



Scottish Law Commission
promoting law reform

| (DISCUSSION PAPER No.168)

Discussion Paper on Heritable Securities: Pre-default

discussion
paper



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June 2019

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The Commission would be grateful if comments on this Discussion Paper were submitted by 30 September 2019.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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Abbreviations

1970 Act

Conveyancing and Feudal Reform (Scotland) Act 1970

2010 Act

Home Owner and Debtor Protection (Scotland) Act 2010

2012 Act

Land Registration etc. (Scotland) Act 2012

Brits, *Real Security Law*

R Brits, *Real Security Law* (2016)

Burns, *Conveyancing Practice*

J Burns, *Conveyancing Practice According to the Law of Scotland* (4th edn, by F MacRitchie, 1957)

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>

Cusine and Rennie, *Standard Securities*

D J Cusine and R Rennie, *Standard Securities* (2nd edn, 2002)

DCFR

C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (6 vols, 2010)

Gloag and Irvine, *Rights in Security*

W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable and Cautionary Obligations* (1897)

Gordon, *Scottish Land Law*

W M Gordon, *Scottish Land Law* (2nd edn, 1999)

Gretton and Reid, *Conveyancing*

G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018)

Gretton and Steven, *Property, Trusts and Succession*

G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017)

Halliday, *Conveyancing Law and Practice*

J M Halliday, *Conveyancing Law and Practice* (2nd edn, by I J S Talman, 2 vols, 1996 and 1997)

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Scottish Home and Health Department, *Conveyancing Legislation and Practice*
(Cmnd 3118, 1966)
- Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970*
J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* (2nd edn,
1977)
- Hardman, *Granting Corporate Security*
J Hardman, *A Practical Guide to Granting Corporate Security in Scotland* (2018)
- Higgins, *The Enforcement of Heritable Securities*
M Higgins, *The Enforcement of Heritable Securities* (2nd edn, 2016)
- Notes on Clauses
Conveyancing and Feudal Reform (Scotland) Bill 1970, House of Commons, Notes
on Clauses (held in the Scottish Government Law Library and not fully paginated)
- NRS
National Records of Scotland
- Paisley, *Land Law*
R Paisley, *Land Law* (2000)
- Reid, *Property*
K G C Reid, *The Law of Property in Scotland* (1996)
- Report on Moveable Transactions
Scottish Law Commission, *Report on Moveable Transactions* (Scot Law Com No
249, 2017) (3 vols)
- Stewart and Sinclair, *Conveyancing Practice*
A Stewart and E Sinclair, *Conveyancing Practice in Scotland* (7th edn, 2016)
- Van der Merwe, *Security in Immovables*
C G van der Merwe, *Chapter 7: Security in Immovables* in A Yiannopoulos and M
Raff (eds), *Volume VI in International Encyclopaedia of Comparative Law* (2014)

Glossary

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 grantor of the security: one person can grant a security for another’s debt.

Assignment. The deed used to transfer a *standard security*. More broadly, the transfer of *incorporeal property*.

Bond and disposition in security. Older form of *heritable security* in which the debtor retained ownership of the property and the creditor obtained a subordinate *real right*. The debt had to be a fixed amount which was contracted for prior to the grant of the security. Not competent since 1970.

Bond of cash credit and disposition in security. Similar form of *heritable security* to the *bond and disposition in security* but which allowed credit given by a bank in relation to an account to be secured up to a maximum figure. Not competent since 1970.

Bond of corroboration. Deed by which a new owner of the *encumbered property* takes on liability under the loan contract relating to a *heritable security*.

Catholic and secondary securities. If a debtor grants to X security over two assets, and later grants to Y a postponed security over one of them, X is the “catholic” secured creditor and Y is the “secondary” security holder. If the debtor defaults on the debt owed to X, X owes a duty to Y to resort in the first instance to the property over which Y has no security, and to resort to the latter only to the extent that the former is insufficient.

Cautionary obligation. An obligation by a party (“the cautioner”) to guarantee a debt or debts owed by another (“the principal obligant”). This can be referred to as “personal security” in contrast to “real security” where an asset is used to secure a debt or debts. Cautionary obligations are often known as “guarantees”, this being the relevant term in English law.

Company charges registration regime. Part 25 of the Companies Act 2006 (the current version of which has been in force since 1 April 2013) 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.

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 & Wales, Scotland, Northern Ireland), each with its own Registrar, though in practice they are closely connected, and share a website at <www.companieshouse.gov.uk>.

Corporeal property. Property with a physical presence, such as a piece of land or a book.

Discharge. The deed used to extinguish a *standard security*.

Encumbered property. The property which is subject to a security. The Conveyancing and Feudal Reform (Scotland) Act 1970 uses the term “security subjects”.

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 securities 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 purchaser who is in good faith then the purchaser takes the property free of the security. Thus it is often weaker than a legal security. The legal/equitable distinction does not exist in Scots 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 over it a *standard security*, securing a debt of £400,000, the “equity” of the property is £600,000.

Ex facie absolute disposition. Older form of *heritable security* in which the property was transferred to the creditor but with the right to a reconveyance on the secured debt being paid. Not competent since 1970.

Foreclosure. The process by which a creditor takes ownership of the property, having been unable to sell it. A court order is required. See the Conveyancing and Feudal Reform (Scotland) Act 1970 section 28. In some jurisdictions the word “foreclosure” is used more broadly to mean enforcement.

Heritable property. Immoveable property ie land and rights in land. Strictly, the term “heritable property” also applies to other very limited types of property such as pensions.

Heritable security. The general term for security over *heritable property*. There is a broad statutory definition of “heritable security” in section 3 of the Titles to Land Consolidation (Scotland) Act 1868. That definition, however, excludes the *ex facie* absolute disposition which in functional terms can be regarded as a *heritable security*. The term “heritable security” would not normally be used to refer to a floating charge. While that form of security does affect land, it is typically granted by a company over all its assets.

Hypothec. Non-possessory security over *corporeal property*. While security over land is in principle a hypothec, in practice the term is used in Scotland for a non-possessory security over corporeal moveables. By contrast in many countries, particularly in continental Europe, the term is used mainly for security over land.

Incorporeal property. Property without a physical presence, such as a lease or a patent.

Juridical act. Any act of will or intention which has, or which is intended by the maker of the act to have, legal effect, but not including any legislative or judicial act.

Keeper of the Registers of Scotland. Commonly referred to as “the Keeper”. The official who heads the Department of the Registers of Scotland and in whose name all acts and decisions are made.

Land Register. The register of title to land in Scotland. A *standard security* must be registered in this register to give a creditor a real right. (The Land Register is gradually replacing the Register of Sasines, a register of deeds.)

LLP. Limited liability partnership. (Limited Liability Partnerships Act 2000.) Not to be confused with limited partnerships. (Limited Partnership Act 1907.)

Mortgage. A term in English law for the main form of security over land, which has come into general usage including in Scotland.

Obligation *ad factum praestandum*. Obligation to do something, such as to convey land.

Offside goals rule. A general doctrine of property law. If X contracts to transfer a right (eg ownership of land) to Y, but in fact transfers it to Z, and Z knew that X was acting in breach of the X/Y contract, then Z has “scored” an “offside goal”. The result is that Y can have the X/Z transfer set aside. Thus Y’s personal right prevails over Z’s real right. The doctrine can apply not only to transfers but also to certain other types of transaction, but its exact parameters, including in relation to security rights, are unclear.

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 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 then Y has a personal right against X. 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 in the land, and the personal right against X to have the land transferred is now spent. Real rights are as good as the thing in which they are held.

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.

Real right. See also *personal right*. Real rights divide into (i) ownership and (ii) the subordinate real rights (or “limited”) real rights, which are rights held in something that is owned by someone else. For example if X owns land and borrows money from Y, granting to Y a standard security, 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*.

Redemption. The right of the grantor of the security to have it extinguished on the secured debt being paid.

Restriction. The deed used to restrict a *standard security* to only part of the property over which it was initially granted.

Standard conditions. A set of statutory conditions found in Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970 which are incorporated into every *standard security*. Most are variable by the parties to the security but some, in particular in relation to enforcement are not.

Standard security. The only type of *heritable security* which can be granted under the current law. It gives the grantee a limited right in the property, leaving ownership with the grantor. A standard security is created by registration in the *Land Register*. The governing legislation is the Conveyancing and Feudal Reform (Scotland) Act 1970.

Sunset rule. A rule in terms of which a right is extinguished after a fixed period of time. (This can be contrasted with negative prescription which requires a right not to be enforced for a period of time before it is extinguished.)

True security. A security right that is a subordinate *real right*, leaving title to the property in the provider of the security. Also known as a “proper security”. A *standard security* is a true security.

Unregistered holder. A person who is not registered as owner of land, or holder of a right in land, but who could complete title and become registered owner or holder. Typical examples of unregistered holders are executors, who acquire the deceased person’s estate by means of confirmation from the Sheriff Court but are not registered as owner on the *Land Register*.

Variation. The deed used to amend a *standard security* other than to reduce the extent of the *encumbered property* where a *restriction* must be used.

Chapter 1 Introduction

General

1.1 The use of property to secure debt is of crucial importance to the economy and society. It allows individuals to obtain loan finance to buy homes in which to live.¹ In the Court of Appeal in England, Lord Justice Munby has stated that a mortgage is advantageous to borrowers for a number of reasons:

“Precisely because the debt will be secured, a lender is likely to be more willing to lend money to people whose credit would otherwise be thought inadequate and, crucially, more willing to lend larger amounts and at a lower rate of interest than he would be prepared to agree if the loan was unsecured. It is, after all, these commercial and economic realities which have enabled so many people to become the owner-occupiers of houses which they would otherwise never have been able to afford.”²

1.2 In 2017, mortgages allowed 365,000 first-time buyers to purchase a home in the UK.³ During 2018, figures from UK Finance show that in Scotland there was £4 billion of mortgage lending for first-time buyers, £5.5 billion for home movers and £4.4 billion for remortgaging.⁴ In 2017/2018 there were 127,306 mortgage transactions registered in Scotland.⁵

1.3 The need for people buying a home to obtain mortgage finance is very familiar. “Mortgage”, strictly, is the term in English law⁶ for the security which the lender will demand over the property. In the event of the borrower failing to repay the loan, the lender will seek to recover the debt by selling the property. The lender is thus protected. If the borrower becomes insolvent the effect of holding a security is to give the lender priority over unsecured creditors. Equally, if the borrower transfers the property to a third party the security is unaffected. This is because in property law terms it is a real right.⁷

1.4 Finance secured on land is also of great importance in the context of agricultural and commercial property, with businesses commonly granting security over their premises to banks and other financial institutions.⁸

¹ See eg Brits, *Real Security Law* at 16: “A mortgage is more than just a legal institution; it is a social tool that facilitates investment in immovable property and home ownership”. And Van der Merwe, *Security in Immovables* at para 83 notes: “Mortgage financing . . . provides a means of homeownership, a highly-priced social aspiration of many people, leading to a realisation of personhood and liberty interests.” See also Higgins, *The Enforcement of Heritable Securities* para 1.2.

² *Zinda v Bank of Scotland Plc* [2011] EWCA 706, [2012] 1 WLR 728 at para 17.

³ Annual Mortgage Lunch Speech by Stephen Jones, Chief Executive of UK Finance, 20 April 2018 available at <https://www.ukfinance.org.uk/annual-mortgage-lunch-speech-stephen-jones/>.

⁴ J Marr, “Welcome note from UK Finance” to *The Mortgage Market in Scotland* seminar, Thursday 7 March 2019.

⁵ Source: Registers of Scotland.

⁶ And other jurisdictions influenced by English law, including South Africa.

⁷ See eg Reid, *Property* para 5.

⁸ See eg Hardman, *Granting Corporate Security* ch 8.

1.5 In Scotland the technical term for security over land and houses is “heritable security”. The background is that immoveable property is the main type of heritable property.⁹ The principal legislation on heritable securities is the Conveyancing and Feudal Reform (Scotland) Act 1970, now almost fifty years old. It replaced the existing forms of heritable security with a new single type: the “standard security”.¹⁰ The holder of a standard security may be called a “heritable creditor”, reflecting the fact that the security is over heritable property.¹¹

Background

1.6 The law of heritable securities was first identified as a project in our Eighth Programme of Law Reform, which ran from 2010 to 2014.¹² But work on it could not begin until we completed our substantial moveable transactions project at the end of 2017.¹³ The project commenced fully in 2018, when we had a series of initial meetings with stakeholders. After this we established and met for the first time with an advisory group of experts working in the area.¹⁴ The lead Commissioner and a member of the advisory group¹⁵ gave a presentation on the project at UK Finance’s *The Mortgage Market in Scotland* seminar in March 2019.

1.7 At the time of consultation on the Eighth Programme there was significant support for a project on heritable securities.¹⁶ The then Lord President, Lord Hamilton, stated that “Heritable security seems an obvious topic for inclusion. It is of the first importance to a large section of the community. It ought to be revisited some forty years after the [Conveyancing and Feudal Reform (Scotland) Act 1970].” The Law Society of Scotland said: “The Society’s members report practical difficulties with the enforcement of heritable securities. This area should be reviewed.” The Scottish Property Federation wrote: “Our members have expressed their support for the Commission’s interest in heritable securities with particular reference being made by members to the issue of covering developer options.”

Reasons for the project

1.8 The Eighth Programme of Law Reform¹⁷ sets out five reasons for carrying out a project in this area. The first is that “the rules about enforcement are complex and hard to understand, and indeed it may be open to debate whether even after exhaustive study they really make sense.” This statement pre-dates by a few months the decision of the Supreme Court in *Royal Bank of Scotland plc v Wilson*,¹⁸ the effect of which was to overturn long-held understanding of what requires to be done to allow a standard security to be enforced for

⁹ As well as a few other limited categories of property, such as pensions. See Reid, *Property* paras 11-15.

¹⁰ See further Chapter 2.

¹¹ Although in this Discussion Paper we generally use the broader terms “creditor” or “secured creditor”.

¹² Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010).

¹³ See Report on Moveable Transactions.

¹⁴ Our advisory group members are listed in Appendix B.

¹⁵ Andrew Kinnes of Shepherd and Wedderburn LLP.

¹⁶ For an earlier call for the 1970 Act to be reviewed, see A J M Steven and D A Massaro, “Standard securities and variations to the standard conditions” 2008 SLT (News) 271 at 276.

¹⁷ Eighth Programme of Law Reform paras 2.29-2.33.

¹⁸ [2010] UKSC 50, 2011 SC (UKSC) 66.

monetary default.¹⁹ In that case Lord Rodger of Earlsferry quoted with approval Professors Gretton and Reid's description of the enforcement provisions as a "veritable maze".²⁰ The statement in the Eighth Programme also pre-dates the significant amendments made for residential cases by the Home Owner and Debtor Protection (Scotland) Act 2010, which have added to the complexity.

1.9 The second reason is that the fairness of the legislation should be reviewed. The Bill which became the 2010 Act is noted in the Eighth Programme, but it is said that the issue of fairness goes wider than enforcement and consumers. The concern here is the fairness of the rules of the security, for example in relation to enforcement. Matters which relate to the debt, such as how much interest can be charged, are for the law of credit rather than the law of rights in security.

1.10 The third reason is that "a section-by-section review of the 1970 Act reveals numerous technical problems. Individually they are generally minor but taken together there is an opportunity for significant technical improvement." An example is how a standard security for an obligation *ad factum praestandum* (obligation to do something) works in practice. The remedies for enforcing standard securities generally involve recovering money by realising the encumbered property. This money can then be used to satisfy a monetary debt which is secured, but if the debt is a non-monetary one the position is more difficult.²¹

1.11 The fourth reason is that previous reviews of the area²² appear not to have taken account of comparative law. There may well be lessons to be learned from other countries. Foreign systems broadly divide into two categories: those based on English law where a security over land is normally known as a "mortgage" and those based on Roman law where such a security is generally known as a "hypothec".²³

1.12 The fifth reason relates to Islamic mortgages, which have been developed because of the prohibition on charging interest under Sharia law. We discuss these below.²⁴

Scope of project

General

1.13 Mortgage law, widely drawn, is a large subject. We have already stated that our focus will be the law of rights in security rather than the law of credit.²⁵ More particularly, our principal objective is to modernise and improve the law of standard securities, as set out in the 1970 Act as amended. Some aspects of mortgage law are governed by European Union

¹⁹ See eg G L Gretton, "Upsetting the Apple-Cart: Standard Securities before the Supreme Court" (2011) 15 Edin LR 251.

²⁰ [2010] UKSC 50, 2011 SC (UKSC) 66 at para 15. See Gretton and Reid, *Conveyancing* para 23-31. In the same vein, Lord Hope of Craighead in the same case at para 70 referred to their statement in K G C Reid and G L Gretton, *Conveyancing 2009* (2010) 179 that the law here is of "labyrinthine complexity".

²¹ 1970 Act s 9(8)(c). See Chapter 4 below.

²² Notably the Halliday Report. See Chapter 2 below.

²³ Eg the German *Hypothek*. See also para 3.18 below. But in Germany there is also the non-accessory *Grundschild*. See para 3.25 below.

²⁴ See paras 1.15-1.18 below.

²⁵ See para 1.9 above.

law or are reserved to the UK Parliament.²⁶ Our intention is to prepare a draft Bill which could be passed by the Scottish Parliament.

1.14 As well as reviewing the legislation on standard securities, we will also consider the statutory provisions which regulate pre-1970 heritable securities.²⁷ Relatively few such securities now exist. We think that the time has come to review the law in relation to these.

Islamic mortgages

1.15 We noted above that a reason given in the Eighth Programme for reviewing the law of heritable securities was the development of Islamic mortgages in Scotland.²⁸ Originally, such mortgages involved both the lender and the borrower taking title to the property in a “*musharaka*” arrangement.²⁹ This contrasts with an “ordinary” mortgage where the borrower alone owns the property and grants a standard security over it.

1.16 In our Eighth Programme we said that there was a need to consider how this arrangement “fits” with Scottish law and in particular the ban on other forms of heritable securities in section 9 of the 1970 Act. We were also concerned that the protective measures for debtors in the 1970 Act as well as other legislation such as the Matrimonial Homes (Family Protection) (Scotland) Act 1981 do not apply where a standard security is not used. A further issue is that the Land Register gives a misleading impression as to the identity of the owner of the property.³⁰

1.17 In the updated version of this arrangement, however, the borrower takes title to the whole property as trustee and grants a standard security to the lender in relation to its obligations.³¹ On this basis, the concerns identified in the Eighth Programme broadly appear to have been met because the mortgage is structured as a standard security.³² Thus the borrower will have the protection of the 1970 Act and associated legislation.

1.18 In so far as Islamic mortgages in Scotland are effected other than by means of a standard security (of which we have no evidence) we do not intend specifically to consider these. We consider that our focus should be on reviewing the existing legislation on heritable securities.

Evolution not revolution and broad policy considerations

1.19 While the 1970 Act can clearly be improved upon, it is not fundamentally broken. It was a significant step forward from the law which pre-dated it.³³ As will be seen, our view is

²⁶ See para 1.32 below.

²⁷ See Chapter 12 below.

²⁸ See generally G Gretton, “Islamic Mortgages” in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 301-315.

²⁹ See G Burnside, “Unveiling the Islamic Mortgage” (2005) 50 JLSS Dec/58. See also the Land and Buildings Transaction Tax (Scotland) Act 2013 sch 7 paras 7 to 12.

³⁰ In other words, it suggests that the finance provider is part owner. While this is true in strict legal terms, it is not functionally true, rather like the position for the old *ex facie* absolute disposition. See para 2.21 below.

³¹ See G Burnside, “Islamic Finance: A Scottish Lead” (2009) 54 JLSS Aug/56.

³² We are grateful here to Graham Burnside and Peter Alderdice of Shepherd and Wedderburn LLP for their assistance.

³³ See Chapter 2 below.

that many of its pillars, including that there should only be one form of conventional heritable security, should be retained.³⁴

1.20 We are also strongly influenced by the fact that the Scottish Parliament within the last ten years has legislated to implement important policy decisions in relation to the enforcement of standard securities. In particular, there is now different treatment of residential and non-residential properties, with greater protection for debtors in relation to the former. We believe that these policy choices should be respected, although there are issues in relation to detail where we intend to consult on reform.

Two Discussion Papers

1.21 Our view, endorsed by our advisory group, is that the project would be best divided into two Discussion Papers. These will be followed by a single Report and draft Bill. This first Discussion Paper is on general/conveyancing aspects (“Pre-default”) and the second will be on enforcement (“Post-default”).³⁵ The advantage of this approach is that the Discussion Papers can be briefer, more targeted and have fewer questions than if we had proceeded by means of a single Discussion Paper. This first Discussion Paper will be of greater relevance to those who prepare standard security documentation. The second Discussion Paper will be of interest more to those who represent debtors and secured creditors where there is default. We accept that the two subjects cannot be entirely divided and that is the reason why we will work towards a single Report and draft Bill.³⁶

1.22 We should also record our reasons for preparing the Pre-default Discussion Paper first. Whilst it is in the area of enforcement where there is arguably greatest difficulty with the current law, our view is that the logical way of proceeding is to consider how a standard security is created prior to how it is enforced. In addition, it makes sense to review other juridical acts, in particular variation, assignation and discharge, when looking at creation.

1.23 We will be assisted in our work towards the second Discussion Paper by a comparative research paper on enforcement of heritable securities by Dr John MacLeod, formerly of the University of Glasgow and now of the University of Edinburgh. It was completed under the Memorandum of Understanding between this Commission and the Scottish Law Schools.³⁷ The paper is available on the project webpage.³⁸

Methodology

1.24 In working on this project we are helped considerably by the existing literature on heritable securities in Scotland.³⁹ With specific regard to the 1970 Act we have been assisted by looking at the Parliamentary Debates when this legislation was being enacted and the Notes on Clauses held in the Scottish Government Law Library, the equivalent of

³⁴ See Chapter 3 below.

³⁵ The “Pre-default” and “Post-default” labels are used for convenience. Of course most securities never have to be enforced.

³⁶ It has also been necessary to consider some enforcement questions in this Discussion Paper. See eg paras 5.25-5.30 below.

³⁷ See Scottish Law Commission, Annual Report 2016 (Scot Law Com No 246, 2017) 23.

³⁸ See <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/heritable-securities/>.

³⁹ Eg Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970*; Cusine and Rennie, *Standard Securities* and Higgins, *The Enforcement of Heritable Securities*.

today's explanatory notes. We have also referred to the law in other jurisdictions, notably England and Wales. Our work has been assisted too by discussions with our advisory group.

1.25 The proposals and questions in this Discussion Paper seek to elicit the views of consultees on what the appropriate policy should be in relation to the future law. Policy decisions will then lead to recommendations and draft Bill provisions in our Report.

Structure of this Discussion Paper

1.26 This Discussion Paper comprises thirteen chapters. Following this introductory chapter, Chapter 2 provides an overview of the history and current law in relation to heritable securities, but focusses primarily on pre-default issues.

1.27 Chapter 3 deals with certain general matters, including what form of heritable security should be allowed and terminology. Chapter 4 considers the secured obligation and includes a detailed discussion in relation to non-monetary obligations. Chapter 5 looks at what property can be encumbered.

1.28 Chapter 6 deals with the creation of a standard security. Chapter 7 then reviews the standard conditions, which are set out in Schedule 3 to the 1970 Act and are incorporated into every standard security. Most of these conditions are variable but some are not. Chapter 8 considers the inter-relationship of a standard security with a lease, a matter presently dealt with in part by one of the standard conditions,⁴⁰ as well as the interaction with other real rights.

1.29 Chapter 9 deals with variation of a standard security. Chapter 10 considers transfer of a standard security. This is carried out by means of an assignation and is an area which has been the subject of recent case law.⁴¹ Chapter 11 examines extinction of a standard security, including redemption.

1.30 The final substantive chapter is Chapter 12, which considers what should be done (if anything) about pre-1970 heritable securities which continue to exist. It also considers the legislation on such securities which is still in force with a view to repeal. Chapter 13 lists the proposals and questions.

Legislative competence

1.31 Our aim is to produce a draft Bill which is within the legislative competence of the Scottish Parliament. For the most part this should not be problematic as the law of heritable securities is not a reserved matter under Part II of Schedule 5 to the Scotland Act 1998. It is indeed an aspect of Scots private law.⁴²

⁴⁰ Standard condition 6.

⁴¹ Notably *OneSavings Bank plc v Burns* 2017 SLT (Sh Ct) 129; *Shear v Clipper Holdings II SARL*, Outer House, 26 May 2017, unreported and *Promontoria (Henrico) Ltd v Portico Holdings* 2018 GWD 6-87.

⁴² Scotland Act 1998 s 126(4).

1.32 In so far as there are areas relevant to the project reserved to the UK Parliament⁴³ or the European Union⁴⁴ we would work within these.

1.33 An Act of the Scottish Parliament is not law so far as any provision of the Act is outwith the legislative competence of the Parliament and a provision is outside that competence in so far as it is incompatible with any right under the European Convention on Human Rights.⁴⁵ In suggesting reforms we require to ensure that these would be ECHR-compliant.

Impact assessment

1.34 When our Report is eventually published it will be accompanied by a BRIA (Business Regulatory and Impact Assessment). We require therefore to assess the impact and, in particular, the economic impact of any reform proposal that we may eventually recommend in the Report. Information on the impact of the current law would also be very helpful. For example, uncertainty in the meaning of statutory provisions may necessitate litigation and increased costs because of this. We would therefore much welcome the help of consultees in relation to the following question.

1. What information or data do consultees have on:

(a) the economic impact of the current legislation on heritable securities in relation to pre-default issues, or

(b) the potential economic impact of any option for reform proposed in this Discussion Paper?

Acknowledgements

1.35 We are grateful to the members of our advisory group, whose names appear in Appendix B. Listed there too are the names of others who have helped, to whom we would also express our thanks. We have had ongoing help from Registers of Scotland and thank the Keeper, Jennifer Henderson, and her staff.

⁴³ Such as the subject matter of the Consumer Credit Act 1974.

⁴⁴ Such as the Mortgage Credit Directive 2014/17/EU as implemented by the Mortgage Credit Directive Order 2015 (SI 2015/910). On this see M Anderson and E Arroya Amayuelas (eds), *The Impact of the Mortgage Credit Directive in Europe* (2017). At the time of writing it is unclear what the consequences of Brexit will be here.

⁴⁵ Scotland Act 1998 s 29(2)(d).

