[17]

Notice filing

6.14 This is the registration system used under UCC–9 and the PPSAs. Under this system it is not a security right (normally referred to as a "security interest" and which includes certain assignments[18]) itself that is registered. Rather it is only notice of it.[19] The notice is given by means of a brief financing statement, which can be registered before or after the security interest is granted. The security interest is created (or, to use the technical language, "attaches") off-register but is given third party effect (is "perfected") by registration. It is possible for a notice to be filed and no security interest ever to be granted. Therefore the register is not definitive as to whether a security interest has been granted, in contrast to the position for transaction filing.[20]

6.15 Under a notice filing system there are two documents: the security contract and the financing statement. Only the latter is registered. This gives rise to the possibility of discrepancy between the two. But the same may be said to be true under an approach where the security document is registered, because there may still be a preceding contractual document which the security document does not properly reflect, for example if the description of the encumbered property is wrong.

6.16 The brevity of a financing statement means that it can be completed very easily online by the secured creditor, with drop-down menu options, for example in relation to asset classes. On the other hand, the minimal nature of the information means that there require to be rules to allow parties with a legitimate interest to ascertain the extent of what is encumbered. Thus the financing statement might state "goods: livestock"[21] but there might only be a security interest over cattle or ostriches. Having to make enquiries is to some extent inconvenient and also has cost implications.

6.17 At the core of the UCC–9/PPSA approach is the idea that failure to register does not mean that the security interest fails. It is merely unperfected. In a question with the provider it is effective and can be enforced. Indeed in New Zealand it is also effective on the

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[17] Scottish Law Commission, Discussion Paper on Registration of Rights in Security by Companies (Scot Law Com DP No 121, 2002) para 1.26 quoted eg in Allan, *The Law of Secured Credit* 447 and I Otabor-Olubor, "Reforming the law of secured transactions: bridging the gap between the company charge and CBN Regulations security interests" (2017) 17 Journal of Corporate Law Studies 39 at 51.

[18] See para 5.5 above.

[19] In addition to the sources mentioned in the Discussion Paper see Hamwijk, *Publicity in Secured Transactions Law* and the Secured Transactions Law Reform Project Discussion Paper of January 2017 by Professor Louise Gullifer, available at https://stlrp.files.wordpress.com/2017/01/gullifer-registration.pdf.

[20] See R Calnan, "What makes a good law of security?" in F Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (2016) 451 at 477.

[21] We use this example from New Zealand. See http://www.ppsr.govt.nz/cms/secured-party-information/financing-statements/what-you-need-to-know/collateral.

provider's insolvency.[22] But as against other secured creditors who have registered, it is ineffective. In contrast the Scottish approach to property rights is that they are not created without an external act, such as registration. Moreover, the idea of a right in property being created which is effective against some parties (for example the assignor) but not others (for example, the assignor's creditors) conflicts with the general approach of Scottish property law and its dislike of "limping" rights.[23]

Transaction filing

6.18 Under a transaction filing system it is not notices of (possible) security rights which are registered. Rather, it is an actual security right. The registration is specific to the creation of that security right. It is therefore not possible for the same notice to cover several security rights. And generally registration takes place after the parties have entered into the transaction and not before (although it is possible to have an advance notice system).

6.19 The Discussion Paper favoured transaction filing by means of registration of the constitutive document of the new security right (the statutory pledge).[24] Reference was made to Form B standard securities where a relatively short-form document is registered and the details of the loan etc are kept off-register and therefore confidential. The Discussion Paper did not directly ask a question about registration of the assignation document, but it clearly contemplated this type of registration for such documents too.

6.20 There was strong support from consultees for registration of assignation documents.

Developments

6.21 Since consultation closed, there have been several significant developments. First and most importantly, with effect from 1 April 2013, the company charges registration scheme in Part 25 of the Companies Act 2006 was reformed.[25] Formerly, what had to be registered were "particulars" of the charge, rather than the charge document. Now, it is a certified copy of the charge document (instrument) itself.[26] We understand that this change has been widely welcomed by stakeholders because it has removed the need to describe the encumbered property and secured obligation.[27] Instead the document can be relied on to provide this information. It is possible for certain parts of the document to be redacted: (a) personal information relating to an individual (other than the individual's name); (b) the number or other identifier of a bank or securities account of a company or individual; and (c) a signature.[28] The reasons are to protect confidentiality and to reduce the possibility for fraud.

6.22 We discussed the 1 April 2013 changes with our advisory group and they were supportive of them. They considered, in agreement with consultees, that a copy of an assignation document should require to be registered in the RoA and that the detail to be

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[22] See Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 8.
[23] See para 5.17 above.
[24] Discussion Paper, paras 20.16–20.20.
[25] Companies Act 2006 (Amendment of Part 25) Regulations 2013 (SI 2013/600). See K G C Reid and G L Gretton, *Conveyancing 2013* (2014) 172-178 and H Patrick, "Charges changing" 2013 JLSS Feb/20.
[26] Companies Act 2006 s 859A(3).
[27] There is a very basic tick box system on the application form in respect of certain asset classes.
[28] Companies Act 2006 s 859G.

included in the application form for registration (which we discuss in the next chapter) should be limited, so as to avoid the possibility of mistakes. They were also of the view that redaction should be allowed in a similar way as is allowed under Part 25 of the Companies Act 2006. Finally, it was noted that having a document registration system would help facilitate an information-sharing order under section 893 of the Companies Act 2006.[29]

6.23 The second development was the enactment of the Belgian Pledge Act of 11 July 2013.[30] This effects a major recasting of the law on security over moveables in Belgium. While a functional approach is chosen and the DCFR Book IX is influential, the form of registration is not notice filing in the UCC–9/PPSA sense. Rather, relevant data in relation to each security transaction has to be registered by means of an online form.[31] But the constitutive document is not registered. Indeed, no document is required except where one of the parties is a consumer.[32] An advantage of this approach is that confidential information in the security agreement is kept off the register. The register is also technically simpler because it contains no documents, only data. On the other hand there are disadvantages as regards transaction costs commonly associated with notice filing, such as potentially greater time and costs in obtaining off-register information. We highlighted the Belgian approach to our advisory group, but they continued to favour a document registration approach, familiar to them both for standard securities and under Part 25 of the Companies Act 2006 where confidential information is kept off the register by means of short documents or redaction.

6.24 The third development was the publication in 2014 of the UNCITRAL Guide on the Implementation of a Security Rights Registry, which should now be read with the UNCITRAL Model Law on Secured Transactions of 2016. The Guide sets out four advantages of notice filing over document filing.[33] These are: (1) it reduces transaction costs both for registrants (as they do not need to register the security agreement) and for searchers (as they do not need to peruse potentially voluminous documentation); (2) it reduces the administrative and archival burden on registry system operators; (3) it reduces the risk of registration error because the less information that must be submitted the lower the risk of error and (4) it enhances privacy and confidentiality because the information on the register is minimal.

6.25 In the context of the functional approach to security rights taken by UNCITRAL these arguments seem strong. The scope for increased costs and risks of error appears great where every transaction that functions as a security has to be registered. The idea of a register full of sale of goods contracts (with retention of title clauses) and hire-purchase agreements is unpalatable. In contrast the RoA would have a far narrower scope: only assignations of claims. The documentation and registration would normally be handled by solicitors and the risk of registering the wrong document should be slight. Moreover, Registers of Scotland have informed us that a facility for documents to be registered as well as data is technologically not problematic. We have discussed the transaction costs and confidentiality issues above.

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[29] See Chapter 36 below.
[30] See E Dirix, "The Belgian Reform on Security Interests in Movable Property" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 391–404. The legislation is due to be brought into force on 1 January 2018.
[31] Dirix (above at 399) sees this as "an intermediate step between 'transactional filing' and 'notice filing'".
[32] Belgian Pledge Act of 11 July 2013 art 9 (which provides for art 4 of the new Book III title XVII of the Civil Code).
[33] UNCITRAL Guide on the Implementation of a Security Rights Registry para 59.

6.26 The fourth development was the statutory review of the Australian PPSA 2009, which was published in 2015. It is possible for the security agreement to be uploaded to the Australian PPSR, but this is rarely done. The reviewer was asked to consider whether it should be mandatory to register the agreement. He concluded that it should not be because (1) it would impose additional burdens on the parties because not only the original agreement would have to be registered, but so too would amendments; (2) the agreement will not necessarily disclose exactly what the encumbered property is; and (3) there may be confidential terms in the document.[34] Once again these arguments are strong in a functional security context. In relation to the first point, an assignation which has taken effect as a transfer cannot be amended.[35] While the second point is of course true, registration of the assignation document means that it is not essential for a description to be provided in a data box in the application for registration. We have considered the third point, confidentiality, already.

6.27 Finally, we would mention the Draft Secured Transactions Code of the Financial Law Committee of the City of London Law Society, the latest draft of which was published in July 2016. It favours document registration based on the Companies Register approach since 1 April 2013.[36] In contrast a Discussion Paper of the Secured Transactions Law Reform Project of January 2017 sees advantages in notice filing.[37]

Conclusion

6.28 We have concluded that the assignation document should require to be registered. The RoA would therefore be more precisely a register of assignation documents.[38] As under Part 25 of the Companies Act 2006 we think that it should be possible for a copy of the document to suffice, such as a scanned copy. But, following discussions with our advisory group, we have been persuaded that there is not a need for the document to be certified. Someone who is willing to forge a document is likely to be willing to add a false certification and it is not clear that fraud is deterred by such a requirement. It may be, however, that certification would be required to enable an information-sharing order under section 893 of the 2006 Act and certainly it should be possible for the Scottish Ministers to impose such a requirement under rules. Such rules might also make it a condition of making an application that the applicant is certifying that the copy submitted is a true one. We think that rules should also be able to allow redaction as is the case under Part 25 of the 2006 Act.[39]

6.29 The document would be registered along with an application which would provide brief data which would go into the entry on the register. We discuss that data in the next chapter.

6.30 We recommend:

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[34] Australian Statutory Review 2015, para 6.11.2.
[35] Of course it would be possible to carry out a retrocession of any claim transferred in error, but that is another transfer rather than an amendment.
[36] City of London Law Society draft Secured Transactions Code section 31.
[37] It is authored by Professor Louise Gullifer and available at https://stlrp.files.wordpress.com/2017/01/gullifer-registration.pdf.
[38] In contrast the Register of Statutory Pledges should be viewed strictly as a register of rights as it requires to take account of the fact that a statutory pledge once created can be amended, transferred or extinguished. See para 29.12 below.
[39] On RoA Rules, see Chapter 11 below.

27. The assignation document should be registered.

(Draft Bill, s 21(1)(h))

Form and protection of the RoA

6.31 The modern international standard for registers of assignations and security rights over moveable property[40] is that these are held in electronic form. This of course is also true of the Land Register of Scotland.[41] We therefore consider that the Keeper should keep the RoA in electronic form. Nevertheless, in line with the position under the Land Registration etc. (Scotland) Act 2012 and in the interests of flexibility,[42] we do not formally recommend that this should be required by statute.[43] Subject to the new statutory rules which we recommend, the exact detail should be a matter for the Keeper. But we would expect her to consult with key stakeholders in the finance and legal sectors. As with the Land Register,[44] we consider that the Keeper should be under a duty to take such steps as appear reasonable to her to protect the RoA from interference, unauthorised access or damage.

6.32 We recommend:

28. (a) Subject to the requirements of statute, the register should be in such form as the Keeper thinks fit.

(b) The Keeper should take such steps as appear reasonable to her for protecting the register from interference, unauthorised access, or damage.

(Draft Bill, s 19(3) and (4))

Applications for registration: paper or online or both?

6.33 In the Discussion Paper, we considered whether applications should be in paper form or online, or both.[45] We noted that online is simpler, quicker and cheaper. It is also more environmentally friendly. Nevertheless, we said that online applications would require fairly high-level digital signatures, and few debtors, and not all creditors, would have such signatures. We therefore thought that both paper and digital applications should be possible.

6.34 We have subsequently rethought our position because of the changes to the company charges registration regime which came into force on 1 April 2013 and also the position in comparator registers abroad. Electronic filing is now possible in the Companies Register. As discussed above, a certified copy of the charge instrument must be registered, but an instrument which has been signed and certified in ink can simply be scanned and transmitted electronically to Companies House. We see no reason why the same should not be possible in the RoA. This would help keep costs down.

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[40] Generally, known as Personal Property Security Registers.
[41] See Reid and Gretton, *Land Registration* para 3.7.
[42] For example, if there was a major IT malfunction and the Keeper had to resort to using paper for a short time.
[43] LR(S)A 2012 s 1(4).
[44] LR(S)A 2012 s 1(5). See Reid and Gretton, *Land Registration* para 3.8.
[45] Discussion Paper, paras 20.39–20.41.

6.35 The UK Government has noted that transactions completed using digital channels generally cost much less – for example the cost to Government per driving test booked in 2013 was £6.62 when post was used, £4.11 when telephone was used and just £0.22 when an online booking was made.[46] Companies House differentiates between the cost of paper registration and electronic registration of charges: with effect from 6 April 2016 it costs £23 for the former but only £15 for the latter.[47] There is also a high rate of use of digital services: most services which the UK Government offers as a digital service have a take-up rate of over 90%.[48]

6.36 Electronic-only registration is becoming the standard position internationally.[49] The New Zealand Personal Property Securities Register (PPSR) has only permitted electronic registrations since it was first established in 2002. This apparently was a deliberate policy decision to compel users to use remote access and to minimise the Registrar's responsibilities.[50] The new Belgian register is also to work on an electronic-only basis. When the Australian PPSR was set up in 2012 there was a facility for manual registrations. This facility was barely used. In the first year of operation only 21 of the 1,446,308 registrations were made manually.[51] The Registrar discontinued the service in July 2013.

6.37 At the moment there is almost no electronic-only registration for property or company transactions in Scotland.[52] But it is telling that when advance notices were introduced under the Land Registration etc. (Scotland) Act 2012, with effect from 8 December 2014, the figures from that date until 21 June 2015 were 55,126 electronic registrations and one paper registration.[53] The paper registration was not made by a solicitor. In addition Registers of Scotland have now consulted on making electronic-only registration possible for certain deeds in the Land Register, namely dispositions, standard securities and discharges.[54] Secondary legislation to provide for this is expected in 2018.[55]

6.38 The registration of assignations and statutory pledges in the RoA would normally be carried out by solicitors and businesses (especially financial institutions). In 2014 96% of businesses in the UK with ten employees or more had fixed broadband access and 81% had a website.[56] In 2016 the internet was used daily or almost daily by 82% of adults in Great

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[46] See https://gds.blog.gov.uk/2013/01/17/gov-transaction-costs-behind-data/.
[47] See https://www.nibusinessinfo.co.uk/content/companies-house-fee-changes-april.
[48] See https://www.gov.uk/performance/services.
[49] More broadly, advances in information technology have helped facilitate reform. See L Gullifer, "Conclusions and Recommendations" in Gullifer and Akseli (ed), *Secured Transactions Law Reform* 505 at 510.
[50] See Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 455–456.
[51] Australian Statutory Review 2015, para 6.11.1.
[52] Not all Companies House registration functions can be carried out online. See https://www.gov.uk/government/organisations/companies-house/about/about-our-services.
[53] We are grateful to Registers of Scotland for this information.
[54] See Registers of Scotland, *Digital Transformation: Next Steps* (November 2016) available at http://www.gov.scot/Resource/0051/00510886.pdf.
[55] See https://www.ros.gov.uk/about-us/news/2017/new-year-to-signal-next-steps-in-digital-transformation.
[56] See http://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/ecommerceandictactivity/2014

Britain and 77% of adults bought goods or services online,[57] but use of the internet was generally lower by those with a disability.[58]

6.39 We think it unlikely that individuals without internet access or who are unable to use the internet would want to register assignations themselves. Allowing the option of paper registration would in our view increase costs without sufficient countervailing benefit. Ultimately the matter should be for the Scottish Ministers and Registers of Scotland, but we recommend:

29. Registration should be by electronic means only.

Automated registration with no checking by the Keeper

6.40 The Discussion Paper did not expressly address the issue of the extent to which the Keeper should check applications for registration. Clearly, there would have to be compliance with certain requirements such as using the correct form of application and paying the requisite fee. We consider these further in the next chapter. But should the Keeper check the application for mistakes? For example, in the application for registration it might be stated that the relevant assignation is by John in favour of the Bonnyrigg Bank, but the accompanying copy assignation document narrates an assignation by Kirsty in favour of the Bonnyrigg Bank. The Keeper, if required to check what is to enter the register, should notice the mistake and "bounce" the application.

6.41 This is the system in the Land Register[59] where an incoming application for registration is considered by the Keeper and, if satisfied, she gives effect to it.[60] A similar system operates at Companies House. Applications are considered and if the registrar is not content then the application will be refused. Such a system has several consequences. First, employing and training staff to check applications costs money. Second, it takes time. Thirdly, where the staff are responsible for transferring data from the application onto the register, there is the possibility that errors are made. In *Sebry v Companies House*[61] a notice that a company was in liquidation was erroneously registered by a member of staff at Companies House against the wrong company. Suppliers and creditors of that company, including its bank, became aware of the notice and refused to give the company credit, resulting in it going into administration. The result of the error in short "was a disaster for the company."[62] Companies House was held to have a duty of care to that company, which it breached by reason of the error.[63]

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[57] See http://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2016.

[58] See http://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/datasets/internetaccesshouseholdsandindividualsreferencetables (Table 8).

[59] Other than for automated registration of title to land (ARTL), on which see Reid and Gretton, *Land Registration* ch 19.

[60] See generally LR(S)A 2012 Part 2 and Reid and Gretton, *Land Registration* para 8.10.

[61] [2015] EWHC 115 (QB), [2016] 1 WLR 2499.

[62] [2015] EWHC 115 (QB), [2016] 1 WLR 2499 at para [37] per Edis J.

[63] Since 1 April 2013 the role of the registar has become more limited as there is no checking of the particulars submitted against the charge document. See L Gullifer and M Raczynska, "The English Law of Personal Property Security: Under-reformed?" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 271 at 277.

6.42 The UCC–9/PPSA approach is different. All that is registered is the financing statement and the registrar does not verify the details. Modern information technology means that registration can work on an automated electronic basis. The UNCITRAL Guide on the Implementation of a Security Rights Registry of 2014 identifies six advantages of this approach.[64] First, it is cheaper, because of the lack of staff involvement. Registers of Scotland advise us that the cost to process an electronic application under an automated system is approximately five times cheaper than processing a paper application. Secondly, it is quicker. The application is dealt with almost instantaneously on receipt by the computer system. Thirdly, the register can be open 24/7, 365 days a year subject to closure for maintenance work. Fourthly, there is no room for human error on the part of the staff at the register. It is the computer system which processes the application system and transfers the submitted data onto the register. Fifthly, the possibility for fraudulent or corrupt conduct on the part of the staff at the register is reduced. Sixthly, there is a reduction in the potential liability of the register to users who might suffer a loss due to errors or dishonest conduct by its staff.

6.43 Cumulatively, these arguments are compelling. As Professor Louise Gullifer has noted: "in most electronic systems the role of the registrar is entirely administrative."[65] This is the model which the Secured Transactions Law Reform Project favours for England and Wales.[66] We have discussed this approach both with our advisory group and with Registers of Scotland. They were supportive of it. It was agreed that the responsibility for making sure that the information in an application for registration is correct should lie on the party making it and, where applicable, their agents such as solicitors who make the application on their behalf.

6.44 An automated system can be designed in a way which reduces the potential for errors. There are a number of possibilities. First, the registrant could be required to register itself on the system before any registration can be made. This registration could be used to pre-populate the online form. A postcode gazetteer could be used to provide and standardise addresses. The system could be set up not to accept a registration where any of the required data fields (such as the assignor's name and address) are not completed. There could be a link to the Companies House website to check a company's registered number. Double keying (requiring the same information to be entered twice) could be used to check for typographical errors. The ability to edit the application at any time while it is being completed and also at the end before final submission should also help. We understand from Registers of Scotland that the use of a "smart/intuitive" application form has decreased errors in land registration applications.

6.45 We recommend:

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[64] UNCITRAL Guide on the Implementation of a Security Rights Registry paras 83 to 85.

[65] L Gullifer, "Conclusions and Recommendations" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 505 at 523.

[66] See its Policy Paper of April 2016, available at https://securedtransactionslawreformproject.org/draft-policy-paper/ and its Discussion Paper on Registration (authored by Professor Louise Gullifer) of January 2017, available at https://stlrp.files.wordpress.com/2017/01/gullifer-registration.pdf.

30. Registration should be by means of an automated system under which applications are not checked by the Keeper.

(Draft Bill, s 119)

Chapter 7 Register of Assignations: structure, content and applications for registration

Introduction

7.1 In this chapter we consider the structure of the RoA, the data and documents that should be contained within it and the application process for registration.

Structure of the RoA

7.2 The RoA would be a register of assignations of claims. But in line with the position in the Land Register,[1] we consider that there should also be an archive record, in which archived material is kept by the Keeper. The circumstances in which an entry for assignation would be archived would be rare and be limited to where the register was corrected, for example where the registration was found to have been made frivolously or vexatiously.[2] In the Discussion Paper we asked consultees whether they agreed that superseded data should be archived.[3] Most consultees who responded to this question agreed, including the Keeper. We discuss archiving in more detail later,[4] but at this stage we recommend:

> **31. The Keeper should make up and maintain, as parts of the Register of Assignations:**
>
> **(a) the assignations record and**
>
> **(b) the archive record.**

(Draft Bill, s 20)

Assignations record

7.3 In the previous chapter we recommended that assignation documents should be registered.[5] But a register comprising merely documents would not be user-friendly. Nor would it be easy to search. At the very least it would be essential that there was some form of indexing. A far preferable approach is to have an entry for each assignation document. The entry would contain key information such as the names of the parties and the date and time of registration. This would allow direct searching against certain data fields just as under the UCC–9 and PPSA systems. We deal with the subject of which fields should be

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[1] LR(S)A 2012 s 14. See Reid and Gretton, *Land Registration* para 4.31.
[2] On corrections see Chapter 9 below.
[3] Discussion Paper, para 20.54.
[4] See paras 11.19–11.21 below.
[5] See paras 6.13–6.30 above.

directly searchable in Chapter 10. Our draft Bill makes provision for the information that is to be contained in the records and includes power for the Scottish Ministers to make rules (known as RoA Rules)[6] setting out more detailed requirements.

7.4 In relation to what data should be required in the entry (and thus in the application for registration), inspiration can be drawn from UCC–9 and the PPSAs, although of course they make provisions for registers of security interests.[7] The fundamental point is that the RoA would be a person-based register, rather than a property-based register and the identification of the parties is crucial. We are of the view that the following data should have to appear.

(1) *Assignor's name and address*

7.5 The entry should reveal the assignor's name and address. To facilitate searching, the RoA Rules would specify what the assignor's "proper name" should be, that is to say the name that must be used in the register.

7.6 For individuals, the proper name could be that as shown on the person's driving licence or passport or birth certificate. An advantage of using the birth certificate name is that it is unusual for birth certificates to change.[8] The names on passports and driving licences more commonly change, notably on marriage. But passports and driving licences are documents which are generally more readily at hand. There is also something counter-intuitive about the idea that a woman who has been married and used her husband's name for 50 years should be identified by her maiden name.[9] In any event, there would need to be a hierarchy of identification documents prescribed by the rules, for example, current driving licence, which failing current passport, which failing birth certificate. Otherwise, there would be confusion.[10] For sole traders, we think that the individual's name rather than the trading name should be used, because this may be less likely to change and, moreover, is to be objectively determined from the documentation specified by the rules.[11]

(2) *Assignor's date of birth*

7.7 We think that where the assignor is an individual, the assignor's date of birth should require to be in the entry. The reason is that the assignor's name is unlikely to be unique.[12] For example, Registers of Scotland have advised us that a sample search against "Andrew Brown" which they conducted in the Land Register across all counties produced 112 results. If the search criteria are changed to "Andrew + [middle name] + Brown" there are 206 results. While not possible in the Land Register, a combined name and date of birth search

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[6] See paras 11.43–11.49 below.
[7] But some assignations require to be registered. See para 5.5 above.
[8] But it is possible for it to be changed under the Gender Recognition Act 2004.
[9] Under the Canadian PPSAs, the name as per the birth certificate is the standard identifier for individuals with a birth registered in that country, but if a name is changed following marriage it is that latter change that should be used. See Cuming, Walsh and Wood, *Personal Property Security Law* 341–344.
[10] See Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 478–481.
[11] Notwithstanding the fact that under rule 5.7 of the Ordinary Cause Rules most small businesses are identified in sheriff court actions by their trading name.
[12] With some exceptions.

would clearly generate far fewer results. Thus date of birth is registered, for example, under the Ontario, New Zealand and Australian PPSAs and under the Jersey legislation.[13]

7.8 The further advantages of using date of birth are that it is fixed and verifiable: an individual's date of birth can be found on that person's passport, driving licence, birth certificate, and marriage or civil partnership certificate. It is also used in many other contexts such as credit and proof of age checks, as well as taxation. There are of course disadvantages. The appearance of someone's date of birth on a public register can be regarded as an invasion of that person's privacy. And the availability of such information could assist identity theft. In our Report on Land Registration we recommended that the designation of individuals in the Land Register should include their date of birth to facilitate more accurate identification.[14] This recommendation was not taken forward into the Land Registration etc. (Scotland) Act 2012 and we understand that concerns about fraud influenced this.

7.9 We think that the case for using dates of birth is stronger in the RoA than in the Land Register because the former is a person-based register. There are, however, ways to reduce the concerns about privacy and fraud. With effect from October 2015, the Companies Register only shows the month and year of a company director's birth and not the day (although the full date of birth is submitted to Companies House).[15] A similar approach could be taken in the RoA. But we think that even more could be done. The individual's date of birth would be registered but not shown at all on the face of the register. But a search against that person's name and date of birth would take the searcher to the entry if there were one. We understand that date of birth has to be provided to register a croft in the Crofting Register established under the Crofting Reform (Scotland) Act 2010 but is not shown on the register.[16]

(3) *Assignors: unique number and other information*

7.10 Some legal persons have unique identifying numbers. Examples include UK companies and LLPs. These numbers do not change and there are clear advantages therefore in using them as a means of identification in order to facilitate searching. It is a requirement in the Land Register that a company is designed by reference to its registered number.[17] We would expect that the RoA Rules would require the unique number of companies, LLPs and some other legal persons to appear on the register. While charities have a registered number, not all charities have legal personality[18] and ones which do are typically structured as companies limited by guarantee and have a company number. Therefore charity numbers do not appear suitable for designation for these purposes. It is

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[13] See s 3(1)(c) of the Minister's Order under the Ontario PPSA 1990 available at https://www.ontario.ca/page/ministers-order-personal-property-security-act-1990; the NZ PPSA 1999 s 142(b); the Australian PPSA 2009 s 153 and the Security Interests (Registration and Miscellaneous Provisions) (Jersey) Order 2013 art 8(2)(e).

[14] Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) paras 4.18–4.24.

[15] See https://companieshouse.blog.gov.uk/2015/06/17/great-news-were-listening-to-our-customers-and-making-changes/.

[16] Admittedly it is not used for searching purposes either, but the RoA could be different.

[17] LR(S)A 2012 s 113(1). See also NZ PPSA 1999 s 142(c).

[18] For example, they may be trusts.

perhaps unlikely that foreign entities would be required by RoA Rules to give their number because this would lead to complexity.[19]

7.11 There are also unique numbers used for individuals, such as VAT (value added tax) registration numbers, NI (national insurance) numbers and CHI (community health index) numbers, but whether any of these could be used may be more open to question.[20]

7.12 It may be helpful in some instances for other information relating to the assignor to be prescribed by RoA Rules. For example, where a partnership is the assignor it could be helpful to require the names and addresses of the partners to be registered too. Where the assignor is a trustee, it may be helpful to require that fact to be stated, along with the name of the trust.