Chapter 2 History and current law

Introduction

2.1 In this chapter we review the current law of heritable securities in relation to pre-default matters. While we touch on some issues in relation to enforcement, we leave that area in the main to the second Discussion Paper which we intend to issue next year. We begin by looking at the older law of heritable securities, before considering the Conveyancing and Feudal Reform (Scotland) Act 1970, which is the main piece of legislation today.

Very old forms of heritable security

Wadset

2.2 Early Scots law appears to have had a unitary approach to security over moveable property and security over land.¹ Property generally could be pledged in security of a debt. The old Scots word for security was “wad”, but as time progressed the wad of land evolved into a *wadset*.² A wadset was created by the land being conveyed to the creditor who required to take infeftment, that is to say be recognised by the feudal superior.

2.3 Wadsets latterly could be “proper” and “improper”.³ The former resembled a pledge of moveables in that the creditor (“wadsetter”) took possession. The wadsetter was entitled to the profits of the land (typically rent) instead of interest on the debt, but did not have to account to the debtor (“reverser”) for any surplus. In contrast, in an improper wadset the reverser retained possession and while the wadsetter was entitled to the profits these had to be set against the interest due, with any surplus being returned to the reverser.

2.4 When the land was conveyed to the wadsetter, the practice developed that the reverser’s right to get it back on payment of the debt was set out in a separate deed known as a “reversion.” Since the wadsetter ostensibly had title to the land,⁴ the reverser was at risk of it being fraudulently transferred to a third party.

2.5 The Reversion Act 1449 was therefore passed to enable the reverser to recover the land, notwithstanding the transfer, on payment of the debt owed. In order to protect purchasers the Registration Act 1617 required reversions to be registered within 60 days of being granted or they would be ineffective. Wadsets stopped being used around the middle

¹ A J M Steven, *Pledge and Lien* (2008) paras 3-19 to 3-21. Heritable security can be traced to ancient times, at least to the second millennium BC. See *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 20 (1992) para 108 (J Burgoyne).

² Stair, *Institutions* 2.10.1; Erskine, *Institute* 2.8.4. Perhaps the most famous example of wadsets are those to Scotland of Orkney in 1468 and Shetland in 1469 by King Christian of Norway in security of the dowry of his daughter who was to marry King James III. These were never redeemed. See B E Crawford, “The Pawning of Orkney and Shetland” (1969) xlviii *Scottish Historical Review* 35.

³ Erskine, *Institute* 2.8.26; Bell, *Principles* § 906; Halliday, *Conveyancing Law and Practice* para 47-02; *Stair Memorial Encyclopaedia* vol 20 para 109 (A J Sim); Reid, *Property* para 112 (G L Gretton).

⁴ But if the deed in favour of the creditor stated expressly that the land was being conveyed in security, the debtor retained ownership and no reconveyance was required. See Stair, *Institutions* 2.10.1.

of the eighteenth century,⁵ being replaced by newer forms of heritable security discussed below.

Infefment of annualrent

2.6 The other early Scottish form of heritable security was the *infefment of annualrent*.⁶ Here the right in security was created by infefment (ie recognition by the feudal superior) and the creditor was entitled to a certain sum generated from the land each year. But ownership remained with the debtor.⁷ Originally, there was no personal obligation owed by the debtor to the creditor. The result was that the debtor could not discharge the annualrent by repaying the debt owed to the creditor. Around the time of the Reformation when the legal prohibitions on interest were the subject of reform, such an obligation was added. The annualrent thus developed into the *heritable bond*. This comprised (a) an obligation to pay a sum backed by (b) an obligation to infef the creditor in an annualrent.

Old forms of heritable security

General

2.7 We consider here the main forms of heritable security which were in use immediately prior to the 1970 Act. The term “heritable security” itself was given a very broad statutory definition by section 3 of the Titles to Land Consolidation (Scotland) Act 1868:

“The words ‘heritable security’ and ‘security’ shall each extend to and include [A] all heritable bonds, bonds and dispositions in security, bonds of annual rent, bonds of annuity and all securities authorised to be granted by the seventh section of the Debts Securities (Scotland) Act, 1856, [bonds of cash credit and disposition in security], and [B] all deeds and conveyances whatsoever, legal as well as voluntary, which are or may be used for the purpose of constituting or completing or transmitting a security over lands or over the rents and profits thereof, as well as [C] such lands themselves and the rents and profits thereof and [D] the sums, principal, [E] interest and penalties, secured by such securities; but shall not include securities by way of ground annual, whether redeemable or irredeemable, or absolute dispositions qualified by back bonds or letters” (lettering added).

This provision remains in force today. “Heritable security” is stretched to breaking point to include (A) specific types of heritable security; (B) other deeds for security purposes; (C) the assets subject to the security; (D) the principal secured obligation and [E] ancillary secured obligations. And yet apart from (A) the definition fails to capture the essence of a heritable security: as a right.

2.8 As can be seen, there were two exclusions from the definition. The first, the ground annual, was a form of perpetual payment secured on land. New ground annuals were prohibited in 1974 and those remaining were extinguished in 2004 on feudal abolition.⁸ The second, the *ex facie* absolute disposition, is discussed below.⁹ It was excluded because of

⁵ Reid, *Property* para 112 (G L Gretton).

⁶ Bell, *Principles* § 908; Halliday, *Conveyancing Law and Practice* para 47-03; Reid, *Property* para 112 (G L Gretton).

⁷ Erskine, *Institute* 2.2.31-32 and 34.

⁸ Land Tenure Reform (Scotland) Act 1974 s 2; Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 56.

⁹ See paras 2.14-2.16 below.

its different nature meaning that the statutory provisions on enforcement in relation to the other heritable securities did not apply to it. But, despite this exclusion, the *ex facie* absolute disposition remains classifiable in general terms as a heritable security.

Bond and disposition in security

2.9 The initial form of the heritable bond was adapted to include an actual conveyance of the land.¹⁰ This was probably influenced by the wadset. The new form of security became known as the “heritable bond and disposition in security”, but the word “heritable” soon came to be omitted.

2.10 The bond and disposition in security enabled the creditor to obtain payment of the secured debt from rent due in respect of the land and, if necessary, by having the land sold.¹¹ Despite its name, under this form of security the debtor retained ownership of the land and the creditor only obtained a subordinate real right. Thus if Max granted a bond and disposition in security in favour of the Northern Bank over his house the bank did not get ownership of it. This was because the fact of the security was explicit from the deed creating it.¹²

2.11 Under a bond and disposition in security what could be secured was restricted. The rules on precision in relation to real burdens¹³ came to be applied to all heritable securities which were subordinate real rights. Thus a security could not be for all sums. As Lord Rutherford Clark stated: “Nothing can be more fixed in our law that a real security cannot be given for an *indefinite* sum of money” (emphasis added).¹⁴

2.12 But that was not the only restriction. In the late seventeenth century, it became “exceedingly common with country gentlemen whose affairs were in confusion”¹⁵ to transfer their land to a trustee with instructions to pay their debts or act as a cautioner. This resulted in legislative intervention because the trustee was felt to be in too powerful a position when the debtor became insolvent. The Bankruptcy Act 1696 prevented land being conveyed in security of *future* debts. The bond and disposition was thus limited not only to fixed sums, but to sums contracted for before the security was granted. This was a very restrictive approach and unsurprisingly led to other forms of heritable security being developed.

Bond of cash credit and disposition in security

2.13 This security was first introduced by legislation of 1793 before being regulated later by section 7 of the Debts Securities (Scotland) Act 1856.¹⁶ It enabled security to be given for

¹⁰ But this was interpreted as a right in security rather than as a transfer. See eg *Campbell v Bertram* (1865) 4 M 23.

¹¹ See Bell, *Principles* §§ 910-911; Gloag and Irvine, *Rights in Security* ch 3; *Stair Memorial Encyclopaedia* vol 20 paras 113-129; (A J Sim); Halliday, *Conveyancing Law and Practice* ch 48; Gordon, *Scottish Land Law* paras 20-04 to 20-83.

¹² G L Gretton, “*Ex Facie* Absolute Dispositions and Their Discharge” (1979) 24 JLSS 462.

¹³ See para 2.17 below.

¹⁴ *Smith Sligo v Dunlop & Co* (1885) 12 R 907 at 915.

¹⁵ Bell, *Commentaries* II, 218.

¹⁶ 33 Geo III c 74, s 12. According to Bell, *Commentaries* II, 221: “the greatest lawyers of the time were consulted” in relation to the restrictive rules in relation to the bond and disposition. On bonds of cash credit and disposition in security generally see Halliday, *Conveyancing Law and Practice* paras 47-05 and 48-72 to 48-76 and Gordon, *Scottish Land Law* paras 20-84 to 20-85.

sums advanced by means of a bank account, but the maximum amount had to be set out in the deed creating the security. It was not permissible to exceed the value of the principal sum of the credit, plus three years of interest at the rate of five per cent per year. Thus while such a security could secure future debts up to a specified maximum, these were restricted to a bank account.

Ex facie absolute disposition

2.14 In order to avoid the restrictions affecting the aforementioned bonds, security was granted instead by transferring the land outright to the creditor, who then became the owner of the land. But this was coupled with a normally unrecorded deed known as a “back letter”, which stated that the transfer was actually in security.¹⁷ This arrangement was known as an “*ex facie absolute disposition*”.¹⁸

2.15 Under this form of security there was no limit on the debts secured. In fact, it became usual practice to require all sums owed to the creditor to be paid before the land was reconveyed.¹⁹

2.16 The *ex facie absolute disposition* was not a “true” security because the creditor held ownership of the land. Thus if Angela granted this form of security to a bank in respect of her house, the bank became owner of the house.²⁰ This did not reflect the practical reality. Moreover, there was a danger that the creditor could convey the land away to a third party. Hence, in the nineteenth century, this form of security was usually only used where the creditor was a bank.²¹ At that time private lending was much more common than institutional lending. That situation changed markedly in the twentieth century, particularly after World War II. The *ex facie absolute disposition* became the dominant form of heritable security. Professors Cusine and Rennie comment that: “[b]ecause there were no statutory provisions governing this security, it was attractive to lenders who could virtually dictate the terms on which they would lend.”²²

Pecuniary real burden

2.17 The final old form of heritable security which should be mentioned is the pecuniary real burden.²³ It differed from the other forms in that it was *reserved* rather than *granted*.

¹⁷ Formerly, the back letter was granted by the creditor but in later practice it was replaced by an unrecorded agreement between the debtor and creditor. See Halliday, *Conveyancing Law and Practice* para 49-01.

¹⁸ See generally Bell, *Commentaries* I, 714; Bell, *Principles* § 912; Gloag and Irvine, *Rights in Security* ch 4; Halliday, *Conveyancing Law and Practice* ch 49; Gordon, *Scottish Land Law* paras 20-86 to 20-102.

¹⁹ See *Scottish & Newcastle Breweries Ltd v Liquidator of Rathburne Hotel Co Ltd* 1970 SC 215 at 217-218 per Lord Fraser.

²⁰ *Sexton v Coia* 2004 GWD 17-376, 2004 GWD 38-781 discussed in K G C Reid and G L Gretton, *Conveyancing 2004* (2005) 117-121. Previously, there was some authority to the effect that there was a distinction between the case where (1) the debtor had ownership of the land prior to the grant; and (2) where the debtor was purchasing the land with finance from a lender and instructed the seller to convey directly to the lender. In the former it was said that the bank only obtained a subordinate real right. This matter is considered further in Chapter 12 below.

²¹ A M Bell, *Lectures on Conveyancing* (3rd edn, 1882) vol 2, 1173-1175.

²² Cusine and Rennie, *Standard Securities* para 1.01.

²³ See Halliday, *Conveyancing Law and Practice* paras 50-02 to 50-08; Gordon, *Scottish Land Law* para 20-103; Reid, *Property* para 383 and Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000) paras 13.29-13.30.

For example, when land was sold the entire purchase price might not be paid immediately. A real burden could be reserved for the shortfall. Only a fixed sum could be secured.²⁴

Halliday Report

Introduction

2.18 In 1964 a committee of five individuals under the chairmanship of Professor John (Jack) M Halliday²⁵ was appointed:

“To examine and report on existing conveyancing legislation and practice in relation to heritable and moveable property and to make recommendations with a view to amending or new legislation.”²⁶

2.19 The committee’s report was published in 1966.²⁷ While extending only to 125 pages,²⁸ it is very wide-ranging. It deals with most aspects of conveyancing and is something of a manifesto for modernisation. Chapter VIII covers heritable securities. It is divided into three parts.

2.20 Prior to these, an introduction notes that the committee had “received many criticisms of [the existing heritable] securities and it is evident that amendment or substantial reform of them is required.”²⁹ In relation to the bond and disposition in security, the main criticism was that the property can only be realised by public sale under an “unduly cumbersome” procedure.³⁰ The bond of cash credit and disposition in security was found to be problematic by bankers because of the need to be linked to a particular account and for a maximum amount secured to be specified. It was therefore “unsuitable to the needs of the financial and commercial world of today.”³¹

2.21 The *ex facie* absolute disposition, while noted to be the most commonly used, was also the subject of several criticisms. First, its use meant that the Register of Sasines was less valuable as a record of ownership of land.³² Secondly, the fact that the creditor owned the property put the debtor at risk of fraud on the creditor’s part. In other words, as noted

²⁴ The historic relationship between ordinary and pecuniary real burdens, and the rules applicable to these, is muddled. See K G C Reid, “What is a Real Burden?” (1984) 29 JLSS 9.

²⁵ Professor Halliday was Professor of Conveyancing at the University of Glasgow from 1955 to 1979. See generally D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) and A J M Steven, “George Gretton and the Scots Law of Rights in Security” in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 235 at 236-238. Professor Halliday was widely respected, as can be seen by a comment made by the future first First Minister of Scotland, Donald Dewar, during the Parliamentary progress of the Bill which became the 1970 Act: “the conveyancing part of the Bill is the pure gospel according to Professor Halliday – and none the worse for that.” See Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 17 February 1970 col 44.

²⁶ Halliday Report para 1. The reason for the appointment of the committee was a recommendation of the Reid Report (Registration of Title to Land in Scotland, Cmnd 2032, 1963) that “the whole question of the amendment of our conveyancing legislation” should be examined. See Halliday Report para 4.

²⁷ The original signed report can be found in NRS HH41/1743.

²⁸ Of near-A5 rather than A4 size and no footnotes.

²⁹ Halliday Report para 102.

³⁰ Halliday Report para 103.

³¹ Halliday Report para 104.

³² This was because, as mentioned in n 20 above, the land was often conveyed directly from a seller to the purchaser’s bank which had financed the purchase. But the debtor did sign as consentor so the criticism is perhaps not that powerful.

above, the creditor could convey the property to another. The Report says that “[t]hese criticisms, however, ought not to be exaggerated since in practice they seldom lead to abuse or injustice”.³³

2.22 The Report states that the main practical difficulty with the *ex facie* absolute disposition was the need for “the preparation of very long documents even for simple loan transactions of a standard type.”³⁴ It notes that the unrecorded agreement between the debtor and creditor was prepared on an individual basis, setting out the rights and obligations of the parties. To twenty-first century eyes, where standard form documents are typically drawn from digital styles banks,³⁵ this comment seems profoundly dated.³⁶ Other problems mentioned, such as creating a postponed security or the need for a reconveyance rather than a mere discharge when the debt is paid, arise from this form of security not being a true security.

2.23 Having surveyed the existing forms of heritable security which could be granted, the Report states:

“We consider that the only effective solution of the many difficulties inherent in the present forms of heritable security is to devise a new and flexible form of security, adaptable for use in connection with all kinds of advances on heritable property, which will supersede all existing forms.”³⁷

In addition, the Report favours a new form of personal charge which could be registered in the Register of Inhibitions and Adjudications. It calls for further work and consultation in relation to its recommendations, but says that first there should be some reforms of the existing securities to deal with the most significant problems.

Part I: Existing heritable securities

2.24 The Report makes various recommendations to enable easier enforcement of a bond and disposition in security, including allowing sale by private agreement following advertisement. It also recommends that it would be “practical and desirable”³⁸ for there to be a form of simple discharge for *ex facie* absolute dispositions, so that a reconveyance was unnecessary.³⁹

Part II: New statutory security

2.25 A new “Statutory Security” is recommended by the Report. It would be a “true security”⁴⁰ rather than a transfer, but would be entirely flexible as to the debt to be secured. Further advances by the creditor could be covered.

³³ Halliday Report para 105.

³⁴ Halliday Report para 105. See also K M Law, “Conveyancing and Feudal Reform (Scotland) Bill” 1970 SLT (News) 45 at 46 referring to the “practical tedium of preparing lengthy documents”.

³⁵ Eg <http://www.psglegal.co.uk/>.

³⁶ But even in the 1960s lenders had printed styles of agreement. The one used by the Abbey National Building Society ran to 10 pages and can be found in NRS AD63/870/11.

³⁷ Halliday Report para 106.

³⁸ Halliday Report para 116.

³⁹ This was provided for by section 40 of the 1970 Act. See paras 12.14-12.18 below.

⁴⁰ Halliday Report para 122.

2.26 As between debtor and creditor, it is recommended that the rights and obligations should be similar to those normally set out in the documentation for *ex facie* absolute dispositions. The Report notes that the committee examined styles used by local authorities, banks, building societies and other lenders.⁴¹ Many were found to be similar. It considers that following consultation, including with the Law Society of Scotland, it would therefore be possible to produce “standard conditions” which would be prescribed by statute. This would save the parties having to make lengthy provision of their own, thus shortening the deed required to create the security. Most of these conditions could be varied if the parties desired. Part II of Appendix F of the Report provides further detail, noting that the standard conditions can be grouped under four principal heads: (1) management of security property; (2) calling-up; (3) default; and (4) redemption.⁴²

2.27 It was expected that institutional lenders would produce a standard form of the Statutory Security with blank spaces to insert the details which changed from transaction to transaction, in particular the description of the parties and the property. Variations of the standard conditions could be effected by means of a short schedule added to the deed.

2.28 In the interests of “uniformity and simplicity in conveyancing practice”⁴³ all future heritable securities would require to be granted in the form of the Statutory Security, but existing securities would be unaffected.

2.29 The Report recommends statutory forms for further transactions in relation to the Statutory Security, such as variations, assignments and discharges. It should be possible for these to be endorsed on the deed creating the security.⁴⁴ The new security should also be used in relation to registered (long) leases.

2.30 Finally, the Report notes that the reform would have a “minor disadvantage”⁴⁵ in that when a property was being purchased and a security was being granted two registrations would now be required. These would be of (1) the disposition in favour of the purchaser and (2) the Statutory Security in favour of the lender. Under the *ex facie* absolute disposition only that deed itself was needed because the seller could convey directly to the lender. It was suggested that registration fees should therefore be reviewed.⁴⁶

Part III: Personal charge on heritable property

2.31 The Report notes that achieving a heritable security can be expensive, as it includes examination of the title to the property, preparing a deed and the paying of stamp duty and registration dues. It was suggested to the committee that there would be benefit in allowing a debtor to grant a “personal charge” in favour of a creditor. This would be registrable in the Register of Inhibitions and Adjudications rather than the Register of Sasines. It would have

⁴¹ Halliday Report paras 121 and 125.

⁴² See Chapter 7 below.

⁴³ Halliday Report para 125.

⁴⁴ Halliday Report para 126. Styles are given Part II of Appendix F.

⁴⁵ Halliday Report para 127.

⁴⁶ This duly happened. See the Act of Sederunt (Amendment of Fees in the Department of the Registers of Scotland) 1970. Standard securities presented for registration with dispositions attracted a fixed fee of 15 shillings (£0.75).

the same broad effect as an inhibition,⁴⁷ meaning that the debtor would require to obtain the consent of the creditor to transfer heritable property and give a purchaser an absolutely good title. The committee took forward the suggestion and the Report recommends that the charge would last for five years like an inhibition, but unlike an inhibition it would not be renewable.⁴⁸ There should be restrictions on when a personal charge could be granted.⁴⁹

Heritable Securities (Scotland) Bill

2.32 The Queen's Speech of October 1968 announced a Bill "to amend the law of heritable securities in Scotland".⁵⁰ This was to implement the Halliday Report provisions on this subject. Parliamentary Counsel began to receive instructions on the Bill two months earlier.⁵¹ It was hoped to introduce it in the 1968/1969 session of Parliament but the "exigencies of the timetable for Scottish legislation prevented [the Secretary of State for Scotland] from doing so."⁵² In January 1970, it was therefore decided to combine the Bill with the separate Heritable Rights (Scotland) Bill. It was being prepared to deal with reform of feu duty and the introduction of the Lands Tribunal for Scotland's jurisdiction to vary land obligations (now title conditions). The result was a Conveyancing and Feudal Reform (Scotland) Bill, which subsequently became the 1970 Act.

Conveyancing and Feudal Reform (Scotland) Act 1970

General

2.33 Professor Halliday acted as consultant to the Government in relation to the Bill which was to become the 1970 Act.⁵³ While his committee's recommendations in relation to existing heritable securities and the introduction of a new statutory security were largely implemented by this legislation,⁵⁴ in contrast, the recommendation to introduce a personal charge was not.

2.34 Part III of the 1970 Act modified the law on existing heritable securities. We cover these securities in Chapter 12 below. Part II (sections 9 to 32) and Schedules 2 to 8 of the 1970 Act make provision for the new statutory security. In the words of the Secretary of State for Scotland (the Rt Hon William Ross MP) to the Scottish Grand Committee, the new security would be "much more satisfactory and acceptable than existing securities".⁵⁵ The Opposition spokesman (Norman Wylie QC MP) noted that: "these changes have the

⁴⁷ On inhibitions, see F Davidson, D J Garrity, L J Macgregor, A D J MacPherson and L Richardson, *Commercial Law in Scotland* (5th edn, 2018) para 8.10.

⁴⁸ Halliday Report para 130.

⁴⁹ For example, it should not be used in the context of hire purchase transactions.

⁵⁰ Parliamentary Debates, House of Lords, Official Report, 30 October 1968 col 5.

⁵¹ NRS AD63/870/1: introductory note to Parliamentary draftsman.

⁵² NRS HH41/2202: memorandum by Secretary of State for Scotland for meeting of Cabinet legislation committee on 27 January 1970.

⁵³ On the day the Bill received royal assent the Secretary of State for Scotland wrote to Professor Halliday to thank him, saying that it was "extremely useful to have your expert advice and your co-operation as a consultant." See NRS HH41/2206.

⁵⁴ The Bill which led to the 1970 Act was described as "useful" and "relatively uncontroversial". See Anon, "The New Conveyancing Bill" (1970) 15 JLSS 55.

⁵⁵ Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 17 February 1970 col 6.

unqualified support of the legal profession in Scotland.”⁵⁶ This was perhaps just as well as the time to debate the new legislation was limited. It was introduced in the House of Commons on 2 February 1970⁵⁷ and received royal assent less than four months later on 29 May 1970, the day that Parliament was prorogued for the general election.⁵⁸ Some regret about this speed was subsequently expressed.⁵⁹

2.35 Section 9(1) of the 1970 Act provides:

“The provisions of this Part of this Act shall have effect for the purpose of enabling a new form of heritable security to be created to be known as a standard security.”

Thus the new security is given the name “standard security” rather than “Statutory Security”.⁶⁰

2.36 The provisions in Part II are described by Professor Halliday as:

“a code, substantially self-contained but using some parts of the former statutory code relating to heritable securities, which regulates the constitution, assignation, restriction, variation, discharge, redemption and enforcement of the new security”.⁶¹

Part II is not a complete code, for the reason given that some of the existing statutory provisions are retained,⁶² but also because general rules of the law in rights in security will apply.⁶³

2.37 The provisions can broadly be divided into three categories: (1) pre-default; (2) post-default; and (3) general. Schedules 2, and 4 to 5, deal with pre-default matters. Schedules 6 and 7 deal with post-default matters. Schedule 3, which sets out the “standard conditions”, deals with both pre- and post-default matters. Schedule 8 has a list of earlier conveyancing statutes on heritable securities which do not apply to the standard security. Even this first glance at the architecture of the 1970 Act evidences complexity.

Pre-default provisions

2.38 In subsequent chapters of this Discussion Paper we will consider these provisions in detail. The treatment here will be relatively brief.

2.39 Section 9, as well as introducing the standard security, provides that it will now only be possible to grant a heritable security in this way.⁶⁴ This means that a heritable security by

⁵⁶ Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 17 February 1970 col 16.

⁵⁷ Parliamentary Debates, House of Commons, Official Report vol 795, 2 February 1970 col 33.

⁵⁸ Parliamentary Debates, House of Lords, Official Report vol 310, 29 May 1970 col 1243. Her Majesty’s speech on prorogation states: “Legislation has been passed to reform the feudal system in Scotland and the Scottish law of heritable conveyancing.” The same speech notes: “My Government have maintained their application for membership of the European Communities”.

⁵⁹ See para 2.53 below.

⁶⁰ See paras 3.16-3.17 below.

⁶¹ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-03.

⁶² Notably the Heritable Securities (Scotland) Act 1894.

⁶³ Such as the doctrine of catholic and secondary securities. See Cusine and Rennie, *Standard Securities* para 7.12.

⁶⁴ 1970 Act s 9(3) & (4). In the words of Professor George Henry in a contemporary article, the standard security is “new and exclusive”. See G L F H, “Conveyancing and Feudal Reform (Scotland) Bill” (1970) 15 JLSS 108.

means of transfer, in particular the *ex facie* absolute disposition, is forbidden.⁶⁵ The rule in the Bankruptcy Act 1696, preventing a heritable security securing a future debt, is disapplied for standard securities, as is the common law rule that real burdens for money have to be for a fixed sum.⁶⁶ This means that standard securities can be and normally are for all sums due or to become due.

2.40 There was some uncertainty in practice as to whether the reservation of pecuniary real burdens remained possible.⁶⁷ In any event, section 117 of the Title Conditions (Scotland) Act 2003, which was based on a recommendation in our Report on Real Burdens⁶⁸ prevents further creations of this type of security.

2.41 It is also provided in section 9 that a standard security must be “expressed in conformity with one of the forms prescribed in Schedule 2”⁶⁹ to the Act. Form A of that Schedule includes the debt element of the security ie the debtor’s obligation to perform the debt which is secured. Form B is a straight grant of security, which excludes that element.