(4) *Assignee's name and address*

7.13 Clearly, the assignee's name and address should also be given. The RoA Rules would set out more precisely what is required, but as we consider that the RoA should not be directly searchable against the assignee,[21] the requirements could be less rigorous.

(5) *Assignees: unique number and other information*

7.14 As recommended in relation to assignors, the RoA Rules should be able to specify when a unique number of an assignee is to be registered as well as any other required information. We think that the entry should also include an address to which requests for information regarding the assignation can be directed, such as enquiries about precisely which claims are assigned.[22] This might be an e-mail address. For example, in a large bank it would be helpful to have the details of the relevant department rather than just that of the head office.[23]

(6) *Identification of assigned claim*

7.15 While the assignation document would be registered and it would identify the claim or claims being assigned,[24] there may be benefit in providing that a form of identification should also be required or permitted as part of the data in the entry. While this would be a matter for RoA Rules, it may be helpful to explore options here.

7.16 For example, there might be tick boxes to be completed when an application for registration is being made with categories such as "rents", "royalties" and "invoices for goods or services". A third party interested in the rents who saw that the box for rents had not been completed would be saved the need to look at the assignation document. Such a system is used in the Ontario, New Zealand and Australian PPSAs.[25] But in New Zealand for all property types other than "all present and after-acquired property" a verbal description is

[19] Given the huge number of possible entities and jurisdictions.
[20] Only individuals who are sole traders and are registered for VAT have VAT numbers and we understand that such numbers can change. NI and CHI numbers raise privacy issues and not all individuals (such as those who have recently moved to the UK) have them.
[21] See below, para 10.3.
[22] See below, paras 11.2–11.14.
[23] Compare NZ PPSA 1999 s 142(d) and Australian PPSA 2009 s 153 item 3.
[24] For the extent to which the claims need be described in the assignation document see paras 4.21–4.25 above.
[25] See general the Australian Statutory Review 2015 paras 6.3.1–6.3.3.

also required. In Australia the statutory reviewer has recommended that the number of asset classes is reduced.[26]

7.17 If there is a tick box system, one concern might be that applicants for registration would simply tick all the boxes to avoid any chance that a class of claim was mistakenly omitted. The tick boxes would then be uninformative if this became general practice. But this objection can be met by having a correction procedure, under which the assignor could require removal of inaccurate ticks.[27]

7.18 In the Canadian PPSA jurisdictions apart from Ontario there is not a "tick box" system. Instead the property must be described in the same way as under the security agreement. This may be by reference to an "item" or "kind" and can therefore be a generic description such as "automobiles" which does not identify which particular cars are covered.[28] It is understood that the Ontario legislation is to be amended to follow this approach too.[29]

7.19 Of course under the UCC–9/PPSA approach there is no document registration. This contrasts with the position for registration of charges in the Companies Register since 1 April 2013. There the document is registered, but the relevant application form[30] contains the following box:

> "4. Brief description. Please give a short description of any land, ship, aircraft, or intellectual property registered or required to be registered in the UK subject to a charge (which is not a floating charge) or fixed security included in the instrument."

7.20 These asset classes all have specialist registers and the point of box 4 seems to be more to remind the party registering that registration in the specialist register is also required for the charge (security right) to have third party effect.

7.21 A further option would be to require the applicant for registration to reproduce the description of the claim in the assignation document. But such an approach would seem to undermine one of the main reasons for requiring that document to be registered and would run contrary to the reforms made to company charges registration with effect from 1 April 2013.

7.22 We would expect consultation on what (if any) type of description should be required before RoA Rules are made.

(7) *Copy of the assignation document*

7.23 As discussed earlier,[31] the entry would include a copy of the assignation document.

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[26] Australian Statutory Review 2015, para 6.3.3.
[27] See paras 9.10–9.22 below.
[28] See R C C Cuming and R J Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (1994) 111.
[29] See Cuming, Walsh and Wood, *Personal Property Security Law* 349.
[30] Form MR01, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537724/MR01_v2.1.pdf
[31] See paras 6.13–6.30 above.

(8) *Unique registration number*

7.24 Each entry should have a unique registration number rather like a title number in land registration. This is standard under comparator legislation.[32]

(9) *Date and time of registration*

7.25 The date and time of registration are important for priority purposes and would be added to the entry by the Keeper's computer system.

(10) *Other data*

7.26 The entry should also contain any other data required under the new legislation or under RoA Rules made by the Scottish Ministers. For example, when a correction to data is made the details of that correction and the date and time it is made should require to appear.[33]

7.27 Drawing this together, we recommend:

32. An entry in the assignations record should include:

(a) the assignor's name and address,

(b) where the assignor is an individual, the assignor's date of birth,

(c) any number which the assignor bears or other information relating to the assignor which, by virtue of RoA Rules, must be included in the entry,

(d) the assignee's name and address,

(e) any number which the assignee bears or other information relating to the assignee which, by virtue of RoA Rules, must be included in the entry,

(f) where the assignee is not an individual, an address (which may be an e-mail address) to which requests for information regarding the assignation may be directed,

(g) such description of the claim as may be required or permitted by RoA Rules,

(h) a copy of the assignation document,

(i) the registration number allocated to the entry,

(j) the date and time of registration of the assignation document, and

[32] Eg NZ PPSA 1999 s 144; UNCITRAL Model Law on Secured Transactions Model Registry Provisions art 1(j).
[33] See Chapter 9 below.

(k) such other data as may be required by legislation.

(Draft Bill, s 21(1))

Applications for registration

7.28 An application for registration would be made online. It would be the assignee who would apply to register the assignation document, in line with the normal rule of property law that it is the transferee who completes title.[34] It would be possible for applications to be made by agents such as solicitors.

7.29 We think that the Keeper should require to accept the application provided that certain conditions are satisfied. The application would have to conform to the requirements imposed by RoA Rules and be accompanied by a copy of the assignation document. The rules would set out the form of application and the data fields that require to be completed. The application would need to provide the Keeper with the necessary data to make up an entry in the register. It would of course also be essential for the applicant to pay the relevant registration fee.

7.30 We recommend:

33. (a) An application for registration of an assignation document should be made by or on behalf of the assignee.

(b) The Keeper should be required to accept an application if:

(i) it conforms to RoA Rules in relation to applications,

(ii) it is submitted with a copy of the assignation document,

(iii) it provides the Keeper with the necessary data to make up an entry for the assignation in the RoA, and

(iv) the registration fee is paid or the Keeper is satisfied that it will be.

(c) Where these requirements are not satisfied, the Keeper should be required to reject the application and inform the applicant accordingly.

(Draft Bill, s 23(1) to (3) and 118(4))

Creation of an entry in the assignations record

7.31 An entry in the assignations record would be made up as follows. The Keeper (or more accurately the automated computer system under her management) would receive the application for registration of the assignation document. Assuming that it was in acceptable

[34] But compare the position as regards intimation. See paras 5.38–5.39 above.

terms,[35] an entry would be created and a unique number allocated to it. The entry would thus be made up by the Keeper's automated computer system from (i) the data provided in the application; (ii) the circumstances of registration, in particular the date and time; and (iii) the copy of the assignation document. We envisage that (i) and (ii) would be presented in a similar way to notice filing registers as under UCC–9 and the PPSAs. As regards (iii) it would be possible for anyone inspecting the entry to view this too.

7.32 We recommend:

> **34. On accepting an application for registration, the Keeper should be required to:**
>
> **(a) make up and maintain in the assignations record an entry for the assignation document, and**
>
> **(b) allocate a registration number to the entry.**
>
> (Draft Bill, s 23(4))

Verification statements

7.33 Under automated registration systems elsewhere such as in the UCC–9/PPSA jurisdictions a verification statement is sent to the applicant for registration confirming that the registration has been successful.[36] The statement normally contains the data that has been registered along with the date and time of registration and the unique number allocated to the entry. We think that there should be a similar system in the RoA. The form of the statement would be set out in the RoA Rules. We understand from Registers of Scotland that in relation to an application for registration in the Land Register the applicant can specify up to four e-mail addresses to which the receipt of the application is sent. The same could happen with the RoA.

7.34 Some PPSAs require the secured creditor to send a copy of the verification statement to the provider, although this can be contracted out of by the parties.[37] The purpose of this is to enable the person named as the debtor in the financing statement to be informed of the existence and content of the registration as it may affect the future ability of that person to obtain credit.[38] Under the DCFR Book IX, where the provider has to be accredited by the system, the verification statement is sent directly to that party.[39]

7.35 There is benefit to the assignee in sending a verification statement to the assignor. That person can ask the assignor to check that it is correct and thus obtain further assurance that the registration is effective.[40]

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[35] See para 7.29 above.
[36] See eg NZ PPSA 1999 s 145; Australian PPSA ss 155 and 156; DCFR IX.–3:313; UNCITRAL Model Law on Secured Transactions Model Registry Provisions art 15. See also Allan, *The Law of Secured Credit* 449–450.
[37] Eg NZ PPSA 1999 s 148; Australian PPSA 2009 s 157.
[38] Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 468.
[39] DCFR IX.–3:313.
[40] Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 468–469.

7.36 We think that the duty to provide a copy of the verification statement is important under the UCC–9/PPSA approach where the financing statement can be registered unilaterally by the secured creditor with no involvement from the party named as the debtor. In the RoA matters would be rather different. Registration would be of an assignation which the assignor has granted.[41] There is no requirement for the secured creditor to confirm the details of registration in the legislation on standard securities and floating charges.[42]

7.37 If a duty were to be imposed we anticipate that financial institutions would wish the right to contract out of this as is the position in Australia and New Zealand. There is also the issue of what sanction there should be for breach of that duty. The UNCITRAL Model Law on Secured Transactions suggests that a nominal amount should be payable to the grantor of the security right, as well as any compensation for any actual loss or damage.[43]

7.38 Another possibility is that the verification statement is sent directly by the Keeper's computer system to the assignor as well as the assignee. But unless an accreditation system along the lines contemplated by the DCFR were used, the statement would be sent to the e-mail address provided by the assignee. This could be wrong.

7.39 On balance our view is that there should not be an obligation on the assignee to send a copy of the statement to the assignor although, as we have noted, it may be in the assignee's interests to send it as the assignor may notice any errors. But we think that the assignor should have the right to request a copy of it from the assignee in order to check the details that have been registered. The assignee should have 21 days to comply.

7.40 We recommend:

35. (a) The Keeper should be required to issue a verification statement on accepting an application for registration.

(b) The statement should require to conform to RoA Rules. It should include the date and time of the registration and the registration number allocated to the entry to which the application relates.

(c) The assignor should be entitled to obtain a copy of the verification statement from the assignee and the assignee should be required to supply the copy within 21 days after the request is made.

(Draft Bill, s 24)

Date and time of registration

7.41 The date and time of a registration are crucial for priority purposes. The Keeper's computer system would determine when the relevant entry is made up and that date and time should be stated in the entry. Given that it is possible for a computer system to record the time of receipt with a high degree of accuracy, perhaps to the nearest second, it is highly unlikely that two registrations would be made at exactly the same time. But if that were the

[41] Of course there is the possibility of a forgery.
[42] Conveyancing and Feudal Reform (Scotland) Act 1970 Part 2; Companies Act 2006 Part 25.
[43] UNCITRAL Model Law on Secured Transactions, Model Registry Provisions art 15(4).

case, we think that the registration in respect of which the application reached the Keeper first should have priority.[44] The computer system should be able to determine which application that is.

7.42 We recommend:

> **36. (a) A registration should be taken to be made on the date and at the time which are entered for it in the Register of Assignations.**
>
> **(b) The Keeper should be required to deal with applications for registration and allocate these registration numbers in order of receipt.**
>
> (Draft Bill, s 25)

Retrocessions

7.43 Often assignations are one-off transactions. The claim is transferred to the assignee and that is that. But in other situations, notably assignations in security, there may well be a re-assignation or, to use the technical term, *retrocession*, if the debt secured is repaid. For example, a landlord might assign the rents due to it from a tenant in return for a loan from the bank. The bank then becomes entitled to the rents. In practice it will not uplift these unless there is default on the loan. But if the loan is repaid the landlord will seek a retrocession.

7.44 The question then arises as to how effect should be given to the retrocession in the Register of Assignations. The position under UCC–9 and the PPSAs is that the assignation is recharacterised as a security interest and the notice on the register giving it priority is simply cancelled on the loan being repaid. In Scotland, however, an assignation in security is a transfer and not a right or interest, and therefore cannot simply be cancelled.[45] As discussed elsewhere in this Report, our consultees opposed recharacterisation.[46]

7.45 We considered a system under which a retrocession could be registered against the same entry as the original assignation, but decided against this for reasons of complexity. It might be, for example, that only some of the claims are retrocessed.

7.46 We have reached the view that a retrocession should be treated like other assignation documents and result in its own entry. This reflects the current position in practice for assignations of rents where typically the parties choose to record the assignation and the eventual retrocession in the Books of Council and Session.

7.47 The Keeper, however, may wish to consider whether it would be possible to have a link between the entries. Thus in the application for registration the applicant might be asked to state whether the assignation is a retrocession and, if so, whether it relates to an

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[44] See the LR(S)A 2012 s 39(1).

[45] This was an issue which was encountered at an earlier stage in Scotland in relation to the *ex facie* absolute disposition, a form of heritable security prior to the introduction of the standard security, for which statute incoherently provided a form of discharge. See G L Gretton, "*Ex Facie* Absolution Dispositions and their Discharge" 1979 JLSS 462.

[46] See para 18.46 below.

assignation that has already been registered. If the registration number of that entry is then provided by the applicant the computer system could put a flag on the original entry.[47]

[47] Such an approach would address the concern of ICAS in its response to our draft Bill consultation of July 2017 that it would help business to discover simply that a financing arrangement is at an end.

Chapter 8 Register of Assignations: effective registration

Introduction

8.1 The purpose of the Register of Assignations is to alert third parties to the existence of an assignation of a claim. This clearly necessitates certain requirements for a registration to be effective to transfer the assigned claim. As noted earlier,[1] the RoA is to be a person-based register. It is therefore crucial that a registration against that person is made in a way that someone searching the RoA can discover it. Thus it would defeat the point of registration if it were acceptable for an assignation granted by Esmerelda to be registered against Suzanna as assignor rather than Esmerelda. Someone searching the RoA against Esmerelda would not find the assignation and would thus be misled.

8.2 This chapter considers the concept of effective registration in the assignations record. We note that the idea of effective registration is also found in the Australian PPSA 2009[2] and the UNCITRAL Model Law on Secured Transactions of 2016,[3] but there the effectiveness relates to registration of a notice (of a security interest). In contrast our concern is with the transfer of a claim by means of an effective registration of an assignation document.

Effective registration

8.3 We consider that it should be made clear where a registration would fail to be effective. In these circumstances the claim would not be transferred. Two categories can be identified: (1) failings in relation to the assignation document; and (2) failings in relation to the data in the entry.

(1) *Entry does not include a copy of the assignation document or document is invalid*

8.4 Earlier we recommended that (a copy of) the assignation document should be registered.[4] Thus if a PDF of a blank sheet of paper is uploaded instead, or a copy of the wrong assignation, or a materially flawed scan with missing text there would be no effective registration. Similarly, the registration would not be effective if it were of an invalid document such as a forgery.

(2) *Entry contains an inaccuracy which is seriously misleading*

8.5 A registration should also fail if the entry created in the assignations record contains a seriously misleading inaccuracy in relation to the registered data. This rule deals with the

[1] See para 7.4 above.
[2] Australian PPSA 2009 s 163. See too Allan, *The Law of Secured Credit* 451.
[3] UNCITRAL Model Law on Secured Transactions, Model Registry Provisions arts 23–25.
[4] See paras 6.13–6.29 above.

situation described above where Suzanna is named as the assignor in the entry for an assignation which was actually granted by Esmerelda.

8.6 In the Discussion Paper, we noted our understanding that in the UCC–9 and PPSA systems errors are common,[5] but that an inaccuracy only invalidates an entry if it would have misled a person searching the register with ordinary diligence. The test is thus an objective one. It does not depend on someone actually being misled. We described the test therefore as one of "reasonable findability". We referred to the relevant provision in the Ontario PPSA: "A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission."[6]

8.7 We wondered, however, whether there was a case for a tougher approach, namely that any mistake would invalidate the registration, in the same way as a key that is *almost* correctly cut will not open the lock. Unlike under the functional approach of UCC–9 and the PPSAs almost all the parties registering would be banks and other financial institutions, or lawyers acting on their behalf. Such a tough approach could be argued for in utilitarian terms, on the basis that the occasional unfairness to particular persons would be justified by benefits to the system as a whole, by incentivising application forms to be completed accurately.

8.8 We therefore asked consultees whether errors should be subject to a "reasonable findability" test. In other words, errors that did not prejudice "reasonable findability" would not matter, but errors which did prejudice "reasonable findability" would be fatal to the validity of the entry, whether or not anyone had in fact been misled. We asked alternatively whether the validity of an entry should depend on its being error-free.

8.9 The consultees who directly answered these questions tended to support a "reasonable findability" test rather than the entry being required to be error-free. For example, Dr Ross Anderson said that the law "should be slow to invalidate the reasonable expectations of business people on the basis of immaterial technicalities." Several law firm consultees, while supporting this approach, noted that there would probably require to be litigation to determine the parameters of what "reasonable findability" meant.

8.10 On reflection, we agree that error-free is too severe a standard to require and that minor errors which do not mislead a searcher should not render a registration ineffective. In the Discussion Paper, as noted above, we referred to the Ontario PPSA where the test is that the searcher is "misled materially". In fact the more common wording used in legislation internationally is that the registration fails where there is an error or omission in the entry which is "seriously misleading". We refer to UCC–9,[7] the Australian PPSA 2009,[8] the New Zealand PPSA 1999,[9] the Canadian PPSAs other than Ontario,[10] the Vanuatu PPSA 2010,[11]

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[5] Discussion Paper, para 20.36 under reference to J Ziegel, "A Canadian Academic's Reactions to the Law Commission's Proposals" in De Lacy (ed), *The Reform of UK Personal Property Security Law* 117 at 125.
[6] Ontario PPSA 1990 s 46(4).
[7] UCC § 9–506.
[8] Australian PPSA 2009 s 164.
[9] NZ PPSA 1999 s 149.
[10] Alberta PPSA 2000 s 43(6); British Columbia PPSA 1996 s 43(6); Manitoba PPSA 1993 s 43(6); New Brunswick PPSA 1993 s 43(6); Newfoundland and Labrador PPSA 1998 s 44(7); Northwest Territories and

the Tonga PPSA 2010,[12] the Papua New Guinea PPSA 2011,[13] the Security Interests (Jersey) Law 2012,[14] the Malawi PPSA 2013,[15] the Samoa PPSA 2013,[16] and the UNCITRAL Model Law on Secured Transactions of 2016.[17] It has been argued that there is no substantive difference between "seriously misleading" and the Ontario formulation of a searcher being "misled materially".[18]

8.11 In the light of its widespread use internationally we recommend the use of the "seriously misleading" test. We think that it more precisely describes the type of mistakes which should invalidate an entry than a "reasonable findability" test. On one interpretation, a "reasonable findability" test is satisfied if the relevant entry can be found. But, even once an entry can be found, it could contain an error which should invalidate the registration. Imagine that where an assignation is registered it is a requirement that the category of claim assigned is identified by means of a tick box system. The advantage of this is that it saves the searcher having to look at the assignation document if the searcher has no interest in the boxes that have been ticked. For example, Eugene might assign the royalties from his patent to Freddie. If Freddie registers the assignation and ticks a box for assignation of rents rather than royalties that error should render the registration ineffective.

8.12 We think that what requires to be "seriously misleading" is an inaccuracy in the entry. The terms "errors" and "omissions" can be found in UCC–9.[19] Other comparator legislation also mentions "defects" and "irregularities".[20] The term "inaccuracy", now familiar from the legislation on land registration,[21] seems to us to capture succinctly all these ideas.

8.13 The "seriously misleading" test would be applied at the time of registration in relation to the data registered. It is at that point that the details should be accurate. For example, in 2020 Anna Smith assigns to the Bearsden Bank the right to be paid the sum of £50,000 in 2022 which has been promised by her uncle. The assignation is registered in the RoA with Anna's correct details. The registration is effective. Anna marries in 2021 and changes her name to Anna Philip. This does not render the registration ineffective because the details are now inaccurate.

8.14 In relation to statutory pledges we recommend a good faith protection rule which would apply in such circumstances.[22] For an assignation, because of its different juridical nature as a transfer rather than a right, such a rule would be awkward. It would mean that the Bearsden Bank would have to update the register to protect itself against the relatively unlikely event of a second fraudulent assignation of the same claim by Anna to another party

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Nunavut PPSA 1998 s 46(4); Nova Scotia PPSA 1995 s 44(7); Prince Edward Island PPSA 1997 s 43(6); Saskatchewan PPSA 1993 s 43(6); Yukon PPSA 2002 s 64(1).

[11] Vanuatu PPSA 2010 s 126.

[12] Tonga PPSA 2010 s 47.

[13] Papua New Guinea PPSA 2011 s 82.

[14] Security Interests (Jersey) Law 2012 art 66(1).

[15] Malawi PPSA 2013 s 64.

[16] Samoa PPSA 2013 s 37.

[17] UNCITRAL Model Law on Secured Transactions Model Registry Provisions art 2. But the Belgian Pledge Act of 11 July 2013 art 20 (inserting a new art 15 into title XVII of book III of the Civil Code) uses the term "incorrectly identified" (*onjuiste identificatie/identification erronée*).

[18] Cuming, Walsh and Wood, *Personal Property Security Law* 363.

[19] UCC § 9–506.

[20] Eg Security Interests (Jersey) Law 2012 art 66.

[21] LR(S)A 2012 s 65.

[22] As to how a change of name should impact on a statutory pledge, see Chapter 32 below.

who was in good faith. Imagine, however, that the Bearsden Bank did not update the register and itself assigned the claim to another financial institution. That institution would lose out if there were a rule protecting a good faith party who had taken a second assignation of the same claim made by Anna.[23] Given that the RoA is not to be a definitive record of all assignations of claims (because the intimation option would remain available[24] as well as assignation without registration under the Financial Collateral Arrangements (No. 2) Regulations 2003[25]), due diligence with potential assignors would mean that enquiries beyond checking the register should take place and ascertaining any recent change of name could be part of that process.

8.15 Below, we consider the "seriously misleading" test in more detail, but before that we recommend:

> **37. The registration of an assignation document should be ineffective if:**
>
> **(a) the entry made up for it does not include a copy of the assignation document,**
>
> **(b) that document is invalid, or**
>
> **(c) there is an inaccuracy in relation to the data registered, which as at the time of registration, is seriously misleading.**
>
> (Draft Bill, s 26(1))

Seriously misleading inaccuracies in entries in the assignations record

Introduction

8.16 We noted above the concerns of some consultees that litigation would be required to test the parameters of which inaccuracies are allowable and which are not. We think that these concerns can be addressed at least to some extent by our draft Bill making more precise provision about when an inaccuracy is "seriously misleading". Another possible source of help is case law from other jurisdictions which use such a test, but caution must be exercised here as account has to be taken of the wording of the comparator legislation as a whole, together with the operation of the register in the particular jurisdiction in question.[26] In fact, we understand there has been relatively little case law on the test, which suggests that it generally works satisfactorily.

(1) *An objective test*

8.17 Further to the discussion above, it should be made clear that the "seriously misleading" test is an objective one. There should be no requirement to show that someone has actually been misled. An Ontario court has expressed the rationale as follows:

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[23] Unless the rule did not apply against subsequent assignees, but this would mean a more complicated rule.
[24] Except in any prescribed cases. See para 5.20–5.21 above.
[25] See Chapter 14 below.
[26] Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 471–472. See also Allan, *The Law of Secured Credit* 460.

> "The purpose for which the reasonable person uses the search function provides the key to determining when it can be said that the reasonable person would be materially misled by an error in a financing statement. The reasonable person uses the system to find prior registered secured interests in the property in question. If the error in the financing statement results in the reasonable person not retrieving that financing statement from the system, then the reasonable person will probably be misled materially. If despite the error, the reasonable person . . . will still retrieve the flawed financing statements from the system, then the error in the financing statement is not likely to mislead materially."[27]

8.18 An objective approach is the standard position internationally[28] and makes the application of the test simpler. There is a subtlety, however, between the approach in Ontario and that in the other Canadian PPSA provinces, New Zealand and Australia. The Ontario PPSA as mentioned above refers expressly to the concept of the "reasonable searcher". This appears to add an extra level of complexity. It is simpler to take the approach whereby an inaccuracy is seriously misleading if it prevents a registration being disclosed by a properly formatted search in the relevant searchable field.[29] We develop this approach further below.[30]

(2) *No account should be taken of assignation document*

8.19 We consider that in determining whether an inaccuracy is seriously misleading no account should be taken of the assignation document. Example 1. The entry for an assignation by Calum in favour of Joshua, mistakenly identifies the assignor as Anna rather than Calum. The fact that the assignation document gives the correct position, namely that Calum is the assignor, would not help the entry to be found as the search would be against the name of the assignor as stated in the data in the entry. Example 2.[31] The application form for registration in the assignations record has a tick box for classes of claim. Eugene assigns the royalties from his patent to Freddie. Freddie registers the assignation in the RoA and erroneously ticks a box for assignation of "rents" rather than "royalties". A searcher who is only interested in royalties is misled. The searcher should not be required also to look at the assignation document to see if there is a discrepancy. We note that under the Australian PPSA, where it is competent to register the security agreement, the "seriously misleading" test is limited to data in the entry.[32]

(3) *Registration ineffective in part*

8.20 We think that there should be express rules on inaccuracies which only render the registration ineffective in part. Such rules are typically found in comparator legislation.[33] Example 1. Alexander assigns to a bank (a) rents and (b) royalties due to him. The bank registers the assignation in the RoA but only ticks the box in the application form for rents and not the one for royalties. The registration is ineffective as regards the royalties.

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[27] *Re Lambert* (1994) 7 PPSAC (2d) 240 at para 46 per Doherty JA. See also *Gold Key Pontiac Buick (1984) Ltd v 464750 BC Ltd (Trustee of)* 2000 BCCA 435 at para 10 per Newbury JA.
[28] See eg NZ PPSA 1999 s 151; Australian PPSA 2009 s 164(2); Security Interests (Jersey) Law 2012 s 66(3).
[29] See *Polymers International Ltd v Toon* [2013] NZHC 1897 at para 23 per Asher J.
[30] See paras 8.21–8.28 below.
[31] See also para 8.11 above.
[32] Australian PPSA 2009 s 164(1)(a).
[33] See eg NZ PPSA 1999 s 152; Security Interests (Jersey) Law 2012 s 66(4); UNCITRAL Model Law on Secured Transactions, Model Registry Provisions art 24(3) and (5).

Example 2. Frances and Henry are the landlords of a shop. They assign the rents to James. He registers the assignation in the RoA, but when completing the application for registration states that Henry is the assignor but fails to mention Frances. The registration is only effective as regards Henry's share of the right to the rents. Example 3. Mairi assigns her right to copyright royalties to Belinda and Charles. Belinda (with Charles's consent) registers the assignation in the RoA, but when completing the application form for registration by mistake only states that Charles is the assignee. The registration is only effective as regards the share of the royalties assigned to Charles.

(4) *Specific cases where search does not retrieve entry*

8.21 We consider that circumstances in which it is clear that there would be a seriously misleading inaccuracy should be spelt out. Again, examples of this can be found in comparator legislation. For example, the Security Interests (Jersey) Law 2012 provides that, without limiting the operation of the test in general, a registration is invalid if there is a seriously misleading defect, irregularity, omission, or error, in any name, or registration number, required by secondary legislation.[34] A registration number would be the unique number of a corporate body, such as a company. The NZ PPSA 1999, again without restricting the operation of the test in general, provides that a registration is invalid if there is a seriously misleading defect, irregularity, omission, or error in the name of a debtor, or in the serial number of encumbered property where that serial number requires to be registered.[35] UCC–9 provides that a financing statement which fails sufficiently to provide the debtor's name is seriously misleading, but this will not be the case if a search "under the debtor's correct name using the filing office's standard search logic" discloses the statement.[36]

8.22 We have drawn on these models to formulate three rules whereby a search against the assignor's details at the date and time at which the entry is made up and which does not reveal the entry means that there is a seriously misleading inaccuracy.

8.23 The first would apply where the assignor (or co-assignor) is a person required by RoA Rules to be identified in the entry by a unique number. We have in mind companies and LLPs, which have unique registration numbers. These, unlike the body's name, do not change. If a search against that number did not retrieve the entry the registration should be ineffective because of this seriously misleading inaccuracy. In contrast an error in the name would not matter provided that the number was correct. But where the number was wrong although the name was correct this would not rescue the entry as getting the number correct would be regarded as essential.

8.24 The second rule would apply where the assignor (or co-assignor) is not required by rules to be identified in the entry by a unique number. We expect this rule to apply to individuals[37] and partnerships. If a search against the assignor's "proper name" does not retrieve the entry the registration should be ineffective. Reference can be made to the

[34] Security Interests (Jersey) Law 2012 art 66(2).
[35] NZ PPSA 1999 s 150.
[36] UCC § 9–506(b) and (c).
[37] It is not impossible that individuals might require to be identified by something like their National Insurance number, but we think that this is unlikely given concerns about privacy and fraud.

Canadian case of *KJM Leasing Ltd v Granstrand Brothers Inc*[38] where there was a registration against "Grandstrand Brothers Inc" rather than "Granstrand Brothers Inc" which was found to be seriously misleading and the court stated:

> "What a search under the incorrect name discloses is not the right question. Obviously a search under the incorrect name will disclose the Applicant's security. But it defies logic to say that a search under the incorrect name discloses the disputed security so the error is not seriously misleading. That is a circular argument. What is relevant is what a search under the right name will disclose. What will a searcher with the right name discover?"[39]

8.25 The meaning of "proper name" would be set out in RoA Rules and would be by reference to specified documentation such as driving licence, passport or birth certificate.[40]

8.26 The third rule would apply to assignors (or co-assignors) who are individuals. If a search against the assignor's "proper name" and date of birth does not retrieve the entry the registration should be ineffective. The advantage of a name and date of birth search is that it reduces the number of search results.[41]

8.27 All three of these rules would have common features. First, the search would be for the assignor's details as at the date and time the registration was made. It is at that moment that the details have to be sufficiently accurate to enable the search to retrieve them. Secondly, the search would be by means of a specific type of search facility which the Keeper would provide. In Chapter 10 below we explain how searches in equivalent registers overseas can have varying logic. In particular a distinction is made between "exact match" where there is little scope for error and "close match" where there is greater scope. We think that this matter should be for further discussion when the RoA is being developed. But, for example, if the RoA is to be an "exact match" register, an entry in the assignations record would have a seriously misleading inaccuracy if the assignor's name as stated in the entry did not exactly match the assignor's "proper name" as per the RoA Rules.

8.28 It should be stressed, however, that an entry may contain a seriously misleading inaccuracy even although it can be retrieved by a search, for example, where the wrong details are given for the assignee. (We do not envisage direct searching against the assignee for the reasons discussed elsewhere.[42])

(5) *Power to specify further instances in which an inaccuracy is seriously misleading*

8.29 We think that it would be helpful for the Scottish Ministers to have a power to specify other circumstances in which an inaccuracy is seriously misleading. For example, if the assignors are trustees the RoA Rules might require that the "proper names" of the trustees include the name of the trust for which they act. It might then be provided that there will be a seriously misleading inaccuracy if a search against the trust name does not retrieve the entry.

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[38] (1994) 7 PPSAC (2d) 197.
[39] (1994) 7 PPSAC (2d) 197 at paras 13–14 per Master Funduk.
[40] See para 7.6 above.
[41] See paras 7.7–7.9 above.
[42] See para 10.3 below.

8.30 Drawing all this together, we recommend:

38. (a) An inaccuracy in an entry in the assignations record may be seriously misleading irrespective of whether any person has been misled.

(b) In determining whether an inaccuracy is seriously misleading no account should be taken of the assignation document included in the entry.

(c) An inaccuracy which is seriously misleading in respect of part of an entry, as regards the details of the claim, assignor or assignee, should not affect the rest of the entry.

(d) Without prejudice to the generality, an inaccuracy should be seriously misleading:

(i) where the assignor (or, as the case may be, a co-assignor) is not a person required by RoA Rules to be identified by a unique number, if a search using a designated facility provided by the Keeper for

(a) the assignor's (or co-assignor's) proper name as at the date and time the entry was created, or for

(b) the assignor's (or co-assignor's) proper name as at that date and time and the assignor's (or co-assignor's) date of birth

does not disclose the entry;

(ii) where the assignor (or, as the case may be, a co-assignor) is a person required by RoA Rules to be identified by a unique number, if a search using a designated facility provided by the Keeper for that number as at the date and time the entry was created does not disclose the entry, including where a search using such a facility for the assignor's (or co-assignor's) number does disclose the entry.

(e) The meaning of "proper name" should be set out in RoA Rules.

(f) The Scottish Ministers should have the power to specify further instances in which an inaccuracy is seriously misleading.

(Draft Bill, s 27)

Chapter 9 Register of Assignations: corrections

Introduction

9.1 In this chapter we consider the issue of inaccurate entries in the Register of Assignations. We recommend rules as to how the inaccuracy could be corrected, with or without court intervention. Where an entry is entirely bad it would be removed from the assignations record and transferred to the archive record. In less severe cases it would merely be data within an entry that would be corrected. We begin by considering examples of inaccuracies.

Possible inaccuracies

Error by party which made the registration

9.2 A mistake could be made by the person who registered the assignation. For example, an assignation by Karl in favour of Leslie might be mistakenly registered against Kevin rather than Karl. This would be caused by the application for registration being completed incorrectly because it would be this application which would generate the entry by means of the automated computer system.[1] Other mistakes could be made in the application too such as identifying the category of claims wrongly (assuming such identification were required), say by ticking the box for "rents" rather than "royalties" where the assignation was of patent royalties. Another possibility would be the wrong copy document being uploaded instead of the copy of the relevant assignation. We envisage, however, that the automated computer system would require a copy document to be registered or the application would not be processed so that it would not be possible for an entry to be created with no document.

Frivolous or vexatious registrations

9.3 Since registration would be automated and the Keeper would not check applications, there would be a risk of frivolous or vexatious registrations being made. An example of a "frivolous" registration would be someone registering an assignation by Mickey Mouse in favour of Donald Duck. Hopefully, the registration fee would deter such practices, but nonetheless there should be a mechanism for the Keeper to delete nonsense entries. An example of a "vexatious" registration would be someone registering a false entry against a famous politician, which could potentially affect that person's credit rating. There have been some examples of this in the USA under UCC–9, although the experience from other jurisdictions generally is that the problem is not a significant one.[2]

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[1] See paras 6.40–6.45 above.

[2] See generally Drobnig and Böger, *Proprietary Security in Movable Assets* 490. But see the two Australian cases of *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* [2014] VSC 217 and *Macquarie Leasing Pty Ltd v DEQMO Pty Ltd* [2014] NSWC 1466.

9.4 Under the Land Registration (Scotland) Act 1979 (now repealed) the Keeper was bound to reject frivolous or vexatious applications for registration.[3] The Land Registration etc. (Scotland) Act 2012 takes an alternative approach: namely that invalid deeds should not be accepted.[4] But this is of course dependent on the Keeper looking at the application before giving effect to it. In contrast under the automated systems of UCC–9, the PPSAs and the Security Interests (Jersey) Law 2012, where no checking is carried out at the time of registration, there is a power for the registrar to remove frivolous or vexatious data.[5]

Inaccuracy attributable to the Keeper

9.5 The assignations record, or indeed the archive record, could be inaccurate due to the Keeper's computer system malfunctioning or a mistake being made by the Keeper's staff. For example, a fault in the system could result in an entry being deleted. The fault in theory could be as a result of hacking. Earlier we recommended that the Keeper should be required to take such steps as appear reasonable to her to protect the register from interference, unauthorised access, or damage.[6]

Reduction of assignation document

9.6 The assignation document which has been registered might subsequently be set aside by a court, for example because it has been induced by fraud or undue influence. Moreover, a court might declare the assignation document to be void from the outset on the basis that it is a forgery or was granted because of force and fear.

Should there be a correction procedure?

9.7 It would be possible to treat the Register of Assignations like the Books of Council and Session or the Register of Sasines, which are deeds registers with no procedure for corrections. But we do not think that such an approach would be satisfactory. As mentioned already, the RoA would be an automated register with no manual involvement of the Keeper's staff at the time of registration. Unlike in these other registers, it is the applicant who is responsible for the summary of the document being registered and not the Keeper. Where an assignation has been mistakenly or even maliciously registered against the wrong person there needs to be a mechanism to enable that person to clear the record of that entry. This is particularly important given that entries in the assignations record, unlike inhibitions,[7] do not lapse after five years.

Types of correction

9.8 We think that five main types of correction can be identified. First, data in an entry could be removed. For example, the entry in the assignations record might state that Grant and Helen are co-assignors, whereas in truth Grant is the sole assignor. A correction would

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[3] Land Registration (Scotland) Act 1979 s 4(2)(c). Another example of "frivolous or vexatious" in Scottish legislation is the High Hedges (Scotland) Act 2013 s 5(1)(b).

[4] LR(S)A 2012 ss 23(1)(b), 25(1)(a) and 26(1)(a). For discussion, see Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) paras 12.47–12.51 and Reid and Gretton, *Land Registration* para 8.7.

[5] For example, NZ PPSA 1999 s 170, Australian PPSA 2009 s 184 and the Security Interests (Jersey) Law 2012 art 80(2).

[6] See para 6.31 above.

[7] Inhibition is a form of diligence (execution) against land. An inhibition requires to be registered in the Register of Inhibitions and Adjudications (known also as the Personal Register.)

enable Helen's details to be removed. Secondly, an entry could be removed from the assignations record to the archive record. This might happen after an assignation has been set aside by the court. Thirdly, data or a copy document in an entry might be replaced. For example, an error in the Keeper's computer system leads to Kirsten being stated as the assignor in an entry whereas it should be Jane. Fourthly, data or a copy document could be restored, for example where it has been deleted in error by the Keeper's computer system. Fifthly, an entry could be restored, for example, where the Keeper's computer system deleted it by mistake.

9.9 We consider that it would be helpful to set out the principal forms of correction in the draft Bill. We recommend:

> **39. Except in so far as the context otherwise requires, any reference to "correction" should include correction by:**
>
> **(a) the removal of data included in an entry,**
>
> **(b) the removal of an entry from the assignations record and the transfer of that entry to the archive record,**
>
> **(c) the replacement of data, or of a copy document, included in an entry,**
>
> **(d) the restoration of data, or of a copy document, to an entry,**
>
> **(e) the restoration of an entry (whether or not by removing it from the archive record and transferring it to the assignations record).**
>
> (Draft Bill, s 31(1))

How a correction is to be effected

Keeper's role

9.10 In considering how corrections should be effected we are influenced by the fact that an assignation is a *transfer*, rather than under UCC–9 and the PPSAs where "interests" are registered. Removing an "interest" from the register means that it is "unperfected". The idea of the "unperfection" of a transfer, however, is incoherent.

9.11 Moreover, one of the main purposes of registering assignations in the RoA is publicity. Third parties should be able to find a registered assignation document by searching against the assignor. That purpose would be defeated if an assignee, having registered an assignation document, had complete freedom to remove the entry by means of a correction or even to change the assignor's name.

9.12 We therefore consider that a correction should only be made by the Keeper. Borrowing from section 80 of the Land Registration etc. (Scotland) Act 2012 the Keeper should be required to make the correction where she becomes aware of a manifest

inaccuracy in the assignations record and what is needed to do to correct it is manifest.[8] If what is needed to correct the record is not manifest the Keeper should have to note the inaccuracy on the entry. The "manifest" test relates to whether it is clear that there is an inaccuracy. In contrast, the "seriously misleading" test described in Chapter 8 above, is a quantitative test about the extent to which the data in an entry is misleading. In some cases an inaccuracy might be manifest but not seriously misleading, for example a minor inaccuracy in a name which does not prevent an entry being retrieved by a search against that name.[9]

9.13 In practice the inaccuracy would be brought to the Keeper's attention by an interested party. We do not think that the Keeper should be expected to review the RoA proactively in an effort to find inaccuracies. This would increase the costs of running the register. We think that RoA Rules should be able to make provision as to the manner in which an inaccuracy in the assignations record may be brought to the Keeper's attention.

Examples

9.14 Some examples may assist explain as to how corrections would be made in practice.

9.15 Example 1. Amy grants an assignation document in favour of Brian. Brian registers this but by mistake states in the application for registration that the assignor is Carol and not Amy. Brian subsequently notices the mistake and applies to the Keeper for correction of the entry. The inaccuracy is manifest because the assignor's details in the entry do not match the copy assignation document that has been registered. If the Keeper is satisfied from the terms of Brian's application for correction that it is manifest that the entry should be corrected to replace Carol's details with Amy's then the Keeper must make the correction.

9.16 Example 2. Same as example 1, but this time Brian completes the application correctly, but unfortunately registers the wrong copy document. The inaccuracy is manifest because the assignor's details in the entry do not match the copy document that has been registered. If the Keeper is satisfied from the terms of Brian's application for correction that it is manifest that the entry should be corrected to replace the copy document then she must make the correction.

9.17 Example 3. A famous politician discovers that there is an entry in the RoA bearing to be granted by him in favour of Mickey Mouse, The Magic Kingdom, Florida. This is a vexatious registration which means that a search against the politician in the RoA would not retrieve a nil result and there may be implications for his credit rating. The politician informs the Keeper. Here it is manifest that there is an inaccuracy and equally manifest that the RoA should be corrected to remove the entry.

9.18 Example 4. The Keeper's computer system malfunctions and copy assignation documents are deleted from entries. The Keeper becomes aware of the problem. It has resulted in manifest inaccuracies in these entries because they no longer contain the copy documents. By means of a back-up system, the Keeper restores the documents. It might

[8] LR(S)A 2012 s 80(3) provides that where what is needed to rectify the register is not manifest the Keeper must enter a note identifying the inaccuracy or in the cadastral map.
[9] This of course would depend on the programming of the searching software. See paras 10.22–10.29 below.

be that in some circumstances of computer malfunction that it would take time for the Keeper to retrieve the relevant data or copy document from the back-up system and therefore it is not manifest immediately as to what is to be done. Here the Keeper would meantime note the inaccuracy in the entry.

9.19 It would take the Keeper some time to consider an application for correction. Therefore to protect their priority we expect that an assignee who notices a mistake may re-register the assignation immediately using the automated system before applying for correction. In that case the correction sought may simply be to remove the bad entry rather than to alter it. It might be possible for a system to be devised whereby an application for registration could be accompanied by an application for correction by means of removal.

Effecting a correction

9.20 Where a correction involves removing the entire entry which would be the case typically with a frivolous or vexatious registration, the Keeper should have to transfer the entry to the archive record and to note the reason for the correction and its date and time. If a correction merely involves correcting data or a copy document, the entry would not of course go to the archive record, but once again the details and the date and time of the correction should be required to be noted. In the case of replacing a copy document which is incorrect, the removed document should be transferred to the archive record.

9.21 We think that the Keeper when making a correction should be required to notify those who are specified in RoA Rules as being entitled to receiving notification. We expect that the rules would specify the parties to the assignation document which has been registered and probably any party named in the entry prior to the correction, such as a person erroneously named as assignor when in fact they were not. We think that the Keeper should also be entitled to notify any other person to whom she thinks that notification should be made.

9.22 We recommend:

40. (a) Where the Keeper becomes aware of a manifest inaccuracy in an entry in the assignations record the Keeper should have to correct the inaccuracy if what is needed to correct it is manifest. If what is needed to correct is not manifest the Keeper should have to note the inaccuracy on the entry.

(b) Where an inaccuracy is corrected by:

(i) removal of the entry the Keeper should have to transfer the entry to the archive record and note on the entry the details of the correction, and its date and time,

(ii) removal or replacement of data included in the entry or by replacement of a copy document the Keeper should have to note on the entry the details of the correction, and its date and time,

(iii) replacement of a copy document, the Keeper should have to transfer it to the archive record.

(c) Where the Keeper effects a correction, the Keeper should have to notify each person specified for these purposes by RoA Rules and any other person whom the Keeper considers it appropriate to notify that the correction has been effected.

(Draft Bill, s 28)

Correction of the assignations record by order of a court

9.23 The Keeper cannot be expected to act quasi-judicially and decide, for example, that the assignation document is a forgery. Such matters must be for a court. We consider therefore that a court should be able to determine that the assignations record is inaccurate and require the Keeper to correct it. For example, an assignation document might be determined by a court to be a forgery. Alternatively, there might be court proceedings which result in an entry becoming inaccurate. For example, an assignation might be reduced by a court on grounds such as fraud, or facility and circumvention. Equally, an assignation might be reduced in part as regards a co-assignor. It is important in such circumstances that the entry or data can be removed from the assignations record so that a search against the purported assignor would not retrieve it.

9.24 We consider that where the court directs the Keeper to correct, it should also be able to give the Keeper further direction, for example as to how and when the correction is to be made.

9.25 In the case of the entry being removed, or a copy document being removed because it is replaced with the correct document, the entry or document would be transferred to the archive record.[10] In the case of only data being removed or replaced the Keeper should have to note the details of the correction, including its date and time in the entry.

9.26 Where the Keeper makes a correction following a direction from the court, the Keeper should be required to notify the persons specified for these purposes by RoA Rules and any other person who the Keeper considers it appropriate to notify. We would expect RoA Rules to require notification to the persons identified as the assignor and as the assignee in the relevant entry.

9.27 We recommend:

41. (a) Where a court determines that the assignations record is inaccurate it should have the power to direct the Keeper to correct it.

(b) In connection with any such correction, the court should be able to give the Keeper such further direction (if any) as it considers requisite.

[10] See paras 11.19–11.21 below.

(c) The Keeper should be required to note on the relevant entry that it has been corrected and the details of the correction, including the date and time. Where the correction requires the removal of the entry or of a copy document the Keeper should have to transfer it to the archive record.

(d) Where the Keeper effects a correction, the Keeper should have to notify each person specified for these purposes by RoA Rules and any other person whom the Keeper considers it appropriate to notify that the correction has been effected.

(Draft Bill, s 29)

Keeper's right to appear and be heard in proceedings in relation to inaccuracies

9.28 Section 83 of the Land Registration etc. (Scotland) Act 2012 provides that the Keeper has the right to be appear and be heard in relation to any proceedings concerning the accuracy of the Land Register or concerning what is needed to rectify an inaccuracy in that register. We think that there should be a similar rule as regards inaccuracies in the RoA.

9.29 We recommend:

42. The Keeper should be entitled to appear and be heard in any civil proceedings, whether before a court or tribunal, in which is put in question (either or both):

(a) the accuracy of the assignations record,

(b) what is needed to correct an inaccuracy in that record.

(Draft Bill, s 30)

Effect of correction

9.30 A correction is the means by which the RoA is amended to reflect the true legal position. Some corrections would be to *remove* incorrect entries or data, for example where an entry was based on a forged assignation or there was a registration which was frivolous or vexatious. Here the correction has no effect on the assignation because there has never been a valid assignation. Sometimes there may have been an assignation which although valid is voidable, perhaps because of fraud. If the court reduces the assignation the transfer of the claim is rendered ineffective. In such circumstances we would expect that the court would also order the correction of the RoA to remove the relevant entry under the powers which we recommend above.

9.31 In other cases, a correction may involve *replacement* of data or a copy document in an entry. For example, the entry states incorrectly that Amy has assigned in favour of Boris, but the assignation document is by Charles in favour of Boris. The Keeper corrects the entry to replace Amy's name with Charles's. The result must be that the registration becomes effective because there is no longer a seriously misleading inaccuracy. The claim held by Charles is duly transferred to Boris. The correction has substantive effect.

9.32 We recommend:

43. A registration which is ineffective should become effective if and when the entry is corrected.

(Draft Bill, s 26(3))

Date and time of correction

9.33 In the same way as the register states the date and time that an assignation document is registered, it should also state the date and time of correction. This is particularly important in circumstances where the correction has substantive effect, in other words makes an ineffective registration effective.

9.34 We recommend:

44. A correction should be taken to be made on the date and at the time which are entered for it in the register.

(Draft Bill, s 31(2))

Chapter 10 Register of Assignations: searches and extracts

Searches

10.1 One of the principal policy reasons for having a Register of Assignations is so that it can be searched against particular persons to check whether they have granted an assignation.[1] It is therefore self-evident that the RoA requires an effective searching mechanism. Searches would of course be made electronically under the automated system and would not require the involvement of the Keeper's staff.

What can be searched?

10.2 An entry in the RoA would consist of (a) data and (b) the copy assignation document. In theory a search mechanism could be set up where any words could be searched against in both data and documents. For example, a search against "Robert Burns" would retrieve any entry where that name is mentioned, as an assignor, an assignee, an account debtor or even in a street name in one of the parties' addresses. This has the potential for a very cluttered search result. A far more preferable approach, in our view, is to restrict the search to certain data which would have been entered in the application for registration and which would therefore form part of the entry data.

10.3 The RoA would be a person-based register and therefore would principally be searched by reference to a person: the assignor. In line with the position under UCC–9 and the PPSAs we do not recommend that searches can be made against assignees. The reason for this is that it would provide too easy a way for a competitor to discover the details of a financial institution's clients.[2] Clearly, it also does not make sense for searches to be made directly against categories of claims, for example "rents", as a voluminous number of search results would be returned.

10.4 In relation to searches against assignors, we think that there should be three possibilities as regards data that can be directly searched against. The first would be by reference to the assignor's name. A search against "Augustus Brown Collins" should retrieve any entry in which Augustus Brown Collins is named as an assignor or as a co-assignor. Earlier, we recommended that RoA Rules set out the "proper name" of an assignor for the purposes of registration which would allow there to be certainty as to how a name should be stated.[3]

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[1] Alternatively, enquiries can be made with the debtor to see if an assignation has been intimated to them. But where there is no identifiable debtor, as is typically the case with a future claim, intimation is impossible.

[2] Although in the interests of flexibility we recommend below at para 10.10 a provision allowing the register to be searched by other factors or characteristics prescribed in RoA Rules and the assignee's details could become directly searchable if prescribed in this way. And where a retrocession of an assignation in security is registered the assignor would typically be a financial institution. See paras 7.43–7.47 above.

[3] See paras 7.5–7.6 above.

10.5 The second possibility would be by references to *both* the name and date of birth for assignors who are individuals. A search against date of birth only should not be possible. Such a search should lead to a less cluttered result than a search against name only. Where the assignor's name is a common one such as "John Smith" this is more important than in less usual names such as "Augustus Brown Collins". As noted elsewhere, we are aware that the presence of dates of birth on a public register raises privacy issues, but we think that there are ways to deal with this.[4]

10.6 The third possibility would be by reference to the unique number of the assignor where the assignor is a person required by RoA Rules to be identified in the assignations record by such a number. We have in mind in particular UK companies and LLPs.[5] Using such numbers has two benefits: they are precise and unlike, for example, a company's name, they do not change.

10.7 We considered whether it should also be possible to search against name and address, but we decided against this principally because (a) the same address can be expressed in different ways (for example, 140/1 Causewayside or Flat 1, 140 Causewayside) and (b) addresses are more likely to change than names.[6] While therefore name and address could not be the subject of a direct search, an entry once found by means of, for example a name search, could be used as additional evidence that the relevant person has been found.

10.8 We think that it should also be possible to search the assignations record by reference to the unique number for an entry (which would depend on the searcher knowing that number) and by reference to any other factor or characteristic specified by RoA Rules.

10.9 The result of carrying out a search against particular data would be to retrieve all entries containing that data. For example, if Andrew Baxter has granted an assignation of his patent royalties to the Cornhill Bank and an assignation of his shop rents to the Deveron Bank, and both assignations have been registered, a search against him would retrieve both assignation entries.

10.10 We recommend:

45. The assignations record should be searchable only

(a) by reference to any of the following data in the entries contained in that record:

(i) the names of assignors,

(ii) the names and dates of birth of assignors who are individuals,

[4] See para 7.9 above.
[5] Cf LR(S)A 2012 s 113(1) (definition of "designation").
[6] Cf Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 523.

(iii) the unique numbers of assignors required by RoA Rules to be identified in the assignations record by such a number,

(b) by reference to registration numbers allocated to entries in that record, or

(c) by reference to some other factor, or characteristic, specified for these purposes by RoA Rules.

(Draft Bill, s 32(2))

Who can search?

10.11 Some registration systems restrict the categories of persons who can search the register in order to protect the privacy of parties whose details are registered. For example, the German Land Register (*Grundbuch*) has a requirement of "legitimate interest" before a search can be made.[7] In the New Zealand Personal Property Securities Register searches can only be made by a restricted number of persons for a restricted number of purposes.[8] A breach of these rules gives rise to an action for breach of privacy.[9]

10.12 We noted in the Discussion Paper that while privacy considerations are relevant, the logic of registration is publicity and not privacy.[10] A strong privacy agenda would impact on the value of the system. For example, a rule that a search against a person can only be carried out with that person's permission would increase transaction costs. The UNCITRAL Legislative Guide states: "The information provided on the record in the registry is available to the public. A search may be made without the need for the searcher to justify the reasons for the search."[11]

10.13 In our Report on Land Registration we commented on the fact that public registration has a long history in Scotland.[12] Land transactions have now been viewable to the public for four hundred years since the Registration Act 1617. Clearly, however, the digital revolution means that information is much more easily obtainable and there is a view that a more restrictive approach should now be taken to what data should be available to the public by means of a search.[13] A balance between publicity and privacy needs to be achieved. As the South African Constitutional Court has noted: "Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks."[14]

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[7] § 12 Grundbuchordnung.
[8] NZ PPSA 1999 s 173. See Allan, *The Law of Secured Credit* 478–479.
[9] NZ PPSA 1999 s 174. We understand that this provision has rarely if ever been used. See also the Australian PPSA 2009 s 173.
[10] Discussion Paper, para 20.31.
[11] UNCITRAL Legislative Guide para 55.
[12] Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) vol 1 para 8.24.
[13] See A Berlee and J Robbie, "Publicity and Privacy in Land Reform in Scotland" (24 September 2015) available at http://schooloflaw.academicblogs.co.uk/2015/09/24/publicity-and-privacy-in-land-reform-in-scotland/.
[14] *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) para 49. See also *Nova Group v Cobbett* (2016) 4 SA 317.

10.14 The data which would appear in the assignations record would be relatively limited and principally consist of the name and address of the assignor and assignee. Often these parties would be partnerships, companies, LLPs or other corporations rather than private individuals.

10.15 While, as already mentioned,[15] we think that the dates of births of assignors who are individuals should require to be registered, RoA Rules could provide for the RoA to be set up in a way whereby the date of birth is either partially or entirely hidden.[16] In relation to the assignation document we recommend elsewhere that RoA Rules should be able to specify that information in it or signatures can be redacted as is the position for registration of charge documents in the Companies Register.[17] We think that limiting what is available to the searcher is a simpler way of proceeding than limiting the classes of person who can search the RoA.

10.16 It should also be possible for RoA Rules to set out requirements in relation to searches, for example as to the information which the person requesting the search must supply. Finally, it would be necessary for a fee to be paid to the Keeper. The fees would contribute to the costs of establishing and running the RoA. Having to pay a fee may also deter those who have no particular reason for searching.

10.17 We recommend:

46. A person should be able to search the assignations record if the search accords with RoA Rules and either the appropriate fee is paid or the Keeper is satisfied that it will be paid.