2.42 Section 9 also has some important definitions including of the types of “real right in land”⁷⁰ over which a standard security can be granted and of the “debt”⁷¹ which a standard security can secure. It may be noted that the latter definition includes not only monetary obligations, but obligations *ad facta praestanda*. As discussed below, this is a subject which is problematic.⁷²

2.43 Section 10 provides details on the forms for the standard security set out in Schedule 2, as well as the clauses within these. Section 11 makes it clear that registration is required to give the grantee a real right in security over the relevant property.⁷³ Nowadays, registration must be in the Land Register even where the property is still in the Register of Sasines and thus a first registration will be needed.⁷⁴ It deals also with the standard conditions, which are set out in Schedule 3, incorporating these into every standard security together with any variations made by the parties.⁷⁵ The standard conditions relating to redemption, powers of sale on default and foreclosure cannot be varied.⁷⁶

2.44 Section 12 deals with the technical matter of standard securities being granted by persons without a registered title to the land in question.⁷⁷ Section 13 regulates the ranking

⁶⁵ See Chapter 3 below. The Financial Memorandum to the Bill which became the 1970 Act estimated that as a result of the *ex facie* absolute disposition being replaced in conveyancing transactions with two deeds (disposition and standard security) 26 additional staff would be required at Registers of Scotland at an annual cost of £51,000. See NRS HH41/2203.

⁶⁶ 1970 Act s 9(6).

⁶⁷ See para 3.6 below for fuller discussion.

⁶⁸ Scottish Law Commission, Report on Real Burdens (Scot Law No 181, 2000) paras 13.29-13.30.

⁶⁹ 1970 Act s 9(2).

⁷⁰ 1970 Act s 9(8)(b). See Chapter 5 below.

⁷¹ 1970 Act s 9(8)(c).

⁷² See Chapter 4 below.

⁷³ 1970 Act s 11(1).

⁷⁴ Registers of Scotland (Voluntary Registration, Amendment of Fees etc) Order 2015 (SSI 2015/265) art 3. See K G C Reid and G L Gretton, *Land Registration* (2017) para 7.12.

⁷⁵ 1970 Act s 11(2).

⁷⁶ 1970 Act s 11(3).

⁷⁷ Or where the land is still in the Register of Sasines, a recorded title.

of standard securities. It provides for a procedure whereby a later security holder can “freeze” the priority of an earlier security holder to certain sums plus interest and expenses.⁷⁸

2.45 There follow a group of sections on juridical acts in relation to a standard security: section 14 (assignation, whereby a standard security is transferred); section 15 (restriction, whereby the extent of the encumbered property is reduced); section 16 (variation) and section 17 (discharge, whereby a standard security is extinguished). Schedule 4 provides statutory forms for these transactions.

2.46 Finally, section 18 deals with redemption. This provides a procedure enabling the debtor to have the security extinguished on repayment of what is owed.

Post-default provisions

2.47 We will be brief here as these provisions will be considered in our second Discussion Paper. Essentially, three routes to realisation of the encumbered property are given: (1) the calling-up notice (sections 19 to 20), in terms of which the debtor is required to pay the secured debt within two months; (2) the notice of default (sections 21 to 23), in terms of which the debtor must remedy the stated default within one month; and (3) the court application (section 24). Prior to the landmark decision of the Supreme Court in *Royal Bank of Scotland plc v Wilson*⁷⁹ these routes were thought to be inter-changeable, but the effect of that decision is that a calling-up notice must be served where there is monetary default. Standard conditions 8 to 10 also partly regulate enforcement, which gives an extra layer of complexity in interpreting the provisions.

2.48 Curiously, no provision is made as to the procedure for ejecting the debtor. The Heritable Securities (Scotland) Act 1894, which regulates this in relation to ejection for the bond and disposition in security, applies to standard securities too.

2.49 There follow three provisions dealing with sale. Section 25 provides that sale can be carried out by private bargain or auction, both following advertisement, and that the creditor is under a duty to achieve the best price which can be reasonably obtained.⁸⁰ Section 26 deals with the disposition by the creditor. In particular, it provides that this extinguishes the standard security and any equal or lower ranking heritable security or diligence. Section 27 sets out the rules on applying the proceeds of sale.

2.50 Finally, section 28 deals with foreclosure. In some jurisdictions “foreclosure” is a general word for enforcement.⁸¹ Here in Scotland it is used more narrowly to refer to the creditor taking ownership of the encumbered property where it has not been possible to sell it. This would probably be where market conditions are poor. A court decree is required to authorise foreclosure.

⁷⁸ Since ranking provisions are most relevant in the context of enforcement, this provision will be examined in our second Discussion Paper.

⁷⁹ [2010] UKSC 50, 2011 SC (UKSC) 66.

⁸⁰ On the reason for this duty, see Gretton and Steven, *Property, Trusts and Succession* para 21.25.

⁸¹ Eg the USA.

General provisions

2.51 Section 29 is a jurisdiction provision. It requires matters in relation to a standard security to be determined by the sheriff court for the locality of the property. Section 30 is the interpretation provision. Section 31 is a saving provision which provides that heritable securities recorded before the legislation came into force are to be unaffected. Section 32 generally applies statutory provisions relating to the bond and disposition in security and the assignation in security to the standard security, except insofar as inconsistent with the 1970 Act. There is also a list in Schedule 8 of specific provisions which do not apply.

Later enactments

2.52 The 1970 Act is the most important source of law on heritable securities today. Nevertheless, there have been a number of significant subsequent enactments, some of which have amended the legislation and some of which are freestanding.⁸²

Redemption of Standard Securities (Scotland) Act 1971

2.53 As originally enacted, the 1970 Act did not permit variation of the debtor's right to redeem a standard security or the procedure relating thereto.⁸³ This was a mistake.⁸⁴ The 1970 Act was passed under a Labour Government, with the 1971 Act being passed under the incoming Conservative Government. While neither measure is party political, the new Lord Advocate (the Rt Hon Norman Wylie QC MP) said: "it is possible that, if the later part of the proceedings on the Bill [which became the 1970 Act] had not been so spectacularly swift, the difficulties which the present Bill [which was to become the 1971 Act] is designed to overcome might have been foreseen last year."⁸⁵ The effect of the 1971 Act is to enable the parties to limit the debtor's right to redeem, although the redemption procedure can still not be varied.⁸⁶

Land Tenure Reform (Scotland) Act 1974

2.54 Section 11 of this Act allows the redemption of a standard security over a private dwelling-house even where the parties have made an agreement limiting the right to redeem.⁸⁷

Consumer Credit Act 1974

2.55 This Act is a complex and wide-ranging piece of legislation, which can apply to standard securities in relation to their enforcement.⁸⁸

⁸² The following paragraphs are not intended to be exhaustive. For example, the Land Registration etc. (Scotland) Act 2012 (as did the Land Registration (Scotland) Act 1979 before it) governs the registration of standard securities in the Land Register.

⁸³ For critical comment see Anon, "The Conveyancing and Feudal Reform (Scotland) Act 1970: The Debtor's Right to Redeem" (1971) 16 JLSS 29.

⁸⁴ See paras 11.18-11.22 below.

⁸⁵ Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 30 March 1971 col 5. See also at col 10 the comments in reply by Norman Buchan MP, the Minister who led for the Government in the Bill which became the 1970 Act. And note also that work on the drafting of the original Heritable Securities (Scotland) Bill had commenced in the summer of 1968. See para 2.32 above.

⁸⁶ See paras 11.18-11.22 below.

⁸⁷ See paras 11.40-11.43 below.

⁸⁸ See J MacLeod, "Research Paper on Enforcement of Heritable Securities" paras 4.136-4.148 (available at <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/heritable-securities/>).

Abolition of Feudal Tenure etc. (Scotland) Act 2000

2.56 Section 69 of this Act applies, with such modification as is necessary, the provisions of the 1970 Act to the older forms of heritable security. For example, the rules on assignation, variation and discharge for standard securities must now be used when dealing with a bond and disposition in security. The provision was based on a recommendation in our Report on Abolition of the Feudal System.⁸⁹ Its purpose was to enable obsolete legislation relating to heritable securities to be repealed.⁹⁰

2.57 The 2000 Act also clarified the rules on conveyancing descriptions in standard securities, a matter on which there had been some difficult case law.⁹¹ It made changes too to some of the property law terminology in the 1970 Act, replacing references to “interest in land” (over which a standard security can be granted) with “land or real right in land”.⁹² Finally, section 11(1) of the 1970 Act was amended to make it clear that a standard security is a true security.⁹³

Mortgage Rights (Scotland) Act 2001

2.58 This legislation resulted from a Member’s Bill in the Scottish Parliament. It gave the right to the debtor where the encumbered property was used to any extent for residential purposes to apply to the sheriff for suspension of the enforcement procedure. The sheriff could make such an order only where it was reasonable and with regard to particular factors.⁹⁴ The 2001 Act was influenced by English legislation.⁹⁵ Prior to it coming into force the courts had no discretion to suspend enforcement.⁹⁶

Home Owner and Debtor Protection (Scotland) Act 2010

2.59 The 2001 Act was largely repealed by this legislation. It made substantial amendments to the 1970 Act in respect of where a standard security is being enforced over property being used to any extent for residential purposes. Under the 2001 Act the initiative had to be taken by the debtor to apply for suspension and persuade the sheriff that this was reasonable. Under the 2010 Act the creditor must satisfy the court that it is reasonable to enforce, again having regard to certain factors. This means that normally a creditor can only enforce against residential property by means of an application under section 24 of the 1970 Act. As a result of the decision in *Royal Bank of Scotland plc v Wilson*,⁹⁷ in the case of monetary default this will require to be preceded by a calling-up notice. The 2010 Act also imposes duties on the creditor to fulfil certain “pre-action requirements”⁹⁸ prior to

⁸⁹ Scottish Law Commission, Report on Abolition of the Feudal System (Scot Law Com No 168, 1999) para 9.31.

⁹⁰ See also paras 12.7-12.12 below.

⁹¹ *Bennett v Beneficial Bank plc* 1995 SLT 1105; *Beneficial Bank plc v McConnachie* 1996 SC 119. See Report on Abolition of the Feudal System paras 9.33-9.39. See paras 6.22 and 6.41 below.

⁹² See eg the 1970 Act s 9(2), (3), (4) and (8)(a) as amended by the 2000 Act sch 12 para 30.

⁹³ 2000 Act Sch 12 para 30. Section 11(1) as passed provided that “Where a standard security is duly recorded, it shall operate to vest the interest over which it is granted in the grantee as a security for the performance of the contract to which the security relates.” This could be read as the land being transferred to the creditor.

⁹⁴ Mortgage Rights (Scotland) Act 2001 s 2.

⁹⁵ Administration of Justice Act 1970 s 36; Administration of Justice Act 1973 s 8.

⁹⁶ *Halifax Building Society v Gupta* 1984 SLT 399.

⁹⁷ See para 2.47 above.

⁹⁸ 1970 Act s 24A (as inserted by the 2010 Act s 4). See also the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 (SSI 2010/317).

enforcement, including supplying the debtor with information about the debtor's obligations and sources of advice and assistance in relation to debt management.

Appraisal of the current law: positives

2.60 The 1970 Act is generally considered to have been a major improvement on the law prior to it being passed.⁹⁹ Professor Gretton has described it as “one of the most important, and one of the most welcome and successful reforms of the law of security that our law has ever seen”.¹⁰⁰ The legislation has a number of merits, which have stood the test of time. First, the replacement of several forms of heritable security with one form – the standard security – has simplified the law. Secondly, the standard security is a true security. The debtor retains ownership and the creditor only has a subordinate right in the property. This has a number of advantages, including reflecting practical reality and making it straightforward for multiple securities to be granted over the property. Thirdly, the standard security is flexible in relation to the debt it can secure. It can be a fixed amount or a fluctuating amount. It can be debt already owed or debt yet to be incurred.

Appraisal of the current law: negatives

2.61 Almost fifty years on from the passing of the 1970 Act it is clear that despite its broad success there are a number of areas of difficulty.¹⁰¹

(1) Uncertainty

2.62 Decisions of the courts, not least in recent years, have demonstrated a lack of certainty in aspects of the legislation. A number of these relate to the enforcement provisions, including those inserted by the 2010 Act.¹⁰² The best known is the Supreme Court decision in *Royal Bank of Scotland plc v Wilson*,¹⁰³ where forty years of misunderstanding of the calling-up notice procedure was exposed. Uncertainties also exist in relation to ranking. Section 13, which deals with the effect of notices to the secured creditor from the grantee of a subsequent standard security over the property and from a transferee, is described by Professor Noble as follows:

“It must be said that this section, which attempts to deal with two totally different situations at the same time and has a misleading rubric, is one of the worst examples of Parliamentary draftsmanship in recent years, and that in itself is no small feat. When one considers that the section occupies a mere 29 lines and was recently the

⁹⁹ Note Van der Merwe, *Security in Immovables* 54: “The English legislator should have followed the recommendations of its Law Commission and like its Scottish counterpart [in fact in 1970 the Scottish legislator was the UK Parliament] have taken the bull by the horns and introduced a standard land security to replace the outdated variety of legal and equitable mortgages and charges.” See also F Fiorentini, *Le garanzie immobiliari in Europa* (2009) 519 referring to “l’alto tasso di complessità ed apparente incoerenza del law of mortgage” [the high degree of complexity and apparent incoherence of the law of mortgage].

¹⁰⁰ G L Gretton, “The Concept of Security” in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126. See also Halliday, *Conveyancing Law and Practice* para 47-07: “On the whole the standard security has proved to be a much more satisfactory form of heritable security than its predecessors.” See too K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 118.

¹⁰¹ There is a degree of overlap in some of the following areas.

¹⁰² See eg *Northern Rock (Asset Management) Plc v Millar* 2012 SLT (Sh Ct) 58 and *Firstplus Financial Group plc v Pervez* 2013 Hous LR 1 in relation to when pre-action requirements documentation has to be sent to the debtor.

¹⁰³ See para 2.47 above.

subject of a memorial to counsel consisting of 39 pages, one can appreciate how obscure the meaning and effect of the section is.”¹⁰⁴

2.63 Section 27, which regulates the distribution of proceeds on enforcement, has also been the subject of criticism.¹⁰⁵ Enforcement matters will be covered in our forthcoming second Discussion Paper.

2.64 There are, however, numerous uncertainties in relation to pre-default aspects too.¹⁰⁶ In 2017 there were a number of cases on how assignation documentation requires to be framed. There was disagreement between the judges.¹⁰⁷ There are also broader questions in relation to the effect of the assignation of an all sums standard security.¹⁰⁸ A second example is how a security in respect of an *ad factum praestandum* obligation operates.¹⁰⁹ What exactly is secured when ultimately a security is enforced by the sale of the encumbered property producing money? A third example is the width of the prohibition on the grant of heritable securities other than by means of a standard security.¹¹⁰ Does this merely outlaw the old forms such as the *ex facie* absolute disposition or is its scope wider?¹¹¹

(2) Complexity

2.65 While the 1970 Act achieved simplification by permitting only one form of heritable security, its structure is more complex than seems necessary. This has been exacerbated by amendments made over the years, most notably by the 2010 Act, which is admittedly about enforcement.¹¹² The placing of rules both within the sections of the 1970 Act and within the standard conditions in Schedule 3 is awkward. Whereas some of the standard conditions are effectively default contract provisions which can be varied, others are mandatory rules.¹¹³

2.66 Another instance of complexity is the plethora of different statutory forms in the Schedules to the 1970 Act. When the Bill which became the 1970 Act was being debated in the First Scottish Standing Committee, George Willis MP said:

¹⁰⁴ I W Noble, “Review of *The Conveyancing and Feudal Reform (Scotland) Act 1970*. Second Edition. By John M Halliday. 1977. Edinburgh: W Green & Son” 1977 JR 169 at 171-172.

¹⁰⁵ In *Halifax Building Society v Smith* 1985 SLT (Sh Ct) 25 at 33, Sheriff Principal Philip Caplan QC notes: “Professor Halliday . . . suggests that the tabulation to be found in [section 27] reflects one of the better characteristics of modern drafting. Be that as it may the sections of the Act I am considering seem to contain certain confusing ambiguities.”

¹⁰⁶ As we noted in our Eighth Programme of Law Reform “a section-by-section review of the 1970 Act reveals numerous technical problems.” See para 1.10 above.

¹⁰⁷ Compare *OneSavings Bank plc v Burns* 2017 Hous LR 55 with *Shear v Clipper Holding II SARL* Court of Session Outer House, 26 May 2017, unreported and *Promontoria (Henrico) Ltd v Portico Holdings* 2018 GWD 6-87. See Chapter 10 below.

¹⁰⁸ Compare G L Gretton, “Assignation of All Sums Standard Securities” 1994 SLT (News) 207 with R G Anderson, “Assignations of All Sums Securities” in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Honour of Professor Robert Rennie* (2015) 73-95.

¹⁰⁹ See K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 136-141 discussing *J H & W Lamont of Heathfield Farm v Chattisham Ltd* [2017] CSOH 119. See Chapter 4 below.

¹¹⁰ 1970 Act s 9(3).

¹¹¹ See eg G Gretton, “Islamic Mortgages” in McCarthy, Chalmers and Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* 301 at 310-312. See Chapter 3 below.

¹¹² The subject of our forthcoming second Discussion Paper. See eg *Accord Mortgages Ltd v Edwards* 2013 SLT (Sh Ct) 24 at 25 where Sheriff Peter Braid refers to “drafting infelicities”.

¹¹³ Gretton and Reid, *Conveyancing* para 23-13.

“I am rather intrigued by these Schedules, which are worse than mathematical conundrums and pose problems greater than those involved in finding one’s way through a psychedelic labyrinth.”¹¹⁴

2.67 More recently, Professors Reid and Gretton have commented:

“[T]he 1970 Act . . . is fussy and over-prescriptive. The styles in the schedules can be difficult to follow faithfully. The Scottish Law Commission is embarking on a review of the law of heritable security, and it may be hoped that the eventual result will be a certain degree of defussification (we just made this word up) of the legislation.”¹¹⁵

The “fussiness” of the forms was the issue in the assignation documentation cases mentioned above.¹¹⁶ A problem in relation to the requirements for description of the encumbered property had to be corrected by statutory amendment.¹¹⁷

(3) Inaccessibility

2.68 While much of the law on heritable securities is to be found in the 1970 Act, there are numerous other relevant provisions scattered across legislation elsewhere.¹¹⁸ This makes this key area of law less accessible than it should be. Many of the individual provisions within the 1970 Act itself are lengthy and difficult to follow. Take, for example, section 10(1), which deals with the “import of the clause relating to the personal obligation contained in Form A of Schedule 2 to this Act”. In the original print of the Act this runs to no less than 34 lines. The use of the word “import” is not very user-friendly, because in everyday language it connotes bringing in goods to a country rather than incorporating certain terms.¹¹⁹ Another example of wording which is not easy to understand is the important section 9(3).¹²⁰ It provides that a grant of a heritable security “shall only be effected *at law* if it is embodied in a standard security” (emphasis added). What is meant by “at law”?

(4) Agedness

2.69 The mere fact that law is old does not make it bad. Much of Scottish property law is founded on Roman law principles which give it a coherent underpinning. In relation to heritable securities, however, there is good reason for concluding that the law is no longer fit for modern needs. The 1970 Act was prepared at a time before conveyancing work had become divided into today’s residential, commercial and agricultural specialisms. The standard conditions in Schedule 3 were developed from 1960s styles used by banks and building societies.¹²¹ For example, standard condition 5 requires the encumbered property to be insured for “market value”. We understand that this is almost universally varied to require insurance for reinstatement value. As Professors Cusine and Rennie note:

¹¹⁴ Parliamentary Debates, House of Commons, Official Report, First Scottish Standing Committee, 21 April 1970 col 501.

¹¹⁵ Reid and Gretton, *Conveyancing 2017* 118-119.

¹¹⁶ See para 2.64 above.

¹¹⁷ See para 2.57 above.

¹¹⁸ Eg the Conveyancing (Scotland) Act 1874, the Heritable Securities (Scotland) Act 1894 and the Conveyancing (Scotland) Act 1924.

¹¹⁹ The use of this word seems to come from the Titles to Land Consolidation (Scotland) Act 1868 s 119 and the Titles to Land Consolidation (Scotland) Amendment Act 1869 s 7. These provisions each ran to about 140 lines making the 34 lines in the 1970 Act pale into insignificance.

¹²⁰ See paras 3.3-3.15 below.

¹²¹ See para 2.26 above.

“In many cases, the cost of reinstating a building will be far in excess of its market value, particularly where the building is constructed of materials which would be difficult or costly to acquire, for example Aberdeen Granite, or Ballachulish slates.”¹²²

2.70 The 1970 Act also reflects an era which pre-dates digital technology. With Registers of Scotland moving towards a system of compulsory online registration and discharge of standard securities,¹²³ there is a need to ensure that the general legislation on heritable securities facilitates this.

2.71 Aside from substantive anachronisms, there is the non-gender neutral drafting style of the 1970 Act, which is typical of its time. Its consistent use of “he” jars, because debtors and creditors may be female, non-binary or a corporate body.

Appraisal: conclusion

2.72 As we have seen, the current law while having many positive qualities, also has inadequacies. It is now over fifty years since there was last a broad review of the legal regime governing heritable securities. During that period there have been significant changes in market conditions, in society and in technology. The case for reform is strong, although such reform should clearly be on an evolutionary rather than revolutionary basis.

¹²² Cusine and Rennie, *Standard Securities* para 4.24.

¹²³ See paras 6.33-6.34 below.

Chapter 3 General matters

Introduction

3.1 In this chapter we consider certain general matters, including whether the Conveyancing and Feudal Reform (Scotland) Act 1970 should be amended or replaced, whether the rule that heritable securities can only be granted in the form of a standard security should be retained and what key terminology should be used in future legislation.

Amending or replacing the 1970 Act

3.2 The Report produced at the conclusion of this project on heritable securities will have a draft Bill. That draft Bill could either (a) patch the 1970 Act by means of amendment or (b) repeal and replace the 1970 Act. Option (a) would probably be quicker and result in a shorter draft Bill. Option (b) would be cleaner. It would facilitate modern and accessible gender-neutral drafting. It would also enable the subject matter of the Heritable Securities (Scotland) Act 1894 and other relevant statutory provisions outwith the 1970 Act to be drawn in and for the existing provisions to be repealed. It would allow the legislation on heritable securities to be brought together into one statute rather than most of it being retained within Part 2 of a 1970-piece of legislation with a short title that does not mention security rights. We have discussed both options with our advisory group, which agrees with our provisional view that the arguments in favour of option (b) are stronger. We therefore propose:

2. **The Conveyancing and Feudal Reform (Scotland) Act 1970 should be repealed and replaced with a new statute regulating heritable securities.**

The standard security as the only form of heritable security

The current law

3.3 We saw in Chapter 2 that the Halliday Report recommended that the standard security should be the only form of heritable security which may be granted.¹ This policy was argued to be in the interests of “uniformity and simplicity in conveyancing practice”.² It was implemented by section 9(3) and (4) of the 1970 Act which provide:

“(3) A grant of any right over land or a real right in land for the purpose of securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security.

(4) Where for the purpose last-mentioned any deed which is not in the form of a standard security contains a disposition or assignation of land or of a real right in land, it shall to that extent be void and unenforceable, and where that deed has been

¹ See para 2.28 above.

² Halliday Report para 125. The Notes on Clauses (clause 8) say: “It has been argued that if the new form of security is satisfactory it is unnecessary to rule out existing forms since practitioners will naturally gravitate towards the more satisfactory type of security deed. On balance however it is thought better to make the standard security mandatory.”

duly registered or recorded the creditor in the purported security may be required, by any person having an interest, to grant any deed which may be appropriate to clear [the Land Register of Scotland or] the Register of Sasines of the security.”³

3.4 The breadth of section 9(3) is uncertain. It is clear of course that a standard security is *not* the only security which can encumber land. The floating charge obviously can.⁴ Standard securities and floating charges are “conventional”⁵ securities, that is to say securities which are *granted*. There are strong arguments that the *tacit* security of lien can arise over land.⁶ Securities can also be created over land under statute, for example, charging orders for costs incurred by local authorities to repair buildings.⁷ It is possible too for there to be judicial security over land by means of the law of diligence.⁸

3.5 From the Halliday Report it can be ascertained that section 9(3) particularly has in its sights the (1) bond and disposition in security, (2) bond of cash credit and disposition in security and (3) *ex facie* absolute disposition. These are the older forms of security mentioned in that Report.⁹ The Notes on Clauses thus say:

“It is envisaged that the effect of this subsection will be to terminate the future use of existing forms of security deed in normal circumstances. That is not to say that the *ex facie* absolute disposition and relative agreement will cease to exist altogether since, as it happens, such a disposition can be used for other purposes than granting a security. It can, for example, be used as a means of conveying property from one person to another with a back letter wherein the parties agree that, notwithstanding the conveyance, the property is to be held in trust for a third party. Transactions of this kind are, we understand, rare but it has been represented to us that they should remain competent and this has been achieved under the terms of the subsection.”¹⁰

3.6 Doubt over whether the provision prevented the creation of pecuniary real burdens, a type of heritable security which is *reserved* rather than granted, led this Commission to consider the matter in both its diligence and real burdens projects.¹¹ Professor Halliday had expressed the view that section 9(3) prevented future pecuniary real burdens from being created.¹² Later legislation also proceeded on the basis that such securities were still competent.¹³ It is clear now from reading Hansard that pecuniary real burdens were not to

³ As amended.

⁴ For discussion as to whether this should continue to be the case, see Report on Moveable Transactions paras 38.5-38.6. On the differences between standard securities and floating charges in practice, see S Cowan, *Scottish Debt Recovery: A Practical Guide* (2nd edn, 2019) para 19-02.

⁵ Also known as “express” or “voluntary” securities.

⁶ See A J M Steven, *Pledge and Lien* (2008) paras 12-02 to 12-04.

⁷ See Paisley, *Land Law* para 11.32. And see also C Mackie and M M Combe, “Charges on Land for Environmental Liabilities: A Matter of ‘Priority’ for Scotland” 2018 *Journal of Environmental Law* 1.

⁸ In particular, adjudication. The Bankruptcy and Diligence etc. (Scotland) Act 2007 provides for adjudication to be replaced by land attachment but the relevant provisions have never been brought into force. Section 126 of the 2007 Act provides that an attachment is not to be treated as a heritable security for the purposes of the Heritable Securities (Scotland) Act 1894.

⁹ Halliday Report paras 102-105.

¹⁰ Notes on Clauses (clause 8).

¹¹ Scottish Law Commission, Discussion Paper on Adjudications for Debt and Related Matters (Scot Law Com DP No 78, 1988) paras 8.7-8.9 and Scottish Law Commission, Discussion Paper on Real Burdens (Scot Law Com DP No 106, 1998) paras 9.14-9.15.

¹² Halliday, *Conveyancing Law and Practice* para 50.01.

¹³ Land Tenure Reform (Scotland) Act 1974 s 5(5); Housing (Scotland) Act 1987 s 72(7).

be prohibited by section 9(3).¹⁴ Such securities in any event became obsolete in practice and further creations were prohibited by section 117 of the Title Conditions (Scotland) Act 2003, implementing a recommendation in our Report on Real Burdens.¹⁵

3.7 As to attempting a heritable security by grant, other than by means of a standard security, Professors Cusine and Rennie express the view that section 9(3) does not strike at the following type of joint venture agreement.¹⁶ Title to land is initially taken in the name of one of the developers. There is then an obligation to convey parts of the land to the other developers in specified circumstances and on the payment of agreed sums of money.

3.8 It is certainly difficult to see how this would be viewed as a heritable security. On the other hand, the professors advise caution where a sleeping partner obtains a conveyance of land from a small developer in return for advancing money, with an obligation to reconvey if planning permission is granted in return for repayment of the sum lent plus an additional sum to reflect the enhanced value of the land. This could be viewed as the land being granted in security with the additional sum being tantamount to interest on a loan and thus section 9(3) would apply. The issues here are similar to those relevant to section 62(4) of the Sale of Goods Act 1979, which disapplies that Act in relation to sales which are intended to operate as securities.¹⁷

3.9 Professor Gretton, in a book chapter on Islamic mortgages, comments that “[d]iscussion of section 9 would take a paper to itself. It is curious that, as far as I know, it has never been subject to any published examination in detail. Further, the [Halliday Report] . . . said rather little about it.”¹⁸ He notes, however, that the wording of section 9(3) is “broad”.¹⁹

3.10 Our discussion so far has focussed on section 9(3). Its sister provision, section 9(4), quoted above, provides that any deed granted for security purposes instead of a standard security is to be “to that extent void and unenforceable” and the “creditor” in whose favour it has been granted may be required to remove it from the Register. In an article discussing *Sanderson’s Trs v Ambion Scotland Ltd*,²⁰ Professor Gretton notes that the standard security in that case could be viewed as having been assigned in security and therefore void under section 9(4), but the point was seemingly not argued.²¹

3.11 The need for section 9(4) was the subject of a lengthy debate during the Parliamentary passage of the Bill which became the 1970 Act.²² The Opposition, citing a

¹⁴ “We certainly do not intend that the provisions of the Clause should affect securities created by reservation . . . They are not affected by the Bill”: Parliamentary Debates, House of Commons, Official Report, First Scottish Standing Committee, 7 April 1970 col 260 (Norman Buchan MP, Joint Under-Secretary of State for Scotland).

¹⁵ Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000) paras 13.29-13.30.

¹⁶ Cusine and Rennie, *Standard Securities* para 3.01.

¹⁷ See G L Gretton, “The Concept of Security” in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 at 135-138. The parallel is also noted by Professor Halliday in *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-09.

¹⁸ G Gretton, “Islamic Mortgages” in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 301 at 312.

¹⁹ Gretton “Islamic Mortgages” at 312.

²⁰ 1994 SLT 645.

²¹ G L Gretton, “Assignment of All-Sums Standard Securities” 1994 SLT (News) 207 at 209-210.

²² Parliamentary Debates, House of Commons, Official Report, First Scottish Standing Committee, 7 April 1970 cols 272-283.

submission made by the Society of Writers to the Signet, argued that it should be omitted on the basis that section 9(3) was sufficient. The Government position, which prevailed, was that on Professor Halliday's advice the provision was needed to deal with the consequences of such a deed being recorded. The Keeper would not necessarily notice a security which was masquerading as a disposition. There appears force in this, although the need for section 9(4) to pronounce on the ineffectiveness of the deed is less easy to justify given section 9(3).

Policy

3.12 The argument made in the Halliday Report that having only one form of conventional heritable security results in uniformity and simplicity seems equally compelling half a century on. More recent times have seen increased moves towards standardised documentation.²³ We are aware of no pressure for change here. Other jurisdictions can be mentioned where there is effectively only one type of security over immoveable property.²⁴ Of course, the floating charge would still be able to be granted by companies and certain other corporations over all their assets, including land. We propose:

3. The standard security should continue to be the only form of heritable security which can be granted.

3.13 We consider therefore that there should continue to be a prohibition on land being transferred for the purposes of security. As Professor Gretton has argued:

“[T]he section 9 prohibition is not some quirky fossil rule. There is a strong argument of public policy in its favour: that for the owner of heritable property to be the party that is in reality merely a lender, is an unacceptable subterfuge: the transaction should show its face.”²⁵

This argument seems particularly strong in Scotland at the moment where there is a public agenda to promote transparency as to land ownership.²⁶ Prohibitions on transfers for security are familiar elsewhere. We have noted section 62(4) of the Sale of Goods Act 1979. In Dutch law there is a well-known prohibition on such transfers.²⁷ Other legal systems such as English law recharacterise transfers in security as charges (securities).²⁸ We propose:

4. It should remain incompetent to transfer land in security.

3.14 A transfer of land for security purposes would be void. Nowadays all transfers of land enter the Land Register rather than the Register of Sasines. Imagine Alan disposes a piece of land to Ben in security of a loan. Depending how the disposition is worded, the

²³ For example, in relation to Scotland-wide residential property missives (on which see the note by R MacKay at (2017) 62 JLSS July/42) and in relation to commercial leasing documentation (on which see <http://www.psglegal.co.uk/>).

²⁴ For example, South African law recognises only the mortgage, although for practical purposes a number of different kinds are recognised. See Brits, *Real Security Law* 42-56. Dutch law has the *hypotheek*.

²⁵ Gretton “Islamic Mortgages” at 312.

²⁶ See eg Land Reform (Scotland) Act 2016 Part 3. See M M Combe, “The Land Reform (Scotland) Act 2016: another answer to the Scottish land question” 2016 JR 291.

²⁷ Dutch Civil Code art 3:84(3). This rule applies to transfers of moveable property as well as land. See Hof 's-Hertogenbosch, 08-09-2009, nr HD 103.004.029 and HR 9 November 2001 case number C99/229HR.

²⁸ See eg H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (3rd edn, 2018) paras 4.13-4.37.

Keeper will not necessarily know that it is for security purposes. She may therefore register it and the title sheet for the land will state that Ben is owner. But the register will be inaccurate. In these circumstances it can be corrected by rectification, although the Keeper is not required to rectify unless the inaccuracy is manifest and it is manifest what needs to be done.²⁹ A court order declaring the transfer void may in practice be needed unless the affected parties all accept that this is the position. Given, however, the statutory provisions on rectification, which had no equivalent for the Register of Sasines at the time that the 1970 Act was passed, we are of the view that a replacement provision for section 9(4) is not required.

3.15 As discussed above, the exact parameters of section 9(3) are not entirely clear. In particular it is uncertain whether any transaction other than a transfer in security is also caught by it. Professor Gretton, while believing that “probably the section 9 prohibition is not engaged”³⁰ in relation to the predominant form of Islamic mortgage used in Scotland, is not entirely certain. The structure here is that the debtor owns the property, but as trustee for both debtor and creditor. As the debt is paid, the debtor’s share of the beneficial interest in the property increases, eventually to 100%. The debtor’s obligations are secured by a standard security being granted over the property. Professor Gretton wonders if the creation of the trust in favour of the creditor could amount to a grant of a right over land by way of heritable security. Given that the definition of “heritable security” in section 9(8)(a) is limited to “disposition or assignation”, we do not think that this can be right. But, more generally, we ask:

5. Should any transactions other than transfers in security be prohibited to ensure that a standard security is used instead?

The name “standard security”

3.16 We noted in Chapter 2 that the Halliday Report had used the term “Statutory Security” for the new form of heritable security which it proposed.³¹ The 1970 Act of course introduced the name “standard security”. Government files held by the National Records of Scotland reveal that the term “statutory security” was used in early drafts of the Heritable Securities (Scotland) Bill. It was subsequently dropped because of reservations in the Bill team, following a meeting with Professor Halliday in 1969.³² A memorandum written prior to the meeting reveals that “standard security” was the idea of the Solicitor to the Secretary of State for Scotland:

“Name for statutory security. Professor Henry³³ mentioned “mortgage” (which is unusual for him standing his general reluctance to accept English terms). Mortgage is already competent in Scotland in respect of ships. How about “standard security”

²⁹ Land Registration etc. (Scotland) Act 2012 s 80(1) & (2).

³⁰ Gretton, “Islamic Mortgages” at 308.

³¹ See para 2.25 above.

³² NRS AD 63/870/1: letter from G R Wilson of the Scottish Home and Health Department to Professor Halliday dated 11 April 1969. The files which we have examined do not say what the reservations were, but it may be speculated that it was because there are other statutory securities.

³³ Professor George Henry held the Chair of Conveyancing in the University of Edinburgh from 1955 to 1973.

– the point of the Bill as I understand it is to produce a standardized heritable security?”³⁴

3.17 The memorandum is typewritten, but beside these words appear also in pen: “statutory land security?” and “statutory heritable security?” “Standard security” was eventually agreed, for reasons that are not recorded, possibly because it was briefer than the other two suggestions.³⁵ The question arises as to whether that name should be retained in the future. For the layperson it is an unfamiliar term.

3.18 In contrast, most people have a reasonable idea of what a “mortgage” is in relation to a house.³⁶ But they may well talk about “getting” a mortgage from the lender. In fact, the mortgage, being a term of English law,³⁷ is what they are granting to the lender in security of the loan that they are being given.³⁸ On this basis there is an argument that the term “standard security” should be replaced with the term “mortgage” in the new legislation. There is a Scottish statutory precedent for this in the Mortgage Rights (Scotland) Act 2001. The use of a technical term of English law in Scottish legislation may, however, attract criticism,³⁹ notwithstanding the abovementioned support of Professor Henry. Some may favour going in the opposite direction, given the Scottish civilian law heritage and argue that the word “hypothec” would be more appropriate terminology. Many European countries use that term to mean security over immoveable property.⁴⁰ But in Scotland “hypothec” means nothing to those not legally trained.

3.19 Although it must be conceded that “standard security” is not the snappiest or most exciting term of art in Scottish law there is now a familiarity with it of almost half a century. Much style documentation uses it. There would be a cost to business in having to change this. Moreover, there would be a need for consequential amendments to legislation other than the 1970 Act which refers to standard securities. A search in the statute law database returns 70 Acts other than the 1970 Act itself in which the term is used.⁴¹ We are not currently persuaded of the case for change.

³⁴ NRS HH41/1893: memorandum from D Cunningham, Solicitor to the Secretary of State for Scotland to G R Wilson of the Scottish Home and Health Department dated 8 April 1969.

³⁵ The term “landed security” had previously been considered but was dismissed because “landed securities” were a recognised form of investment. See NRS HH41/1893: memorandum to G R Wilson from D Cunningham dated 28 March 1969.

³⁶ See eg Higgins, *The Enforcement of Heritable Securities* para 1.2 n 4.

³⁷ Although it was originally a French word, literally meaning “dead pledge”. The “dead” originally referred to the fact the creditor took possession of the land until the debt was repaid but the profits of the land such as rents would not reduce the debt. See A J M Steven, *Pledge and Lien* (2008) para 3.20. In later times the “dead” was taken to refer to the pledge dying when the debt was repaid or the pledge was enforced. See Sir Thomas Littleton, *Tenures* (ed E Wambaugh, 1903) § 332. (Littleton died in 1481).

³⁸ Gretton and Steven, *Property, Trusts and Succession* para 21.1. See also *Zinda v Bank of Scotland Plc* [2011] EWCA Civ 706, [2012] 1 WLR 728 at para 16.

³⁹ “Perhaps we should just abandon Scots law now” commented Sheriff Nigel Morrison QC in (2001) 42 Greens Civil Practice Bulletin 2 when it was used in the 2001 Act.

⁴⁰ In his “Pledge, Bills of Lading, Trusts and Property Law” 1990 JR 23 at n 2, Professor Gretton helpfully notes the German *Hypothek*, the French *hypothèque*, the Italian and Romanian *ipoteca*, the Spanish and Portuguese *hipoteca*, the Dutch *hypothek*, the Serbo-Croat and Slovene *hipotheka*, the Polish *zastaw hipoteczny* and the Turkish *ipotek*. Not to be outdone we would also mention the Bulgarian and Macedonian *хипотека*, the Czech *hypotéka*, the Estonian *hüpooteek*, the Greek *υποθήκη*, the Latvian *hipotēka* and the Lithuanian *hipoteka*.

⁴¹ For example, the Companies Act 2006 s 859A(7) and the Land Registration etc. (Scotland) Act 2012 s 113(1).

3.20 We propose:

6. The term “standard security” should be retained.

Accessoriness

3.21 A standard security is an accessory security. That is to say, it is dependent on the debt which it secures. This can be seen from section 9(3), the provision which we considered in detail above:

“A grant of any right over land or a real right in land *for the purpose of securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security*”(our emphasis).

3.22 In the 2018 case of *J H & W Lamont of Heathfield Farm v Chattisham*⁴² the Inner House considered the position of a standard security in relation to an option agreement to purchase land. The option could no longer be exercised. Lord President Carloway said:

“Once the exercise of an option to purchase ceased to be possible, either because of the passing of the longstop date for doing so or the contract was lawfully terminated, with the same practical result, there was a counter obligation to discharge the security. Put another way, the existence of the security is the counterpart of the subsistence of the option itself. Once it becomes impossible to exercise that option, the security must be discharged.”⁴³

It was not possible therefore for the creditors to exercise a right of retention in relation to granting a discharge.⁴⁴

3.23 The same rule essentially applied to the older forms of heritable security.⁴⁵ For example, in *Nisbet’s Creditors v Robertson*⁴⁶ a security was granted by a Scottish merchant to his supplier in the Netherlands for the price of goods which were being smuggled. The contract was illegal and therefore void. Thus so too was the security.⁴⁷

3.24 Standard securities are in fact subject to a relatively weak form of accessoriness. Strong accessoriness would require that a security is for a specific debt which is owed when the security is granted.⁴⁸ As mentioned in the previous chapter, a standard security can be for all sums due by the debtor, both present and future.⁴⁹ For example, Charlotte, a businesswoman, may grant her bank a standard security over her house in respect of an overdraft facility. At the time that the security is registered there may be no overdraft. But that does not mean that the security is invalid. It is sufficient that a debt *may* arise.⁵⁰ Where

⁴² [2018] CSIH 33, 2018 SC 440.

⁴³ At para 22.

⁴⁴ Lords Malcolm and Drummond Young had alternative grounds for their judgments. See L Richardson, “What do we know about retention now?” (2018) 22 Edin LR 387.

⁴⁵ For a detailed treatment see A J M Steven, “Accessoriness and Security over Land” (2009) 13 Edin LR 387.

⁴⁶ (1791) Bell’s Octavo Cases 349.

⁴⁷ For a more recent example, see *Trotter v Trotter* 2001 SLT (Sh Ct) 42, discussed in K G C Reid and G L Gretton, *Conveyancing 2001* (2002) 90-92.

⁴⁸ See Steven, “Accessoriness and Security over Land” especially at 414-416.

⁴⁹ See para 2.39 above. See also Chapter 4 below.

⁵⁰ See the South African case of *Kilburn v Estate Kilburn* 1931 AD 501 at 505.

the standard security is truly accessory is in relation to enforcement. This cannot happen unless there is a debt due.⁵¹

3.25 While accessoriness is a common theme of security rights internationally,⁵² the concept of non-accessory security over land is recognised in some legal systems: for example, the German *Grundschild* and the Swiss *Schuldbrief*. The circumstances in which the security can be enforced are set out in a security contract, but this concept can be problematic as it raises debtor protection issues where the security is transferred and the new holder is not a party to the contract.⁵³

3.26 In our recent moveable transactions project we consulted on whether a non-accessory security should be introduced in respect of moveable property. We mentioned our understanding that there can be situations where a company wishes to raise money on the security of certain assets, without being contractually liable on the loan, so that if it defaults, the creditor can enforce against the assets, but if this proves insufficient the creditor cannot sue the debtor for the shortfall.⁵⁴ This is sometimes referred to as a “non-recourse loan” or a “non-recourse finance arrangement”.⁵⁵ We considered that this result can be achieved by contractual agreement, but we asked nevertheless whether non-accessory moveable security should be competent. There was little support for this.⁵⁶

3.27 We are unaware of pressure in Scotland for non-accessory security to be made available for heritable property. The accessoriness present in the standard security which is sufficiently limited to allow commercial flexibility but which ultimately still protect debtors seems satisfactory. We ask, however:

7. Should there be a non-accessory form of standard security?

The parties to a standard security

The 1970 Act terminology

3.28 The terms used by the 1970 Act for the parties to a standard security are the “debtor” and the “creditor”. Section 9(8)(c) provides a definition of “debt”, which we will consider fully in the next chapter. That definition concludes by saying that “and ‘creditor’ and ‘debtor’, in relation to a standard security, shall be construed accordingly”. Section 30(1) goes on to provide that “‘creditor’ and ‘debtor’ shall include any successor in title, assignee or

⁵¹ See eg *J Sykes & Sons (Fish Merchants) Ltd v Grieve* 2002 SLT (Sh Ct) 15.

⁵² See eg F Fiorentini, *Le garanzie immobiliari in Europa* (2009) 527, but noting that the trend is towards “*l’accezione elastica*”.

⁵³ In Germany legislation was passed in 2008 to let debtors plead any defence arising out of the security agreement against a subsequent holder of the security, meaning that if the security is assigned the assignee cannot enforce if there is no debt due. See generally L P W van Vliet, “Mortgages on immovables in Dutch law in comparison to the German mortgage and land charge” in M Hinteregger and T Borić, *Sicherungsrechte an Immobilien in Europa* (2009) 285 at 293-297. See also L P W van Vliet, “The German *Grundschild*” (2012) 16 Edin LR 147.

⁵⁴ Scottish Law Commission, Discussion Paper on Moveable Transactions (Scot Law Com No 151, 2011) para 5.29.

⁵⁵ See eg L Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, 2017) para 3-06.

⁵⁶ Report on Moveable Transactions paras 19.27-19.30.

representative of a creditor or debtor". In contrast the terms "grantor" and "grantee" are used to refer to the original parties only.⁵⁷

Third-party security grantors

3.29 It is uncontroversial that the debtor in the secured obligation does not have to be the same person as the person who owns the property over which the security is granted. Scots law here is the same as Roman law.⁵⁸ Neil may grant a standard security over land which he owns in favour of the Ochil Bank to secure a loan owed to the bank by his friend Philippa. Such an arrangement is often referred to as "third-party security". If Philippa defaults, Neil's land will be sold to recover the debt. This does not mean that Neil is personally liable on the debt. Thus if the sale of land does not recoup the debt he cannot be pursued for the shortfall.⁵⁹

3.30 Third-party security is common in group company transactions, where one company in the group grants security for the debts of another. A further example is spouses granting standard securities over their share in the matrimonial home to secure their spouse's business debts.⁶⁰ The 1970 Act recognises third-party security by the use of the term "proprietor" in addition to the term "debtor".⁶¹ Further, the provision defining "debt" is not limited to debts owed by the security grantor.⁶²

Third-party creditors

3.31 A less-settled phenomenon in legal terms is the creditor in the secured debt and the grantee of the standard security being different persons. Here we are aware only of sheriff court authority. In *Watson v Bogue (No 1)*⁶³ it was held by Sheriff Principal C G B Nicholson QC that where a standard security is assigned but the debt⁶⁴ which it secured was not, then this is effective to transfer the security but not the debt. Thus the security and debt become held by different persons. *UK Acorn Finance Ltd v Smith*,⁶⁵ a decision of Sheriff Philip Mann at Banff, involved the opposite situation of the debt being assigned but not the standard security. When the standard security was enforced, the debtor argued that its holder had no title to sue because it was no longer the creditor in respect of the debt. It was held, however, that because the debtor's obligation to pay the debt was owed to the original creditor (the

⁵⁷ Eg 1970 Act ss 11(1), s 12(2) and 14(2).

⁵⁸ D 20.1.5 (Marcianus): "*Dare autem quis hypothecam potest sive pro sua obligatione sive pro aliena.*" See also eg Italian Civil Code art 2808.

⁵⁹ See *Hewit v Williamson* 1999 SLT 313 at 316 per Lord Macfadyen and K G C Reid and G L Gretton, *Conveyancing 2016* (2017) 145.

⁶⁰ See especially *Smith v Bank of Scotland* 1997 SC (HL) 111.

⁶¹ Eg 1970 Act s 18 and Sch 3 under the heading "Interpretation". See Cusine and Rennie, *Standard Securities* para 3.07. A possible interpretation is that these provisions are only aimed at where the encumbered property is transferred without the security being discharged. The debtor and proprietor then become different, but that is not third-party security at the outset. But, the Minister piloting the legislation (Norman Buchan MP) describes what is now s 18(1) of the 1970 Act with its separate references to "debtor" and "proprietor" as covering "where A grants a standard security over his property to secure a loan made by B to C." See Parliamentary Debates, House of Commons, Official Report, First Scottish Standing Committee, 9 April 1970 col 321.

⁶² 1970 Act s 9(8)(c). See para 4.11 below.

⁶³ 2000 SLT (Sh Ct) 125.

⁶⁴ Or, strictly, the claim to performance of the secured debt.

⁶⁵ 2014 Hous LR 50. See K G C Reid and G L Gretton, *Conveyancing 2014* (2015) 177-182.

standard security holder) and its assignees and that enforcement will “result ultimately in payment”⁶⁶ to the assignee. Exactly how this would work is not explained.

3.32 These two cases both involved assignments. Originally (1) the right to be paid the secured debt and (2) the standard security were held by the same party. As a result of the assignment of one but not the other, the rights subsequently parted company. In contrast, in *3D Garages Ltd v Prolatis Co Ltd*,⁶⁷ a decision of Sheriff Principal Mhairi Stephen QC, the rights were divided from the outset. The facts were somewhat complex. As a result of a settlement agreement following litigation in the English High Court, the pursuers in the action had become obliged to pay £1.5 million to nine separate parties or to their nominee, Mr Gill. The obligation(s) were to be secured by the grant of standard securities over five properties in favour of Prolatis Company Ltd, rather than in favour of the nine parties or Mr Gill. But the pursuers subsequently sought declarator that the standard securities were unenforceable. Before the sheriff they were unsuccessful.⁶⁸ On appeal, their case was based on the argument that under the 1970 Act “the person in whose favour a standard security is granted must also be the creditor in the obligation secured by the standard security.”⁶⁹ The court held that no such rule could be found in the legislation and dismissed the action.

Discussion

3.33 Ken Swinton, in a helpful commentary on *3D Garages Ltd*, argues that the 1970 Act “is not well adapted to more complex three and four party arrangements.”⁷⁰ In relation to three-party arrangements he notes in relation to the redemption provisions that the third-party grantor would have to pay the whole amount owed in order to redeem, whereas if the security is enforced liability is limited in effect to the value of the property. We consider the redemption provisions later.⁷¹ He is concerned also that if the law allows a standard security to be held by a nominee rather than the creditor in the secured debt then current re-mortgaging work could be lost, because rather than the discharging of the old security and the grant of a new security all that would be needed would be for the nominee to acknowledge that the security is being held for the new lender rather than the old. He hopes that our current project “will include a fundamental review of what a heritable security is, whether it can exist in the abstract and the nature of the relationships in three party and four party securities.”⁷²

3.34 In this Discussion Paper and our forthcoming second Discussion Paper on enforcement, we intend to look at all the fundamental aspects of the standard security, as well as to review the law in relation to the older forms of heritable security which still exist. In relation to the question of whether a heritable security can exist in the abstract ie separate

⁶⁶ 2014 Hous LR 50 at para 22.

⁶⁷ [2016] SC EDIN 70, 2017 SLT (Sh Ct) 9.

⁶⁸ The details of that judgment are unavailable but it may be guessed that the arguments were the same as those made to the Sheriff Principal.

⁶⁹ [2016] SC EDIN 70, 2017 SLT (Sh Ct) 9 at para 5.

⁷⁰ K Swinton, “Three and four party Heritable Securities: now available in 3D!” 2017 Scottish Law Gazette 60 at 62.

⁷¹ See Chapter 11 below.

⁷² Swinton, “Three and four party Heritable Securities” at 62.

from a debt, we considered the issue of accessoriness earlier.⁷³ We will look at it again below in the context of assignment.⁷⁴

3.35 It may be helpful before proceeding to set out the factual possibilities.

Case	Parties
1	Debtor = grantor of security Creditor = grantee of security
2	Debtor ≠ grantor of security Creditor = grantee of security
3	Debtor = grantor of security Creditor ≠ grantee of security
4	Debtor ≠ grantor of security Creditor ≠ grantee of security

3.36 Case 1 is the “vanilla” or standard case. It is normal in residential lending. In return for a loan from a bank or other institutional lender, the purchasers of a house will grant a standard security over it.

3.37 Case 2, while less common is well-established, as we have seen above. There seems to be no policy objection to allowing someone acting freely to grant a security over that person’s property in security of a debt of another. It may be added that in case 1 where the encumbered property is transferred without the security being discharged, the debtor in the loan and the owner of the property will *then* be different persons. For example, Cara grants a standard security over land which she owns to the Dundee Bank, which it duly registers. Cara then transfers the land to David. As a real right, the security continues to encumber the property. This makes it attractive to the bank as it is effective against the grantor’s successors and in the event of the grantor’s insolvency. In practice, of course, if David were a purchaser his solicitor would check the Land Register and insist on the discharge of the security as a condition of the sale.

3.38 Case 3 is also recognised regularly in practice. In commercial lending, for example for syndicated loans, a security right is granted in favour of a security trustee, who is acting for several secured creditors.⁷⁵ The trustee may be a member of the syndicate and then hold the security on trust for itself and the other members.

⁷³ See paras 3.21-3.27 above.

⁷⁴ See Chapter 10 below.

⁷⁵ See eg Hardman, *A Practical Guide to Granting Corporate Security in Scotland* paras 5-09 to 5-11; H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (3rd edn, 2018) para 2.16.