(Draft Bill, s 32(1))

Data protection

10.18 The information which would be kept in the RoA would, as considered above, include the name and address of the assignor and assignee, and the date of birth of an assignor who is an individual.

10.19 The name, address and date of birth of a living individual are all the personal data of that individual for the purposes of the Data Protection Act 1998[18] (the "DPA"). The DPA protects the privacy of such individuals by regulating the manner in which a data controller such as the Keeper can process the data, and by giving the individual rights to information and to control over processing in certain circumstances.

10.20 The DPA also provides for various public interest exemptions from rights and duties under that Act. Section 34 of the DPA sets out that personal data are exempt from key controls if the data consists of information which the data controller is obliged by or under an

[15] See para 10.5 above.
[16] See paras 7.7–7.9 above.
[17] See para 11.46 below.
[18] The 1998 Act transposes Directive 95/46/EC (OJ L 281, 23.11.1995, p 31). The Data Protection Directive will be replaced from the 25 May 2018 by Regulation (EU) 2016/679 (OJ L 119, 4.5.2015, p 1). The new EU General Data Protection Regulation will be directly applicable in the UK legal order, and will make substantial changes to the EU data protection regime. We have not considered the effect of those changes in this Report.

enactment to make available to the public (whether or not on payment of a fee). That exemption would apply as appropriate to the Keeper when exercising her functions under the legislation governing the RoA.

10.21 The effect of the exemption is that disclosure of information is regulated by the appropriate enactment, to the extent that the exemption is engaged. It follows that the proposed registration scheme should have due regard for the privacy of living individuals whose private information would be held on the RoA. We considered this issue above.[19]

Search facilities

10.22 In the UCC–9 and PPSA registers a general distinction is recognised between "exact match" and "close match" searching. An "exact match" search only retrieves exact matches of the search terms (subject to the basic search logic). For example, a search against "Katharine Smith" will not find an entry against "Katherine Smith". This means that the party making the registration has to achieve almost complete accuracy.[20] A small typographical error is all that is needed for the registration to be ineffective.[21]

10.23 In contrast, "close match" searching uses search logic which finds words which are similar to the target name. The degree of latitude depends on the programming of the system. Under this system a search will retrieve a greater number of results relating to names similar to the target name, most of which will be irrelevant. The searcher therefore has to differentiate between relevant and irrelevant (or what is sometimes termed "false positive") results. Hence the leniency granted to the party making the registration has the consequence of requiring more effort on the part of the searcher.

10.24 Exact match searching is used in Ontario, New Zealand and Australia, whereas the other Canadian provinces with PPSAs use close match searching.[22] To some extent this policy choice has been driven by the size of the jurisdiction. In larger jurisdictions with the potential for more results, an exact match approach seems preferable. Yet New Zealand, which has a similar population size to Scotland and one smaller than Australia and Ontario, has an exact match system. It must be remembered, however, that the number of registrations in a functional system of security interests will be far higher than under our scheme, where only assignations would be registered in the RoA.

10.25 In New Zealand there is also the possibility of a "wild card" search where the end of a word is replaced with an asterisk. For example, a search against "Ian Thom*" will retrieve an entry against Ian Thomson or Ian Thompson, but not Ian Timpson.[23]

10.26 Under any of these systems of searching, the search logic depends precisely on how the computer system is programmed in the particular register. For example, a search need not be case-sensitive and thus not distinguish between upper and lower case letters.

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[19] See paras 10.11–10.17 above.
[20] There is a little latitude depending on the search logic of the computer system. See para 10.26 below.
[21] See generally *Polymers International Ltd v Toon* [2013] NZHC 1897.
[22] See Cuming, Walsh and Wood, *Personal Property Security Law* 364-366; Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 473–474; M Gedye, "The New Zealand Perspective" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 115 at 135–136.
[23] Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 481–483; Allan, *The Law of Secured Credit* 480–481.

Searches against "&" can be set up to find "and" and vice versa. Spaces, punctuation marks and accents can be disregarded. So too can abbreviations at the end of a legal person's name that indicate the nature of the person (LLP, Ltd etc).

10.27 There is a close inter-relationship between the search facility and the "seriously misleading" test in the UCC–9 and PPSA jurisdictions. If an error results in the entry not being retrieved by a search the error will be regarded as seriously misleading and the registration will be ineffective. In Chapter 8 above we recommended that this test is also used in the RoA. We also concluded there that the matter of whether an "exact match" or "close match" approach should be one which is discussed with stakeholders when the Register is being set up. Clearly, the former is more demanding on the person registering because a small error may result in the entry not being retrieved by a search and the registration is thus invalidated on the basis that there is a "seriously misleading" error. But, the benefit of such an approach, is that a search result is less cluttered as it only returns "exact" and not "close" matches.

10.28 We think that the Keeper should have to provide a search facility for the purposes of the "seriously misleading" test. In shorthand, this might be referred to as the "official" search facility. Its criteria, in other words the criteria in accordance with which what is searched for must match data in an entry in order to retrieve that entry, would be specified by RoA Rules. In practice we would expect it to be either "exact match" or "close match". But we think that it should also be possible for the Keeper to offer alternative search facilities, for example "wild card" searching.

10.29 We recommend:

47. (a) The Keeper should be required to provide a search facility in relation to which the search criteria are specified by RoA Rules, but may provide such other search facilities, with such other search criteria, as the Keeper thinks fit.

(b) "Search criteria" should be defined as the criteria in accordance with which what is searched for must match data in an entry in order to retrieve the entry.

(Draft Bill, s 33)

Printed search results

10.30 While the RoA would exist in electronic form it would be possible to print a copy of a search result. We think that the result should be admissible in evidence before a court. In addition, unless there is contrary evidence it should be capable of proving the registration of the assignation document to which the result relates, a correction of the entry in the assignations record to which the result relates, and the date and time of the registration or

correction.[24] If its authenticity were challenged, the solution would be to seek a formal extract from the Keeper under the recommendations which we make below.

10.31 We recommend:

48. A printed search result which purports to show an entry in the assignations record should be admissible in evidence, and in the absence of evidence to the contrary, should be sufficient proof of:

(i) the registration of the assignation document to which the result relates,

(ii) a correction of the entry in the assignations record to which the result relates, and

(iii) the date and time of such registration or correction.

(Draft Bill, s 34)

Extracts

10.32 As in the Land Register we think that it should be possible for application to be made to the Keeper for a formal extract of an entry.[25] This would include an entry which has been moved to the archive record following a correction, although such cases would be rare.[26] There would of course be a fee payable. We think that the Keeper should be allowed to authenticate the extract as the Keeper considers appropriate.[27] Since the RoA is to operate electronically, we consider that the Keeper should be able to issue the extract as an electronic document unless the applicant requests a traditional (paper) document.[28] As is the case under the land registration legislation we think the extract should be accepted for all purposes as sufficient evidence of the contents of the entry.[29] The extract would be time-sensitive given that it would be possible for entries to be changed by means of a correction.[30]

10.33 Elsewhere we recommend that RoA Rules may permit the Keeper to exclude certain information appearing in the register from an extract.[31] We have in mind privacy concerns. We also deal with the Keeper's liability for incorrect extracts below.[32]

10.34 We recommend:

49. (a) Any person should be able to apply to the Keeper for an extract of an entry in the register.

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[24] We have been influenced here by the equivalent provisions in the PPSAs. See eg Saskatchewan PPSA 1993 s 48(2) and NZ PPSA 1999 s 175. And see the Security Interests (Jersey) Law 2012 art 84.
[25] See LR(S)A 2012 s 104.
[26] See Chapter 9 above.
[27] Cf LR(S)A 2012 s 104(6).
[28] On traditional documents, see the Requirements of Writing (Scotland) Act 1995 s 2.
[29] LR(S)A 2012 s 105(1).
[30] See Chapter 9 above.
[31] See para 11.46 below.
[32] See para 11.29 below.

(b) The Keeper should be required to issue the extract if the appropriate fee is paid or the Keeper is satisfied that it will be paid.

(c) The Keeper should be able to validate the extract as the Keeper considers appropriate.

(d) The Keeper should be able to issue the extract as an electronic document if the applicant does not require that it be issued as a traditional document.

(e) The extract should be accepted for all purposes as sufficient evidence of the contents, as at the date on which and the time at which the extract is issued (being a date and time specified in the extract), of the entry.

(Draft Bill, s 35)

Chapter 11 Register of Assignations: other issues

Introduction

11.1 In this chapter we consider miscellaneous matters in relation to the register, namely (1) information duties; (2) duration of registration and decluttering; (3) archiving; (4) the liability of the Keeper and other parties for errors and breach of duties; and (5) RoA Rules.

Information duties

Introduction

11.2 The information which would appear in entries in the RoA would not always be comprehensive. This is true even although a copy of the assignation document appears in the entry. For example, an assignation may be of future invoices specified in schedules to be sent from the assignor to the assignee.[1] Thus the register by itself would not reveal whether a particular invoice has been assigned. Another possibility is that the assignation document contains a suspensive condition. The register would not reveal whether the condition has been purified.

11.3 Under UCC–9,[2] the PPSAs,[3] the DCFR,[4] the Security Interests (Jersey) Law 2012[5] and the UNCITRAL Model Law on Secured Transactions[6] the issue that the register only provides notice of a secured transaction[7] and thus very limited information is addressed by imposing information duties on the party that has registered the notice. Under some of these systems only the debtor is entitled to off-register information and therefore a third party would have to obtain the information via the debtor. But under others some third parties have independent rights.[8]

11.4 The RoA is not a notice filing register but rather a register where documents are filed. More information would therefore be directly obtainable from it than from a notice filing register. Nevertheless, we consider that there should be *limited* statutory information duties owed to a *limited* number of third parties. Such an approach seeks to draw a balance between the fact that neither the details of individual claims being assigned nor information that a suspensive condition has been purified require to appear on the register.

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[1] See paras 4.27–4.28 above.
[2] UCC § 9–210.
[3] Eg NZ PPSA 1999 ss 177–183. See Allan, *The Law of Secured Credit* 481–482.
[4] DCFR IX.–3:319 to 3:324.
[5] Security Interests (Jersey) Law 2012 art 85.
[6] UNCITRAL Model Law on Secured Transactions art 56.
[7] Or even merely the possibility of a secured transaction.
[8] Under UCC–9 the rights extended to the debtor only. But under the PPSAs third parties have rights. See C Walsh, "Transplanting Article 9: The Canadian PPSA Experience" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 49 at 66–67. Similarly, the Jersey legislation is limited to the debtor but not the DCFR.

What information?

11.5 We think that the information which could be requested should be relatively limited. A third party should only be able to ask whether a particular claim is assigned by the assignation or whether a condition to which the assignation is subject has been satisfied. It should not be possible simply to ask for a list of all the claims that have been assigned. The starting point should be that the third party identifies the claims in respect of which the information is sought. Example. B Ltd, a multi-trades company, grants an assignation to the Crimond Bank of future invoices specified in schedules to be sent from B Ltd to the Crimond Bank. An information request could be made as to whether, for example, the invoices issued in May 2022 have been listed in such a schedule.

Who can request?

11.6 Only a limited category of persons should be entitled to make a request, namely those who are affected or potentially affected by the assignation. The approach taken in the DCFR is that any party may make a request to the secured creditor if they have the consent of the provider of the security.[9] We recommend that a similar approach is taken with regard to the RoA and that third parties may make a request if they have the permission of the person identified in the entry as the assignor. For example, B Ltd, a multi-trades company, grants an assignation to the Crimond Bank of future invoices specified in schedules to be sent from B Ltd to the bank. B Ltd and the Crimond Bank subsequently agree that only invoices for plumbing work will be assigned. A few months later B Ltd enters into negotiations with the Duffus Bank about assigning its invoices for electrical work. The Duffus Bank searches the RoA and discovers the assignation. B Ltd advises that the arrangement is only for plumbing invoices. With B Ltd's permission, the Duffus Bank is entitled to have the Crimond Bank confirm this.

11.7 We consider that certain persons should also have independent rights to request information. We have in mind, first, a person who has a right to execute diligence against the claim, even if a charge for payment has not yet been executed.[10] There is a difficulty here. Whether a person has the right to execute diligence depends on who holds the claim. If it is held by the assignor then that party's creditors would be entitled to do so. If it is now held by the assignee then it would now be the assignee's creditors who would be so entitled. It is only on being supplied with the information as to who holds the claim that the requester will know the position. Therefore we consider that both creditors of the person identified in the entry as the assignor and as the assignee should be able to make a request.

11.8 Secondly, we think that there should be power to prescribe other categories of person who would be entitled to make an information request. We have in mind insolvency officials and executors.

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[9] DCFR IX.–3:319(1).

[10] Such a right is recognised under several of the PPSAs. See eg NZ PPSA 1999 s 177(1) ("judgment creditors") and the Australian PPSA 2009 s 275(9)(d).

How should a request be made?

11.9 The request should require to be made to the person identified as the assignee in the entry. In theory it could be made orally but we would expect it would normally be made by electronic communication.

11.10 We recommend:

> **50. (a) An entitled person should be entitled to request from the person identified in an entry in the assignations record as the assignee a written statement as to:**
>
> **(i) whether or not a claim specified in the notice is assigned; or**
>
> **(ii) whether a condition to which the assignation is subject has been satisfied.**
>
> **(b) The following should be entitled persons:**
>
> **(i) a person who has the right to execute diligence against a claim specified in the notice (or who is authorised by decree to execute a charge for payment and will have the right to execute diligence against that claim if and when the days of charge expire without payment) depending on whether the claim has been assigned by the assignation,**
>
> **(ii) a person who is prescribed for these purposes, and**
>
> **(iii) a person who has the consent of the person identified in the entry as the assignor.**
>
> (Draft Bill, s 36(1) to (3))

Duty to comply with information requests

11.11 We think that the person identified in the entry as the assignee should have 21 days to comply.[11] But this would be subject to certain exceptions.[12] It should be possible to apply to the court to seek an extension to the 21-day period. The court should be entitled to make such an order if it is satisfied that in all the circumstances it would be unreasonable for the person to comply within that period. Relevant factors here might be difficulty in finding the information or in verifying the requester's entitlement to obtain it.[13] Similarly, it should be possible to apply to the court to be exempted from the requirement to supply the information either in whole or part, with the court once again having to be satisfied in all the circumstances that it would be unreasonable to expect the request to be complied with.

[11] The periods under comparator legislation vary. For example, under the Australian PPSA 2009 s 277 the period is 10 business days, under the NZ PPSA 1999 s 178 the period is 10 working days, under the DCFR IX.–3:319(3) the period is 14 days and under the Security Interests (Jersey) Law 2012 art 85(2) the period is 30 days.
[12] Cf NZ PPSA 1999 s 179, Australian PPSA 2009 s 278 and Security Interests (Jersey) Law 2012 s 86.
[13] Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 543.

Relevant factors here could be the reasonableness of the inquiry and the relevance of the information to the requester.[14] For example, the value of information as to long-dead claims may be doubtful.

11.12 Drawing on the DCFR,[15] we think that there should also be no requirement to comply if it is manifest from the entry that the claim in question is not assigned. For example, in the entry it is stated that the assignation is of royalties. It is therefore directly apparent that the assignation is not of rents and therefore an information request querying whether rents are included can be ignored. Moreover, if the same requester has made the same request within the last three months and nothing has changed since then, there should be no requirement to comply.

11.13 Similarly, there should no need to comply if it is manifest that the registration is ineffective. For example, an entry states that Clarissa is the assignor and the Barra Bank is the assignee. But the copy document which has been registered is an assignation by Colin in favour of the Barra Bank. In such a case it is patent that no claim has been transferred because the registration has been botched and no information need be supplied.

11.14 It has been suggested to us by our advisory group that the assignee should also be able to decline to answer the request if the assignee does not hold the relevant information. We understand that in some invoice financing transactions the assignor continues to hold the ledger of relevant invoices and therefore it has the relevant information rather than the assignee. We consider, however, that in such circumstances the assignee should obtain the information from the assignor or authorise the assignor to provide it to the party making the request.

11.15 If none of the exceptions apply and the person identified in the entry fails to supply the requested information it should be possible for the entitled person to seek an order requiring them to do so within 14 days. We think that the court should make such an order if it is satisfied that the registered assignee has failed to comply without reasonable excuse. Failure to adhere to the order would be contempt of court. Elsewhere we recommend also statutory liability to any party who has suffered loss as a result of failure to comply with the information duty requirements without reasonable excuse.[16]

Cost of complying with request

11.16 We think that the registered assignee should be entitled to recover the reasonable costs of providing the information.[17]

11.17 We recommend:

51. (a) An information request should require to be complied with within 21 days of its receipt, unless:

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[14] Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* 543.
[15] DCFR IX.–3:320(5).
[16] See paras 11.35–11.42 below.
[17] NZ PPSA 1999 s 180(1); Australian PPSA 2009 s 279(1).

(i) a court is satisfied that in all the circumstances this would be unreasonable and either extends the 21-day period or exempts the recipient from complying with the request in whole or in part,

(ii) it is manifest from the entry that the claim specified in the notice has not been assigned by the assignation document or that the registration is ineffective, or

(iii) the same request has been made by the same person within the last 3 months and the information supplied in response to the last request has not changed.

(b) The recipient should be entitled to recover from the requester any costs reasonably incurred in complying with the request.

(c) If a court is satisfied on the application of the requester that the recipient has not complied with the duty to provide information without reasonable excuse it should by order require that the recipient complies within 14 days.

(Draft Bill, s 36(4) to (8))

Duration of registration and decluttering

11.18 In the Discussion Paper we considered whether as in UCC–9/PPSA systems there should be a lapsing provision, under which a registration ceases to be effective after a certain period unless renewed.[18] This helps declutter the register, making it easier to search. That discussion, however, was in the context of security rights rather than assignations. The concept of a duration does not fit well with an assignation being a transfer, even although claims are ephemeral and often have short lives. We recommend no lapsing provision for assignations.

Archiving

11.19 We noted earlier in the Report that consultees supported archiving.[19] But archiving in the context of assignations would be relatively unusual and be limited to whether the assignations record is incorrect. This can be contrasted with the position for the new security (the statutory pledge) which we recommend later in this Report. There needs to be the facility for it to be removed from the active part of the register and archived where it is extinguished.[20] A search against a person in the register should show security rights which are extant. An assignation, however, being a transfer, is never extinguished.[21]

11.20 Nevertheless, where the register is corrected to remove an entry we think that the Keeper should be required to transfer it to the archive record. The archive record would

[18] Discussion Paper, paras 20.51–20.53.
[19] See para 7.2 above.
[20] See Chapters 23 and 33 below.
[21] What is likely to be extinguished is the claim as claims are typically ephemeral.

therefore be made up of the totality of all such transferred entries. RoA Rules might specify further information that requires to be noted by the Keeper.

11.21 We recommend:

52. The archive record should be the totality of all the entries transferred from the assignations record following a correction and include other data specified by RoA Rules.

(Draft Bill, s 22)

Liability of Keeper and other parties

Introduction

11.22 In certain situations we think that there should be statutory liability imposed on the Keeper for losses caused by Keeper-error in relation to the running of the register and the supply of incorrect information. In addition, we think that there should also be liability imposed on a party who has registered an assignation for losses caused by errors in the registered data or failure to comply with the information duties which we have recommended. Liability provisions can be found under UCC–9, the PPSAs and the Land Registration etc. (Scotland) Act 2012.[22]

Liability at common law

11.23 An initial question is whether there is a need to impose statutory liability or whether the matter can be left to the general law.[23] For example, where the Keeper has made an error that has caused wrong data to appear in an entry in the RoA, a person who has suffered a loss as a result of that error is likely to have a remedy in delict if negligence can be established.[24] But the position cannot be stated with certainty.[25] Difficult questions can arise as to whether a public body in carrying out statutory duties can be liable in delict in the absence of an express provision on civil liability in the relevant statute.[26] We are of the view that making express provision is the preferable option as this would offer greater certainty. In addition, as regards the Keeper, we consider that liability should be strict, which is not the position under the general law.

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[22] UCC § 9–625(b); Saskatchewan PPSA 1993 s 65(5); NZ PPSA 1999 s 176 and LR(S)A 2012 ss 84(1)(b) and 106.

[23] For a helpful discussion as regards the common law liability of the Keeper in respect of the Land Register, see Reid and Gretton, *Land Registration* paras 14.9–14.12.

[24] See *Schubert Murphy v Law Society* [2014] EWHC 4561 (QB) and *Sebry v Companies House* [2015] EWHC 115 (QB).

[25] To establish a duty of care on the part of the Keeper the claimant would probably have to satisfy the three-part test set out by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617H–618B: (1) the foreseeability of the damage; (2) proximity (here between the claimant and the Keeper); and (3) that it is fair, just and reasonable to impose a duty upon the defender, here the Keeper.

[26] See *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *Gorringe v Calderdale MBC* [2004] UKHL 15; *Braes v Keeper of the Registers of Scotland* 2010 SLT 689 and *Santander UK plc v Keeper of the Registers of Scotland* [2013] CSOH 24.

Liability of Keeper

11.24 The Keeper's role is to manage the RoA. It is necessary that the register is reliable and that the data and documents registered are not affected by any inaccuracy caused by the Keeper, or more precisely the Keeper's staff and computer system. Third parties would rely on the RoA for accurate information and where that information is not accurate because of a mistake for which the Keeper is responsible we think that the Keeper's liability should be strict. This is the position under the Land Registration etc. (Scotland) Act 2012 as regards the Land Register in respect of the issuing of incorrect extracts or information.[27]

11.25 We consider that the Keeper's liability should fall broadly under four heads. First, this would be in respect of the making up, maintenance or operation of the RoA and in the attempted making of corrections. There is no direct equivalent of this head in the 2012 Act and liability in such circumstances in relation to the Land Register would necessitate the requirements of the general law being satisfied.[28] The Land Register, however, is a far more complex register than the RoA. For the most part the RoA would be automated[29] and we consider that the Keeper should have strict liability where the computer system malfunctions.[30] This would hopefully be very rare. In contrast, in relation to corrections, manual input would be needed from the Keeper's staff and there could be human error. Failure to make a correction may have serious consequences and we take the view that there should be strict liability in such circumstances too. Some examples may assist.

11.26 Example 1. An application is made to register an assignation by Fred in favour of Ginger. The entry made up by the computer system gives the name of the assignor as Frank. The result is an ineffective registration because there is a seriously misleading inaccuracy. The assignee, Ginger, should be compensated for any loss suffered.

11.27 Example 2. The computer system deletes an entry for an assignation of rents by Peter to the Rathen Bank. Peter (fraudulently) assigns the rents again to the St Cyrus Bank, who relies on the fact that a search in the RoA against Peter is clear. The St Cyrus Bank should be compensated for its loss because the computer error meant that it could not find the assignation. We consider too that the Keeper should be liable for loss suffered as a result of an attempted correction to the RoA, where in fact no correction should have taken place.

11.28 Example 3. The Keeper corrects the assignations record to remove a number of vexatious registrations against a famous politician, but mistakenly also removes a genuine entry. The assignee in relation to the genuine entry should be compensated for any loss suffered, for example by a third party challenging whether there has been such an assignation.

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[27] See LR(S)A 2012 s 106.
[28] See Reid and Gretton, *Land Registration* para 14.10.
[29] See paras 6.40–6.45 above.
[30] Other jurisdictions take varying approaches to this issue. Registrar liability in New Zealand appears to require negligence on the registrar's part: see Gedye, Cuming and Wood*, Personal Property Securities in New Zealand* 533. In some of the Canadian provinces, there is no liability on the registrar where the electronic system fails to effect the registration or to effect it satisfactorily. See Cuming, Walsh and Wood, *Personal Property Security Law* 372. Such an approach seems harsh on the party making the registration.

11.29 Secondly, we consider that the Keeper should be liable for the provision of incorrect information in a verification statement, or an extract which is not a true extract.[31] Thus where the Keeper issues a statement verifying that an assignation document has been registered the recipient should be able to rely on that and have a remedy for loss suffered for example where in fact no entry has been made up.

11.30 Thirdly, the Keeper should be liable where a notification issued in relation to a correction of the register is itself incorrect, for example it states that the correction has been made when it has not.

11.31 As under the 2012 Act,[32] we think that the Keeper's statutory liability should be subject to the duty of the party claiming compensation to mitigate their loss. For example, where a claim is made in respect of loss suffered by an incorrect entry the claimant would be expected to have drawn this to the Keeper's attention as soon as is reasonably possible so that it can be corrected and the loss minimised.

11.32 We consider also that there should be no liability for loss that is not reasonably foreseeable. The wording in the 2012 Act is "in so far as a claimant's loss is too remote"[33] but the role of remoteness in the Scots law of delict is a matter on which at least on one view there is now uncertainty.[34] A "reasonably foreseeable" test is typically found in the PPSAs.[35]

11.33 Finally, again as with the position in respect of the Land Register we are of the view that there should not be liability for non-patrimonial loss.[36]

11.34 We recommend:

53. (a) A person should be entitled to be compensated by the Keeper for loss suffered in consequence of:

(i) an inaccuracy attributable to the Keeper in the making up, maintenance or operation of the Register of Assignations, or in an attempted correction of the register,

(ii) the issue of a statement or notification which is incorrect, or

(iii) the issue of an extract which is not a true extract.

(b) But the Keeper should have no statutory liability:

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[31] Compare LR(S)A 2012 s 106(1)(a) and (b).
[32] LR(S)A 2012 s 106(2)(a).
[33] LR(S)A 2012 s 106(2)(b).
[34] See *Allan v Barclay* (1864) 2 M 873, J M Thomson, *Delictual Liability* (5th edn, 2014) para 16.2 and *Simmons v British Steel Plc* 2004 SC (HL) 94 per Lord Rodger of Earlsferry at paras 59–67. We are grateful to Professor Elspeth Reid for her assistance here.
[35] See eg NZ PPSA s 176(1).
[36] LR(S)A 2012 s 106(2)(c). See Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) para 22.58.

(i) in so far as the person's loss could have been avoided had the person taken measures which it would have been reasonable for the person to take,

(ii) in so far as the person's loss is not reasonably foreseeable, or

(iii) for non-patrimonial loss.

(Draft Bill, s 37)

Liability of certain other persons

11.35 We think that there should be two circumstances where others should have statutory liability for loss, but we think that this should be fault-based rather than strict. In this regard we have been influenced by section 111 of the Land Registration etc. (Scotland) Act 2012.[37] It requires, among other things, that persons applying for registration must take reasonable care to ensure that the Keeper does not inadvertently make the register inaccurate as a result of the application. For example, a forged deed should not be sent for registration.

11.36 The first circumstance of liability is in relation to someone who is responsible for the application which led to an erroneous entry which causes another party loss.[38] Example 1. Alice, a sole trader, assigns her invoices to a bank. But in the application for registration, the bank names Alison, another sole trader, as the assignor rather than Alice. This prevents Alison from assigning her invoices until the matter is sorted out. The bank should be liable to Alison for loss suffered.

11.37 Secondly, we consider that there should be liability in relation to the information duty provisions[39] for either (a) failure to respond to a request for information or (b) the supply of incorrect information.

11.38 Example 2. X Ltd, a multi-trades company, grants an assignation to the Y Bank of future invoices specified in schedules to be sent from X Ltd to the bank. X Ltd and the bank subsequently agree that for the most part only invoices for plumbing work will be assigned. A few months later X Ltd enters into negotiations with the Z Bank about assigning certain invoices for electrical work. The Z Bank searches the RoA and discovers the assignation. X Ltd advises that the arrangement is only for plumbing invoices. With X Ltd's permission, the Z Bank is entitled to have the Y Bank confirm this. The Y Bank, however, supplies wrong information and states that certain electrical invoices have been assigned to it when these have not. This means that X Ltd is prevented from assigning the invoices to the Z Bank. The Y Bank should be liable to X Ltd for loss suffered as a result.

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[37] See Reid and Gretton, *Land Registration* paras 15.2–15.5.