3.39 We are advised that case 4 is also encountered in practice, although less commonly.⁷⁶ This would be where a third-party security is granted in favour of a security trustee.

3.40 In our Report on Moveable Transactions we recommended a flexible approach to the effect that the secured obligation should not require to be an obligation owed by the provider of a statutory pledge or an obligation owed to the secured creditor.⁷⁷ This followed representations from our advisory group. We favour provisionally the same flexible approach for the standard security, but Mr Swinton's point about the 1970 Act not being well adapted to deal with such situations is well made. We have kept it in mind in preparing this Discussion Paper and will do so in relation to the Discussion Paper on enforcement issues to follow. We propose:

8. (a) The grantor of a standard security (and any successor) should not require to be the same person as the debtor in the secured obligation.

(b) The grantee of a standard security (and any successor) should not require to be the same person as the creditor in the secured obligation.

3.41 Such an approach accommodates existing practice of using security trustees. While we consider that the regulation of security trusts is primarily a matter of trust law,⁷⁸ our advisory group have suggested that it would be helpful to ask consultees whether there are any specific issues in this area which should be addressed in the context of the current project. We understand also – as mentioned by Mr Swinton in his article - that standard securities are sometimes granted in favour of a “nominee” of several specified persons, all companies or other corporations and that there may be issues where it is desired to update the Land Register when the persons change. The appropriate route here is registration of a variation document⁷⁹ rather than rectification of the Register.⁸⁰

9. Do consultees have any comments on the use of security trustee or nominee arrangements in relation to standard securities?

3.42 There remains to be discussed the question of terminology. In our Report on Moveable Transactions, having been influenced by comparator legislative instruments, we recommended the terms “provider” and “secured creditor” for the parties to a pledge.⁸¹ In doing so, we had in mind that the grantor of the security did not have to be the debtor in the secured obligation. This terminology is not perfect as it is a little odd to refer to a successor owner of the encumbered property, who is bound by the security, as the “provider”. The

⁷⁶ Ken Swinton in his article regards the *3D Garages Ltd* case as an example, on the basis that the debt was owed by a Mr Darroch rather than the pursuers who granted the standard security. Our reading is that the pursuers were also debtors under the settlement agreement.

⁷⁷ Report on Moveable Transactions paras 19.23-19.24. We note that a similarly flexible approach is taken by the City of London Law Society draft Secured Transactions Code section 18.2.

⁷⁸ On which see Scottish Law Commission, Report on Trust Law (Scot Law Com No 239, 2014).

⁷⁹ See Chapter 9 below.

⁸⁰ On the basis that the legal reality of who the creditor is can only be changed by the registration of the variation and cannot happen off-register.

⁸¹ Report on Moveable Transactions paras 19.9-19.12.

1970 Act, as we have seen, (a) uses “debtor” and “creditor” (to refer to the current parties to the security), (b) “grantor” and “grantee” (to refer to the original parties) and (c) “proprietor” where the debtor and owner of the encumbered property are not the same. Of these, (a) is encountered much more than (b), and (c) is rare. We consider that there would be benefit in generally retaining the existing terminology, in particular “debtor” and “creditor”, but we would welcome the views of consultees. We ask:

10. (a) Do consultees agree that the parties to a standard security should continue to be referred to as the “debtor” and “creditor”?

(b) Do consultees agree that “grantor” and “grantee”, and “proprietor” should continue to be used where appropriate?

Section 47 of the Conveyancing (Scotland) Act 1874

3.43 This provision is one of a number of pre-1970 Act provisions which remain in force and relate to heritable securities in general, including standard securities. We suspect that it has almost been forgotten about in practice.⁸² It deals with the relatively unusual situation where the encumbered property is transferred and the heritable security is kept in place. Section 47 (as amended) provides:

“An heritable security for money, duly constituted over land, or over a real right in land, shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such land or real right by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears in gremio of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure; and the personal obligation may be enforced against such person by summary diligence or otherwise, in the same manner as against the original debtor. A warrant to charge may be applied for and validly granted in the Bill Chamber or in a Sheriff Court, in the form set forth in Schedule K. hereto annexed, or in a similar form, and all diligence may thereafter proceed against the party in common form. A discharge of the personal obligation of the original or any subsequent debtor, whether granted before or after the commencement of this Act, shall not where the debt still exists prejudice the security on the land or real right or the obligation as hereby made transmissible against the existing proprietor.”

3.44 The provision’s objective is to enable transfer of the liability for the secured *debt* when the encumbered property is being transferred, without having to prepare a separate deed for this purpose (a deed traditionally known as a *bond of corroboration*).⁸³ The *security* itself will automatically continue to burden the property as it is a real right. As can be seen, the provision is limited to monetary debts. According to Burns, where an obligation *ad factum praestandum* is to be transferred a bond of corroboration must be used.⁸⁴ Another relevant issue is that the provision is confined to where the secured debt (the personal

⁸² For example, there is only a brief mention in a footnote in Gretton and Reid, *Conveyancing* para 23.14.

⁸³ Burns, *Conveyancing Practice* 547.

⁸⁴ Burns, *Conveyancing Practice* 547. On obligations *ad facta praestanda*, see Chapter 4 below.

obligation) is set out in the security deed. Form B standard securities would seem to be excluded.⁸⁵

3.45 Section 47 apparently contemplates two types of transfer. The first is “by succession, gift, or bequest.” The second is “by conveyance, when an agreement to that effect appears in gremio of the conveyance”, in other words the agreement is narrated in the conveyance. This is comprehensible, but that is more than can be said for the first. What is the distinction between “succession”, “gift” and “bequest”? A bequest is a form of succession. Is “gift” restricted in terms of the *ejusdem generis* principle to gifts on death? Clearly a lifetime gift would require a conveyance. The provision of course pre-dates section 14 of the Succession (Scotland) Act 1964 under which the estate of the deceased will vest in the executor. It was held in an Inner House case prior to that Act that section 47 of the 1874 Act does not apply to an heir on succession unless he accepts the property.⁸⁶ Professor Halliday comments that because an executor is liable for the deceased’s debts this issue “is now of less frequent occurrence”.⁸⁷ He mentions, however, that property which is the subject of a survivorship destination⁸⁸ does not vest in the executor and that the person taking under such a destination may have to renounce it to avoid liability.⁸⁹

3.46 In the (non-succession) case of a conveyance, section 47 does not extinguish the liability of the original debtor. An express discharge of this liability by the creditor will be required.⁹⁰

3.47 Section 47 is supplemented by section 15 of the Conveyancing (Scotland) Act 1924. In respect of transfer by succession, gift or bequest, it provides that summary diligence will not be competent unless the transferee agrees to the transfer of the secured debt.⁹¹ In the case of transfer by conveyance, liability for the secured debt does not transfer unless the transferee signs the conveyance.⁹²

3.48 Our provisional view is that section 47 of the 1874 Act and section 15 of the 1924 Act should be repealed and not replaced. The question of liability of successors should be left to the general law. Thus universal successors, in particular executors, would be liable up to the value of the property,⁹³ but singular successors such as ordinary transferees would not unless they agree.⁹⁴ A bond of corroboration could be used in relation to the latter.⁹⁵

3.49 We propose:

⁸⁵ Cusine and Rennie, *Standard Securities* para 9.05. On form B, see paras 6.6-6.9 below.

⁸⁶ *Fenton Livingstone v Crichton’s Trs* 1908 SC 1208.

⁸⁷ Halliday, *Conveyancing Law and Practice* para 48-54.

⁸⁸ See Gretton and Steven, *Property, Trusts and Succession* paras 30.8-30.10.

⁸⁹ On the liability of the survivor, see now *Fleming’s Tr v Fleming* 2000 SC 206 and *Machin’s Tr v Machin* [2017] SC GLA 29, discussed in K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 182-186.

⁹⁰ *University of Glasgow v Yuill’s Tr* (1882) 9 R 643.

⁹¹ Conveyancing (Scotland) Act 1924 s 15(2).

⁹² 1924 Act s 15(1).

⁹³ Gretton and Steven, *Property, Trusts and Succession* paras 26.48-26.50.

⁹⁴ On the difference between universal and singular successors, see Reid, *Property* para 598.

⁹⁵ Indeed Burns considers given the limitations of the 1874 Act s 47 and 1924 s 15 that it may in certain cases be preferable to use such a bond now. See Burns, *Conveyancing Practice* 547-551.

11. **Section 47 of the Conveyancing (Scotland) Act 1874 and section 15 of the Conveyancing (Scotland) Act 1924 should be repealed and not replaced.**

Chapter 4 The secured obligation

Introduction

4.1 In this chapter we consider the types of obligation which a standard security can secure. Ordinarily, it will secure a monetary debt such as the loan made by a financial institution to facilitate the purchase of a house. If the loan is not repaid then the house is sold to recover the debt.

4.2 The 1970 Act, however, also expressly allows a standard security to secure a non-monetary obligation in the form of an obligation *ad factum praestandum* (obligation to do something). In practice, standard securities are often used in respect of option agreements to purchase land, but there are difficult questions here as to how the security actually works and the remedies available on default.¹ We look at how the law might be reformed here.

A preliminary point

4.3 Strictly, what is secured by a right in security is the right to the performance of an obligation. Thus if Jennifer grants a standard security over her house to Kenneth in respect of a loan which he has made to her, it is his claim for repayment of the loan which is secured.² But the terms “secured debt” and “secured obligation” are in general usage, both in Scotland and internationally.³

Background

4.4 In Chapter 2 we noted that an important reason for the introduction of the standard security was that the old bond and disposition in security was very restrictive in relation to the debt that could be secured. Recourse was therefore made to the *ex facie* absolute disposition, but it too had serious drawbacks, not least that ownership of the property was given to the creditor.⁴ The Halliday Report, noting that “no comparable restrictions [to those affecting the bond and disposition] exist in England”,⁵ suggested that the new form of heritable security:

“should be applicable to all kinds of advances, whether fixed or fluctuating, and whether made before, at, or after infeftment in the security subjects.”⁶

¹ We noted in para 1.7 above that the Scottish Property Federation in their response to the consultation on our Eighth Programme of Law Reform were particularly interested in the question of developer options.

² See DCFR IX.–2:401.

³ See eg 1970 Act s 9(8)(c); UNCITRAL Model Law on Secured Transactions (2016) article 7 and City of London Law Society draft Secured Transactions Code section 18 (pp 62–65).

⁴ See paras 2.14–2.16 above.

⁵ Halliday Report para 119.

⁶ Halliday Report para 120. “Infeftment”, as noted in para 2.2 above was a feudal term meaning being recognised by the feudal superior. Following the establishment of the Register of Sasines by the Registration Act 1617 infeftment required registration in that register, originally of a special deed known as an instrument of sasine. By the time of the Halliday Report, “infeftment” was being used synonymously with “recording”. The feudal system was abolished on 28 November 2004 by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the word “infeftment” is no longer used.

4.5 A few paragraphs later it made the following three formal recommendations in relation to the secured obligation:

“(1) That the provisions of the Bankruptcy Act 1696 which invalidate securities for debts contracted after infertment should be repealed.

(2) That the rule that a real burden for money must be stated precisely should be modified to permit the creation of a new heritable security to cover advances up to a specified maximum amount.

(3) That a new form of heritable security, sufficiently flexible to be used for all kinds of advances, should be adjusted after consultation with the Law Society of Scotland, local authorities, banks, building societies and other parties specially interested.”⁷

4.6 As we shall see shortly, the 1970 Act deviated a little from these recommendations. For the moment, however, we note that there is no reference to non-monetary obligations.⁸

1970 Act provisions

4.7 The first relevant provision was considered in some detail in the previous chapter.⁹ It is section 9(3) and it provides:

“A grant of any right over land or a real right in land *for the purpose of securing any debt* by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security” (our emphasis).”

The matter on which we need to focus here is the “debt” which is secured. That term is defined and we look at the definition below.

4.8 Before that, we note section 9(6):

“The Bankruptcy Act 1696, in so far as it renders a heritable security of no effect in relation to a debt contracted after the recording of that security, and any rule of law which requires that a real burden for money may only be created in respect of a sum specified in the deed of creation, shall not apply in relation to a standard security.”

This provision broadly implements the first and second recommendations of the Halliday Report referred to above, but not exactly. First, the provisions in the 1696 Act are disapplied rather than repealed. In any event that whole Act has now been repealed by the Bankruptcy (Scotland) Act 1985.¹⁰ Secondly, while the rule of real burdens requiring reference to a specific sum is disapplied, there is no requirement imposed for a maximum sum to be specified.¹¹ Such a requirement is familiar in other jurisdictions.¹²

⁷ Halliday Report para 125.

⁸ Note also that in the Halliday Report Appendix F Part II the discussion of the “personal obligation” secured is limited to monetary obligations.

⁹ See paras 3.3-3.15 above.

¹⁰ Bankruptcy (Scotland) Act 1985 Sch 8. That Act implemented Scottish Law Commission, Report on Bankruptcy and Related Aspects of Insolvency and Liquidation (Scot Law Com No 68, 1981).

¹¹ Although note the 1970 Act s 10(1)(b) and Sch 2 form A which reflect the fact that a standard security for a fluctuating debt *may* be subject to a maximum amount. See para 4.28 below.

¹² Eg French Civil Code art 2423; Dutch Civil Code art 3:260; Deed Registries Act 47 of 1937 s 51(1)(a) (South Africa).

4.9 We turn now to the definition of “debt”, which is found in section 9(8)(c):

“‘debt’ means [A] any obligation due, or which will or may become due, to repay or pay money, including any such obligation arising from a transaction or part of a transaction in the course of any trade, business or profession, and [B] any obligation to pay an annuity or [C] *ad factum praestandum*, [D] but does not include an obligation to pay any rent or other periodical sum payable in respect of land”.¹³

4.10 We have added the lettering to help navigate the provision and to divide it into four parts.

General monetary obligations [A]

4.11 This part of the definition is cast very broadly. It is not limited to debts owed by the grantor of the security. It covers both existing debts and contingent debts. A contingent debt is a debt which is not yet in existence and it is uncertain whether it will come into existence.¹⁴ An example is an overdraft facility. A bank may grant such a facility to a customer but the customer may never use it. Professor Halliday notes that the definition is wide enough to cover cautionary obligations.¹⁵ For example, Maria may borrow money from a bank to start a business. The loan is to be guaranteed by her parents. They could grant a standard security over their house in respect of their cautionary obligation to the bank.

4.12 Obligations in respect of a trade, business or profession are expressly mentioned. Professors Cusine and Rennie note that it is “perhaps less obvious”¹⁶ why this is so, but say that the intention is to make it clear that fluctuating sums in a trading account with a bank can be covered. The account may be in credit in which case there is no debt, or in debit in which case there is. According to the Notes on Clauses,¹⁷ the provision will cover “a common type of business transaction where, for example, business credit is advanced to a tradesman by a supplier on security of the tradesman’s property (eg where a petrol company or brewery supply their product on credit terms to a garage owner or publican on the understanding that they are to be his sole suppliers).” Despite the use of the word “common”, we are doubtful as to how frequently suppliers of moveables would resort to taking heritable security. They could retain title to the goods supplied although this of course would not be effective as regards drink and petrol which has been consumed.

4.13 In practice, standard securities are normally for all sums due or to become due by the debtor to the creditor.¹⁸ This gives banks the assurance that any lending which they make will be covered by the security.

¹³ As amended by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 Sch 12 para 30(6)(d)(iii) to delete references to feuduty and ground annual. These debts were excluded from the definition of “debt”. They were feudal and no longer exist.

¹⁴ See eg Bell, *Principles* § 47.

¹⁵ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-05.

¹⁶ Cusine and Rennie, *Standard Securities* para 3.05.

¹⁷ Notes on Clauses (clause 8).

¹⁸ Gretton and Reid, *Conveyancing* para 23-09. On whether there should be limits to what such a clause can cover, see paras 10.69-10.72 below.

Obligations to pay an annuity [B]

4.14 An annuity is the right to an annual payment for a period of years. For example, on retirement a lump sum may be paid by an employer. It may be used to buy an annuity in terms of which an annual payment will be made to the retired person until death. According to Professors Cusine and Rennie the effect of the express reference to annuities is to make it incompetent to secure an annuity by means of a reservation in a disposition.¹⁹ For the reasons given in Chapter 3 we are doubtful about this, but the point is now academic since the Title Conditions (Scotland) Act 2003 has abolished the pecuniary real burden.²⁰

Obligations *ad facta praestanda* [C]

4.15 An obligation *ad factum praestandum* is an obligation to do something, for example to convey land in terms of an obligation in an option agreement. It is the only type of non-monetary obligation mentioned.²¹ There is no mention of negative obligations ie obligations not to do something. As we have already noted,²² there was no reference to obligations *ad facta praestanda* in the Halliday Report. It may be wondered why the provision mentions these. The answer lies in representations made to the Government, when it was preparing the Heritable Securities (Scotland) Bill which would eventually lead to the 1970 Act, that there was sometimes a need to secure such obligations in practice.²³ Professor Halliday himself had “expressed his own serious doubts about the need to provide for non-monetary obligations.”²⁴

4.16 There appears to be only one relevant case in relation to the pre-1970 heritable securities and that is *Edmonstone v Seton*.²⁵ In two transactions dated 1849 and 1858, the Rev Henry Lumsden, the owner of land in Aberdeenshire, “borrowed”²⁶ from the trustees of a marriage settlement between him and his wife certain investments held with the Bank of England.²⁷ The investments were transferred into Mr Lumsden’s name by the bank. In return he granted bonds and dispositions in security of the land to the trustees. The obligations secured by the bonds were (1) to purchase at any time, as required by the trustees, equivalent investments which were to be transferred into the trustees’ names and (2) to account to the trustees for the interest and dividends received on the “borrowed” investments. The bonds also contained the further clause:

“Provided always . . . that if I, or my heirs, executors, or administrators, shall make default in making transfer of the said [investments] . . . it shall be lawful for the said [trustees] to recover payment of such a sum as will at the same time be sufficient to purchase the foresaid [investments] and as will replace the whole dividends or interests which may then be due thereon, and all costs, damages, and expenses,

¹⁹ Cusine and Rennie, *Standard Securities* para 3.05.

²⁰ See para 3.6 above.

²¹ Although Note 7 of Schedule 2 to the 1970 Act is cast in broader terms: “In the case of a standard security for a non-monetary obligation, the forms in the Schedule shall be adapted as appropriate.”

²² See para 4.6 above.

²³ See NRS HH41/1891: Letter from G R Wilson of the Scottish Home and Health Department to J Pollock, Solicitor dated 18 December 1968. There is no reply in the file but it may be assumed that an example of such a secured obligation is that given in the Notes on Clauses and set out in para 4.21 below.

²⁴ See NRS HH41/1891: Note of meeting at Lord Advocate’s Department on 12 December 1968.

²⁵ (1888) 16 R 1.

²⁶ We have used inverted commas because Mr Lumsden did not have to give back the same investments.

²⁷ Two sums of £5000 and £3500 respectively 3 per cent Consolidated Bank Annuities.

which they, the said [trustees] shall or may incur, sustain, or be put into by reason or on account of default being made in making the transfer . . .”²⁸

4.17 Mr Lumsden died in 1867 leaving the land in liferent to his widow. Following her death in 1886, the trustees sought declarator that they held valid heritable securities over the land. The action was defended by others with an interest in land.²⁹ The defenders argued that the bonds were invalid because they secured obligations *ad facta praestanda*. Insofar as they secured the obligations to account for interest they were also said to be invalid as it was not competent for a real burden to be created for an indefinite and unascertained amount.³⁰ These arguments failed both in the Outer House and on appeal. The Lord Ordinary (Kinnear) said:

“The primary obligation to purchase and transfer a certain amount of Government stock is in the form of an obligation *ad factum praestandum*. But it results in the payment of money; and it does not appear to be very material to the question whether it is in form an obligation to pay or an obligation to transfer.”³¹

4.18 It was held that obligations *ad facta praestanda* could be real burdens and that it did not matter if the amount of interest which would be payable was indefinite provided that the principal obligations were definite.

4.19 Two points are worth noting at this stage. First, as Lord Kinnear said, the obligation here – to buy readily available publicly traded investments of a certain value – was little different from an obligation to pay money. Secondly, if there was default on this obligation the bonds expressly said that enforcement could be made against the land to recover the money necessary to fulfil the obligation to purchase the investments. The reason for this is that it is difficult to see how a non-monetary obligation can be enforced by realisation of a heritable security, because that realisation will lead (normally by sale) to money. While money can satisfy a monetary obligation the position as regards a non-monetary obligation is unclear.

4.20 In the only commentary on the subject prior to the 1970 Act of which we are aware, Burns, in his *Conveyancing Practice According to the Law of Scotland*, notes that it is “doubtful”³² whether securities for obligations *ad facta praestanda* fall within the statutory definition of “heritable securities” in section 3 of the Titles to Land Consolidation (Scotland) Act 1868. He adds that the sales clauses in legislation on heritable securities “are not appropriate [and] there would be the utmost difficulty in getting anyone to purchase.”³³ He states that securities for these purposes “are rare except securities for relief, and the better suggestions are that there should be either an alternative money obligation in the creditor’s option or an *ex facie* absolute disposition.”³⁴ A security for relief would be where a principal debtor (obligant) granted security in favour of a cautioner to relieve the cautioner of the liabilities which that party has taken. Therefore if the cautioner pays the creditor the amount

²⁸ (1888) 16 R 1 at 2.

²⁹ As heirs of entail. We will not try to explain what an heir of entail is, save to note that new entails were forbidden in 1914 and any existing ones remaining in 2004 were abolished with the feudal system. The interested reader might refer to Jane Austen’s *Pride and Prejudice*.

³⁰ This rule of real burdens law applied to the bond and disposition in security. See paras 2.11 and 2.17 above.

³¹ (1888) 16 R 1 at 3.

³² Burns, *Conveyancing Practice* 451.

³³ Burns, *Conveyancing Practice* 451.

³⁴ Burns, *Conveyancing Practice* 451.

required to satisfy the debt the cautioner can enforce the security against the principal debtor to recover that sum. It would seem, rather like the situation in *Edmonstone*, that the obligation to relieve is little removed from a monetary obligation and in any event, as in that case, Burns recommends an alternative monetary obligation.

4.21 In relation to the 1970 Act, the Notes on Clauses have the following commentary:

“[An obligation *ad factum praestandum*] is an obligation to do some act. For example, a firm might undertake to complete a contract by a specific time and as security for their fulfilling this obligation might grant security over part or all of their property. Such transactions might also have a financial penalty clause written into them and the extent of the security may be related to the amount of the penalty. This type of transaction is catered for within the framework of the new form of security.”³⁵

It is interesting to see again a non-monetary obligation being backed up by a monetary obligation.³⁶ We return to these issues below.

Obligations to pay periodic sums [D]

4.22 Such obligations are excluded from the definition. Following feudal abolition, the principal remaining instance of such an obligation is rent. In fact it is not clear to us that there are any other cases. Imagine that John is renting premises from Khalid. It would be incompetent for John to grant a standard security over land which he owns elsewhere to secure his rent obligation to Khalid.

4.23 According to the Notes on Clauses, the reason for the exclusion is that there are “generally accepted forms of deeds for such transactions in existence at the moment and there is no intention of making any of these incompetent.”³⁷ Professor Halliday in his published work does not comment on the issue. It was not immediately clear to us what the forms of deeds would be. The situation is not that the rent itself is being used to secure another debt where the appropriate deed would be one of assignation.³⁸ Rather the debt *is* the rent. In that regard the security which comes most readily to mind is the landlord’s hypothec. But that is a tacit hypothec with no deed.³⁹ Research in the Government Bill files, however, reveals that the intention was for the bond and disposition in security to continue to be used for securing periodic sums on the basis that the personal obligation provisions in the 1970 Act were not readily adaptable for this purpose.⁴⁰

Reform in relation to monetary obligations

4.24 The flexibility of the standard security in relation to monetary obligations undoubtedly has been one of its major successes. Our view is that this must be retained. A standard security should be able to secure an existing debt such as a loan of £100,000 or a contingent debt such as the amount run-up under an overdraft facility.

³⁵ Notes on Clauses (clause 8).

³⁶ See also NRS HH41/1891: Letter from G R Wilson of the Scottish Home and Health Department to J Pollock, Solicitor dated 18 December 1968.

³⁷ Notes on Clauses (clause 8).

³⁸ On reform of the law of assignation of rents see Report on Moveable Transactions paras 4.13-4.14.

³⁹ Following the coming into force of s 208(3) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 the landlord’s hypothec is restricted to commercial leases.

⁴⁰ NRS HH41/1888: “Wandering thoughts by consultant” (the consultant is Professor Halliday).

4.25 We think, however, that the definition of “debt” in the 1970 Act is too ornate and could be simplified. There appears to be no compelling reason to specify individually transactions in the course of a trade, business or profession or obligations to pay an annuity. These are simply examples of monetary obligations.

4.26 In contrast to the position under the 1970 Act, we consider that there is no reason to exclude rent. If Mari wants to grant a standard security over her property, Blackmains, in order to secure the rent payable under her lease of Whitemains there appears to be no good reason why she should not be able to do so.

4.27 Therefore we provisionally favour a broad definition along the lines recommended in our Report on Moveable Transactions: “any obligation owed, or which will become owed”.⁴¹

4.28 We mentioned above the recommendation in the Halliday Report that the new form of heritable security which it proposed could cover further advances made by the creditor to the debtor but only up to a specified maximum.⁴² Elsewhere in the Report in the Appendix setting out style forms for the security, it is said that this maximum amount would “regulate the stamp duty”.⁴³ This requirement to set out a maximum amount was not taken forward into the 1970 Act following opposition from banks and building societies.⁴⁴ As we have noted, however, such a rule applies in other jurisdictions.⁴⁵ It is not clear to us, however, that there is benefit in having to specify a maximum. It would mark a departure from the current practice of standard securities typically being drafted to secure “all sums due or to become due”. If such a rule were imposed, creditors may simply set a very high limit such as £1 billion.⁴⁶

4.29 A standard security will normally secure a sum or sums owed under a contract but a widely drawn clause such as one for “all sums due or to become due” may be capable of securing debts arising under another basis such as unjustified enrichment.⁴⁷

4.30 In English law there is presently some debate in relation to whether a fresh security requires to be granted where the secured obligation is varied, even although the original documentation expressly refers to the fact that it may be varied.⁴⁸ The answer depends on the scope of the so-called “purview doctrine” which has developed with regard to guarantees (the English equivalent of cautionary obligations).⁴⁹ The doctrine also applies to third-party

⁴¹ Report on Moveable Transactions para 19.26.