[38] See in this regard the Belgian Pledge Act of 11 July 2013 art 35 (which provides for art 29 of the new Book III title XVII of the Civil Code) and the DCFR IX.–3:306(e).

[39] See paras 11.2–11.14 above. We note that under the Security Interests (Jersey) Law 2012 art 85(6) failure to comply with an information request is a criminal offence. We do not follow this approach.

11.39 Example 3. Same as example 2. But the Y Bank simply ignores the information request. This effectively prevents X Ltd from assigning invoices to the Z Bank. The Y Bank should be liable to X Ltd for loss suffered as a result.

11.40 Example 4. Same as example 2. But X Ltd has in fact assigned electrical invoices and forgotten about this or is fraudulent. The Z Bank makes the information request to the Y Bank, which this time says wrongly that the electrical invoices have not been assigned. The Z Bank then takes an assignation of these invoices, which of course is ineffective as they have already been assigned to the Y Bank. The Y Bank should be liable to the Z Bank for loss suffered as a result.

11.41 As with the Keeper's liability, we think that liability here should be subject to the duty of the party claiming compensation to mitigate loss. There also should be no liability for loss that is not reasonably foreseeable or for non-patrimonial loss.

11.42 We recommend:

54. (a) Where a person suffers loss in consequence of:

(i) an inaccuracy in an entry in the Register of Assignations (which is not caused by the Keeper), the person should be entitled to be compensated for that loss by the person who made the application which gave rise to that entry if, in making it, that person failed to take reasonable care, or

(ii) a failure to respond to a request for information under the information duty provisions, or the provision of information in which there is an inaccuracy, the person is entitled to be compensated for that loss by the person who failed to supply the information if that failure was without reasonable cause or if, in supplying it, that person failed to take reasonable care.

(b) But there should be no liability:

(i) in so far as the person's loss could have been avoided had the person taken measures which it would have been reasonable for the person to take,

(ii) in so far as the loss is not reasonably foreseeable, or

(iii) for non-patrimonial loss.

(Draft Bill, s 38)

RoA Rules

11.43 While the main aspects of the RoA should be set out in primary legislation, there requires to be more flexibility on other aspects. Here secondary legislation is more

appropriate. This model can be found both in relation to the Land Register in Scotland,[40] as well as under the PPSAs.[41]

11.44 We consider therefore that the Scottish Ministers should have the power to make secondary legislation in relation to the RoA. These would be known as "RoA Rules". Below, we set out a formal recommendation as to matters on which RoA Rules should be capable of being made. Many of these are self-explanatory, but a few deserve comment.

11.45 We think that RoA Rules should be able to specify the degree of precision with which time is to be recorded in the register and thus displayed in the relevant entry. Earlier, we recommended automated electronic registration,[42] so it may be sensible to record the time to perhaps the nearest second rather than fraction of a second.

11.46 It should also be possible for RoA Rules to allow certain information in the assignation document, as well as any signatures, to be redacted in the interests of confidentiality and fraud prevention. This is similarly possible when documents are registered in the Companies Register.[43] We think also that it should be possible for certain information that is registered not to be visible to persons searching the register or to appear in extracts. We have in mind particularly dates of birth, where one possibility might be to withhold the day, as is done for director's details in the Companies Register. Another would be that while a name and date of birth search would take the searcher to any relevant entries the date of birth would not actually be displayed.[44]

11.47 RoA Rules could also set out when the register is open for registrations and searching. The PPSA registers are typically open 24 hours a day and 365 days a year, except for scheduled downtime.

11.48 Before making RoA Rules we think that the Scottish Ministers should be required to consult the Keeper.[45]

11.49 We recommend:

55. The Scottish Ministers should, following consultation with the Keeper, have the power to make rules (to be known as "RoA Rules")

(a) as to the making up and keeping of the register,

(b) as to procedure in relation to applications:

(i) for registration, or

(ii) for corrections,

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[40] See the LR(S)A 2012 s 115 and the Land Register Rules etc. (Scotland) Regulations 2014 (SSI 2014/150).
[41] See eg NZ PPSA 1999 and the Personal Property Securities Regulations 2001.
[42] See paras 6.40–6.45 above.
[43] Companies Act 2006 s 859G.
[44] See para 7.9 above.
[45] Cf LR(S)A 2012 s 115(2).

(c) as to the identification, in any such application of any person or claim, including:

(i) how the proper form of a person's name is to be determined, and

(ii) where the person bears a number (whether of numerals or of letters and numerals) unique to the person, whether that number must (or may) be used in identifying the person,

(d) as to the degree of precision with which time is to be recorded in the register,

(e) as to the manner in which an inaccuracy in the assignations record may be brought to the attention of the Keeper,

(f) as to information which, though contained in an assignation document, need not be included in a copy of that document submitted with an application for registration,

(g) as to whether a signature contained in an assignation document need be included in a copy of that document so submitted,

(h) as to searches in the register,

(i) as to information which, though contained in the register, is not to be:

(i) available to persons searching it, or

(ii) included in any extract issued by the Keeper,

(j) prescribing the configuration, formatting and content of:

(i) applications,

(ii) notices,

(iii) documents,

(iv) data,

(v) statements, and

(vi) requests,

to be used in relation to the register,

(k) as to when the register is open for:

(i) registration, and

(ii) searches,

(l) requiring there to be entered in the assignations record or the archive record such information as may be specified in the rules, or

(m) regarding other matters in relation to registration, being matters for which the Scottish Ministers consider it necessary or expedient to give full effect to the purposes of the draft Bill.

(Draft Bill, s 40)

Chapter 12 Assignation: debtor protection

General

12.1 In this chapter we consider what rules there should be to prevent a debtor being prejudiced by an assignation.

Debtors who perform in good faith to the assignor

12.2 In legal systems or international instruments where intimation is not required to complete an assignation, there are rules to protect debtors who perform to the assignor in good faith.[1] Thus say Albert owes Ben £1,000. Ben assigns his right to payment to Caroline. Albert, being unaware of the assignation, pays Ben. Albert is discharged of his debt. Under Scottish law, however, intimation to Albert is currently necessary to complete the assignation. Albert, on receiving intimation of the assignation to Caroline, would not be in good faith by paying to Ben.

12.3 There is therefore little authority on protection of good faith debtors in Scotland, but the doctrine is recognised.[2] Dr Ross Anderson notes: "The most common example will be postal intimation to the debtor. If the debtor pays the [assignor] in good faith because he never received the intimation before payment, he has a defence of good faith payment."[3] This reflects the difference which we highlighted earlier between the purpose of intimation of determining priority and the purpose of notifying the debtor.[4] Under our recommendations it becomes more likely that a debtor does not know of an assignation because assignations may be completed without intimation by registration in the Register of Assignations.[5]

12.4 We consider that where there has been an assignation of a claim, the debtor who performs in good faith to the person last known to the debtor to be the holder of the claim should be discharged.[6] To assist with the explanation we use the example above. Albert owes Ben £1,000. Ben is the person last known by Albert to be the holder of the claim. (If, however, Ben had assigned the claim to Zoe and Zoe had intimated to Albert, then Zoe would become the person last known to Albert to be the holder). Ben assigns the claim to Caroline. Caroline registers the assignation in the RoA but does not intimate to Albert.

12.5 Albert should be discharged if he pays the £1,000 to Ben in good faith (having had no intimation from Caroline), that is to say makes performance to the person last known to Albert to hold the claim. Good faith performance to the assignor should be interpreted broadly and be taken to include performing to a third party at the direction of the assignor.

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[1] For example, see the German Civil Code art 407(1). See also DCFR III.–5:119. In English law a similar result is achieved by means of the rule in *Dearle v Hall* (1828) 3 Russ 1. See para 5.65 above.
[2] Stair 1.18.3 and 4.40.33; *Hume v Hume* (1632) Mor 848. See generally Anderson, *Assignation* paras 7-01 to 7-10. See also P Nienaber and G Gretton, "Assignation/Cession" in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004) 787 at 799–801.
[3] Anderson, *Assignation* para 7-10.
[4] See paras 5.26–5.28 above.
[5] See paras 5.1–5.22 above.
[6] Cf DCFR III.–5:119.

For example, Albert should be discharged if in good faith he pays the £1,000 to Deborah after having been directed by Ben to pay Deborah. As Albert believes Ben to be the holder of the claim he should be discharged where he has simply followed Ben's instructions. Similarly, Albert should be discharged if in good faith he pays the £1,000 to Ellie after Ben informing Albert that he has assigned the claim to Ellie. In all these cases if Albert only pays £500 of the £1,000 or any other part of the claim he should only be discharged to that extent.

12.6 We consider it unreasonable to expect debtors to check the register. This would involve time and cost. Therefore the fact that the assignation document has been registered should not of itself mean that a debtor is in bad faith as regards the assignation.[7] Similarly, the provisions which we recommend elsewhere,[8] which deem that notice is to be received after certain periods should not impact on Albert's good faith.

12.7 We think that the same rules should apply where Albert is a co-debtor and performs in good faith. Imagine that Albert and Alice are co-debtors to Ben for the debt of £1,000 and Albert pays Ben the £1,000 in good faith, being unaware of the assignation to Caroline. The result is that Albert and Alice, together being the debtor, should be discharged, but Albert would have a right of relief against Alice for £500 (subject to any contrary agreement between them) because they were co-debtors.[9]

12.8 An alternative approach would be to discharge a debtor (including a co-debtor) who makes performance to the assignor until such time as the debtor actually receives intimation of the assignation. It would not matter that the debtor was aware of the assignation by other means. This is the approach taken, for example, by the UNCITRAL Convention on the Assignment of Receivables in International Trade[10] and the UNCITRAL Model Law on Secured Transactions.[11] There is also some authority for it in our law, but ultimately the position is uncertain.[12] The attraction of this alternative approach is that it is simpler and more certain than one dependent on good faith.[13] On the other hand, it seems less fair that a debtor in full knowledge of an assignation can choose to ignore this because formal written notification has not been received. We consider that the certainty issue can be assisted by following the approach of German law,[14] so that the onus is on the assignee to show that the debtor is not in good faith. Thus Caroline would need to convince the court that Albert knew about the assignation, because, for example, she did intimate to him and she has evidence that he received the intimation.

12.9 We therefore hold to an approach based on good faith and recommend:

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[7] If, however, a debtor and creditor agree that the debtor should search the register against the creditor before making payment to check if an assignation has been registered, a failure to do so may mean that the debtor is regarded as being in bad faith.

[8] See paras 5.52–5.54 above.

[9] Bell, *Principles* § 62; W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) para 28.2.

[10] UNCITRAL Convention on the Assignment of Receivables in International Trade art 17.

[11] UNCITRAL Model Law on Secured Transactions art 61.

[12] See Anderson, *Assignation* para 6-25 fn 71.

[13] A point made to us by Professor Hugh Beale and Professor Louise Gullifer in their response to our draft Bill consultation of July 2017.

[14] German Civil Code art 407(1). But if intimation has been received by the debtor, it is then for the debtor to demonstrate good faith. See H Prütting, G Wegen and G Weinreich (eds), *BGB: Kommentar* (11th edn, 2016) § 407, Rn 7 and 10. We are grateful to Dr Ross Anderson for this reference.

56. (a) Where after a claim has been transferred by assignation there is performance by the debtor or any co-debtor to the assignor and that performance is in good faith, the debtor should be discharged to the extent of the performance.

(b) The fact only that an assignation document has been registered or that a notice of an assignation has been deemed to have been received, should not of itself mean that a debtor, or any co-debtor, is to be regarded as having performed other than in good faith.

(c) In any dispute as to whether performance was in good faith the burden of proof should lie on the party asserting that performance was other than in good faith.

(Draft Bill, ss 11 and 120)

Successive assignations

12.10 There is a second situation where we consider that a good faith debtor should be protected,[15] particularly in the light of our recommendation that an assignation of a claim could be completed by registration instead of intimation. It is best explained by an example. Lisa owes Kelly £5,000. Kelly assigns her claim against Lisa to Mhairi. Mhairi registers the assignation in the RoA. The claim is thus transferred to Mhairi, but there is no intimation to Lisa. Kelly then fraudulently assigns the same claim again to Nils. Nils intimates to Lisa. Lisa pays Nils in good faith. Here we consider that Lisa should be discharged.[16] Under English law, Lisa would also be discharged, but on a different basis, namely that Nils' intimation trumps the transfer to Mhairi, because Mhairi did not notify.[17] The rule which we recommend is merely a rule of debtor protection. The transfer to Mhairi would remain effective and she would have the right to recover the money from Nils.[18] He could then pursue Kelly for breach of warrandice on the basis that she did not have title to the claim when she assigned it to him.[19]

12.11 We consider that this rule of debtor protection should be similar to the general rule outlined above in that: (a) discharge should only be to the extent of the performance; (b) the debtor should not be regarded as not being in good faith merely because the assignation document has been registered or notice of the assignation has been deemed to have been received; and (c) it should be for a party asserting that the debtor is not in good faith to prove this.

12.12 We recommend:

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[15] See Nienaber and Gretton, "Assignation/Cession" at 800.
[16] Cf DCFR III.–5:119(3) and UNCITRAL Convention on the Assignment of Receivables in International Trade art 17(4).
[17] *Dearle v Hall* (1828) 3 Russ 1. See para 5.68 above.
[18] See Stair 4.40.33; Scottish Law Commission, Discussion Paper on Recovery of Benefits Conferred Under Error of Law (Scot Law Com DP No 95, 1993), vol 1, para 3.59. Similarly, for German law, see the German Civil Code art 816(2).
[19] On warrandice, see further paras 13.36–13.43 below.

57. (a) Where a claim (or one and the same part of a claim) has been assigned successively, the debtor should be discharged to the extent that the debtor (or any co-debtor) performs in good faith to the first assignee from whom intimation is received.

(b) The fact only that an assignation document has been registered or that a notice of an assignation has been deemed to have been received, should not of itself mean that a debtor, or any co-debtor, is to be regarded as having performed other than in good faith.

(c) In any dispute as to whether performance was in good faith the burden of proof should lie on the party asserting that performance was other than in good faith.

(Draft Bill, ss 12 and 120)

Performance in good faith where claim assigned is of a prescribed type

12.13 Earlier we recommended that the Scottish Ministers should have power to prescribe certain types of claim where an assignation requires to be completed by registration in the RoA and intimation does not effect transfer.[20] Imagine that certain types of trade invoice are prescribed. Jean is the customer (debtor) in respect of an invoice of the prescribed type. She receives intimation from a bank that the invoice has been assigned to it and she should make payment to it. The invoice has indeed been assigned to the bank but the bank fails to register the assignation in the RoA. Here we consider that Jean should be discharged to the extent that she pays the bank,[21] provided that she is in good faith.

12.14 Typically, Jean would be in good faith. For her not to be in good faith, we consider that she would have to *know* that (a) the assignation has not been registered (perhaps because the assignee has informed her of this) and (b) that the assignation of such an invoice requires registration for transfer (perhaps because she is a lawyer).

12.15 We recommend:

58. (a) Where a claim is of a type that has been prescribed as transferable only by registration and an assignation of that claim is not registered, but intimation of it is made to the debtor or a co-debtor, the debtor should be discharged to the extent that performance is made in good faith to the assignee.

[20] See paras 5.16–5.20 above.

[21] We think that the same result would be reached under a "priority" registration system such as that being proposed by the Financial Law Committee of the City of London Law Society and the Secured Transactions Law Reform Project for England and Wales. Under such a system if there is no registration the assignment will nevertheless be effective as between the assignor and assignee, so a debtor paying the assignee would be discharged.

(b) A debtor or co-debtor who knows that the assignation has not been registered and that transfer of the claim requires such registration should not be taken to perform in good faith.

(Draft Bill, s 13)

Wider good faith protection?

12.16 There is some authority supporting a general principle that debtors who perform in good faith should be discharged where they perform to the wrong person.[22] Take the following situation. Albert owes Ben £1,000. Crispin draws up an assignation document by Ben in his (Crispin's) favour and forges Ben's signature on it. Crispin intimates the "assignation" to Albert. Albert then pays Crispin in good faith. Crispin disappears. Should Albert be discharged? Unlike the situations in respect of which we have made recommendations above, there has not been an assignation by the holder of the claim. It is a difficult question of policy as to whether the debtor (Albert) should be protected over the holder (Ben). Both are innocent. Under the information duty provisions which we recommend below, a debtor in doubt as to whether there has been a valid assignation should be entitled to withhold performance until provided with reliable evidence of that assignation. This may assist, but we accept that a debtor might regard what later transpired to be a forgery as such evidence. A general rule protecting debtors who perform in good faith to the wrong person clearly could apply in situations where there was no assignation valid or otherwise and therefore we do not recommend express provision on the matter here.[23] It would of course be open to the courts to develop such a rule from the authority that already exists.

Debtor protection: information duties

12.17 Under the current law the debtor is protected by the assignation requiring intimation to effect it. Other than in the case of the intimation not actually reaching the debtor, by say going missing in transit, the debtor knows that there has been an assignation because of the requirement of intimation. Further, the Transmission of Moveable Property (Scotland) Act 1862 requires that the debtor is supplied with a copy of the assignation. Thus while the assignee who intimates may well be a stranger to the debtor, the debtor can see the assignation and the assignor's signature on it.

12.18 We saw earlier, however, that the requirement to send a copy of the assignation may be impractical.[24] It is also unclear following the decision of the Inner House in *Christie Owen and Davies plc v Campbell*[25] that there must be compliance with the 1862 Act.[26] Under our recommendations neither intimation nor supplying a copy of the assignation would be mandatory. This therefore brings the need for statutory information duties to the debtor,

[22] Stair 1.18.3 and 4.40.33; Anderson, *Assignation* para 7-02. See also the submission of defender in *Promontoria (Ram) Ltd v Moore* [2017] CSOH 88 at para 21.
[23] We note that the DCFR III.–5:119 (performance to person who is not the creditor) is also a limited provision.
[24] See para 5.46 above.
[25] [2009] CSIH 26; 2009 SC 436.
[26] See para 5.31 above.

which are a familiar feature of legal systems and international instruments where intimation is not a requirement.[27]

12.19 Under EU law it is a requirement that where a right against a consumer under a credit agreement is assigned "the consumer shall be informed of the assignment . . . except where the original creditor, by agreement with the assignee, continues to service the credit vis-à-vis the consumer."[28] This requirement does not add anything to current Scottish law because intimation is required in every case anyway, regardless of whether the debtor is a consumer or not. But under our recommendations, where intimation is no longer essential, it would have to be complied with in consumer credit agreement cases.

12.20 In the Discussion Paper we addressed the issue that intimation sent to the debtor could be in small print or otherwise in such a form that may not bring home to the debtor what it is. The problem is worse if the document is a large one. The provisions dealing with the assignation might be tucked away on page 93 of a 120 page document. The debtor should hardly be expected to search for them. We consider that in such a case the debtor should be protected by our earlier recommendations on good faith performance.[29] It is unreasonable for the debtor to have to read a 120 page document to be informed that the claim has been assigned. An intimation of an assignation should be succinct and clear. This is why we have recommended a model form.[30]

12.21 On the wider issue of information duties, we asked consultees when there should be such duties on the assignee and, if so, what they should be, and what should be the consequences of failure to perform them. We received a range of views from consultees. Aberdeen Law School argued that "it does seem sensible to force the assignee to at least prove an assignation has taken place." The Judges of the Court of Session said that "whatever the detail of any information duties upon the assignee, they should be sufficient to ensure that prima facie proof of the assignation is provided." Professor Eric Dirix believed that "the best rule is that if the notification is made solely by the assignee, the debtor has the right to request some proof of the assignment and is entitled in the meantime to withhold payment." David Cabrelli supported reform based on the DCFR. We have indeed found the DCFR rules[31] very helpful in formulating policy on information duties.

12.22 First, we consider that where intimation is made by the assignee (rather than the assignor) the debtor should be entitled to request from the assignee sufficient evidence of the assignation. This right would apply where the debtor has been sent a notice of the assignation. If, in contrast, intimation was made judicially, any question as to the validity of the assignation could be raised within the relevant proceedings. "Sufficient evidence"[32] should include the written confirmation of the assignor that there has been an assignation. Another way of providing evidence would be to supply a copy of the assignation but it may be that the parties do not want to do this for reasons of confidentiality.

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[27] For example under the German Civil Code art 410, the UNCITRAL Convention on the Assignment of Receivables in International Trade art 17(7) and the DCFR III.–5:120.

[28] Directive 2008/48/EC, Art 17(2), originally transposed into UK law by the Consumer Credit Act 1974 s 82A. See now the Consumer Credit Instrument 2014 (FCA 2014/11) rule 6.5.

[29] See paras 12.2–12.8 above.

[30] See para 5.45 above.

[31] DCFR III.–5:120.

[32] The term used in the DCFR is "reliable evidence" but "sufficient" is more familiar in Scotland in the context of proof.

12.23 Secondly, where there has been no intimation received but the debtor has reasonable grounds to believe that there has been an assignation (for example, they have private information in relation to this), the debtor should be entitled to written confirmation from the (supposed) assignor that the claim has been assigned or not assigned. Where the claim has been assigned the debtor should be given the name and address of the assignee (unless performance is still to be to the assignor, in which case the confirmation should include a note to that effect.)

12.24 There requires also to be a sanction where there is no compliance with the information duties. The approach of the DCFR is that the debtor can withhold performance until there is such compliance.[33] In contrast the UNCITRAL Convention on the Assignment of Receivables in International Trade permits the debtor to perform to the original holder of the claim until there is compliance.[34] On balance we think the DCFR approach better. The debtor should simply be entitled to withhold performance, rather than be entitled to perform to a party who may no longer in fact hold the claim.

12.25 Where there are co-debtors, we think that the rights to information should be exercisable by the co-debtors acting together rather than an individual co-debtor acting alone because it is in the interests of all the co-debtors that the true position is ascertained.

12.26 We recommend:

59. (a) A debtor to whom intimation of an assignation has been made by an assignee should be entitled to request from the assignee sufficient evidence of the assignation.

(b) "Sufficient evidence" should include the written confirmation of an assignor that an assignation to which that assignor is party has taken place.

(c) A debtor who has reasonable grounds to believe that a claim has been assigned should be entitled to ask the supposed assignor whether there has been an assignation.

(d) The supposed assignor should have to confirm in writing whether the claim has been assigned.

(e) Until the debtor receives the evidence or confirmation, the debtor should be entitled to withhold performance.

(Draft Bill, s 15)

[33] DCFR III.–5:120(4).
[34] UNCITRAL Convention on the Assignment of Receivables in International Trade art 17(7).

The *assignatus utitur jure auctoris* rule

General

12.27 This rule – often shortened to the *assignatus utitur* rule - is a longstanding part of the law of assignation in this country and others.[35] Its effect is that defences which the debtor can plead against the assignor can also be pled against the assignee. In other words, the debtor should not be prejudiced by the assignation.

12.28 The example which we gave in the Discussion Paper was as follows. Cosmo sells oats to Duncan for £10,000. The sale is on credit, and Cosmo assigns the invoice to Alison. The oats as delivered are of a quality that Duncan says is disconform to contract. If Duncan had the right to refuse to pay anything to Cosmo, he also has that right against Alison. If he had the right against Cosmo to pay a reduced sum, he also has that right against Alison. The fact that the assignee will, in the typical case at least, have taken the assignation in good faith is irrelevant.[36] Thus the rights of an account debtor are unimpaired by an assignation.

12.29 The rule also applies in relation to rights of compensation (set-off) of the debtor. For example, Gwyneth owes Henry £1,000 but Henry owes Gwyneth £250.[37] Gwyneth would be entitled to plead the defence known as compensation and set-off the £250, so that she only pays Henry £750. Imagine that Henry assigns the £1,000 claim against Gwyneth to Isabel. Gwyneth is still entitled to exercise her right of compensation and only pay Isabel £750. (Provided that the claim for £250 arose before the £1,000 claim was transferred).

Reform

12.30 In the Discussion Paper,[38] we took the view that the *assignatus utitur* rule was a sound one. The only issue we highlighted was whether a contract might be subject to special rules of interpretation after an assignation, in favour of a good faith assignee. This was an issue mentioned in our 2011 Discussion Paper on Interpretation of Contracts.[39] Our provisional view was that no exception should be made to the *assignatus utitur* rule. We inclined to think that the law in this area did not stand in need of legislative intervention. But we sought the views of consultees on whether any reform was needed, and also on whether it might be of value if the rule were given a statutory form.

12.31 All the consultees who responded on this matter considered that no legislation was required. When, however, we came to consider the issue as we worked on the draft Bill appended to this Report we came to the view that it would be necessary to make express provision in relation to compensation (set-off). Under the current law the cut-off time in respect of which this can be pled is the time of intimation, that is to say the time that the

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[35] See, for example, Stair 2.1.20 and the French Civil Code art 1216(2).
[36] Cases on the *assignatus utitur jure auctoris* doctrine are numerous. See eg *Johnstone-Beattie v Dalziel* (1868) 6 M 333; *Scottish Widows Fund v Buist* (1877) 4 R 1076; *Train v Clapperton* 1907 SC 517 aff'd 1908 SC (HL) 26.
[37] This example is given also at para 3.13 above.
[38] Discussion Paper, para 14.73.
[39] Scottish Law Commission, Review of Contract Law: Discussion Paper on Interpretation of Contract (Scot Law Com DP No 147, 2011) paras 7.32 and 7.35.

assignation is completed.[40] Thus the debtor can set-off claims owed by the assignor which arise prior to that time. Under our recommendations set out earlier[41] assignations would be able to be completed by registration in the RoA as well as by intimation. But in respect of compensation (including a right of contractual set-off where this the basis of that right is the contract which gave rise to the claim),[42] we think that the cut-off point should be when the debtor would no longer have been in good faith had the debtor performed to the assignor, notwithstanding that there has been earlier registration. The debtor cannot be expected to check the register. Normally the debtor would cease to be in good faith on receiving intimation of the assignation. Similarly, the provisions which we recommend elsewhere,[43] which provide that notice is deemed to be received after certain periods should not impact on the debtor's good faith.

12.32 The reason for using the debtor's state of knowledge to determine the cut-off point is that we consider that debtors should not be prejudiced by an assignation which they do not know about. It follow that the debtor should be able to plead compensation in respect of cross-claims against the assignor until intimation of the assignation is received. On the other hand it would not be fair to allow the debtor to make such a plea in respect of subsequently arising claims against the assignor as this would mean that the debtor would effectively have the power to reduce the value of the claim now held by the assignee.[44] One member of our advisory group[45] has expressed concern that a rule based on good faith is insufficiently certain. But our view is that an assignee has it within their power to achieve certainty by making sure that a clear intimation reaches the debtor.

12.33 Having concluded that provision is needed on this matter, we came to the view that there would be advantage in putting the general *assignatus utitur* rule into statutory form. This would see it being expressed in modern language as it is in international instruments,[46] rather than recourse having to be made to Latin. This would fulfil one of our duties, that is to make the law more accessible.[47]

12.34 We therefore recommend:

60. (a) The *assignatus utitur jure auctoris* rule should be put into statutory form, that is to say the debtor (or any co-debtor) should be able to assert against the assignee all defences that the debtor could assert against the assignor.

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[40] In English law equitable set-off (where the claim and cross-claim are so closely related that it would be regarded as unconscionable to enforce the claim without taking the cross-claim into account) can be asserted against an assignor even after notice (intimation). See *Bibby Factors Northwest Ltd v HFD Ltd* [2015] EWCA Civ 1908 and Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* para 7-73. Scottish law appears otherwise. See Anderson, *Assignation* para 8-53.

[41] See paras 5.1–5.22 above.

[42] See Anderson, *Assignation* para 8-60.

[43] See paras 5.52–5.55 above.

[44] See Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* para 7-73.

[45] Dr Hamish Patrick.

[46] For example, UNIDROIT Factoring Convention art 9; UNCITRAL Assignment Convention art 18; DCFR III.–5:116 and the UNCITRAL Model Law on Secured Transactions art 64. And see also the Code civil art 1324 (France).