⁴² See para 4.5 above.

⁴³ Halliday Report p 107. Stamp duty on mortgage deeds was abolished by the Finance Act 1971 s 64.

⁴⁴ NRS HH41/1888: Note of meeting on 22 July 1968 in St Andrew’s House between officials and representatives of the Committee of Scottish Bank General Managers paras 3 to 6; Note of meeting on 30 July 1968 in St Andrew’s House between officials and representatives of the Building Societies Association and the Scottish Building Societies Association paras 3 to 5. The flexibility of the *ex facie* absolute disposition with no maximum amount was mentioned.

⁴⁵ Eg France, the Netherlands and South Africa. See para 4.8 above.

⁴⁶ Although tax or registration fees could be imposed to discourage this.

⁴⁷ See the South African case of *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* 2016 (1) SA 202 (SCA). But cf J C Sonnekus and E C Schlemmer, “Covering bonds, the accessory principle and remedies founded in equity – not self-evident bedfellows” (2015) 132 SALJ 340.

⁴⁸ See R Salter, “Syndicated lending and the “purview doctrine”: how to preserve guarantees when varying the guaranteed obligation” (2017) 32 JIBFL 459. For a Scottish perspective, see R Caldwell, “Guarantees & The Purview Doctrine – An Unhelpful Encroachment into Commercial Transactions” (2019) available at https://www.morton-fraser.com/sites/files/guarantees_the_purview_doctrine.pdf.

⁴⁹ See eg *CIMC Raffles Offshore (Singapore) Ltd v Schahin Holding SA* [2013] EWCA Civ 644, [2013] 2 Lloyd’s Rep 575 at para 51 per Sir Bernard Rix.

security, that is to say where one party is granting security for another party's debt.⁵⁰ It does not apply where the debtor and the grantor of the security are the same person. The fact that a standard security can secure all sums due or to become due seems to us to avoid difficulties caused by variation of a narrower obligation.⁵¹

4.31 While standard securities are typically granted for all sums, there are particular policy issues in relation to whether this wording should be allowed to cover debts originally owed to another party but the rights to which have now been assigned to the creditor. We discuss this matter and the question of whether there should be any other restrictions in Chapter 10 below,⁵² where we look at the assignation of all sums standard securities. There are similar considerations in relation to what debts can be covered following the assignation of the security.

4.32 Finally, in our Report on Moveable Transactions, we recommended that the secured obligation should include any ancillary obligations, as for example to pay interest,⁵³ to pay damages (for non-performance) and to pay the reasonable expense of extra-judicial recovery of interest and damages.⁵⁴ We consider that the same general rule should apply in relation to standard securities so that ancillary obligations are secured. Our intention, however, is to examine the issue of the debtor's liability for expenses in our second Discussion Paper. We also consider below the issue of the debtor having liability for damages for non-performance of a secured obligation in the context of non-monetary obligations.

4.33 We propose:

12. (a) It should be competent for a standard security to secure monetary obligations which are owed or which may become owed in the future.

(b) A standard security should also secure ancillary obligations, in particular obligations to pay interest, damages and expenses (subject to rules governing what expenses are allowable).

Reform in relation to non-monetary obligations: introduction

4.34 As discussed above,⁵⁵ the 1970 Act expressly permits standard securities for obligations *ad facta praestanda* ie *positive* obligations. It does not on the other hand permit *negative* obligations to be secured. The approach taken by the floating charges legislation is seemingly wider: "a debt or other obligation (including a cautionary obligation)"⁵⁶ can be secured.

⁵⁰ See paras 3.29-3.30 above.

⁵¹ But compare *Dowling v Promontoria (Arrow) Ltd* [2017] BPIR 1477.

⁵² See particularly paras 10.69-10.72 below.

⁵³ The interest payable will usually be set out in the loan contract. In Islamic finance arrangements, no interest is payable.

⁵⁴ Report on Moveable Transactions para 19.25. This was influenced by the DCFR IX.-2:401.

⁵⁵ See paras 4.15-4.21 above.

⁵⁶ Companies Act 1985 s 462(1).

4.35 The inclusion of obligations *ad facta praestanda* may be influenced by the 1888 case of *Edmonstone v Seton*.⁵⁷ But, as we have noted, the obligation in that case was little different from one to pay money and was expressly backed-up by a substitutionary monetary obligation.⁵⁸

***Ad facta praestanda* obligations in practice**

4.36 We have discussed with our advisory group when standard securities are currently used in practice to secure obligations *ad facta praestanda*. The following cases have been identified:

- (1) A contractual right of first refusal to acquire land on the owner deciding to sell (a pre-emption);
- (2) The obligations of a land owner under an option agreement with another party for that party to acquire or take a lease of the land;
- (3) The obligations of a seller of land under a contract of sale which is subject to suspensive conditions (eg to provide support and assistance to the purchaser to obtain planning permission);
- (4) The obligations of a landlord under a lease to the tenant which may not be *inter naturalia* of the lease and therefore not binding on the landlord's successors;⁵⁹ and
- (5) The obligations of a recipient of a grant to carry out works to its property funded by the grant.

4.37 There is a recurring theme behind several of these examples, namely to protect against an unauthorised transfer of the property to a third party (or to provide protection in the event of the current owner's insolvency⁶⁰). The registration of the standard security puts any prospective acquirer on notice of the obligations and acts as a deterrent to transfer of the land without the involvement of the secured creditor. For case (1) at least, proven knowledge by the transferee that the transfer is in breach of the contractual pre-emption means that the offside goals rule enables the transfer to be set aside.⁶¹

⁵⁷ And the representations to the Government to allow non-monetary obligations to be secured. See paras 4.15-4.19 above.

⁵⁸ In *Joint Administrators of Granite City Assets, Petitioners* [2018] CSOH 55, 2018 GWD 23-290 at para 22 it was argued that obligations to repay deposits could be obligations *ad facta praestanda* but at para 37 Lord Doherty "did not think it necessary or appropriate to comment" on it. This was because the argument had only been made orally and was not set out in the written pleadings. The case was to be the subject of further procedure.

⁵⁹ See eg *Ross v Duchess of Sutherland* (1838) 16 S 1179 (landlord's agreement to reduce the rent in return for work carried out by tenant not binding on successor landlord).

⁶⁰ In this regard see the example given in *The Laws of Scotland: The Stair Memorial Encyclopaedia* vol 20 (1992) para 148 (J Burgoyne): "[for implementation] of a contract for the erection of a house on land belonging to the builder and the title to which will not be granted to the purchaser until full payment of the price of the house is made where the purchaser is obliged to pay the price of the house in instalments and requires security before parting with substantial sums of money."

⁶¹ *Matheson v Tinney* 1989 SLT 535; *Roebuck v Edmunds* 1992 SLT 1055. On this rule see further Reid, *Property* paras 695-700 and Gretton and Steven, *Property, Trusts and Succession* paras 4.47-4.50 and 14.12.

4.38 The standard security is therefore effectively being used as a device to overcome the fact that contractual obligations are personal ie only enforceable against the other party to the contract and are not enforceable against third parties. In other words, such rights are not real rights.

Problems

4.39 There are clearly difficulties with the concept of a security securing a non-monetary obligation. The principal one, to which we have already referred,⁶² is that enforcement of a security involves recovering money from the encumbered asset, usually by selling it. How can money satisfy a non-monetary obligation? This is a subject which was first aired in relation to the 1970 Act by Professor George Gretton in a volume of essays in honour of Professor Halliday:

“[I]t is unclear to me how securities for obligations *ad facta praestanda* are supposed to work. A right in security, when realised, will produce money. This will satisfy a money obligation. But it will be irrelevant to an obligation *ad factum praestandum*. It may be that a security for such an obligation is really a security for the damages which would arise from default. But this is speculative. This problem is particularly obscure if the obligation contains no clause of liquidated damages. Suppose a standard security *secundo loco* is granted for an obligation *ad factum praestandum* and there is default on the *primo loco* security, which leads to sale. What is to happen to the free proceeds?”⁶³

4.40 Two points may be highlighted. The first is the suggestion that the security must truly be one for damages. This has been accepted by other writers.⁶⁴ The second is the question of the ranking and enforcement of such a security. When the encumbered property is sold either by the security holder or, as in Professor Gretton’s example, by the holder of another security over the property, how is a security to rank if it is for other than a monetary sum?

4.41 More broadly, the 1970 Act remedies, principally sale, do not lend themselves well to enforcement of a security for an obligation *ad factum praestandum*.⁶⁵ What the holder of the security principally wants is the performance of the non-monetary obligation, such as the land being conveyed to them in terms of an option agreement, rather than money. But the limited remedies in the 1970 Act reflect a broader principle that a right in security over an asset gives a creditor the means of enforcing an obligation by realising an asset.⁶⁶ Realising assets produces money to make up for the fact that there has been default on the secured obligation. The secured obligation itself is not performed. Were it to be otherwise, there would be no need to enforce the security. It is of course possible to go to court and seek an order for specific implement of a non-monetary obligation. But such an order will be ineffective if the debtor has disappeared or become insolvent. This is because an

⁶² See para 4.19 above.

⁶³ G L Gretton, “The Concept of Security” in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 at 128-129.

⁶⁴ Cusine and Rennie, *Standard Securities* para 3.05; D A Brand, A J M Steven and S Wortley, *Professor McDonald’s Conveyancing Manual* (7th edn, 2004) para 21.4.

⁶⁵ See Paisley, *Land Law* para 11.3 n 20 and Hardman, *Granting Corporate Security* para 8-18 n 46. In Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 10-06 there is a suggested style for a calling-up notice in relation to a non-monetary obligation which provides that “failing fulfilment of the said obligation . . . the subjects of the security are to be sold.” What is to happen to the proceeds is not stated.

⁶⁶ Only in very limited circumstances and with the authority of a court order can the land itself be taken by means of foreclosure. See the 1970 Act s 28.

insolvency official is not bound by an option agreement entered into by the debtor whereby land is to be conveyed.

4.42 We note in passing that where a standard security document contains the express consent of the debtor to registration for execution, in the case of default on an obligation *ad factum praestandum* the creditor cannot proceed directly to imprison the debtor.⁶⁷ A court order to perform will be required and it will only be the failure to obey that which can lead to imprisonment at the discretion of the court.⁶⁸ Imprisonment in any event is a useless remedy where the debtor is a corporate body.

4.43 Professor Gretton has maintained his approach to the *ad factum praestandum* provision in the 1970 Act in his more recent writings,⁶⁹ including in his commentary with Professor Reid on *J H & W Lamont of Heathfield Farm v Chattisham Ltd.*⁷⁰ That case involved an option agreement secured by a standard security. Its focus was whether there was an entitlement to have the security discharged in terms of the agreement or whether the doctrine of retention prevented this.⁷¹ The question of enforcement of the security was therefore not addressed. Professor Gretton noted:

“The Scottish Law Commission is embarking on a project to review the law. Perhaps the provision that a standard security can secure an obligation *ad factum praestandum* should simply be done away with . . . the objective can be attained quite simply by drafting a standard security in terms that secure any damages due.”⁷²

4.44 We know, however, that other members of our advisory group take the view already expressed above that what is wanted is the land and not money. Consideration of the way forward is helped by looking at the law in other jurisdictions.

Some comparative law

4.45 We have discovered numerous examples of legal systems which restrict security rights to monetary obligations.⁷³ These typically deal with the matter in their civil code. We look also at four uncodified systems: India, New Zealand, South Africa, and England and Wales.

⁶⁷ Debtors (Scotland) Act 1987 s 100. In the case of almost all monetary debts, civil imprisonment has been long abolished. See the Civil Imprisonment (Scotland) Act 1882 s 4.

⁶⁸ Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s 1. See Cusine and Rennie, *Standard Securities* para 3.28.

⁶⁹ Gretton and Reid, *Conveyancing* para 23-09.

⁷⁰ [2017] CSOH 119 aff'd [2018] CSIH 33, 2018 SC 440. See K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 136-141.

⁷¹ See L Richardson, “What do we know about retention now?” (2018) 22 Edin LR 387.

⁷² Reid and Gretton, *Conveyancing 2017* 141.

⁷³ See also generally here Van der Merwe, *Security in Immovables* paras 230-232 which considers broadly the law in Western Europe, common law jurisdictions and the United States. While non-monetary obligations generally can be secured, they must be capable of being converted into money.

(a) France

4.46 Article 2423 of the French Civil Code provides: “A hypothec [*hypothèque*]⁷⁴ is always granted for the principal [*capital*]⁷⁵ up to a determined amount which the notarial deed specifies on pain of nullity.”⁷⁶ Registration of the hypothec requires the involvement of a notary and that person will also be responsible for drawing up the deed of hypothec.

(b) Germany

4.47 In Germany the civil code provisions in relation to both the *Hypothek* (accessory security over land)⁷⁷ and the *Grundschuld* (non-accessory security over land)⁷⁸ limit these to a specific sum of money (“*eine bestimmte Geldsumme*”). There is a special form of *Hypothek* known as the *Höchstbetragshypothek* which will secure monetary debt up to a maximum specified in the constitutive deed.⁷⁹ Any of these securities can secure damages.⁸⁰ But all are limited to monetary obligations. Mention must also be made of the *Vormerkung*, a form of protective notice that can be registered in the German Land Register and which can protect the party who is registering it from competing deeds.⁸¹ This means that in German law the holder of an option can still enforce the option where the land has been transferred to a third party.

(c) The Netherlands

4.48 The Dutch Civil Code provisions in relation to security over land (*hypotheek*) enable only a monetary debt (“*een geldsom*”) to be secured.⁸² This may be a damages claim.

4.49 We understand that sometimes in the Netherlands the parties to a contract of sale of land will agree that ownership is not to transfer until a date sometime in the future to be decided by the purchaser. The contract will contain a “penal clause” (“*boetebeding*”) to the effect that if the seller refuses to grant a deed of transfer when the buyer requests it then certain damages will be due. The damages can be secured by a *hypotheek*. Similar arrangements are also made in relation to option agreements, including rights of pre-emption (right of first refusal if the owner decides to sell). It is possible too for a contract for the sale of land to be registered so that if the seller becomes insolvent the insolvency official must transfer the land in terms of the contract, but this protection for the buyer in principle lasts only six months.⁸³

⁷⁴ This is the main express security over land. French law also recognises the *gage immobilier* (antichresis) but it requires that the creditor is placed in possession of the land.

⁷⁵ We have used the official translation from <https://www.legifrance.gouv.fr/>. “Principal” is used in the same way as it is used in relation to bonds ie the principal capital sum (to which interest is added). The principal stated in the deed may be more than that which is actually lent.

⁷⁶ See V Sagaert, “Main developments in immovable securities in French and Belgian law: a transition from tradition to modernity” in M Hinteregger and T Borić (eds), *Sicherungsrechte an Immobilien in Europa* (2009) 201 at 208.

⁷⁷ German Civil Code § 1113(1). See Münchener Kommentar BGB/Lieder, 77 Auflage 2017, § 1113 Rn. 48.

⁷⁸ German Civil Code § 1191(1).

⁷⁹ German Civil Code § 1190(1).

⁸⁰ For the *Hypothek* a damages claim would be a future or conditional claim within the meaning of the German Civil Code § 1113(1). See beck-online.GROSSKOMMENTAR/Kern, Stand 01.07.2018; § 1113 Rn. 93.2.

⁸¹ German Civil Code §§ 883-888. See D Assmann, *Die Vormerkung* (1998).

⁸² Dutch Civil Code art 3:227.

⁸³ Dutch Civil Code art 7:3.

(d) *Switzerland*

4.50 In Switzerland the rule is that when a hypothec⁸⁴ is created a specific amount in Swiss currency must be stated as being the debt.⁸⁵ There is, however, an alternative of setting out a maximum amount up to which the encumbered property will be liable for all claims of the creditor.⁸⁶

(e) *Spain*

4.51 The Spanish Civil Code provides that it is of the essence of a contract of pledge or hypothec that on the principal obligation becoming due the encumbered property can be disposed of to pay the creditor.⁸⁷

(f) *Italy*

4.52 Under the Italian Civil Code a hypothec requires to be for a definite sum of money (“*una somma determinata*”).⁸⁸

(g) *Estonia*

4.53 The Estonian Law of Property Act of 1993 provides that any claim which can be valued in money can be secured by a security over property (either land or moveables).⁸⁹ Conditional and future claims can be secured.⁹⁰

(h) *Hungary*

4.54 The Hungarian Civil Code provides that a security may secure any existing or future, conditional or unconditional monetary claims of a specified amount or an amount which can be determined.⁹¹ Where a security is not created in respect of a monetary claim, the damages resulting from the failure to satisfy the relevant obligation are secured.⁹²

(i) *Louisiana*

4.55 The Civil Code of Louisiana defines “security” as a right “to secure performance of an obligation”.⁹³ It goes on to provide:

“A mortgage that secures an obligation other than one for the payment of money secures the claim of the mortgagee for the damages he may suffer from a breach of the obligation, up to the amount stated in the mortgage.”⁹⁴

⁸⁴ Swiss legislation is equally authoritative in French, German and Italian. See P Pichonnaz, “Legal Interpretation in Multilingual States: An Opportunity” in S Glanert (ed), *Comparative Legal Reasoning: Essays in Honour of Geoffrey Samuel* (2018) 155.

⁸⁵ Swiss Civil Code art 794(1).

⁸⁶ Swiss Civil Code art 794(1).

⁸⁷ Spanish Civil Code art 1858.

⁸⁸ Italian Civil Code art 2809.

⁸⁹ Estonian Law of Property Act 1993 § 279(1).

⁹⁰ Estonian Law of Property Act 1993 § 279(2).

⁹¹ Hungarian Civil Code § 5:97(1).

⁹² Hungarian Civil Code § 5:97(2).

⁹³ Civil Code of Louisiana art 3136.

⁹⁴ Civil Code of Louisiana art 3294. This provision was added in 1991, but note H Denis, *A Treatise on the Law of the Contract of Pledge as Governed by Both the Common Law and the Civil Law* (1898) para 71: “[I]t is important

This approach is similar to that in Hungary.

(j) Quebec

4.56 In Quebec, the Civil Code provides that the deed creating a hypothec must set out the specific sum for which it is granted.⁹⁵ This rule applies even where the hypothec is constituted to secure the performance of an obligation whose value cannot be determined or is uncertain.

(k) India

4.57 The statute which primarily governs mortgage law in India is the Transfer of Property Act 1882. Section 58(a) of the Act provides that:

“A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.”

4.58 Thus while a mortgage can secure a non-monetary “engagement”, that has to be one which leads to a duty to pay money.

(l) New Zealand

4.59 In New Zealand the Land Transfer Act 2017 provides that a “mortgage”:

“(a) means a charge over an estate or interest in land created by a mortgagor under this Act a purpose of which is to secure the performance of an obligation to pay money, whether or not—

- (i) the charge also secures the performance of other obligations; or
- (ii) any obligation secured by the charge is unconditional or conditional on the failure of another person to perform it; and

(b) includes a rentcharge or an annuity.”

4.60 This definition means that a mortgage must secure some form of monetary obligation, although it is permitted to secure other obligations.

(m) South Africa

4.61 In South Africa the subject of non-monetary obligations has been explored in texts on property law. A standard text states that “an obligation to perform an act or a series of acts may also be secured by a mortgage, provided that it is ultimately capable of being converted

to observe that, when a pledge is given to secure the fulfilment of another obligation than a moneyed debt; in other words when the obligation secured consists in doing something; the amount for which the pledge is given must be fixed in the contract of pledge. This is as necessary as in the case of a mortgage. Parties who deal with pledgeors or mortgageors must know to what extent that property is already encumbered. Thus, if a pledge is given to secure the faithful administration of a corporation officer, a sum must be fixed to the extent of which, and no more, the pledge will answer.”

⁹⁵ Quebec Civil Code art 2689.

into an obligation sounding in a fixed and definite amount of money.”⁹⁶ Professor Brits takes a similar view.⁹⁷ He gives the example of *Grahamstown Building Society v Dakin*,⁹⁸ where a mortgage became enforceable where a building was not erected. But this appears to be more about an event of default⁹⁹ rather than the obligation to build being secured as such. Where a mortgage is to secure future debts such as damages it is necessary for a maximum amount to be stated in the deed that is registered.¹⁰⁰

(n) England and Wales

4.62 In *Santley v Wilde*,¹⁰¹ Lord Lindley MR defined “mortgage”:

“The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.”¹⁰²

It can be taken from this definition that mortgages are not limited to monetary debts. Nevertheless, we note that the Law of Property Act 1925 defines “mortgage” as including “any charge or lien on any property for securing money or *money’s worth*” (our emphasis).¹⁰³ Richard Calnan is very clear on the issue:

“It is not possible to secure the performance of a non-monetary obligation. Assume, for instance, that B has an obligation to transfer shares to A on the happening of an event and that obligation is secured by a charge over the shares. If B fails to perform, the only value of the charge is to secure the payment of damages for the failure to transfer the shares. A cannot simply take the shares if B does not perform. B has an equity of redemption in the shares, which effectively requires A to sell them in order to pay the secured liability.”¹⁰⁴

4.63 We note also the following provisions from the Draft Secured Transactions Code prepared in 2016 by the Financial Law Committee of the City of London Law Society:

“18.1 The secured obligation can be any obligation or liability of any kind of any person. It can be present, future or contingent.

18.6 If the secured obligation is not an obligation to pay money, the charge [ie the security] secures the obligation to pay damages for the breach.”

4.64 At least some of the explanation for the general lack of discussion may lie in the Land Registration Act 2002 allowing options and similar contracts in relation to land to be protected by registering notices and restrictions.¹⁰⁵ An *option* is an estate contract under

⁹⁶ P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman’s The Law of Property* (5th edn, 2006) 359.

⁹⁷ Brits, *Real Security Law* 18.

⁹⁸ 1965 (4) SA 787.

⁹⁹ Compare the 1970 Act Sch 3 standard condition 2 (duty to complete buildings etc). Failure to comply with this would result in the debtor being in default.

¹⁰⁰ Deeds Registries Act 47 of 1937 s 51(1)(b).

¹⁰¹ [1899] 2 Ch 474.

¹⁰² At 474. Note, however, now the statutory definition of “mortgage” in the Law of Property Act 1925 s 85 under which a mortgage is no longer a conveyance.

¹⁰³ Law of Property Act 1925 s 205(1)(xvi).

¹⁰⁴ R Calnan, *Taking Security* (4th edn, 2018) para 7.28.

¹⁰⁵ Land Registration Act 2002 Part 4. See generally E Cooke, S Bridge and M Dixon (eds), *Megarry and Wade’s The Law of Real Property* (9th edn, 2018) paras 6-069 to 6-085.

English law and confers an equitable proprietary interest on its holder.¹⁰⁶ If notice of the option is registered this will in principle bind successor owners. It will also give priority over any other parties who subsequently acquire an interest in the land such as the tenant under a lease. But registration of the notice cannot make the successor owner perform any positive obligations under the option agreement,¹⁰⁷ such as co-operating in applications for planning permission. Therefore a *restriction* is also registered. It prevents the land from being transferred to a third party without the option holder's consent. The option holder can then insist that the transferee agrees to the terms of the option including positive obligations before permitting the land to be transferred.

4.65 Therefore under English law, it is notices and restrictions which are used to bind successor owners of land into obligations undertaken by the current owner. Mortgages are not.

Reform possibilities in the law of heritable security

4.66 We set out here some possible ways in which the law could be reformed, within the context only of heritable security.

4.67 One preliminary point should be made. As discussed above,¹⁰⁸ the 1970 Act permits only non-monetary obligations which are obligations *ad facta praestanda* to be secured. Negative obligations are excluded. A heritable security for an obligation *ad factum praestandum* had been approved in *Edmonstone v Seton*, whereas case law on negative obligations was lacking. We see no reason to maintain this distinction in the future and therefore what follows relates to all non-monetary obligations.

4.68 The first possibility would be to provide that a standard security can *only* secure *monetary* obligations. We have seen that several jurisdictions such as France, Germany and Italy take this position. This would *not* mean that standard securities in relation to option agreements and the like would be banned. Rather, if such a security were to be granted, it would *require* to secure the contingent liability for damages for breach of the agreement. In the interests of certainty the parties may wish to stipulate exactly what damages would be due, but we accept that in complex land assembly transactions it may be difficult so to do.

4.69 The second possibility would be little different in substance from the first. This would follow the approach taken in Hungary and Louisiana and in the City of London Law Society draft Secured Transactions Code. It would be permissible for the secured obligation to be a non-monetary obligation, but in that case the security would secure the damages payable in respect of a breach of that obligation. We think that this is the current law. One advantage of this approach is that it may allow existing security documentation to continue to be used without revision.

4.70 The third possibility would be more radical. Security for non-monetary obligations would be expressly authorised. But this would lead to special rules in relation to ranking and

¹⁰⁶ See eg *London and South Western Railway v Gomm* (1882) 20 Ch D 562.

¹⁰⁷ See *Ridgewood Properties Group Ltd v Valero Energy Ltd* [2013] EWHC 98 (Ch), [2013] Ch 525.

¹⁰⁸ See para 4.15 above.

enforcement. As we have noted, there is an inherent difficulty with ranking non-monetary securities, but it would be possible in principle to find solutions to this.

4.71 Imagine that Anna grants an option agreement to Barry in respect of land that she owns. She grants him a first ranking standard security in respect of her obligation to transfer the land if he exercises the option. Anna then grants a second ranking standard security for £100,000 to the Cuminestown Bank. She becomes insolvent. Barry enforces the option to have the land conveyed to him by Anna's trustee in sequestration. In that event the rule would be that the bank would get nothing as the land has gone to Barry. It would be left as an unsecured creditor. But the practical consequence of such a rule would probably be that the bank would not lend in the first place as it would know that its security could be worthless.

4.72 We can take the same example, but reverse the order of the securities with the bank ranking first and Barry second. The land would be sold to recover the debt owed to the bank. If there was any remaining money this would go to Barry to the extent that he is entitled to be compensated in damages for the land not being transferred in terms of the option.

4.73 It is possible to think of further examples, such as where there are two securities and both are for non-monetary obligations, perhaps one securing an option to purchase the land and the other securing an option to lease the land. Appropriate rules could in theory be formulated. We are conscious, however, that other legal systems do not take this approach and we think that it could be complex. We incline against it but we would welcome the views of consultees.

Reform possibilities beyond the law of heritable security

Our 2000 Report on Real Burdens

4.74 We look now at possible alternative approaches in relation to making options and other agreements in relation to land enforceable against successor owners. This was a matter which we examined previously in our Report on Real Burdens in 2000.¹⁰⁹ In that Report we noted that options could be set up in a number of ways: (1) contract; (2) standard security; (3) real burden; (4) lease; and (5) reversion. Of these, the final merits some explanation as it is the least familiar.

4.75 A reversion was a right to reacquire land upon the fulfilment of a condition or conditions. In terms of the Registration Act 1617 reversions required to be recorded in the Register of Sasines to affect successor owners of the land. This legislation was actually aimed at wadsets under which the land was conveyed to the creditor with the debtor having a right of reversion.¹¹⁰ Nevertheless, reversions could be used more widely. Thus, a form of reversion known as a "redemption" gave the holder a right of repurchase, whether at a time of choosing of the holder, or at some fixed future time, or on the occurrence of a specified event such as the granting of planning permission. For example, Tim, a farmer, might convey land to Ulrike, a neighbouring farmer, for grazing purposes, but with a right of

¹⁰⁹ Scottish Law Commission, Report on Real Burdens (Scot Law Com 181, 2000) Part 10.

¹¹⁰ See para 2.5 above.

redemption to reacquire it if planning permission is obtained for housing. Section 12 of the Land Tenure Reform (Scotland) Act 1974, however, limited the duration of new reversions to 20 years.

4.76 In our Report we went on to contrast (a) pre-emptions, in other words options conferring a right of first refusal when the owner decides to sell, with (b) other options in the context of the reform of the law of real burdens.¹¹¹ We said:

“Options falling into this category [(b)] are potentially oppressive in that the owner has no control over when, or whether, the option is to be exercised. A person may lose property without his consent and, in some cases, without adequate compensation. It is one thing for an owner to agree to redemption by contract. Then there is an initial act of consent and, sometimes, the payment of money. But it is another thing entirely for a successor of that owner to be bound. This does not seem an appropriate use of real burdens . . . In the discussion paper we suggested that options to acquire (other than pre-emptions) should cease to be capable of being constituted as real burdens. Options would thus remain in the realm of contract law, supported if need be, by the grant of a standard security or, in appropriate cases, by a right of pre-emption. The original parties would remain bound, but successors would be unaffected. Consultees generally agreed.”¹¹²

4.77 This policy was implemented by section 3(5) of the Title Conditions (Scotland) Act 2003. While pre-emptions can be created as real burdens, this usually necessitates there being a benefited property nearby which is owned by the holder.¹¹³ A party who wants to take an option may not own suitable land. Further, pre-emptions created as real burdens are subject to certain statutory restrictions.¹¹⁴

4.78 We noted elsewhere in our Report that “the statutory remedies available on default [in a standard security] seem scarcely appropriate for a non-pecuniary obligation. But a security will at least alert a purchaser to the existence of the option, and put him in bad faith for the purposes of the offside goals rule. In practice the holder will be contacted and a discharge sought, and as part of the negotiations the option might come to be renewed.”¹¹⁵ Nevertheless, the policy approach in the Report was generally against options binding successors.

Our 2010 Report on Land Registration

4.79 We saw above that in Germany registration of a notice called a *Vormerkung* can protect the holder of an option.¹¹⁶ The *Vormerkung*, along with the system of priority notices in English land registration law, influenced us in our more recent project on land registration where we developed a system of advance notices.¹¹⁷ This system was implemented by the Land Registration etc. (Scotland) Act 2012.¹¹⁸ An advance notice protects the prospective acquirer of land for a period of 35 days. It is aimed principally at covering the gap between

¹¹¹ A real burden is a type of title condition affecting land.

¹¹² Report on Real Burdens para 10.20.

¹¹³ An exception is rural housing burdens under the 2003 Act s 43. These are a type of personal real burden.

¹¹⁴ 2003 Act ss 82 to 84. They are in effect limited to one chance to exercise.

¹¹⁵ Report on Real Burdens para 10.9. On the offside goals rule, see para 4.37 above.

¹¹⁶ See para 4.47 above.

¹¹⁷ Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) paras 14.9-14.10.

¹¹⁸ Land Registration etc. (Scotland) Act 2012 Part 4.

settlement of a conveyancing transaction and registration of the deed of transfer in favour of the purchaser.¹¹⁹ In our Report on Land Registration we considered whether the system of advance notices might be given a wider role. We think it is worth setting out in full what we said:

“It has been put to us by some solicitors working in the field of commercial property that under the current law it is difficult for some types of agreement about land to be protected. An example is the land option agreement. Such an agreement can, indeed, be secured by a standard security. But the principal method of enforcement of a standard security is sale. Sale results in the transfer of the property to someone else, which is just what the option was intended to prevent. In England and Wales it is possible, we understand, to protect a land option agreement by a registered “restriction”. The German *Vormerkung* system also covers such cases, and arguably does so in a way that, to a Scottish eye, looks technically preferable. It may be that other technical solutions would be possible, eg a form of heritable security.

We think that there may well be a case for exploring such ideas. But to do so would be outwith the scope of the present project and accordingly, with reluctance, we do not consider the matter further here, other than to remark that if the advance notice system that we recommend were to be introduced, and if it were to prove successful, it might, as in Germany, prove to be the starting point for development of a system to protect such arrangements as land option agreements.

It may be that these ideas should be addressed in any future review of the law of heritable security, given that advance notices, though their inner logic is different from the inner logic of heritable security, have a comparable function of securing a right.”¹²⁰

4.80 The representations made by commercial property solicitors at that time are supported by the response of the Scottish Property Federation to the consultation on our Eighth Programme of Law Reform and by our advisory group.

Discussion and questions

4.81 As can be seen, we concluded that the subject of protecting option agreements etc was outwith the scope of our land registration project. After careful consideration and discussion with our advisory group, our view is that it would not be appropriate to address it within the current project. We have three principal reasons for this.

4.82 The first reason is that the current project is already large. This Discussion Paper is a substantial one and there is a second to follow, which will cover enforcement issues, including ranking. It will take several years to complete the project and to prepare a draft Bill. The second reason is that comparator models such as the English restriction and German *Vormerkung* are not regarded as part of the law of rights in security. The third reason is that formulating appropriate policy is not straightforward. We are conscious that the approach taken in the Report on Real Burdens was to limit the scope for options to bind successor land owners and that it was implemented by legislation as recent as 2003. Trying to resolve the appropriate policy within the context of a project on heritable security would be too ambitious.

¹¹⁹ For a general account, see K G C Reid and G L Gretton, *Land Registration* (2017) ch 10.

¹²⁰ Report on Land Registration paras 14.58-14.60.

4.83 Instead, we favour a dedicated project, which we would commence separately and which could look in detail at comparable models.¹²¹ Our provisional view is that it would seem possible to develop a single notice system like the German one. The issue which necessitates double registration in England – the inability of positive obligations to bind successors – is not one which troubles Scottish property law.¹²² The project might look again at the “personal charge” model proposed by the Halliday Report, but which has never been implemented.¹²³ Such a charge would be registered in the Register of Inhibitions and Adjudications rather than the Land Register. Admittedly, another approach, as noted in the text quoted above from our Report on Land Registration, would be to try and develop a solution within the law of heritable securities. We made a very provisional attempt at that above.¹²⁴ We think, however, that it would be preferable for this to be considered as part of the separate project on option agreements etc.

4.84 One concern may be that if there were to be a separate project then this could delay the implementation of the Report arising from this project. We do not think this should be the case. A reform which makes it clear that a standard security can effectively only secure monetary obligations (including damages for breach of a non-monetary positive or negative obligation) would not have an adverse effect on such agreements as this is almost certainly the current law, notwithstanding the express reference to an obligation *ad factum praestandum* in the 1970 Act.

4.85 We therefore ask:

13. Which of the following approaches do consultees prefer?

(a) Standard securities should not be able to secure non-monetary obligations (but they may secure a damages claim in respect of such an obligation).

(b) Standard securities should be able to secure non-monetary obligations, but in such case it would be the damages claim for breach of the obligation which would actually be secured.

4.86 We propose:

14. There should be a separate reform project in relation to making options and similar agreements enforceable against third parties by means of registration. That review should consider other models, such as a special form of standard security which could secure non-monetary obligations and which would have special ranking and enforcement rules.

¹²¹ This would not be the first time that a new but related project has arisen out of an existing project. For example, our Report on Real Burdens (Scot Law Com No 181, 2000) was prompted by our work on feudal abolition.

¹²² Thus real burdens can be affirmative as well as negative. See Title Conditions (Scotland) Act 2003 s 2. This was the common law too.

¹²³ See para 2.31 above.

¹²⁴ See paras 4.69-4.72 above.

Chapter 5 The encumbered property

Introduction

5.1 In this chapter we look at the property over which a standard security can be granted. Usually this will be land, including buildings. It is also possible for standard securities to be granted over certain other types of heritable property, in particular long leases.

Heritable property

5.2 A standard security, being a heritable security, can only be granted over heritable property. It cannot be granted over moveable property such as furniture and vehicles. Of course, moveable property such as bricks may become heritable by being permanently attached to the land. This is known as “accession”.¹ A standard security will typically encumber land which has been built upon for housing or commercial use.

5.3 The heritable/moveable distinction is long established in Scotland, but it is not quite the same as immovable/moveable. In fact, it is based in succession law. Prior to the Succession (Scotland) Act 1964, if someone died intestate (ie without a will) heritable property went to the heir-at-law (normally the oldest son) and moveable property went to a wider class of relatives.² Heritable property includes certain rights other than land and rights in land, in particular rights with a tract of future time such as pensions and annuities, and titles of honour.³ As far as we are aware, it has never been suggested that a standard security could be created over such other rights, which can said to be heritable but not immovable. There is a significant practical barrier to this, namely that a standard security must be registered against a particular piece of land in the Land Register (or formerly recorded in the Register of Sasines) to be created.⁴

5.4 We think that it would be helpful to confirm that a standard security may only be granted over immovable property (both corporeal and incorporeal). It can be argued more generally that “heritable property” is a term which should now be replaced with “immovable property”.⁵ But that is not for this project. We propose:

15. A standard security may only be granted over immovable property.

The 1970 Act terminology

5.5 The terminology in the 1970 Act is not consistent in relation to the property encumbered by a standard security. The starting point is the original version of section 9(2), which provided:

¹ See eg Reid, *Property* paras 570-586; Gretton and Steven, *Property, Trusts and Succession* paras 9.8-9.12.

² Reid, *Property* para 11.

³ Reid, *Property* para 14.

⁴ See para 2.43 above.

⁵ See Scottish Law Commission, *Corporeal Moveables: Some Problems of Classification* (Scot Law Com Consultative Memorandum No 26, 1976) paras 31-32.

“It shall be competent to grant and record in the Register of Sasines a standard security over any interest in land ...”

Section 9(8)(b) went on to define “interest in land” as:

“any estate or interest in land, other than an entailed estate or any interest therein, which is capable of being owned or held as a separate interest and to which a title may be recorded in the Register of Sasines.”

5.6 These definitions had to be updated to take account of feudal abolition and because it is the Land Register where standard securities are now registered.⁶ Any remaining entails were abolished on 28 November 2004⁷ so the reference to these required to be deleted. In preparing the report which led to feudal abolition we considered the term “interest in land”. We concluded that in some private law statutes the more precise terminology of “land or a real right in land” was necessary.⁸

5.7 The present wording of section 9(2) is as follows:

“It shall be competent to grant and register in the Land Register of Scotland or to grant and record in the Register of Sasines a standard security over any land or real right in land ...”⁹

And section 9(8)(b) now provides:

““real right in land” means any such right, other than ownership or a real burden, which is capable of being held separately and to which a title may be registered in the Land Register of Scotland or recorded in the Register of Sasines”.¹⁰

5.8 The expression “land or real right in land” is found in numerous provisions in the 1970 Act.¹¹ But it is not the only term for the encumbered property. In many other provisions the term is “security subjects”.¹² “Subjects” is a traditional Scottish term for, rather oddly, the *object* of a conveyance.¹³ This dichotomy in the legislation is difficult to fathom. For example, section 10 uses both terms. Subsection (2) provides:

“The clause of warrandice . . . shall, unless specially qualified, import absolute warrandice as regards the land or real right in land over which the security is granted ...”

⁶ See para 2.43 above.

⁷ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 50.

⁸ Report on Abolition of the Feudal System (Scot Law Com No 168, 1999) para 9.5.

⁹ 1970 Act s 9(2) as amended by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 sch 12 para 30(6)(a) and the Land Registration etc. (Scotland) Act 2012 sch 5 para 17(2)(a).

¹⁰ 1970 Act s 9(8)(b) as amended by the Title Conditions (Scotland) Act 2003 sch 14 para 4(2)(b) and the Land Registration etc. (Scotland) Act 2012 sch 5 para 17(2)(c)(ii).

¹¹ See 1970 Act s 9(4) & (8)(a), 10(2), 12(2), 13(1), 15(1), 16(1), 17, 18(3), 19(10A), 19A(1), 20(2A), 23(4), 24(1A). The expression “interest in land” is still found in s 19B(1) but this would seem to be an oversight.

¹² 1970 Act s 10(4), 13(2)(b), s 18(1), (2), 19(1) to (4) & (11), 20(2) to (3) & (5), 23(3), 25, 26(1) & (2), s 27(1), s 28(1) to (8), 29(1), 30(2), Sch 2 forms A and B, Sch 3, Sch 4 forms C and D, Sch 6 form A.

¹³ See Gretton and Reid, *Conveyancing* para 12-10 n 44: “It [the term] can be criticised on the ground that in legal theory the term “subjects” refers to the subjects of rights, which is to say persons, in contrast to “objects” which themselves may be divided into rights and things. Land is thus an object rather than a subject.” The term “subjects” is also used in this way in our law of trusts.

Subsection (4) in turn provides:

“The forms of standard security . . . shall, unless specially qualified, import an assignation to the creditor of the title deeds . . . affecting the security subjects . . .”

5.9 It is not clear why the terminology has to change between these subsections. Our provisional view is that so far as possible a single consistent term should be used. “Land or a real right in land” is somewhat cumbersome and “real right” is a technical expression. “Security subjects” is more appealing, but, as we have seen, is imperfect. We wonder whether there would be benefit in adopting the term “encumbered property”, as we did in our draft Moveable Transactions (Scotland) Bill.¹⁴ But consultees may have their own views. We propose and ask:

16. (a) The new legislation should use consistent terminology to refer to the property affected by a standard security.

(b) What term should be used?

Immoveable property over which a standard security may be granted: introduction

5.10 As we have seen, a standard security can currently be granted over land or certain real rights in land. Such real rights must: (a) not be ownership or a real burden; (b) be capable of being held separately; and (c) be held under a title which can be registered in the Land Register.¹⁵ We shall review these criteria as we consider the types of immoveable property over which a standard security might be granted.

Land

5.11 It is uncontroversial that a standard security must be capable of encumbering land (including buildings).¹⁶ Land should also be understood broadly to include immoveable property that can be owned as separate tenements.¹⁷ For example, a standard security may be granted over salmon fishing rights.¹⁸

5.12 Prior to feudal abolition, ownership of land was divided into superiority and *dominium utile* interests and ultimately held of the Crown. Then it was not possible to grant a standard security over the land itself but only over one of these interests.¹⁹ Matters are now much simpler as land is owned outright.

5.13 In principle, a standard security can be granted over a *pro indiviso* share in land,²⁰ but such a possibility will be unattractive in practice as if the security is to be enforced, it will be

¹⁴ See Report on Moveable Transactions paras 19.61-19.71.

¹⁵ 1970 Act s 9(8)(b). The Register of Sasines is now closed to new standard securities. See para 2.43 above.

¹⁶ On whether strictly it is the land or the ownership of that land which is encumbered, see G L Gretton, “Ownership and its Objects” (2007) 71 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 802 at 840-844.

¹⁷ “Tenement” here simply means immoveable property. Confusingly, tenement flats are examples of tenements in this sense. See generally Reid, *Property* paras 207-216.

¹⁸ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-06.

¹⁹ See Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-06.

²⁰ See *McLeod v Cedar Holdings Ltd* 1989 SLT 620 at 623 per Lord Justice-Clerk Ross. See also Reid, *Property* para 28. See also Italian Civil Code art 2825.

difficult to find a buyer. As noted earlier,²¹ a standard security over land will also encumber any moveable property that has become part of that land by accession.

Real burdens

5.14 The 1970 Act expressly provides that a standard security cannot be granted over a real burden, in other words a positive or negative title condition which runs with land. Real burdens are governed by the Title Conditions (Scotland) Act 2003. There are two types. *Praedial real burdens* require a benefited as well as a burdened property. In respect of the benefited property they can be regarded as a pertinent, in other words a right inextricably associated with that property. For example, Ethel, a land owner, may have the right under a real burden to prevent Fiona, a neighbouring land owner, trading from that neighbouring property. A standard security over such a pertinent alone would not make sense as the real burden could not be sold separately from the benefited property (the land owned by Ethel), making enforcement impossible.

5.15 Under the 2003 Act there is also a limited class of real burdens known as *personal real burdens*.²² These are not tied to land but to certain persons. In principle, this would make realising the burden by sale easier, although the rules on who may hold such burdens would pose a significant restriction on this. For example, economic development burdens can only be held by the Scottish Ministers and local authorities.²³ We note too that several personal real burdens are subject to specific prohibitions in respect of standard securities being granted over them, notwithstanding the general ban in section 9(8)(b) of the 1970 Act.²⁴ Our view is that this ban should remain. We propose:

17. A standard security may not be granted over a real burden.

Servitudes

5.16 A servitude is a right of one land owner to enter or to make limited use of another's land. The issues are effectively the same as for praedial real burdens as servitudes are inextricably tied to a benefited property and cannot be sold on their own.²⁵ A standard security granted over the benefited property will include the servitude.²⁶

Proper liferents

5.17 According to Professor Paisley a standard security can be granted over a proper liferent.²⁷ This is a real right in land entitling the holder to possess the land for life. Certainly a proper liferent is created by recording in the Register of Sasines or registration in the Land

²¹ See para 5.2 above. See also Italian Civil Code art 2811.

²² See R Paisley, "Personal Real Burdens" 2005 JR 377.

²³ Title Conditions (Scotland) Act 2003 s 45(1).

²⁴ See the 1970 Act s 9(2B) for personal pre-emption and personal redemption burdens, the 2003 Act s 39(3) for conservation burdens, the 2003 Act s 43(4) for rural housing burdens, the 2003 Act s 45(4)(a) for economic development burdens and the 2003 Act s 46(4)(a) for health care burdens.

²⁵ According to Professor Halliday a standard security can be granted over a servitude although "in practice a servitude right will not be encountered as a subject of security *per se* since it requires to be attached to a dominant tenement". See Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-06. In fact it seems doubtful that such a standard security could be validly granted.

²⁶ D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 1.24 and Cusine and Rennie, *Standard Securities* para 3.03.

²⁷ Paisley, *Land Law* para 11.3.

Register.²⁸ But since such a right cannot be transferred,²⁹ by sale or otherwise it would seem somewhat pointless to create a standard security over it. Since a liferenter can grant a lease it may be that the creditor's remedy on enforcement would be to do the same. Any lease could not survive the liferenter's death. In practice, however, proper liferents are rare and we suggest that the law should not allow these to be the subject of a standard security. We propose:

18. A standard security may not be granted over a proper liferent.

Leases

5.18 A standard security can be granted over a long lease, that is to say a lease which exceeds 20 years in length.³⁰ The reason why such a security cannot be granted over a short lease is that such leases cannot be registered in the Land Register.³¹ That said, the wording of section 9(8)(b) of the 1970 Act which is quoted above is somewhat curious as it refers to rights in respect of which "a title *may* be registered in the Land Register". This in itself suggests that a standard security can be granted over a long lease even although it has not actually been registered. In fact, the lease does have to be registered as otherwise it will not be a real right.³² In practice the standard security will be registered on the title sheet of the long lease in question in the securities section.³³

5.19 Standard securities are typically only granted over long commercial leases. Under section 8 of the Land Tenure Reform (Scotland) Act 1974 there is an effective prohibition on long leases being granted of residential properties. Although this has been relaxed in recent years, particularly in relation to the new private residential tenancy,³⁴ it will remain the case that most residential leases will not be registered in the Land Register. Similarly, leases regulated by the Agricultural Holdings Acts or other agricultural tenancy legislation are typically not long leases and therefore do not have standard securities granted over them.

5.20 A standard security over a lease will only be worthwhile if the lease is assignable and can thus be "sold" on enforcement.³⁵ If the lease is non-assignable then it is incapable of disposal. Another factor which the creditor will want to consider is the terms of the user clause in the lease. The narrower this is the less marketable the lease will be.³⁶ The creditor

²⁸ Land Registration etc. (Scotland) Act 2012 s 51.

²⁹ See Gretton and Steven, *Property, Trusts and Succession* para 22.12 citing *Ker's Trs v Justice* (1867) 6 M 627 at 631 per Lord Curriehill. In some countries a liferent (usufruct) can be transferred and there is sense in allowing a security over it. See eg Italian Civil Code arts 980 and 2814.

³⁰ See Halliday Report para 127; Gretton and Reid, *Conveyancing* para 23-17.

³¹ Registration of Leases (Scotland) Act 1857 s 1. Or formerly the Register of Sasines before a county became operational for the Land Register. A reason for the introduction of the 1857 Act was to facilitate the taking of security over long leases. See G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 117.

³² Thus section 9(8)(b) begins "'real right in land' means any *such* right" (our emphasis).

³³ K G C Reid and G L Gretton, *Land Registration* (2017) para 16.22.

³⁴ Land Tenure Reform (Scotland) Act 1974 s 8(3ZA).

³⁵ Cusine and Rennie, *Standard Securities* para 11.09; Higgins, *The Enforcement of Heritable Securities* para 13.8.

³⁶ Cusine and Rennie, *Standard Securities* para 11.10.

will also want to have power to “step in” to perform the tenant’s obligations if the landlord threatens to irritate (extinguish) the lease for breach of its terms.³⁷

5.21 It has been suggested to us that there may be benefit in permitting standard securities to be granted over short leases as well as long leases. The difficulty with this suggestion is where such a security should be registered. There is no Land Register title into which it can be added, because short leases cannot be registered in that register. The question therefore probably evolves into a wider question of what leases can be registered in the Land Register. This approach was taken effectively in the Review of Agricultural Holdings Legislation Final Report of 2015 which was commissioned by the Scottish Government. In order to assist tenant farmers access finance, the Report recommends:

“Allowing the registration of secure 1991 Act [the Agricultural Holdings (Scotland) Act 1991] tenancies in the Land Register, should be considered further to determine what impact this would have on a tenant’s ability to offer the lease for the purpose of granting a standard security over it.”³⁸

5.22 This recommendation has not as of yet been implemented. We note also that in Part 4 of its Draft Crofting Reform (Scotland) Bill Consultation Paper of 2009, the Scottish Government proposed that the law should be reformed to allow standard securities to be granted over crofting leases.³⁹ Such leases are not registered in the Land Register. But the proposals were not taken forward into the Crofting Reform (Scotland) Act 2010.

5.23 Given that the 2015 Report and the 2009 Consultation Paper are with the Scottish Government for consideration, our view is that policy in that area of agricultural leases should be left for it to take forward. We hold to the more general position that only registered leases may be encumbered by a standard security.

5.24 We propose:

19. (a) A standard security may be granted over a lease which has been recorded in the Register of Sasines or registered in the Land Register as appropriate.

(b) A standard security may not be granted over any other lease.

Standard securities

5.25 In his commentary on the 1970 Act, Professor Halliday notes that it is permissible to grant a standard security over a standard security, adding only:

³⁷ Cusine and Rennie, *Standard Securities* para 11.11; Higgins, *The Enforcement of Heritable Securities* para 13.8. See also Scottish Law Commission, Discussion Paper on Aspects of Leases: Termination (Scot Law Com DP No 165, 2018) paras 7.22-7.23.

³⁸ Review of Agricultural Holdings Legislation Final Report (2015) recommendation 9. The paper is available at https://www.webarchive.org.uk/wayback/archive/20170215032734mp_/http://www.gov.scot/Resource/0046/00468852.pdf.

³⁹ The paper is available at <https://www2.gov.scot/Resource/Doc/272272/0081124.pdf>.

“Where the original standard security is discharged the security for the second standard security ceases to exist but it will be advisable to arrange for it to be formally discharged in order to clear the Register.”⁴⁰

5.26 He therefore does not comment on how such a security is to be enforced. Professor Noble, in contrast, refers to an opinion from counsel “who recommended that the appropriate procedure was to assign the existing security *ex facie* absolutely coupled with a back letter.”⁴¹ He further suggests that the cautious approach is to use both a standard security and an *ex facie* absolute assignation. But, this surely risks the new standard security being extinguished by *confusio*.⁴² Professor Gretton has commented that “the concept of a standard security over a standard security is an odd one. Nevertheless, it can be made to work and indeed piggyback standard securities are sometimes used in modern commercial practice.”⁴³ Given section 9(3) and (4) of the 1970 Act, an assignation in security of a standard security is invalid.⁴⁴

5.27 We understand that an example of where a standard security will be taken over a standard security is where there is mortgage funding provided by Lender A to Borrower Z which is funded by Lender B. In return for a loan, Borrower Z will grant a standard security over its land to Lender A. Lender A will then grant a standard security over that standard security in favour of Lender B. The current battery of remedies in relation to enforcement of a standard security can hardly be regarded as suitable for standard securities over standard securities. A standard security is not marketable in the sense that a house is. And sale of the standard security on its own would be worthless because of the accessoriness principle.⁴⁵ Lender B also needs to be able to sell the claim which Lender A holds against Borrower Z for repayment of the debt. Thus an assignation in security of the debt will be needed too.⁴⁶

5.28 It has been suggested to us that it would be preferable to allow standard securities to be assigned in security.⁴⁷ This would mean that both the underlying debt and standard security would be assigned together avoiding the more complex structure of the piggyback standard security. One drawback to assignation, however, is that as a transfer it can only be done once. In contrast, in theory at least, it would be possible to take multiple standard securities over the same standard security, although without the debt being assigned in security too these would be worthless so this does not seem to be a strong point. A further issue is the extent to which enforcement of such an arrangement should be statutorily regulated. The remedies for enforcement of a standard security are set out exhaustively in legislation. Presumably if there were default where a standard security had been assigned in security the result would be that the assignor’s right to a retrocession of the security would

⁴⁰ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-06.