[47] Under the Law Commissions Act 1965 s 3(1) we are required to work towards the "simplification and modernisation of the law".

(b) The debtor (or any co-debtor) should be able to assert against the assignee any right of compensation (including a right of contractual set-off where the basis of that right is the contract which gave rise to the claim) available to the debtor against the assignor up to the time when the debtor would no longer have been in good faith had the debtor performed to the assignor.

(c) The fact only that an assignation document has been registered or that a notice of an assignation has been deemed to have been received, should not of itself mean that a debtor, or any co-debtor, is to be regarded as having performed other than in good faith.

(Draft Bill, s 14(1) to (3) & (5))

Waiver-of-defence clauses

12.35 Where the debtor renounces the right to plead against an assignee substantive defences which could have been pled against the assignor this is known as a "waiver-of-defence" clause.[48] The effect of this is to make the claim more marketable. Some legal systems recognise the validity of such a clause.[49] Though such clauses are quite often used in Scotland, their effect seems to be untested in the courts. But as far as the common law is concerned, there would seem to be no reason why they should not be valid.[50]

12.36 We asked consultees whether the law here should be clarified. We took the view that if waiver-of-defence clauses are to be given statutory force then presumably they should be of no effect against consumers. In general, consultees who responded to this question favoured such clauses being enforceable in a business but not a consumer context. Professor Eric Dirix said that in civil law systems the matter of defences and exceptions is left to the principle of contractual freedom, except for certain limitations based on consumer protection. Several consultees pointed out that consumers were already protected by legislation here. Reference was made to the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contract Regulations 1999.[51] These have now been replaced in the consumer context by the Consumer Rights Act 2015.[52] We share the view of these consultees that the matter should be left to this legislation.

12.37 There is then the matter of whether provision should be made to declare such clauses otherwise effective. A number of consultees pointed out that this seems essentially

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[48] The debtor must agree to waive the defence. Thus a waiver-of-defence clause in a notice intimating an assignation will only be effective where the debtor signs and returns a copy of the notice to the assignee agreeing to its terms.

[49] For example UCC § 9–403; Saskatchewan PPSA 1993 s 41(2); Ontario PPSA 1990 s 14; New Zealand PPSA 1999 s 102(2); Australian PPSA 2009 s 80(2).

[50] But they may be struck at by consumer protection legislation as we note in the next paragraph. The position is similar in other jurisdictions. See eg Gedye, Cuming and Wood*, Personal Property Securities in New* Zealand 370.

[51] SI 1999/2083 implementing Directive 93/12/EEC. See in this regard *Coca-Cola Financial Corporation v Finsat International Ltd* [1998] QB 43; *Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133 at para [75].

[52] See Part 2 of that Act. Under section 62(1) an unfair term of a consumer contract is not binding on the consumer. And see in particular Sch 2, para 2.

a matter of freedom of contract. In the Discussion Paper[53] we noted that the statement of the *assignatus utitur* rule in the DCFR[54] is in such unqualified terms that it is doubtful whether a waiver-of-defence clause would be regarded as valid. In contrast, other statutory models confirm that such a clause is valid. Since we have decided to recommend that the *assignatus utitur* rule be placed in statutory form we have concluded that the validity of waiver-of-defence clauses should also be confirmed.

12.38 We recommend:

61. (a) The debtor and the assignor should be able to agree that any defences which the debtor may assert against the assignor may not be asserted against an assignee.

(b) This should be without prejudice to any other enactment.

(Draft Bill, s 14(1) & (4))

[53] Discussion Paper, para 14.74.
[54] DCFR III.–5:116.

Chapter 13 Assignation: miscellaneous issues

Introduction

13.1 In this chapter we deal with the remaining issues relating to assignation covered in the Discussion Paper. These include anti-assignation clauses; mandates; transfer of entire contracts; accessory rights; assignations in security; and codification.

Anti-assignation clauses

13.2 Contracts may contain anti-assignation clauses.[1] The effect of such a clause is that if a party to the contract thereafter purports to assign, the assignation is ineffective. The common law is the same in both Scotland and England.[2] In other words, such a clause has effect not only as between the contracting parties themselves but also as against any purported assignee.[3]

13.3 Thus if Cosmo contracts to do construction work for Duncan, and the Cosmo/Duncan contract says that Cosmo is not to assign, and he nevertheless purports to assign the contract price to Abigail, she thereby acquires no right against Duncan. Such clauses are used for various reasons. One is convenience. It is administratively simpler for Duncan to know that he is to pay Cosmo, and not have to deal with the possibility that the claim has become payable to someone else. Another reason is that in some types of contract, assignation may give rise to potential difficulties. For example, a contract may contain an arbitration clause, and if there were to be an assignation, that might give rise to questions as to the position of the assignee in relation to the arbitration clause. Barring assignation means that such questions should not arise.

13.4 There is a strong tendency nowadays internationally for such clauses to take effect only as between the parties, so that breach merely amounts to a breach of contract, without making the assignation actually invalid.[4] The Law Commission for England and Wales has

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[1] These are also known as non-assignment clauses.

[2] See *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228 and *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85.

[3] Dutch law takes the same approach: see R G Anderson and J W A Biemans, "Reform of Assignation in Security: Lessons from the Netherlands" (2012) 16 EdinLR 24 at 47.

[4] See eg UCC § 9–406; Australian PPSA 2009 s 81; DCFR III.–5:109; UNCITRAL Convention on the Assignment of Receivables in International Trade art 9 and UNIDROIT Convention on International Factoring art 6. But cf G J Tolhurst and J W Carter, "Prohibitions on assignment: a choice to be made" 2014 Cambridge Law Journal 405. See also N O Akseli, "Contractual prohibitions on assignment of receivables: an English and UN perspective" 2009 JBL 650; R Goode, "Contractual Prohibitions against Assignment" [2009] LMCLQ 300; H Beale, L Gullifer and S Paterson, "Ban on Assignment Clauses: Views from the Coalface" 2015 Journal of International Banking and Financial Law 463; L Gullifer, "Should Clauses Prohibiting Assignment be Overridden by Statute?" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 319–336; N O Akseli, "The United Nations Convention on the Assignment of Receivables in International Trade and Small Businesses" in Gullifer and Akseli (eds), *Secured Transactions Law Reform* 465 at 473; H Beale, L Gullifer and S Paterson, "A case for interfering with freedom of contract? An empirically-informed study of bans on assignment" 2016 JBL 203 and N O Akseli, "Non-assignment Clauses and their Treatment under UNCITRAL's Secured Transactions Laws Instruments in S V Bazinas and N

recommended that English law should take the same approach[5] and this is now the position in Jersey.[6] Sometimes statutory provisions in relation to these clauses apply generally,[7] whilst others are limited to trade receivables.[8]

13.5 The general rule for *real* rights such as ownership is that an agreement not to alienate has contractual effect between the parties but goes no further than that, so that it does not invalidate a transfer made in breach of the agreement.[9] Should that approach be followed for personal rights? The issue is, therefore, in reality not about freedom of contract but about the consequences of breach. Thus an anti-transfer clause should merely have the same effect in relation to the transfer of contract rights as it does for real rights. Hence a creditor who proposed to assign in breach of an anti-assignation clause could be interdicted, and if the assignation had already taken place, damages would be due if any loss could be shown to have followed from the breach. The difference would be that the transfer would be wrongful (but valid) rather than, as under the current law, invalid.

13.6 In the Discussion Paper, we said that we were not persuaded that a case exists to alter the law.[10] It had been suggested to us that altering the current law could upset carefully structured contracts. But to test opinions we asked whether, if a contract between X and Y contains an anti-assignation clause, and nevertheless there is a purported assignation by X of a right arising from the contract, the effect of the clause should be (as under the current law) that the assignation of that right is invalid, or that the only consequence should be that there has been a breach of contract by X. Secondly, we asked whether the rule should vary according to the type of case. For example, the rule might only apply to receivables but not to other claims. If that were to be the case, we asked which rule should apply to which type of case.

13.7 Most of the consultees who responded to this question did not favour reform of the law. Brodies noted that a breach of contract claim may be of limited value if the defender does not have funds to satisfy such a claim. The Law Society of Scotland said that it did "not believe that it would assist commerce to have a general rule overriding the parties' ability to agree provisions relating to assignability."

13.8 But Dr Ross Anderson said that there was no good answer to the questions. He pointed out that freedom of alienation and freedom of contract can be invoked to justify both validity and invalidity of an assignation in breach of an anti-assignation clause.[11] ABFA and the WS Society took the view that it would be helpful for legislation to clarify that a blanket ban on assignation of rights under a contract should not necessarily mean, unless the wording is explicit, that the right to receive payment could also not be assigned.

O Akseli (eds), *International and Comparative Secured Transactions Law: Essays in honour of Roderick A Macdonald* (2017) 77–93.

[5] Law Com Report No 296 para 4.40.

[6] Security Interests (Jersey) Law 2012 art 39(1).

[7] Such as DCFR III.–5:109.

[8] Such as those recommended by Law Com Report No 296.

[9] But in some types of case the "offside goals rule" applies with the result that the transfer is voidable (though not void). See Reid, *Property* paras 695–700.

[10] Discussion Paper, para 14.47.

[11] He referred to G Gilmore, *Security Interests in Personal Property* vol 1 (1965) 212-213. See also C Rudolf, *Einheitsrecht für internationale Forderungsabtretungen* (2006) 263.

13.9 Dr Hamish Patrick's position was that the current law should be maintained and that any exceptions should be a matter of policy in the area in question following specific consultation in that area to address a specific identified problem.

13.10 Since the publication of the Discussion Paper, there has been an important development.[12] Section 1 of the Small Business, Enterprise and Employment Act 2015 allows the Scottish Ministers[13] by regulations to make provision that anti-assignation clauses in relation to receivables in relevant contracts have no effect, or to have no effect in relation to certain persons that are prescribed.[14] A contract is a "relevant contract" if (a) it is a contract for goods, services or intangible assets (including intellectual property) which is not an excluded financial services contract, and (b) at least one of the parties has entered into it in connection with the carrying on of a business".[15] There is a long list of excluded financial services contracts in section 2 of the 2015 Act and further instances can be prescribed. The target of the legislation is trade receivables. At the time of writing the Scottish Ministers have not consulted on draft Regulations, but DBIS[16] has in England and Wales.[17]

13.11 We conclude that the general law on anti-assignation clauses should be left as it is, but that this should be subject to specific enactments such as the 2015 Act. We recommend:

> **62. (a) The ability of the holder of a claim to assign should be subject to any enactment, or any rule of law, by virtue of which a claim is not assignable.**
>
> **(b) Subject to any other enactment, an assignation of a claim should be ineffective in so far as the debtor and the holder of the claim agree, or the person whose unilateral undertaking gives rise to the claim states, that the claim is not to be assigned.**
>
> (Draft Bill, s 7)

Assignability: other issues

13.12 Aside from anti-assignation clauses, there were other issues in relation to the assignability of claims which we mentioned in the Discussion Paper.[18] One was where a contract confers powers on the creditor, such as a power to vary an interest rate. We thought that this might bar assignation, or possibly mean that the assignee cannot exercise that power. We also raised the issue of an arbitration clause in the original contract and the effect of that following assignation.[19] We asked consultees whether they thought that the law

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[12] See G Yeowart and R Parsons, *The Law of Financial Collateral* (2016) paras 24.62–24.93.
[13] And in England and Wales, and Northern Ireland, the Secretary of State. See Small Business, Enterprise and Employment Act 2015 s 1(6).
[14] 2015 Act s 1(1).
[15] 2015 Act s 1(3).
[16] Department for Business, Innovation and Skills. Now Department for Business, Energy and Industrial Strategy.
[17] See https://www.gov.uk/government/consultations/invoice-finance-nullifying-the-ban-on-invoice-assignment-contract-clauses. See also R Calnan, "Ban the Ban: Prohibiting Restrictions on the Assignment of Receivables" 2015 Journal of International Banking and Financial Law 136.
[18] Discussion Paper, para 14.59.
[19] See generally J C Landrove, *Assignment and Arbitration: A Comparative Study* (2009).

about assignability of contract terms conferring powers on the creditor, stood in need of reform and, if so, how.

13.13 Consultees who responded to this question generally did not favour reform. These included the Faculty of Advocates and the Law Society of Scotland. John MacLeod and Dr Hamish Patrick expressed the view that assignees would have the power to vary an interest rate if this was conferred on the assignor in the original contract. They considered that any restriction on this should be a matter for consumer protection law. We agree and consider that this would be most appropriately considered on a UK-wide basis, given that the subject matter of the Consumer Credit Act 1974 is a reserved matter.[20]

Mandates etc

13.14 Since assignation as such did not exist in Roman law, a functional equivalent gradually developed. If Gaius owed Julia money, she could "assign" to Claudia by granting her a mandate to collect from Gaius.[21] By late Roman law this had reached the point at which it was fairly close to a true assignation.

13.15 Scottish law appears to have developed the assignation in the mediaeval period.[22] The concept does not seem to have been borrowed from Roman law, and thus did not (contrary to what is often said) develop out of mandate. Scottish law therefore did not need to borrow from the less-developed Roman law on this topic. But the influence of Roman law was so strong that the Roman quasi-assignation came to influence Scottish law. Two results of this "assignation as mandate" idea are: (a) a mandate to collect, if granted for onerous consideration, takes effect as an assignation;[23] and (b) an assignee can sue in the name of the assignor.[24]

13.16 In the Discussion Paper we set out our view that these rules are not satisfactory.[25] We considered that if a creditor wishes to give a mandate to someone else to collect a debt, that this should be possible, without the arrangement being converted by force of law into an assignation. As for the doctrine that the assignee can sue in the assignor's name, we noted that while it is not important in practice, it still seems unsatisfactory. The effect of a successful action is that the debtor *is ordered to pay the wrong person*, that is a person who is not his creditor. For example, what if X assigns to Y, and Y then raises an action in X's name, and decree is pronounced, and X is now insolvent. Who gets the benefit of the decree: Y or X's creditors?

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[20] Scotland Act 1998 Sch 5 Part II Head C7. See paras 1.39–1.42 above.
[21] For the history see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) ch 13 and Anderson, *Assignation* ch 4.
[22] It seems likely that there was a strong French influence.
[23] *National Commercial Bank of Scotland Ltd v Millar's Tr* 1964 SLT (Notes) 57 at 59 per Lord Cameron.
[24] Anderson, *Assignation* paras 2-25 to 2-33. See also N R Whitty, "Mandates to Pay, Unjustified Enrichment and the Pandectist Deficit" in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing as Practical as a Good Theory: Festschrift for George L Gretton* (2017) 136–149.
[25] Discussion Paper, paras 4.46–4.50 and 14.48–14.50.

13.17 Formerly assignations were chargeable to stamp duty, but mandates were not. Thus mandates were used to circumvent the tax. But this incentive to use mandates disappeared with the abolition of stamp duty on assignations.[26]

13.18 We asked consultees whether they agreed that (a) the rule that a mandate can operate as an assignation should be abrogated; and (b) the rule whereby an assignee can sue in the name of the assignor should be abrogated.

13.19 Most consultees who responded to these questions agreed. A minority argued that it may be difficult to distinguish an assignation document from a mandate document. We consider, however, that this concern can be addressed by documentation being made clear. Dr Ross Anderson raised an important issue, namely that a rule preventing assignees suing in the name of assignors would significantly affect reparation cases where insurers sue in the name of the injured party. In his view, subrogation is a type of assignation. We therefore consider that the rule should not apply in subrogation cases.

13.20 We recommend:

63. (a) The following rules of law should no longer have effect:

(i) any rule whereby a mandate may operate as an assignation of a claim;

(ii) any rule whereby an assignee of a claim may sue in the name of an assignor.

(b) But this should be without prejudice to the application of any enactment or rule of law as respects subrogation.

(Draft Bill, s 17(1)(a) & (c), and (2))

Policies of Assurance Act 1867

13.21 The Policies of Assurance Act 1867 provides for the assignment of insurance policies. It was passed to make it possible in England for life assurance policies to be assigned at law (and not merely equitably assigned, as formerly). In Scotland they had always been assignable. The intention was apparently that the Act was not intended to apply in Scotland,[27] but it has no express provision on the matter. As far as we can ascertain the Act has never been applied in any Scottish case. But some texts cite it as if it is in force here.[28]

[26] See Anderson, *Assignation* paras 3-18 and 5-41.

[27] Cf F A R Bennion, *Bennion on Statutory Interpretation* (6th edn, 2013) 316. The fact that the Transmission of Moveable Property (Scotland) Act 1862 expressly applies to policies of assurance of any assurance company or association in Scotland, irrespective of the place of residence of the policy holder, and was not amended by the 1867 Act also provides evidence that the 1867 Act was never intended to apply in Scotland. We are grateful to Dr Ross Anderson for drawing this to our attention.

[28] See, for example, Gloag and Irvine, *Law of Rights in Security* 530.

13.22 In the Discussion Paper,[29] we considered that it would make sense to amend the 1867 Act so as to confirm that it does not apply in Scotland. The consultees who responded on this issue either agreed or did not regard it as a material issue. We therefore hold to the view we expressed in the Discussion Paper, but because insurance law is reserved to the UK Parliament[30] we make no provision in our draft Bill on the matter.

13.23 We recommend:

64. The Policies of Assurance Act 1867 should be amended to confirm that it does not apply in Scotland.

Transfer of entire contracts

13.24 Some legal systems have rules on the consensual transfer of an entire contract. Thus a contract between D and E becomes a contract between D and F, with F succeeding to both the rights and the obligations of E, and E being discharged of any liabilities to D.[31] In the Discussion Paper,[32] we inclined to think that the issue was already adequately covered by the general law of contract, and that accordingly no legislative intervention was needed. But we sought the views of consultees. Consultees agreed.

13.25 We recommend:

65. There should be no statutory provision made in relation to the transfer of entire contracts.

Assignation and accessory security rights

13.26 Security rights are accessory to the claims that they secure. In principle, therefore, when a secured claim is assigned, the security should follow the claim.[33] This is part of a wider rule that the assignation carries all accessory rights and is familiar in other legal systems.[34] Thus Erskine writes: "Assignations, when properly perfected, carry to the assignee all rights which corroborate or strengthen the right conveyed."[35] Such rights include security over property as well as cautionary obligations (guarantees of third parties). But, as we noted in the Discussion Paper,[36] the law is not in a wholly satisfactory state.

13.27 To promote clarity and certainty, we thought that there might be a case for a general provision to the effect that, unless otherwise agreed, an assignation carries with it any security that exists for the assigned claim, and that if any further act is needed to vest the security in the assignee, the assignor will perform that act.[37] Thus, for example, if X owes

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[29] Discussion Paper, para 14.69.
[30] Scotland Act 1998 Sch 5 Part 2 Head A3.
[31] DCFR III.–5:302.
[32] Discussion Paper, para 14.76.
[33] On the difficulties arising where the claim and security right are held by different people, see *3D Garages Ltd v Prolatis Co Ltd* [2016] SC EDIN 70, 2016 GWD 34-617, discussed in K Swinton, "Three and four party heritable securities: now available in 3D!" 2017 SLG 60.
[34] See eg French Civil Code art 1321.
[35] Erskine 3.5.8. See also Stair 3.1.17; Anderson, *Assignation* para 2-01; Steven, *Pledge and Lien* para 4-18; and A J M Steven, "Accessoriness and Security over Land" (2009) 13 EdinLR 387 at 403–410.
[36] Discussion Paper, Chapter 5.
[37] This was the view taken by Lord Gifford in *McCutcheon v McWilliam* (1876) 3 R 565: "The conveyance of the debt is implied necessarily in conveying the subject of the security."

money to Y, secured by a standard security,[38] and Y assigns the claim to Z, without there being any assignation of the standard security, Z would have the right as against Y to have the security assigned.[39]

13.28 It would be possible to go further, and provide that an assignation of the secured claim automatically gives to the assignee a completed title to the security.[40] This is perhaps the most logical solution. But it would be a radical reform and would affect the law of standard securities. It would reduce the "publicity" value of registration as the register would not state the holder of the standard security.[41] We sought the views of consultees on this and also on the more general question of whether it should be provided that unless otherwise agreed, the assignation of a claim should carry with it a right to acquire any security that exists for the assigned claim, and that if any further act is needed to vest the security in the assignee, the assignor should perform that act.

13.29 Most consultees who responded to the general question agreed. But some law firm consultees were opposed, arguing that the transfer of the security should require to be dealt with expressly by the parties. A particular concern which these and some other consultees had was the situation where the secured obligation is more extensive than the security. Take the following example. Alice borrows £10,000 from Bertie. In return she grants him a standard security for all sums due to him. Such a security right, as the name suggests, will secure the entire indebtedness of the debtor to the secured creditor. One year later Alice borrows another £5,000 from Bertie under a separate loan contract. Bertie then assigns his claim to repayment under that contract to Cecilia. What is to happen to the security? Probably the law says that it is shared as between Bertie and Cecilia,[42] but this result is complex and normally in practice the parties would regulate this expressly.

13.30 We consider that a simple default rule should apply. The assignee should acquire, as a result of the assignation, the right to any security which relates to the claim assigned and is restricted to that claim. Thus in the case of the assignation of one of a number of claims secured by the security the right to the security would remain with the assignor. Of course, as a default rule the parties could make alternative provision. As a matter of policy we think that this should require to be made in the assignation document.

13.31 Again in the interests of simplicity, we think that the default rule should be that where a claim is assigned in part, the security should not pass to the assignee. Thus, for example, Donald owes Eric £10,000 secured by a standard security. Eric assigns £2,500 of his £10,000 claim against Eric to Fiona. The right to the standard security should remain with Eric, unless express provision to the contrary is made.

13.32 With some security rights it would be necessary for more to be done to vest the security in the assignee.[43] The alternative approach outlined above of the assignee

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[38] Or other right in security.
[39] It may be that this is already the law.
[40] See Anderson, *Assignation* para 2-13 to 2-14.
[41] For the position as regards statutory pledge, see paras 23.41–23.48 below.
[42] See Anderson, *Assignation* para 2-15 to 2-16. See also C G van der Merwe and E Dirix, "A Comparative Law Review of Covering Bonds and Mortgages Securing Fluctuating Debts" 1997 Stellenbosch Law Review 17 at 26–29.
[43] Note in this regard the Belgian Pledge Act of 11 July 2013 art 28 (which provides for art 23 of the new Book III title XVII of the Civil Code).

automatically obtaining a completed title in all cases would appear a step too far. Hence, for a claim secured by a possessory pledge, it would seem that the pledged property would have to be delivered to the assignee[44] and in the case of a standard security there would require to be an assignation of that security and registration of that assignation in the Land Register.

13.33 We recommend:

> **66. (a) Unless the assignor and assignee provide otherwise in the assignation document, where a claim is assigned in whole, the assignee should acquire, by virtue of the assignation, any security which relates to the claim assigned and is restricted to that claim.**
>
> **(b) The assignee should be required to perform any act requisite for the transfer of the security to the assignee as soon as reasonably practicable.**
>
> (Draft Bill, s 16)

13.34 A related issue is what should happen if there is a deed assigning the claim and the security, and this is registered in the relevant register, for example, an assignation of a standard security registered in the Land Register. At that stage there may have been no intimation to the debtor. If the law continues to be that assignation requires some external act to take effect, we asked whether it should be provided that the registration transfers the claim. For example, Doris owes money to Chris secured by standard security. Chris assigns the claim and the security to Audrey and this is registered in the Land Register on 1 June. Should the law be that the assignation of the claim is complete at the same time as the assignation of the security, that is on 1 June, even though there is no notification to Doris until later?[45] In more general terms, the question is whether the registration should transfer the claim notwithstanding that the general requirements of the law as to transfer of claims have not been met. Any such rule would of course require to be subject to protections for Doris in the event that she pays Chris in good faith, and so on. The reason for such a reform would be to prevent a split between the claim and the security.

13.35 There was little support from consultees for such a reform. Dr Ross Anderson and John MacLeod noted that it inverted the basic principle that the accessory (the security) follows the principal (the claim). The Law Society of Scotland thought that there could be difficulties caused by the transfer of the claim being dependent on the completion of conveyancing (although, earlier intimation would deal with this). Brodies raised issues with the assignation of all sums standard securities. In the light of the views of consultees we do not recommend this reform, but we may revisit the matter in our forthcoming project on heritable securities.

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[44] See Steven, *Pledge and Lien* paras 4-18 to 4-27. But compare Anderson, *Assignation* paras 2-05 to 2-06.
[45] It is possible that this might be the current law. But no-one can be certain.

Warrandice

13.36 When a claim is assigned, the law implies certain guarantees by the assignor to the assignee. This is known as "warrandice" and is a feature of the law as regards the transfer of all types of property.[46] The parties can exclude the implied guarantees or conversely agree on additional guarantees.

13.37 In the Discussion Paper we said that what the law implies in relation to the assignation of a claim is warrandice *debitum subesse*, that is to say that the assignor guarantees to the assignee the existence of the claim.[47] This means that if the assignee finds that the claim is barred, wholly or partially, by a plea of *assignatus utitur jure auctoris*[48] the assignor is in breach of warrandice and must compensate the assignee. We went on to say that the guarantee is only that the debtor is bound to perform, not that the debtor will actually make performance. We gave the example of the assignee being unable to obtain payment from the debtor because the debtor is insolvent. We did not ask consultees any questions in relation to warrandice in the Discussion Paper.

13.38 On reflection, following comments made to us by Professor Kenneth Reid, we consider that there would be advantage in placing the law here onto a statutory footing. The main reason for doing so is that the common law is unclear, as has been shown by Professor Reid[49] and also in more recent scholarship by Dr Chathuni Jayathilaka.[50] And in recommending a new statutory rule we consider that the common-law position that the parties are free to make contrary provision would be maintained. For example, in response to our draft Bill consultation, R3 noted that insolvency practitioners do not provide any form of warrandice. They would be able to maintain that position under our recommendations. In line with the common law too we think that a distinction requires to be made as regards assignations for value (typically where claims are sold) and assignations where there is no consideration (payment) made by the assignee.

13.39 For assignations for value and drawing on the admittedly unclear common law, we consider that the implied guarantee should be threefold. First, assignors would be taken to warrant that they are entitled to transfer the claim to the assignee, or in the case of the assignation of a future claim will become so entitled. This would require that they were the holder of the claim, or, in the case of a future claim, would become the holder. In addition, the claim would require to be assignable to the assignee. So if there were a ban on assignation resulting in transfer being debarred the assignor would be liable.[51] Secondly, there should be an implied guarantee that the debtor is bound to perform to the assignor in full. This means that the debtor should not have any defence such as that the claim is invalid, or be able to plead compensation (set-off) and only perform in part. Thirdly, assignors should be taken to warrant that they have done nothing in the past and will do nothing in the future to jeopardise the assignation, for example by granting an assignation of

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[46] See Reid, *Property* paras 701–800 and C Jayathilaka, *Sale and the Implied Warranty of Soundness* (forthcoming) paras 5-39 to 5-65.
[47] Discussion Paper, para 4.25.
[48] See paras 12.26–12.31 above.
[49] Reid, *Property* para 717.
[50] C Jayathilaka, "The Warrandices Implied in the Sale of a Claim to Payment" 2016 Juridical Review 105.
[51] See paras 13.2–13.11 above.

the same claim to another party. At common law, this is referred to as "fact and deed" warrandice.[52]

13.40 Where the assignation is not for value, assignors should be taken to warrant that they will do nothing in the future to prejudice the assignation. This is referred to by the common law as "simple warrandice".[53]

13.41 We think that the new statutory rule should make it clear as under the common law that there is no guarantee that the debtor will perform.[54] As mentioned earlier, the reason for non-performance will typically be insolvency.[55]

13.42 Finally, there is also doubt at common law whether warrandice is also implied in any contract (or unilateral undertaking) which precedes the assignation.[56] Normally of course this will be a contract of sale. In the case of transfer for no consideration there will probably not be any prior contract.

13.43 We recommend:

67. (a) In assigning a claim for value the assignor should be taken to warrant to the assignee that:

(i) the assignor is entitled to, or (in the case of a future claim) will be entitled to, transfer the claim to the assignee,

(ii) the debtor is obliged to perform in full to the assignor, and

(iii) the assignor has done nothing and will do nothing to prejudice the assignation.

(b) In assigning a claim other than for value the assignor should be taken to warrant to the assignee that the assignor will do nothing to prejudice the assignation.

(c) In assigning a claim, whether for value or other than for value, the assignor should not be taken to warrant to the assignee that the debtor will perform to the assignee.

(d) These rules should also apply to any contract or unilateral undertaking which the assignation implements.

(e) These rules should be subject to contrary agreement by the parties.

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[52] See Reid, *Property* para 717 and Jayathilaka, "The Warrandices Implied in the Sale of a Claim to Payment" at 106-107. See also *Waitch v Darling* (1621) Mor 16573.
[53] See Reid, *Property* para 717.
[54] See eg Stair 2.3.46.
[55] See also Jayathilaka, "The Warrandices Implied in the Sale of a Claim to Payment" at 107–111. See also the French Civil Code art 1326.
[56] See Reid, *Property* para 719 and Jayathilaka, "The Warrandices Implied in the Sale of a Claim to Payment" at 114–115.

(f) The common law rules on warrandice in relation to the assignation of claims should be abolished.

(Draft Bill, ss 10 and 17(1)(d))

Assignation in security

13.44 Our recommendations on assignation of claims apply also to assignations in security of claims. It may be worth saying a little more on this subject here.

13.45 First, the alternative of registration instead of intimation would help facilitate assignations in security in relation to claims, making these much easier. Secondly, as we have seen,[57] the definition of "claims" includes rents. The assignation of rents is a very common security transaction which is currently cumbersome because of the need for intimation. Thirdly, for reasons explained more fully later in this Report, we recommend that for the moment at least it is not possible for the new security (the statutory pledge) to be granted in respect of claims.[58] This means that the assignation in security would remain the appropriate form of security in respect of this type of incorporeal moveable property. Fourthly, the clarification of the law which we recommend, namely that a notice of intimation can instruct the debtor to perform to the assignor rather than to the assignee, would help facilitate assignations in security as the parties will only want performance to be made to the assignee on default.[59] Fifthly, assignations in security granted by companies etc. would continue to require to be registered under the company charges registration scheme.[60] Thus, such an assignation would require (1) intimation or registration in the RoA and (2) registration in the Companies Register.

The Cape Town Convention

13.46 The Cape Town Convention on International Interests in Mobile Equipment came into force in the United Kingdom in respect of aircraft objects on 1 November 2015.[61] We say more on this below in volume 2. The Convention provides for a right in security known as an "international interest" which is recognised in the countries that have acceded to the Convention. It has some special rules in relation to the assignation[62] of a right associated with an international interest.[63] Such a right is known as an "associated right". A "claim" within the meaning of our recommendations could qualify as such a right.[64] Therefore our general rules on assignation of claims require to be made subject to these special rules. We recommend:

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[57] See paras 4.13–4.14 above.
[58] See Chapter 22 below.
[59] See paras 5.58–5.61 above.
[60] Companies Act 2006 Part 25.
[61] In terms of The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (SI 2015/912). On the Convention, see R Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment Official Commentary* (revd ed, 2008).
[62] The Convention uses the term "assignment". This is defined as "assignation" for Scotland under reg 35 of the 2015 Regulations.
[63] See regulations 27 to 35 of the 2015 Regulations. For example, under regulation 27 an assignment of an associated right automatically transfers the international interest related to that right.
[64] "Associated rights" are defined as "all rights to payment or other performance by the debtor under an agreement which are secured by or associated with the aircraft object".

68. The general provisions on assignation of claims should be without prejudice to the application, as respects the assignment and acquisition of associated rights, of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015.

(Draft Bill, s 18)

Codification

13.47 In the Discussion Paper, we asked consultees whether codification of the law of assignation should be an objective of the moveable transactions project.[65] We noted that the arguments against codification would be the usual arguments – achieving this would be time-consuming, there would be disputes as to its interpretation, drafting errors would be discovered, and even if it were to be done perfectly, the real gain would be small.[66] The arguments in favour of codification would include that it would make the law clearer and more accessible. We said that a middle view would be that whilst codification would be desirable, it would be better to proceed in two stages. These were to reform the law first, and then, once the reforms had bedded down and any problems had come to light, to codify as a second step.

13.48 Consultees who responded to this question were unanimous that codification should not be attempted in this Report. While several thought it desirable in the longer term, they believed that more limited reform in the short term is what is needed.

13.49 We therefore recommend:

69. At the present time the law of assignation of claims should not be codified.

[65] Discussion Paper, para 14.80.

[66] On the general challenges of codifying, see G Gretton, "Of Law Commissioning" (2013) 17 EdinLR 119 at 131–133 and G L Gretton, "The Duty to Make the Law More Accessible? The Two C-Words" in M Dyson, J Lee and S Wilson Stark (eds), *Fifty Years of the Commissions: The Dynamics of Law Reform* (2016) 89 at 93–95.

Chapter 14 Financial collateral

Introduction

14.1 Security over financial collateral is the subject of dedicated legislation.[1] The Financial Collateral Directive ("Directive"), dating from 2002[2] and substantially amended in 2009,[3] applies in EU Member States. It has been implemented in the UK by statutory instrument, the Financial Collateral Arrangements (No. 2) Regulations 2003 ("FCARs").[4]

14.2 The Directive aims to achieve a harmonised set of rules on financial collateral in the European Union which enable security over this type of asset to be taken and enforced more easily. But it has been the subject of significant negative comment, notably for its wide scope of application and lack of clarity.[5] Perhaps unsurprisingly, given their basis in the Directive, the FCARs have similarly been criticised, both generally[6] and in relation to how they apply to Scottish law.[7] Dr Ross Anderson has written: "Few legislative instruments are as difficult to follow as the Financial Collateral Directive; and there can be few examples of legislation implementing a European Directive as unsatisfactory as the attempts by way of the [FCARs] to implement the [Directive] into Scots law."[8]

14.3 In this chapter we attempt to provide an overview of the legislative framework in relation to financial collateral, before setting out the recommendations necessary to make our scheme comply with it in relation to where financial collateral is the subject of an assignation in security. The approach taken in the Discussion Paper was that no special rules were required.[9] As a result, no specific questions on financial collateral were addressed to consultees. On looking into the matter further and with the assistance of our

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[1] See generally Yeowart and Parsons, *The Law of Financial Collateral*; Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* ch 3; Calnan, *Taking Security* paras 3.288–3.300; J Benjamin, "Securities Collateral", in De Lacy (ed), *The Reform of UK Personal Property Security Law* 223–269. There is also much of value in Law Commission, Company Security Interests (Law Com No 296, 2005) Part 5.

[2] Directive 2002/47/EC on financial collateral arrangements.

[3] Directive 2009/44/EC amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims. (For the European Commission Report leading to the amending directive see http://ec.europa.eu/internal_market/financial-markets/docs/collateral/fcd_report_en.pdf.)

[4] Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) as amended by the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 (SI 2010/2993). One of the reasons for the 2010 amendments was that there were problems with the original version of the Regulations as regards Scotland. See H Patrick, "The Financial Collateral Arrangements Regulations: some Scottish issues" 2009 Law and Financial Markets Review 532.

[5] See G L Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" (2006) 10 EdinLR 209; L Gullifer, "What Should We Do about Financial Collateral?" (2012) 65 Current Legal Problems 377 and L Gullifer, "Compulsory Central Clearing of OTC Derivatives: The Changing Face of the Provision of Collateral" in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) at 379–380.

[6] Yeowart and Parsons, *The Law of Financial Collateral* Appendix 1 lists 29 shortcomings and uncertainties. See also the sources referred to in the previous footnote.

[7] See Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" (above).

[8] R G Anderson, "Security over bank accounts in Scots law" 2010 Law and Financial Markets Review 593 at 597.

[9] Discussion Paper, paras 2.10–2.25.

advisory group,[10] we consider now that we need to make express provision in circumstances where the Directive may be applicable.[11]

14.4 An alternative approach, suggested to us by Professor Gretton, was simply to have a provision in our draft Bill stating that it is subject to the Directive. While there are attractions in such an approach, we do not think that it would make the draft Bill sufficiently accessible.

14.5 It remains to be seen what the legal consequences for the application of the Directive are to be in the light of the pending withdrawal of the UK from the EU.

What is financial collateral?

14.6 The Directive has a threefold definition of "financial collateral" as "cash, financial instruments or credit claims".[12]

14.7 "Cash" means, not cash such as bank notes, but "money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits."[13] Thus it includes a claim to have money repaid if that money has been deposited with a financial institution to be invested in a money market.[14]

14.8 "Financial instruments" are defined as:

> "Shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing."[15]

14.9 This can be seen to be a broad category, in particular with its inclusion of shares in companies (both certificated and uncertificated[16]). Intermediated securities are also included. This is where shares are held by an intermediary on behalf of an investor.[17]

14.10 "Credit claims" are defined as "pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4(1)(1) of Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013, and including the institutions listed in Article 2(5)(2) to (23) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013, grants credit in the form of a loan."[18] Thus if a bank lends Jack £10,000, the bank has a "credit claim". But if a trading company is owed £10,000 by one of its customers

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[10] We are particularly grateful here to Professor George Gretton, Dr Hamish Patrick and Stephen Phillips.
[11] This was also Professor Hugh Beale's view in response to the Discussion Paper. See H Beale, "A View from England" (2012) 16 EdinLR 278 at 281–282.
[12] Directive Art 1(4).
[13] Directive Art 2(1)(d). See too the FCARs reg 3(1).
[14] Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* para 3.17.
[15] Directive Art 2(1)(e). See too the FCARs reg 3(1).
[16] Dealings in uncertificated shares are carried out electronically under the CREST system. See the Uncertificated Securities Regulations 2001 (SI 2001/3755).
[17] See Discussion Paper, para 7.15 and Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* para 3.25.
[18] FCARs reg 3(1) as amended by the Capital Requirements Regulations 2013 (SI 2013/3115). For the Directive, see Art 2(1)(o) introduced by Directive 2009/44/EC.

in respect of goods sold, the company does not have a "credit claim." Nor is there a credit claim if Nicola borrows the money not from the bank but from her friend Oliver.

14.11 The Directive therefore does not cover land, or intellectual property, or corporeal moveable property. Its scope is limited to certain types of incorporeal moveable property.

14.12 Professor Louise Gullifer has identified the core attribute of the definition of financial collateral in the Directive as liquidity.[19] Thus it comprises assets which can quickly and easily be transformed into money. The result is that the collateral is often not seen so much as a back-up if payment under the secured obligation is not made, but rather as a form of payment itself, for example by invoking the doctrine of compensation (set-off). For example, imagine that A Ltd lends B Ltd £10,000. In respect of the obligation to repay, B Ltd grants A Ltd security over the sums in a bank account which it holds. B Ltd defaults on repayment and at that time there is £2,000 in that bank account. A Ltd can set off that amount against the outstanding amount owed to it by B Ltd.

14.13 Security over financial collateral is of crucial economic importance.[20] The liquid assets can be used to reduce major systemic risk on the wholesale financial markets[21] and on that basis it is considered necessary to have special rules.[22]

What is a financial collateral arrangement?

14.14 The Directive sets out two types of financial collateral arrangement: (a) a title transfer financial collateral arrangement; and (b) a security financial collateral arrangement.

Title transfer financial collateral arrangement (TTFCA)

14.15 Article 2(1) of the Directive provides that a "title transfer financial collateral arrangement" means:

> "an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of, or full entitlement to, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations".

14.16 The corresponding definition in the FCARs is:

> "an agreement or arrangement, including a repurchase agreement, evidenced in writing, where
>
> (a) the purpose of the agreement or arrangement is to secure or otherwise cover the relevant financial obligations owed to the collateral-taker;
>
> (b) the collateral-provider transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and

[19] Gullifer, "What Should We Do about Financial Collateral?" (n 5) at 380.
[20] See D Murphy, "The rising risks and roles of financial collateral" 2014 Journal of International Business and Financial Law 3.
[21] The wholesale financial markets are those used by bodies engaging in large-scale financial transactions, typically larger companies, financial institutions and governments.
[22] Gullifer, "What Should We Do about Financial Collateral?" (n 5) at 400–401.

beneficial ownership of equivalent financial collateral to the collateral-provider; and

(c) the collateral-provider and the collateral-taker are both non-natural persons".[23]

14.17 We discuss aspects of these definitions below, but it can be seen that the essence of a TTFCA is that the collateral is transferred to the creditor. The classic example is a "repo" ("repurchase agreement"). Here one party sells market securities[24] to another for cash and agrees to repurchase equivalent securities subsequently at the original sale price plus a premium representing interest on the price (sometimes called the "repo rate").[25]

14.18 As financial collateral in Scottish law terms is incorporeal moveable property and as under our current law the method of giving security over such property is to transfer it,[26] it would seem to follow that any financial collateral arrangement must be a TTFCA.[27] There is an exception to this: the floating charge.[28] But, such is the opaque nature of the legislation, it is not impossible that an assignation in security could also be regarded as a security financial collateral arrangement. Thus the FCARs now disapply the need to register at Companies House in Scotland "any charge created or arising under a financial collateral arrangement".[29] Thus it is not limited to TTFCAs. In fact the original version of the Regulations was limited to security financial collateral arrangements.[30]

14.19 Article 6 of the Directive requires that a TTFCA "can take effect in accordance with its terms". It is therefore not possible for national legislation to recharacterise it as a security right.

Security financial collateral arrangement (SFCA)

14.20 The Directive states that a "security financial collateral arrangement" means:

> "an arrangement under which a collateral provider provides financial collateral by way of security to or in favour of a collateral taker, and where the full or qualified ownership of, or full entitlement to, the financial collateral remains with the collateral provider when the security right is established".[31]

14.21 The corresponding definition in the FCARs is:

> "an agreement or arrangement, evidenced in writing, where

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[23] FCARs reg 3(1). The term "legal and beneficial ownership" are unfamiliar in Scottish law.
[24] Such as government bonds.
[25] A survey by the International Capital Market Association in December 2014 which was responded to by the major players in the repo market in Europe valued outstanding repo transactions at €5,500 billion. See http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/short-term-markets/Repo-Markets/repo/.
[26] See Chapter 3 above. See also Yeowart and Parsons, *The Law of Financial Collateral* para 23.06 (H Patrick).
[27] Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" at 214. See also Yeowart and Parsons, *The Law of Financial Collateral* paras 6.07 and 7.25.
[28] A further exception may be bearer instruments which can be pledged. But whether this is a true pledge or a transfer is unclear. See Steven, *Pledge and Lien* paras 5-07 to 5-09.
[29] FCARs reg 4(4) as amended.
[30] These were amended by the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 (SI 2010/2993). See H Patrick, "The Financial Collateral Arrangement Regulations: some Scottish issues" (2009) 3 Law and Financial Markets Review 532.
[31] Directive Art 2(1).

(a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker;

(b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations;

(c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or a person acting on its behalf; any right of the collateral-provider to substitute financial collateral of the same or greater value or withdraw excess financial collateral or to collect the proceeds of credit claims until further notice shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; and

(d) the collateral-provider and the collateral-taker are both non-natural persons".[32]

14.22 We discuss aspects of these definitions below, but it appears that in an SFCA the collateral is not transferred to the secured creditor. Rather, title is retained by the provider and the secured creditor obtains a subordinate real right, as in pledge of a corporeal moveable.[33] But such is the general opaque nature of the Directive and FCARs it is impossible to be sure that an assignation in security of a claim would not be classified as an SFCA.

Parties

14.23 The Directive provides that the collateral-taker and the collateral provider must each belong to one of a number of categories.[34] Categories (a) to (d) comprise public authorities, such as central banks, and commercial entities meeting certain requirements, such as authorised banks and clearing houses. Category (e) is any person other than a natural person. Thus any entity in Categories (a) to (d) would also qualify in Category (e).

14.24 The Directive applies only if both of the parties fall into Category (e) and at least one of the parties falls into Categories (a) to (d). The FCARs[35] go further, so that a financial collateral arrangement between two private companies, for example a transaction involving shares, would be caught. In *R (Cukorova Finance International Ltd) v HM Treasury*[36] a challenge to the Regulations in the High Court of England and Wales on the basis that this is not justified by the Directive was unsuccessful. The judge, Moses LJ, did not accept the argument that the Directive's purpose was to ensure stability on the wholesale financial markets rather than being of more general application. In the subsequent Supreme Court case of *The United States of America v Nolan*,[37] which concerned different Regulations, Lord Mance expressed doubts as to whether Moses LJ had reached the correct conclusion and the matter remains controversial.[38] The broader application of the FCARs compared with the

[32] FCARs reg 3(1) as amended.
[33] A floating charge would also in principle be a SFCA, but the requirement of control is unlikely to be satisfied in the case of that security.
[34] Directive Art 1(2).
[35] FCARs reg 3(1).
[36] [2008] EWHC 2567 (Admin).
[37] [2015] UKSC 63.
[38] [2015] UKSC 63 at paras [67]–[69]. See Yeowart and Parsons, *The Law of Financial Collateral* para 2.29.

Directive is also difficult to justify in policy terms. It seems unlikely that transactions between two private companies would result in systemic risk on the wholesale financial markets.[39]

Disapplication of formalities

General

14.25 The Directive disapplies certain formalities in relation to security over financial collateral. Article 3(1) provides:[40]

> "Member States shall not require that the creation, validity, perfection,[41] enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement be dependent on the performance of any formal act.
>
> …When credit claims are provided as financial collateral, Member States shall not require that the creation, validity, perfection, priority, enforceability or admissibility in evidence[42] of such financial collateral be dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claim provided as collateral. *However, Member States may require* the performance of a formal act, such as *registration or notification, for purposes of perfection, priority, enforceability* or admissibility in evidence against the debtor or third parties."[43]

14.26 The first of these paragraphs is a general provision prohibiting any requirement, on the part of national law, for any "formal act". There is no definition of this term in the Directive, but Recital 10 gives some examples:

> "… the execution of any document in a specific form or in a particular manner, the making of any filing with an official or public body or registration in a public register, advertisement in a newspaper or journal, in an official register or publication or in any other matter, notification to a public officer or the provision of evidence in a particular form as to the date of execution of a document or instrument, the amount of the relevant financial obligations or any other matter."

14.27 Thus the FCARs disapply the usual requirement of registration in the Companies Register for security granted by a company where the security is over financial collateral.[44]

14.28 The second paragraph of Article 3(1) referred to above is a special and more detailed provision in the case where the financial collateral consists of "credit claims". The second sentence of the second paragraph appears to take away most of the force of the first sentence. Thus in respect of "credit claims" a formal act apparently can be required for perfection, priority and enforceability but *not* for creation or validity.

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[39] See Gullifer, "What Should We Do about Financial Collateral?" (n 5) at 401ff.
[40] Directive Art 3(1).
[41] The meaning of this term, which is also used in the next paragraph, is uncertain. Possibly it has the UCC meaning. But the French and German terms ("*conclusion*" and "*Abschluss*") do not fit such a meaning. When Recital 9 speaks of perfection, the French term is "*opposabilité*", and yet that latter term matches, in Art 3, not "perfection" but "enforceability".
[42] This list is different from the list in the previous paragraph and both are different from the list in the last sentence of the second paragraph. The significance of these differences is unclear.
[43] Emphasis added.
[44] FCARs reg 4(4).

14.29 The Directive does not unconditionally sweep away formality requirements. It only does so where (a) the financial collateral arrangement and its provision are evidenced in writing and (b) the collateral-taker (creditor) has "possession" or "control" of the collateral.[45]

Writing

14.30 The Directive requires both that the financial collateral arrangement itself and the provision of the collateral are evidenced in writing.[46] "Writing" includes recording by electronic means and any other durable medium."[47] As well as e-mails, recordings of telephone conversations will qualify.[48] Care therefore requires to be taken with bearer instruments that both the security agreement and delivery of the instruments are duly recorded.

The requirement for possession or control

14.31 Article 1(5) provides that "This Directive applies to financial collateral *once it has been provided*." This is explained by Article 2(2), which states:

> "References in this Directive to financial collateral being 'provided', or to the 'provision' of financial collateral, are to the financial collateral being *delivered, transferred, held, registered* or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf."[49]

14.32 As Professor Gretton has noted,[50] the FCARs appear to have been drafted on the basis that the need for "provision" only applies to SFCAs and not TTFCAs. This, however, seems not to take account of the breadth of Article 1(5).

14.33 Recital 9 of the Directive states: "… the only perfection requirement regarding parties which national law may impose in respect of financial collateral should be that the financial collateral is *under the control of the collateral taker* or of a person acting on the collateral taker's behalf…"[51] Recital 10 states that "this Directive cover[s] only those financial collateral arrangements which provide for some form of *dispossession, ie the provision* of the financial collateral…"

14.34 The Directive does not further define "possession" or "control". This was originally the position in the FCARs. In *Gray v G-T-P Group Ltd, Re F2G Realisations Ltd (in liquidation)*[52] Vos J doubted the relevance of "possession" in relation to intangible (incorporeal) property. He concluded that for a collateral-taker to have control, the collateral provider must be prevented legally and (probably) practically from transacting with the collateral.[53] The control thus required may be termed "negative control", as opposed to

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[45] See paras 14.31–14.36 below.
[46] Directive Arts 1(5) and 3(2). On the meaning of "provision" see the next paragraph.
[47] Directive Art 2(3). What is meant by "other durable medium" is unclear. See Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" at 233.
[48] Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* para 3.30.
[49] Emphasis added.
[50] Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" (n 5) at 226–227.
[51] Emphasis added.
[52] [2010] EWHC 1772 (Ch).
[53] For a full analysis, see Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* para 3.33ff. See also R Parsons and M Dening, "Financial collateral – an opportunity missed" (2011) 5 Law and

"positive control", where the collateral-taker is legally and practically able to take or dispose of the collateral without requiring to involve the debtor.[54] The *Gray* case involved a floating charge and the argument was that there was the necessary possession or control to mean that the exemption from registering SFCAs under the company charges registration scheme applied.[55] The argument was unsuccessful.

14.35 In 2011 the FCARs were amended to provide that:

> ""possession" of financial collateral in the form of cash or financial instruments includes the case where financial collateral has been credited to an account in the name of the collateral-taker or a person acting on his behalf (whether or not the collateral-taker, or person acting on his behalf, has credited the financial collateral to an account in the name of the collateral-provider on his, or that person's, books) provided that any rights the collateral-provider may have in relation to that financial collateral are limited to the right to substitute financial collateral of the same or greater value or to withdraw excess financial collateral."[56]

14.36 This was largely prompted by Vos J's interpretation of "possession". Furthermore, in the subsequent case of *Re Lehman Brothers International (Europe) (in administration)*,[57] Briggs J took a different approach, holding that it would be wrong to limit "possession" in a way that excludes intangibles.[58] For him, what was essential was that there was sufficient control or possession on the part of the collateral taker for the collateral provider to be "dispossessed".[59] In some cases the collateral may be so "sufficiently clearly in the possession of the collateral taker that no further investigation of its rights of control is necessary."[60] But, notwithstanding this decision, there continues to be uncertainty about what is required to establish possession or control.[61]

Assignation of claims

14.37 Under current Scottish law if B Ltd wishes to transfer to C Ltd a claim, such as a right to payment, which it has against A Ltd there requires to be (a) an assignation of the claim, followed by (b) intimation to A Ltd.[62] We recommend in this Report that the requirement for intimation is retained but the alternative of registration of the assignation in the Register of Assignations should be introduced.[63] A claim, however, may satisfy the definition of "financial collateral" in the Directive, for example it could be a credit claim (as defined). The question is whether there requires to be a special rule in such cases which would apply

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Financial Markets Review 164 at 166–168 and T Anderson, "Dilemmas of possession and control" 2011 Journal of International Banking and Financial Law 431.

[54] Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* para 3.45.

[55] Now FCARs reg 4(4).

[56] FCARs reg 3(2), as amended, with effect from 6 April 2011, by the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 (SI 2010/2993).

[57] [2012] EWHC 2997 (Ch). See E Chell, C Meinertz and J Walter, "Possession and control: financial collateral remains a Gray area" 2013 Journal of International Business and Financial Law 43.

[58] [2012] EWHC 2997 at para 131.

[59] [2012] EWHC 2997 at para 136.

[60] [2012] EWHC 2997 at para 136. Perhaps an example of this would be bearer securities in the possession of the collateral-taker.

[61] The Law Commission for England and Wales, Company Security Interests (Law Com No 296, 2005) Part 5 recommended that "control" be defined for the purposes of its recommended new scheme on security over personal property but accepted that it was impossible to define the term for the purposes of the Directive because this is a matter of European Union law.

[62] See para 3.7 above.

[63] See Chapter 6 above.

where an assignation (in security) is within the scope of the Directive, in other words is a financial collateral arrangement.

14.38 The FCARs expressly disapply in Scotland "an act [that] is required as a condition for transferring, creating or enforcing a right in security over any book entry securities collateral".[64] "Book entry securities collateral" is defined as "financial collateral subject to a financial collateral arrangement which consists of financial instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary".[65] "Act" is defined as "(a) any act other than an entry on a register or account maintained by or on behalf of an intermediary which evidences title to the book entry securities collateral [and] (b) includes the entering of the collateral-taker's name in a company's register of members."[66] These provisions clearly only apply to intermediated securities. But, as Professor Gretton has demonstrated, their rationale, including their Scotland-only application, is uncertain.[67] It is possible that the objective is to remove the requirement of intimation to the intermediary where there is an assignation of an intermediated security which qualifies as a financial collateral arrangement. The requirements of the current law for intimation are commercially unworkable as intermediated securities are held electronically.[68]

14.39 In England and Wales, there is a distinction between legal assignments, which require notification (intimation) to transfer the claim,[69] and equitable assignments, which do not.[70] The FCARs do not disapply the requirement for intimation of legal assignments on the basis that this is not required by the Directive.[71]

14.40 Our recommendations would allow an assignation in security of a claim to be completed by registration in the RoA. Registration, however, is a type of "formal act" which the Directive seeks to disapply. But the alternative of intimation would be available and the requirements for intimation would be less onerous under the current law with intimation by electronic notice being possible. Thus it can be argued that no special rule is required. It is impossible to be certain how strong such an argument is. In particular, there is a distinction with English law because equitable assignment (with no intimation or registration) is recognised there. Thus, on one view, intimation only matters in English law for priority purposes because an assignment will be effective to transfer a claim in equity without intimation. In Scotland under our recommendations, unless there were registration in the RoA, intimation would be required for transfer. Intimation would therefore not solely be a priority issue.[72]

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[64] FCARs reg 6(1).
[65] FCARs reg 3(1).
[66] FCARs reg 6(2).
[67] Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" (n 5) at 234–236.
[68] Such as the need under the Transmission of Moveable Property (Scotland) Act 1862 for a copy of the assignation document to be intimated. See paras 3.9–3.10 and 5.40–5.44 above.
[69] Law of Property Act 1925 s 136.
[70] But equitable assignments are vulnerable to being trumped by a subsequent assignment which is intimated: *Dearle v Hall* (1828) 3 Russ 1. On the rule see J de Lacy, "Reflections on the Ambit of the Rule in *Dearle v Hall*" (1999) 28 Anglo-American Law Journal 87 and 197.
[71] See Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" (n 5) at 233–234.
[72] Yeowart and Parsons, *The Law of Financial Collateral* para 23.50 (H Patrick).

14.41 The best solution would be for the meaning of the Directive on this issue to be clarified, along with other uncertainties under this legislation which have been identified. But this would require to be done at a European Union level.[73] We have therefore concluded that in the meantime we require to take a cautious approach. This means excluding the requirement for intimation or registration in the RoA where an assignation of a claim amounts to a TTFCA or SFCA. Instead, we consider that in such circumstances the assignation could be completed by the financial collateral in question coming into the possession of, or under the control of the collateral-taker (assignee) or a person acting on the collateral-taker's behalf. As we saw above, it is a requirement under the Directive that the collateral must be provided to the collateral-taker so that the collateral-taker receives possession or control of it.[74] On the other hand, in the FCARs this is only a requirement for an SFCA, a point noted by Professor Hugh Beale and Professor Louise Gullifer in their response to our draft Bill consultation of July 2017. But there is nothing in the Directive or in the FCARs to prevent such a rule being imposed in relation to a TTFCA. The alternative of merely requiring an assignation document for a TTFCA would not satisfy the requirement for an external act in Scottish property law in relation to transfer. A TTFCA has the priority of an English legal rather than equitable assignment and therefore, in our view, requiring the additional step of possession or control is appropriate.

14.42 Where an assignation constitutes a TTFCA or SFCA, it is also necessary in order to comply with the Directive to disapply the requirement for an assignation to be executed or signed electronically.[75] The assignation document merely requires to be created as writing transcribed by electronic or other means in a durable medium, or as sounds recorded in such a medium. But the other ordinary transfer rules in relation to a claim would remain applicable, in particular that the assignor (collateral-provider) holds it, that the claim is identifiable as a claim to which the assignation document relates and that any condition which must be satisfied in order for there to be transfer is duly satisfied.

14.43 We therefore recommend:

70. (a) If an assignation document evidences a security financial collateral arrangement or a title transfer financial collateral arrangement (as defined in regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003) in respect of a claim, then the transfer of that claim should require either (i) intimation to the debtor or registration in the Register of Assignations, or (ii) the financial collateral in question to come into the possession of, or under the control of, the collateral-taker or a person authorised to act on the collateral-taker's behalf.

(b) In case (ii) the assignation document need not be executed or signed electronically and may be created as writing transcribed by electronic or other means in a durable medium, or as sounds recorded in such a medium.

(Draft Bill, s 4)

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[73] The departure of the UK from the European Union will of course have consequences here.
[74] See paras 14.31–14.36 above.
[75] See paras 4.15–4.20 and 14.30 above.

Chapter 15 International private law

Introduction

15.1 Where a case involves more than one legal system the branch of law known as international private law determines which set of legal rules apply (the applicable law), and which country's courts have the right to hear and determine a given matter (jurisdiction).

15.2 In the Discussion Paper we noted that in principle it would be possible to address the international private law aspects of moveable transactions as part of the project. But we took the view that cross-border issues should be left to existing international private law rules to determine when Scottish law applies and when it does not. We considered that the project should confine itself to the substantive Scottish law of moveable transactions to keep it within manageable bounds.[1] This approach was, however, questioned by some consultees.[2] We have therefore decided to review the matter here. This chapter therefore outlines the various international private law issues which arise in relation to assignation of claims. It looks also briefly at the issue of jurisdiction.

Legislative background

15.3 This area is heavily regulated by EU law, limiting national competence to legislate. At the time of writing the consequences of Brexit in relation to applicable law and jurisdiction remain to be worked out.[3] We therefore proceed on the basis that EU law remains binding.

15.4 The Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters created a new harmonised framework for allocating jurisdiction to courts of the then European Economic Community Members. The introduction of this Convention led the Belgian Government to propose that the Member States should collaborate on the basis of a draft convention to harmonise their international private law rules, which it saw as "a natural sequel to the Convention on jurisdiction and the enforcement of judgments."[4]

15.5 Three decades later, the Treaty of Amsterdam 1997[5] introduced new Community competence in the area of judicial co-operation on civil matters and the recognition of foreign judgments, under Articles 61(c) and 67(1) of the EC Treaty, facilitating the conversion of the 1968 Convention into a new Regulation. This sequence of events resulted in two

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[1] Discussion Paper, para 1.16.
[2] For example, Scott Wortley considered that international private law issues should have been given a greater treatment in his response to the Discussion Paper.
[3] See A Dickinson, "Back to the future: the UK's EU exit and the conflict of laws" (2016) 12 Journal of Private International Law 195.
[4] Report on the Convention on the law applicable to contractual obligations by M Giuliano and P Lagarde, Official Journal C 282, 31/10/1980 P.00010 – 0050 at 4–5.
[5] The content of which can be found at: http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf

Regulations of importance for present purposes: the Brussels I Regulation (recast)[6] and the Rome I Regulation.[7]

15.6 The result is that the UK has limited competence to legislate in areas of international private law. Reform of the rules on jurisdiction and choice of court, for example, are restricted to conflicts involving non-EU member states and intra-UK cases.[8] This is because the Brussels regime only applies as between persons domiciled in EU member states. Further, jurisdictional rules for both intra-UK cases and those involving countries outwith the EU are relatively settled and can be found in the Schedules to the Civil Jurisdictions and Judgments Act 1982.[9]

15.7 Unlike the Brussels regime, the Rome I Regulation is of universal application and has no domicile requirement for litigating parties. Thus, determination of the law applicable to contractual obligations in civil and commercial matters must be made by following the rules in the Rome I Regulation, unless the subject matter falls outwith its scope.[10] One important caveat is that Rome I is overridden by any uniform law convention.[11] This includes the 1988 UNIDROIT Convention on International Factoring which has limited application in the realm of assignations of claims. It applies only where those States in which the factor has its place of business are Contracting States; and/or where both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State.[12] If the first condition is met then the Convention will directly apply. If not, the Rome I Regulation will determine whether the second condition is met as a preliminary issue.[13]

15.8 The assignation of claims is within the scope of the Regulation and therefore precludes any Scottish (or, for that matter, UK) legislation on the applicable law in such cases. Moreover, Article 14 of the Rome I Regulation on voluntary assignments appears to determine both the contractual and proprietary effects of such transactions.

Applicable law: outright transfer of incorporeal moveable property

Rome I: introduction

15.9 The assignation of claims has become very important within the financial services industry, for example in factoring and securitisation arrangements.[14] As mentioned in the preceding paragraphs, this area is generally subject to the Rome I Regulation.[15] Article 14

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[6] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). This recently replaced Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which in turn replaced the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention/Jurisdiction and Judgments Convention) (Brussels, 27 September 1968).

[7] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[8] Although see also the Lugano Convention 2007 which creates the same limitations for certain EFTA countries.

[9] Schedules 4 and 8.

[10] Rome I Regulation, Article 1.

[11] Rome I Regulation, Article 25.

[12] UNIDROIT Convention on International Factoring, Ottawa 28 May 1988, available at www.unidroit.org. While the UK was a signatory, it has not acceded to the Convention.

[13] See M Mankowski, *European Commentaries on Private International Law: Rome I Regulation* (2017) 752.

[14] See para 3.16 above.

[15] For a brief overview of the history of international instruments affecting assignations in the European context, see W G Ringe, "The Law of Assignment in European Contract Law" in L Gullifer and S Vogenauer (eds), *English*

regulates assignments of, and security over, claims. The definition of 'claims' is wide and includes receiving sums of money, as well as delivering goods or rendering services.[16] As assignation is the method of transferring incorporeal moveable property in Scotland,[17] for Scottish purposes "assignment" must mean assignation. Article 14 provides:

> "1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.
>
> 2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
>
> 3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims."

15.10 These provisions clearly distinguish questions based on whether they relate to (i) the contract to assign or (ii) the claim being assigned. Under paragraph one, the validity of an assignment *as between* the assignor and assignee is governed by the law applicable to the contract to assign. In contrast, the underlying *assignability* of the claim and the *relationship* between the assignee and debtor are to be governed by the law applicable to the assigned claim.[18] The relationship between the assignor and debtor is governed by the law that creates the obligation between them. From a Scottish property law perspective the concept of an assignment (assignation) taking effect as between the assignor and assignee, but not having effect in a question with other parties is inherently problematic.[19]

15.11 Further, recital 38 of the Regulation states:

> "In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question."

15.12 "Preliminary questions" include the underlying assignability of the claim. Thus, if A contracts with B to assign a claim, whether the claim is assignable in the first place would not necessarily be decided using the same law that applies to all other aspects of the parties' "relationship". Indeed, paragraph 2 would operate in this situation and the underlying

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and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale (2014) 251 at 253–257.

[16] Mankowski, *European Commentaries on Private International Law: Rome I Regulation* at 754.

[17] See para 3.2 above.

[18] P R Beaumont and P E McEleavy (eds), *Anton's Private International Law* (3rd edn, 2011) 964 ff.

[19] See para 5.17 above.

assignability of the claim would be determined in accordance with the law applying to the original contract from which the debt arose.

Assignability of claim and relationship between assignor and assignee

15.13 The propositions that (i) the assignability of a claim should be determined by the law which governs that claim and (ii) the relationship between an assignor and assignee should be governed by the law under which the contract to assign was formed, are not controversial. These rules do, however, create problematic scenarios which Professor Trevor Hartley describes as the problem of 'relativity'.[20] He points out that the choice of law rules applicable to decide a question are different depending on the parties to the proceedings in which the question arises.

15.14 We have seen that, as between the assignor and assignee, under paragraph 1 of Article 14 the validity of an assignment is governed by the law of the assignment. However where the question of validity of an assignment arises in proceedings between the assignee and the debtor, that question must be decided by the law of the obligation, as per paragraph 2. Professor Hartley gives the example of an assignee suing for payment and the debtor claiming he was never notified.[21] Beyond paragraph 1, recital 38 offers no guidance on how to answer such incidental questions as between the assignee and debtor.

15.15 But in proceedings involving the assignor and assignee, what if the question is not incidental but rather makes up the focal point of litigation? Under paragraph 2 the question of whether or not a claim is assignable is determined by the law of the underlying obligation. But if the assignee sues the assignor because the assigned claim turns out to be unassignable, the applicable law is not so clear; paragraph 1 clearly states that the relationship between the assignor and assignee is to be regulated by the law governing the assignation.[22] It seems to us that the same law should be applicable to a given question, irrespective of which parties raise the proceedings. Further, as already noted, under Scottish law an assignation is either effective or it is not, rather than potentially being effective between the assignor and assignee, but not with regard to third parties.

15.16 An alternative analysis is that some Member State jurisdictions recognise a difference between the underlying contract and the deed of assignation. Recital 38 therefore attempts, rather ironically, to clarify that the law referred to in Article 14(1) determines the question of whether a deed of assignment in such jurisdictions, independently from or together with the underlying contract, is required to transfer the proprietary rights over the claim.[23] This analysis, however, does nothing to address the concern that an assignation agreement might be valid between the assignor and assignee, but not as between the assignor and debtor. This problem is discussed in more detail below.

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[20] T C Hartley, "Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation" (2011) 60 International and Comparative Law Quarterly 29 at 35 ff.

[21] Hartley, "Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation" at 36.

[22] Hartley, "Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation" at 37. See also H C Sigman and E Kieninger (eds), *Cross-Border Security over Receivables* (2009) 1 at 56–57.

[23] See Mankowski, *European Commentaries on Private International Law: Rome I Regulation* at 756–757.

Contractual and proprietary issues

15.17 Transactions involving incorporeal moveable property (such as claims) tend to cause complex issues of characterisation. In order to ascertain the law applicable to any given issue, a court must first "characterise" the issue by identifying the appropriate area of law. Questions involving incorporeal moveable property may engage both contract law and property law.[24] This is problematic because there are different so-called "connecting factors" which link an issue to a legal system, depending on how the issue is characterised. For example, if the matter is deemed to be contractual in nature, then the Rome I Regulation will apply, and the rule in either paragraph 1 or 2 will operate as the connecting factor.[25] Article 14(3) mitigates this issue somewhat by expressly stating that the Article covers not only outright transfers of claims, but also transfers by way of security, pledges, or other security rights over claims. It does not, however, cover the effects of agreements in a question with third parties, and thus issues of characterisation persist in this context.

15.18 One of the core features of incorporeal moveable property is the lack of a physical presence. As a result it is often most closely associated with the underlying contract. These problems are summarised by Professors Clarkson and Hill:

> "There are two points which should be borne in mind in cases involving the assignment of intangibles. First, as with all property transactions, it is vital to distinguish contractual issues from proprietary ones. One must not fall into the trap of assuming that where an assignment of an intangible is effected by contract, the only question to consider is the validity of the contract. Secondly, in cases involving the assignment of certain types of intangible (in particular, debts) there are two transactions to consider: the first is the transaction which creates the relationship between the debtor and the creditor; the second is the assignment by the creditor to the assignee."[26]

15.19 This problem is an historic one, and many of the leading cases in this area are based on Rome I's predecessor, the Rome Convention.[27] Article 12 of the Convention dealt with voluntary assignation and spoke of the "mutual obligations" of the assignor and assignee. There was no supporting information to clarify precisely whether or not this extended to the proprietary rights of the parties, and in fact this was a conscious decision in order to prevent a lengthy exposition on what 'property rights' meant for the various legal systems of the Member States:

> "First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An article in the original preliminary draft had expressly so provided. However, the group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing between the various legal systems of the Community."[28]

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[24] M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 18.08.
[25] See also H Patrick, "Romalpa: the international dimension" 1986 SLT (News) 265 at 267.
[26] J Hill and M Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, 2016) 479.
[27] Rome Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980).
[28] Report on the Convention on the law applicable to contractual obligations by M Giuliano and P Lagarde, Official Journal C 282, 31/10/1980 P.00010 – 0050 at 10.

15.20 This is, however, somewhat inconsistent with the later commentary on Article 12 in the Giuliano-Lagarde report which states that Article 12(2) covers not only the conditions of transferability of the assignation but also the procedures required to give effect to the assignation in relation to the debtor.[29] This statement implies that the proprietary aspects of the assignor and debtor's relationship are to be governed by Article 12(2), despite the earlier statement to the contrary.

The Raiffeisen *approach*

15.21 The foregoing interpretation heavily influenced the Court of Appeal of England and Wales in the leading case in this area, *Raiffeisen Zentral Bank Osterreich AG v Five Star General Trading LLC (The Mount I)*.[30] There, Lord Justice Mance held that in an insurance contract case, Article 12(2) of the Rome Convention covered "issues both as to whether the debtor owes monies to and must pay the assignee (their 'relationship') and under what 'conditions', for example, as regards the giving of notice."[31] He came to this conclusion by consulting the Giuliano-Lagarde Report on this point and stating:

> "The Rome Convention now views the relevant issue – that is, what steps, by way of notice or otherwise, require to be taken in relation to the debtor for the assignment to take effect as between the assignee and debtor – not as involving any 'property right', but as involving – simply – a contractual issue to be determined by the law governing the obligation assigned."[32]

15.22 This construction does, however, create some difficulties. To accept that procedures required to give effect to an assignation are contractual issues, solely on the basis of the explanatory report to the Rome Convention, appears to ignore the fact that domestic legal systems will continue to characterise the issues as proprietary in nature.

15.23 Lord Brodie confirmed this interpretational difficulty in *Atlantic Telecom GmbH, Noter*[33] when, agreeing with the approach of Lord Justice Mance in *Raiffeisen* that the court must first ask if the issue fell within the scope of the Convention, he stated that:

> "Nevertheless, in characterising the issue raised in this case I am applying Scots law. I am looking at matters from the perspective of a Scots lawyer. I consider that I am entitled to form an impression of the character of the issue from that perspective, just as I am entitled (to the extent that this is a different exercise) to identify what is the issue from that perspective."[34]

15.24 In 2003 the European Commission issued a Green Paper[35] which sought to modernise the Rome Convention and convert it into a Community instrument. It recognised the absence of any rules on the proprietary effects of assignation which led to the new Article 14 and accompanying recital.

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[29] Report on the Convention on the law applicable to contractual obligations by M Giuliano and P Lagarde, Official Journal C 282, 31/10/1980 P.00010 – 0050 at 34–35.
[30] [2001] EWCA Civ 68.
[31] *Raiffeisen Zentral Bank Österreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA Civ 68 at para 43.
[32] *Raiffeisen Zentral Bank Österreich AG* at paras 47–48.
[33] 2004 SLT 1031.
[34] 2004 SLT 1031 at 1044.
[35] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation (COM (2002) 654 final).

15.25 Articles 14(1) and (2) of the Rome I Regulation are in similar terms to Articles 12(1) and (2) of the Convention, although the term "mutual obligations" has been replaced by "relationship". Unlike its predecessor, this term is defined in recital 38 to the Regulation, and seems to reiterate the judgment in *Raiffeisen* and the Giuliano-Lagarde Report stating that Article 14(1):

> "also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations."

15.26 The difficulty with recital 38 is that it only relates to the assignor and assignee relationship; there is no equivalent provision for the relationship of the assignee and debtor under Article 14(2).[36] Indeed, this ties in with a wider issue that both Articles 12 and 14 of the Convention and Regulation respectively fail to deal with the question of the law applicable to the effectiveness of the assignation in a question with third parties.[37] This was another issue identified by the European Commission Green Paper, but one that could not be resolved due to an inability to reach a compromise between the law of habitual residence of the assignor at the material time and the law governing the assigned debt. The former option was originally proposed by the European Commission, but was withdrawn from the draft Regulation after it did not find favour with the European Council.[38]

15.27 The inability to reach a consensus on the applicable law for third party effects explains why paragraphs 1 and 2 of Article 14 seem to create Professor Hartley's problem of 'relativity'. The intention of recital 38, drafted when the Commission's proposed rule governing third party effects remained in the draft Regulation, was to highlight that, although the effectiveness of an assignment against third parties would be determined by the proposed rule which favoured the habitual residence of the assignor, the "proprietary" effectiveness of the transaction between the assignor and assignee (and only those parties) would continue to be subject to the law governing their transaction.[39] Recital 38 remained despite the proposal's later removal.

15.28 In order to secure a first reading with the European Parliament on the Rome I Regulation it was agreed that a clause would be included to require a review to be undertaken by 17 June 2010 as to the effectiveness of assignations or subrogation of claims against third parties and the priority of the assigned or subrogated claim over a right of another person.[40] The British Institute of International and Comparative Law (BIICL) was commissioned to draft a report, which was completed in 2011.[41] The report proposes three

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[36] See paras 15.9–15.15 above.
[37] McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* paras 18.67–18.104.
[38] British Institute of International and Comparative Law, *Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person* (2011) 151–152. See also F J Garcimartín Alférez, "The Rome I Regulation: Much ado about nothing?" 2008 The European Legal Forum (E) 78.
[39] F.J Garcimartin-Alférez, "Assignment of Claims in the Rome I Regulation: Article 14" in F Ferrari and S Leible (eds), *Rome I Regulation* (2009) 217 at 226. On third party effect generally, see also R Goode, "The Assignment of Pure Intangibles in the Conflict of Laws" in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 353 at 361.
[40] Art 27(2).
[41] British Institute of International and Comparative Law, *Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person: Final Report* (2011), available at http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf.

potential connecting factors for determining the law which should govern the question of whether the assignation may be relied on against third parties, but does not favour one over the others. These are: (i) the law applicable to the contract between the assignor and assignee; (ii) the law applicable to the assigned claim; and (iii) the law of the assignor's habitual residence.[42] At the time of writing there appear to have been no further attempts to address this question.

Scottish practice

15.29 A report by the Scottish Executive Central Research Unit in 2002 on business finance for small and medium-sized businesses in Scotland showed that because of the limitations within Scottish law many businesses were being advised to prepare their contracts under English law.[43] The assumption among those interviewed for the report was that the decision in *Raiffeisen* is correct; it was therefore beneficial for Scottish businesses to use English equitable assignments rather than Scottish assignations as the former do not require notification in order to transfer title from the assignor to assignee.

15.30 However, the validity of this practice has been brought into question following the highly publicised Rangers Football Club administration.[44] In a discussion in relation to the applicability of the Rome Convention[45] Lord Hodge observed that the Convention was concerned only with the law applicable to contractual obligations and did not deal with proprietary rights:

> "I do not consider that the Rome Convention deals with proprietary rights at all. Article 1(1) states that the rules apply "to contractual obligations in any situation involving a choice between the laws of different countries". The creation of an equitable interest intermediate between a personal right and a right *in rem* is to my mind not a contractual obligation which the Convention covers."[46]

15.31 These comments were obiter.[47] They stand clearly in contrast with the *Raiffeisen* decision, as well as the Rome I Regulation which hold that such matters are within the scope of the Regulation, at least as far as the assignor and assignee are concerned.[48]

15.32 The position for Scottish businesses is therefore rather unclear. It could well be that any reform of the Rome I Regulation which saw an end to proprietary matters being treated as 'contractual' could cause issues for the multitude of small Scottish businesses which are currently engaged in the practice of assigning under English law. However, our recommendation to provide an option of either intimation or registration in order to complete an assignation under Scottish law would remove this potential problem.[49] The BIICL Report

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[42] See further Goode, "The Assignment of Pure Intangibles in the Conflict of Laws" at 366 ff.
[43] Scottish Executive Central Research Unit, *Business Finance and Security Over Moveable Property* (2002). See para 18.37 below.
[44] *Joint Administrators of Rangers Football Club Plc, Noters* 2012 SLT 599.
[45] The Rome I Regulation seems to have been overlooked.
[46] *Joint Administrators of Rangers Football Club Plc, Noters* 2012 SLT 599 at para 28. But See also *Akers (and others) v Samba Financial Group* [2017] UKSC 7 at paras 36 to 37 per Lord Mance.
[47] Counsel later withdrew his submission in relation to the Rome Convention and Contracts (Applicable Law) Act 1990.
[48] But as regards third party effect see McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* para 18.52: "there was no legislative intention that Article 14(1) should be extended to cover the property aspects of any assignment (*erga omnes*)."
[49] See Chapter 5 above.

of 2011 made three proposals for reform, none of which involve treating proprietary matters as contractual issues.[50] The matter remains unresolved. It is therefore important that a solution is offered for Scottish businesses in the interim.

Jurisdiction

General

15.33 The term "jurisdiction" can be used in several different senses in legal discussion. For present purposes, the relevant sense is that a court has jurisdiction in proceedings where it has the authority to deal with the particular persons who are parties to the proceedings.[51] It is in this sense that the European Union has competence to legislate and determine the factors which connect parties or the dispute to courts of Member States. It is also in this sense that the rules of jurisdiction in intra-UK cases and those outwith the EU are found in the Civil Jurisdiction and Judgments Act 1982.[52] This is how jurisdiction is defined in this chapter. "Jurisdiction" can also be used in a second sense to describe when an action is within the power of a court and that a remedy can be competently granted by it. This type of jurisdiction may also be referred to as a court's *competence*.[53] Competence of a court to hear particular types of action is a matter for the domestic law of a legal system and does not involve international private law.

Application of jurisdictional rules

15.34 Generally speaking the Brussels I Regulation (Recast) applies where the defender in an action is domiciled in an EU Member State. The Regulation determines the courts of which Member States have jurisdiction. The Lugano Convention takes effect when the defender is domiciled in one of the three non-EU States which are parties to it, and similarly identifies the state or states whose courts have jurisdiction.

15.35 Where an action is a civil or commercial action within the meaning of the Regulation and the defender is domiciled in the UK, Schedule 4 to the 1982 Act allocates jurisdiction between the courts of the different legal systems within the UK.

15.36 Schedule 8 to the 1982 Act operates in determining whether the Scottish courts have jurisdiction in a wide range of civil proceedings not governed by the Brussels Regulation (Recast), the Lugano Convention or Schedule 4 to the 1982 Act. However Schedule 8 does not apply where a statute provides a rule of jurisdiction of a Scottish court on a specific subject-matter.[54] Accordingly a possible option in the present context is to disapply Schedule 8 by introducing a specific rule of jurisdiction.

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[50] See note 38 above.
[51] G Maher and B J Rodger, *Civil Jurisdiction in the Scottish Courts* (2010) para 1-01.
[52] Schedules 4 and 8.
[53] Maher and Rodger, *Civil Jurisdiction in the Scottish Courts* para 1-02.
[54] 1982 Act s 21(1). Furthermore, section 20(3) states that section 43 of the Courts Reform (Scotland) Act 2014 applies in respect of matters not governed by Schedule 8. This provision replicates an earlier version of section 20(3) concerning the interaction of Schedule 8 and section 6 of the Sheriff Courts (Scotland) Act 1907. It has been argued that section 6 of the 1907 Act had little, if any, application after the 1982 Act came into effect (Maher and Rodger, *Civil Jurisdiction in the Scottish Courts* paras 2-26–2-27) and the same is true of section 43 of the 2014 Act.

Grounds of jurisdiction

15.37 The next issue is the grounds of jurisdiction under each set of rules. Many of the grounds are the same in all sets.[55] These include the place of domicile of the defender;[56] the place of performance in contractual obligations;[57] prorogation of jurisdiction;[58] and multiple defender and third party proceedings.[59] Additionally Schedule 8 provides general grounds of jurisdiction. Of particular relevance to the present discussion are actions relating to rights in moveable property. Where such actions are governed by Schedule 8, the Scottish courts have jurisdiction where the property is located in Scotland.[60]

Discussion

15.38 The overall position is that, although Scotland retains competence to introduce rules for actions where the Brussels I Regulation (Recast) and the Lugano Convention do not apply, the current rules on jurisdiction are extensive and well settled. It is not clear to us that any reform is required here in the context of assignation of claims or indeed moveable transactions more generally.[61]

Conclusion

15.39 Reform of the rules of international private law as regards the applicable law in assignment (assignation) would generally have to be at a European level. But, for the UK the future applicability of EU rules following the withdrawal from the EU have yet to be worked out. It is clear that Article 14 of the Rome I Regulation is causing uncertainty and we would welcome clarification of the position of the applicable law as to the proprietary effects of assignments (assignations). It is also desirable that steps are taken to ensure consistency of choice of law rules, so as to avoid different results where the same issue is raised by different parties. Finally, the rules on jurisdiction are well-established at every level. We see no reason to depart from these rules.

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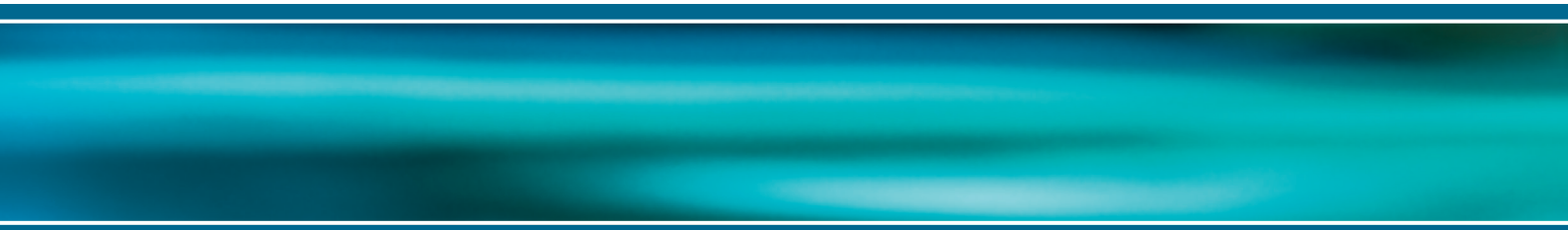
[55] The Lugano Convention and Schedule 4 to the 1982 Act are closely based on the original version of the Brussels I Regulation but do not take account of the revisions added by the Recast instrument. Many of the Schedule 8 grounds are based on the pre-recast Regulation but others have no counterpart in the other sets of rules.
[56] Brussels I (recast) Art 4; 1982 Act, Schedule 4, rule 1 and Schedule 8, rule 1; Lugano Convention Art 2.
[57] Brussels I (recast) Art 7; 1982 Act, Schedule 4, rule 3 and Schedule 8, rule 2; Lugano Convention Art 5.
[58] Brussels I (recast) Art 25; 1982 Act, Schedule 4 rule 12 and Schedule 8, rule 6; Lugano Convention Art 23.
[59] Brussels I (recast) Art 8; 1982 Act, Schedule 4, rule 5 and Schedule 8, rule 2; Lugano Convention Art 6.
[60] 1982 Act, Schedule 8, rules 2 and 6.
[61] See para 39.13 below.



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