⁴¹ I W Noble, “Review of *The Conveyancing and Feudal Reform (Scotland) Act 1970*. Second Edition. By John M Halliday. 1977. Edinburgh: W Green & Son” 1977 JR 169 at 172.

⁴² See K G C Reid and G L Gretton, *Conveyancing 2014* (2015) 181. On *confusio* see paras 11.45-11.49 below.

⁴³ See *UK Acorn Finance Ltd v Smith* 2014 Hous LR 50. See also G L Gretton, “Assignations of All-Sums Standard Securities” 1994 SLT (News) 207 at 210. Cf C Anderson, *Property: A Guide to Scots Law* (2016) para 15-40: “it is not clear how [a standard security over a standard security] would work in practice.”

⁴⁴ See paras 3.3-3.11 above.

⁴⁵ See paras 3.21-3.27 above.

⁴⁶ See *UK Acorn Finance Ltd v Smith* 2014 Hous LR 50 discussed in Reid and Gretton, *Conveyancing 2014* 177-182.

⁴⁷ This is at least to some extent what happened in *Sanderson’s Trs v Ambion Scotland Ltd* 1994 SLT 645, as Professor Gretton notes at 1994 SLT (News) 207 at 209-210.

be lost. But the assigned standard security may have a greater value than the secured debt.⁴⁸

5.29 If the current rule, that a standard security can only be used for the purposes of security by granting another standard security over it, is to be maintained the issue of enforcement should also be given careful consideration. The 1970 Act remedies do not seem very appropriate.⁴⁹ It may be preferable to allow the creditor to “step into the shoes of” the original holder of the security, although such a remedy would surely deter postponed standard securities over standard securities.

5.30 We would welcome the views of consultees.

20. (a) Should it continue to be possible to create a standard security over a standard security or would it be preferable to allow a standard security to be assigned in security?

(b) In either case what should be the rules on enforcement?

Other immoveable property

5.31 We think that we have identified and discussed the types of immoveable property over which a standard security may be granted, but in order to ensure complete coverage we ask:

21. Are there other types of immoveable property over which it should be possible to grant a standard security?

⁴⁸ Under the accessoriness principle the excess would surely require to be returned to the assignor.

⁴⁹ We leave the question of enforcement generally to our forthcoming second Discussion Paper.

Chapter 6 Creation

Introduction

6.1 In this chapter we consider how a standard security is constituted. We look at the statutory forms which are currently in use, as well as the registration processes. We address the issue that, for companies and certain other corporate bodies, registration in the Companies Register is also required meaning that in such cases a standard security requires to be registered twice.

Three stages of creation

6.2 As with other rights over property in Scotland, three stages can be identified in relation to the creation of a standard security. The first is the contract between the prospective grantor of the security and the prospective secured creditor. The second is the actual grant of the standard security by means of a constitutive document. The third is the creation of the real right, which in the case of a standard security is by registration in the Land Register.

Security contract

6.3 The security contract will set out the details of the security transaction. It may well be a part of a wider contract which covers both the loan and security arrangements. For commercial lending, a typical security contract will include: (a) the details of the parties and recitals setting out the basis of the transaction; (b) the covenant to pay the relevant debt; (c) the charging clause, in which it is agreed that security is to be granted; (d) representations and undertakings by the grantor of the security; (e) the circumstances in which the security can be enforced; (f) “boilerplate” clauses; (g) definitions; and (h) a provision on governing law and jurisdiction.¹

6.4 Strictly, there is no requirement for the parties to enter into a contract prior to the grant of a standard security, in the same way as property can be transferred without a preceding contract of sale. In fact the approach of the Halliday Report, taken forward in the 1970 Act, is that the standard security document itself, together with the standard conditions which are incorporated by statute, embodies the security contract.² But, in practice nowadays, there will inevitably be a preceding contract such as the offer and acceptance of loan in residential cases or the commercial security contract mentioned above. In terms of the Requirements of Writing (Scotland) Act 1995, it will require to be in writing because it is a contract for the creation of a real right in land.³

¹ See Hardman, *Granting Corporate Security* paras 5-14 to 5-36.

² Halliday Report para 120(4). On the standard conditions, see the next chapter.

³ Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(i).

Constitutive document: introduction

6.5 Standard securities require a constitutive document. In other words they need writing.⁴ In terms of the 1995 Act, they fall into the category of the creation of a real right in land.⁵ The 1970 Act is explicit on the point. Section 9(2) provides:

“It shall be competent to grant and register in the Land Register of Scotland . . . a standard security over any land or real right in land to be expressed in conformity with one of the forms prescribed in Schedule 2 to this Act.”

Forms A and B

6.6 Schedule 2 sets out two alternative forms of a standard security deed: form A and form B. The genesis of these lies in the Halliday Report.⁶ The essential difference is that form A includes the personal obligation or loan element, whereas in form B it is contained in a separate document. Form A states:

“I, AB (*designation*), hereby undertake to pay to CD (*designation*), the sum of £ (or a maximum sum of £) (or all sums due and that may become due by me to the said CD in respect of (*here specify the matter for which the undertaking is granted*))⁷ with interest from (or from the respective times of advance) at per centum per annum (or otherwise as the case may be) (annually, half-yearly, or otherwise as the case may be) on each year commencing on; For which I grant a standard security in favour of the said CD over ALL and WHOLE (*here describe the security subjects as indicated in Note 1 hereto*): The standard conditions specified in Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970, and any lawful variation thereof operative for the time being, shall apply: And I grant warrandice: And I consent to registration for execution.

Testing clause”.

6.7 Professor Halliday, writing in the 1970s, recommends that form A is used in cases where the personal obligation is simple and is unlikely to be subsequently amended, such as where there is a loan of a fixed sum.⁸ He notes that the 1970 Act will require any variations to the personal obligation to be recorded, which may be inconvenient, although it may be possible to avoid this by means of broad drafting.⁹ He states that building societies and assurance companies tend to use form A, but not banks.¹⁰ Nowadays, however, form A has come to be used generally in residential mortgage transactions.¹¹ Lending institutions will have a *pro forma* style based on it.¹²

⁴ This can be electronic. See para 6.40 below.

⁵ 1995 Act s 1(2)(b).

⁶ Halliday Report pp 106-107.

⁷ The text in relation to all sums due and may become due is not in the original version of the form which appears in the Halliday Report at p 106.

⁸ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 7.12.

⁹ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 7.13.

¹⁰ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* paras 7.15-7.18.

¹¹ Cusine and Rennie, *Standard Securities* para 3.19; Gretton and Reid, *Conveyancing* para 23-10; Stewart and Sinclair, *Conveyancing Practice* para 10.3.1.

¹² See eg <https://www.rbs.com/credit-docs/land-in-scotland/rbs-forms.html>; <https://www.skipton.co.uk/~media/skipton-co-uk/pdf/Conveyancers/Scottish-Standard-Security.ashx?la=en-GB>; <https://www.scottishwidows.co.uk/bank/conveyancers/scotland.html>; <https://www.ecology.co.uk/wp-content/uploads/2016/09/standard-security-scot.pdf> and <https://www.nationwide.co.uk/~media/MainSite/documents/about/media-centre-and-specialist-areas/information-for-lawyers/S21-Mortgage-Deed-Scotland.pdf>.

6.8 Form B is simpler:

“I, AB (*designation*) hereby in security of (*here specify the nature of the debt or obligation in respect of which the security is given and the instrument(s) by which it is constituted in such manner as will identify these instruments*) grant a standard security in favour of CD (*designation*) over ALL and WHOLE (*here describe the security subjects as indicated in Note 1 hereto*): The standard conditions specified in Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970, and any lawful variation thereof operative for the time being, shall apply: And I grant warrandice.

Testing clause”.

6.9 According to Professor Halliday, form B is aimed at transactions where the parties want to keep the terms of the personal obligation private or where the terms of that obligation are likely to be varied.¹³ He goes on to state that banks use it because it allows the loan details to be kept confidential, as well as enabling security over moveable property to be granted in respect of the same loan agreement.¹⁴ He notes also that it is used by lenders to businesses where the loan will be part of an ongoing business relationship.¹⁵ We understand that form B is rarely used in practice today, even in commercial property transactions.¹⁶ Instead, an adapted version of form A is used, which contains the undertaking to pay but typically with reference also to unregistered security documentation, setting out further obligations. Professors Cusine and Rennie suggest that form B may be used where an obligation *ad factum praestandum* is being secured.¹⁷

The Schedule 2 Notes

6.10 After setting out the two forms, Schedule 2 continues by providing no fewer than eight notes on these. These deal with the following issues:

- (1) the description of the property over which the standard security is being granted;
- (2) adapting the forms where the grantor has not completed title to the property;
- (3) adapting the forms where the grantor has already granted an *ex facie* absolute disposition of the property without first completing title to the property;
- (4) adapting the forms where the standard conditions are to be varied;
- (5) adapting the forms where there is a prior heritable security over the property;
- (6) where there is a form A standard security for a fluctuating amount, how to insert provisions about ascertaining the amount due at any given time;

¹³ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 7.14.

¹⁴ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 7.17.

¹⁵ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 7.19.

¹⁶ Gretton and Reid, *Conveyancing* para 23-10.

¹⁷ Cusine and Rennie, *Standard Securities* para 3-19. On obligations *ad facta praestanda* see Chapter 4 above.

- (7) adapting the forms where the standard security is for a non-monetary obligation; and
- (8) execution (signing).

6.11 The level of detail is striking, something to which we will return below.

Further provision in relation to the forms

General

6.12 Section 10 makes detailed further provision about the forms. As we noted earlier,¹⁸ like older conveyancing legislation it uses the word “import” to mean that certain meanings are to be taken to be incorporated into the wording.

The personal obligation

6.13 First, there are provisions in relation to the personal obligation element of form A standard securities, in so far as not qualified by the wording of the actual deed. These are based on recommendations made in the Halliday Report.¹⁹

6.14 If the security is for a fixed sum the undertaking by the debtor to pay the creditor set out in form A imports either (a) an acknowledgement of receiving the sum lent or (b) an acknowledgement by the debtor of liability to pay the sum.²⁰ The difference between the two is whether the creditor has actually given the debtor money. If it has then (a) is appropriate. If, however, the debtor has accepted a liability to pay the creditor without money actually having been lent then (b) is appropriate. In either case the debtor is obliged to (re)pay the sum on written demand together with interest at the agreed rate together with all the expenses due to the creditor under the deed or under the 1970 Act. It is noteworthy that an obligation to pay on demand is implied. If the parties wish to agree that the secured loan is not repayable for say five years then express wording will be needed to achieve this.²¹

6.15 If the security is for a fluctuating rather than a fixed amount, the undertaking to make payment is not deemed to import an acknowledgement of receipt of money or of a liability to pay.²² This takes account of the fact that no sum may be due, for example where the security is for an overdraft facility that has not been used. What is imported once again is an obligation to (re)pay on written demand what is due. This will be the amount outstanding at the time of the demand. It is expressly provided that the deed may specify the maximum amount that can be secured, but it does not have to do so. Once again there is also an obligation implied to pay interest and expenses.

¹⁸ See para 2.68 above.

¹⁹ Halliday Report p 107.

²⁰ 1970 Act s 10(1)(a).

²¹ A separate contract of loan will typically be signed before the standard security is signed and therefore arguably the “payable on demand” provisions in the 1970 Act will supersede it.

²² 1970 Act s 10(1)(b).

Warrandice

6.16 Secondly, the warrandice clauses in the forms, unless stated otherwise, are to be taken to import: (1) absolute warrandice in respect of the relevant property; and (2) warrandice from fact and deed in relation to the rents (if any) due in respect of the property.²³ This simply repeats the rules of warrandice applicable to the old bond and disposition in security.²⁴ Absolute warrandice is a guarantee against title defects even where they are not the fault of the grantor.²⁵ In particular the grantor is guaranteeing that the secured creditor will receive a valid standard security. In contrast, fact and deed warrandice is a guarantee against only past or future acts of the grantor which would jeopardise the right granted. Therefore, the grantor must not do anything which would prevent the creditor taking the rents, which of course is only something which the creditor would do if there is default and then enforcement of the security.

6.17 In practice, warrandice obligations in securities are of no value, except in third-party security cases. What the creditor wants is repayment of the secured debt. If this can be obtained, any defect in the debtor's title resulting in the security being invalid is irrelevant. If it cannot be obtained, the debtor is likely to be insolvent and unable to pay damages for breach of warrandice.

Consent to registration for execution

6.18 Thirdly, the clause consenting to registration for execution in form A, unless expressly provided otherwise, is to import consent to registration in the Books of Council and Session, or in the books of the appropriate sheriff court, for execution.²⁶ It may be thought that this is a statement of the general law and is therefore unnecessary. This was Professor Halliday's view.²⁷ The effect of the wording is that the creditor can carry out summary diligence on the debt.²⁸

Assignment of writs

6.19 Fourthly, both forms, unless specially qualified, import an assignment to the creditor of the title deeds, searches and unrecorded conveyances relating to the property.²⁹ This is the equivalent to the assignment of the writs in a disposition,³⁰ which nowadays is also implied.³¹ If the creditor requires to enforce the security by selling the property, the creditor can insist on the debtor handing over the deeds and can assign to the purchaser the right to possess these. This provision reflects Register of Sasines conveyancing, where there are bundles of deeds. The 1970 Act of course pre-dates the introduction of the Land Register,

²³ 1970 Act s 10(2).

²⁴ Titles to Land Consolidation (Scotland) Act 1868 s 119. See Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-20.

²⁵ See generally Reid, *Property* paras 702-714.

²⁶ 1970 Act s 11(3).

²⁷ See Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-17 n 37 where it is described as a "non-definition" because "[t]he legal effect of such a clause is so well-established . . . that there can be no doubt on the matter."

²⁸ See F Davidson, D J Garrity, L J Macgregor, A D J MacPherson and L Richardson, *Commercial Law in Scotland* (5th edn, 2018) para 8.6.1.

²⁹ 1970 Act s 11(4). See Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-21.

³⁰ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-21; Cusine and Rennie, *Standard Securities* para 3.26.

³¹ Land Registration (Scotland) Act 1979 s 16.

where the bundle is replaced by an electronic title sheet which cannot be physically possessed. The right to possession of the title deeds therefore remains only of significance where a property has not yet moved onto the Land Register. But the assignation of the writs also transfers certain personal rights to the grantee in particular those of warrandice and of relief.³²

Following the forms

6.20 As we saw above,³³ section 9(2) of the 1970 Act requires a standard security “to be expressed in conformity with one of the forms prescribed in Schedule 2.” We saw also that the forms are accompanied by notes. This inevitably raises the issue of how much deviation is permissible. Section 53(1) makes provision in relation to this:

“It shall be sufficient compliance with any provisions in this Act which require any deed, notice, certificate or procedure to be in conformity with a Form or Note, or other requirement of this Act, that that deed, notice, certificate or procedure so conforms as closely as may be, and nothing in this Act shall preclude the inclusion of any additional matter which the person granting the deed or giving or serving the notice or giving the certificate or adopting the procedure may consider relevant.”

6.21 The key words are “conforms as closely as may be”. These have been glossed by Lord Glennie in *Liquidator of Letham Grange Development Co Ltd v Foxworth Investments Ltd*³⁴ as meaning “as closely as may be appropriate to the circumstances of the case – some latitude may be allowed”.³⁵ It was in dispute in that case whether a personal bond referred to in the standard security deed had been sufficiently identified in terms of a note in Schedule 2 form B. In somewhat unusual drafting the details of the interest payable were within the deed itself notwithstanding the reference to the personal bond. Lord Glennie held:

“the standard security is, in effect, a hybrid between Form A and Form B, referring to the personal bond to identify the principal sum secured (as per Form B) while setting out the obligations about interest in the standard security itself (Form A). There is no difficulty in a standard security being granted in hybrid form.”³⁶

6.22 This seems to allow a considerable leeway, although in an earlier case the argument that a hybrid had been created was on the facts dismissed.³⁷ Other cases, however, have taken a stricter approach. Thus the requirement in the original version of Note 1 to Schedule 2 that there required to be a particular description of the relevant property and that a postal address would generally not do was enforced to the letter.³⁸ And in one sheriff court decision

³² See Gretton and Reid, *Conveyancing* paras 11-17 to 11-19. On the meaning of warrandice, see paras 6.16-6.17 above. The assignation means that the grantee can enforce warrandice guarantees given by former owners. On relief, see Gretton and Reid, *Conveyancing* para 11-23.

³³ See para 6.5 above.

³⁴ 2011 SLT 1152. For discussion, see K G C Reid and G L Gretton, *Conveyancing 2011* (2012) 134-137.

³⁵ 2011 SLT 1152 at para 99. And see *Royal Bank of Scotland v Marshall*, Glasgow Sheriff Court, 5 June 1996 reported in R Paisley and D Cusine (ed), *Unreported Property Cases from the Sheriff Courts* (2000) 445-449 where Sheriff Gerald Gordon QC said that the level of deviation permissible is an issue of “impression and degree”. This case held that it is not essential to state an initial rate of interest in a form A standard security.

³⁶ 2011 SLT 1152 at para 101.

³⁷ *Spowart v Wylie* 1995 GWD 23-1257.

³⁸ *Bennett v Beneficial Bank plc* 1995 SLT 1105; *Beneficial Bank plc v McConnachie* 1996 SC 119. See D J Cusine, “Descriptions in Standard Securities – Where Now?” (1996) 41 JLSS 209. See para 6.41 below.

an inflexible approach was taken to the notes as to what is required in a document assigning a standard security.³⁹

6.23 We note that now that there is a general provision in relation to latitude as regards forms in Acts of the Scottish Parliament, although of course the 1970 Act is not such an Act:

“Where a form is prescribed in or under an Act of the Scottish Parliament, a form that differs from the prescribed form is not invalid unless the difference materially affects the effect of the form or is misleading.”⁴⁰

6.24 As far as we have been able to discover, this provision has only been discussed in one reported case and this was in the context of residential leasing legislation passed by the UK Parliament.⁴¹ There is no equivalent provision in the Interpretation Act 1978.

Reform of the forms: general

6.25 Professor Gordon describes forms A and B as “very simple”, because of the effect of further provisions made in section 10 and the incorporation of the standard conditions by section 11.⁴² But the overall structure appears more complicated than it needs to be. In particular, it may be questioned whether two separate forms are necessary. Professors Gretton and Reid write somewhat bluntly: “The distinction between form A and form B is pointless, and an example of the 1970 Act’s fussiness about inessentials.”⁴³

6.26 Form A’s origins lie in the styles used for the old bond and disposition in security, where the debt and security arrangements were expressed in the same document.⁴⁴ But in the versions used nowadays by institutional lenders the debt details are set out very broadly. Here, for example, is the current style used by RBS for individuals, companies and LLPs:

“1.1 The Owner undertakes to pay to the Bank or otherwise discharge, in each case on demand, the Obligations. The **Obligations** are all the Owner’s liabilities to the Bank (present, future, actual or contingent and whether incurred alone or together with another or as a partner of a firm (an **Other Person**)) and all obligations under this standard security and include:

1.1.1 **Interest** at the rate charged by the Bank, calculated both before and after demand or decree on a daily basis and compounded according to agreement, or, in the absence of agreement, monthly on the days selected by the Bank,

1.1.2 any expenses the Bank incurs (on a full indemnity basis and with Interest from the date of payment) in taking, perfecting, protecting, enforcing or exercising any power under this standard security.”⁴⁵

³⁹ *OneSavings Bank plc v Burns* 2017 SLT (Sh Ct) 129. But compare *Shear v Clipper Holdings II SARL*, Outer House, 26 May 2017, unreported and *Promontoria (Henrico) Ltd v Portico Holdings* 2018 GWD 6-87. See Chapter 10 below.

⁴⁰ Interpretation and Legislative Reform (Scotland) Act 2010 s 21.

⁴¹ *Beattie v Rogers* 2016 Hous LR 107.

⁴² Gordon, *Scottish Land Law* para 20-124. On the standard conditions, see the next chapter.

⁴³ Gretton and Reid, *Conveyancing* para 23-10 n 38.

⁴⁴ See eg Burns, *Conveyancing Practice* 451-452.

⁴⁵ See <https://www.rbs.com/credit-docs/land-in-scotland/rbs-forms.html>.

6.27 It can be seen there is no specific information on the amount lent, when it is to be repaid and the actual interest rate which applies. This will all be governed by other documentation. The Skipton Building Society's style is another example:

"The Borrower hereby undertakes to pay to the Society the Loan as shown in the Offer Document as defined in the Mortgage Conditions (Scotland) and all other sums due and that may become due on any account or in any manner whatsoever by the Borrower to the Society including any re-advance of the Loan or further advance (additional borrowing) that may be made by the Society to the Borrower or in any other way whether as principal or surety, with interest from the respective times of advance at the interest rate specified in the Offer Document by the Society to the Borrower and the Mortgage Conditions (Scotland) subject to Rules of the Society referred to therein, which Mortgage Conditions (Scotland) and Offer Document are hereby incorporated into this Standard Security."⁴⁶

6.28 Here the particular details of the loan will be in the "Offer Document". Form A is therefore not being used in the way which Professor Halliday envisaged.

Reform of the forms: the personal obligation

6.29 By containing provisions on the personal obligation (ie the secured obligation) the 1970 Act perpetuated the position in heritable security documentation before that date.⁴⁷ Our provisional view is that a simpler approach would be to leave the debt provisions as a matter for the parties. As we have seen, this effectively has become the position already in relation to home loans. If the parties wish to set out the debt provisions in full in the standard security deed they may do so, but equally these may be set out in separate documentation. As under the current law, the extent of the debt owed will be a matter of interpretation of the agreement between the parties.⁴⁸ Such an approach would mean that provisions such as section 10(1) – which sets out the default position that a secured loan is repayable on demand and requires to be overridden by the parties – can be omitted. Similarly, there should be no requirement for a consent to registration for execution clause. That clause relates to the personal obligation and it is a matter for the parties whether it should be included.⁴⁹ It follows in our view that the current form A should not appear in the new legislation.

6.30 We propose:

- 22. (a) The secured obligation should be a matter for the parties to a standard security and no longer be the subject of default provisions.**
- (b) Form A should be abolished.**

⁴⁶ See <https://www.skipton.co.uk/~media/skipton-co-uk/pdf/Conveyancers/Scottish-Standard-Security.ashx?la=en-GB>.

⁴⁷ But it was always the case that the creditor could enforce the personal obligation separately from enforcing the security. See *McWhirter v McCulloch's Trustees* (1887) 14 R 918 at 919 per Lord President Inglis: "This case is too clear for argument."

⁴⁸ See eg *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 and 649; *Hewit v Williamson* 1999 SLT 312.

⁴⁹ We understand from our advisory group that it is common in commercial practice for such clauses to be deleted as part of the negotiations between parties on draft documentation.

Should there be a statutory form?

6.31 As we have seen, the difficulty with there being a statutory form is the extent to which deviation from that form is permitted. In the draft Moveable Transactions (Scotland) Bill we took a different approach in relation to the creation of statutory pledges. Section 46 of that draft Bill provides:

- “(1) A statutory pledge requires a constitutive document.
- (2) The constitutive document must –
 - (a) be executed or authenticated by the provider [of the security],
 - (b) identify the property which is to be the encumbered property, and
 - (c) identify the secured obligation.”⁵⁰

6.32 The approach therefore is to set out the mandatory details that must be included, but not to require the document to be in a particular form.⁵¹ We note that there is no statutory form of a floating charge.⁵² Furthermore, in other countries there is typically no such form in relation to security over immoveable property.⁵³ We think that this approach is preferable to that taken in the 1970 Act because it removes the deviation issue. It must be stressed, however, that the policy concerns in relation to enforcement notices, which we will consider in our second Discussion Paper, are not the same. There is arguably a stronger case for prescribed forms in relation to such notices for debtor protection reasons, which means that an equivalent to section 53(1) may still be required in the new legislation.⁵⁴

6.33 We must also take account here of the move towards digital conveyancing. In terms of the Land Register Rules etc. (Scotland) Regulations 2014,⁵⁵ as amended by the Registers of Scotland (Digital Registration, etc.) Regulations 2018,⁵⁶ the Keeper can require applications for certain kinds of deed, with very limited exceptions, to be in electronic form. The Keeper must give six months’ notice of her decision that only electronic deeds can be used.⁵⁷

6.34 Registers of Scotland already has a computerised system whereby digital discharge deeds to be granted by institutional lenders in relation to standard securities over residential properties are created and then electronically signed. We understand that these digital deeds differ only in relation to the details of the parties and property. By the time that the recommendations made in our Report at the end of this project are enacted there will most

⁵⁰ Report on Moveable Transactions vol 3, p 55.

⁵¹ See also Scottish Law Commission, Discussion Paper on Aspects of Leases: Termination (Scot Law Com DP No 165, 2018) ch 4.

⁵² Although there was one when the floating charge was first introduced in Scotland. See the Companies (Floating Charges) (Scotland) Act 1961 s 2 and First Schedule.

⁵³ For example, the Netherlands and South Africa. In England, the Land Registry has a style form known as a “CH1”, but its use is optional. See <https://www.gov.uk/government/publications/registration-of-legal-charges-and-deeds-of-variation-of-charge/practice-guide-29-registration-of-legal-charges-and-deeds-of-variation-of-charge>.

⁵⁴ On the degree of accuracy more generally required in an enforcement notice, see most recently *Legal and Equitable Nominees Ltd v Scotia Investments Limited Partnership* [2019] SAC (CIV) 23.

⁵⁵ Land Register Rules etc. (Scotland) Regulations 2014 (SSI 2014/150) rule 7.

⁵⁶ Registers of Scotland (Digital Registration, etc.) Regulations 2018 (SSI 2018/72) reg 6.

⁵⁷ Land Register Rules etc. (Scotland) Regulations 2014 rule 7(5).

likely be the same system in place for standard security deeds. It may well also have become mandatory under the 2018 Regulations generally to use a digital deed and the level of flexibility will be dependent therefore on the requirements of the Keeper's computerised system.

6.35 We remain of the provisional view nevertheless that primary legislation should no longer set out a mandatory form of standard security. Instead, as for statutory pledges, only key information should be compulsory. In addition to the information which is to be required for statutory pledges, we consider that the deed should have to use the words "standard security" in the same way now that a deed creating a real burden must use the words "real burden" or an equivalent.⁵⁸ The Keeper would obviously take account of the mandatory details when developing the form of digital deed for use with her computerised system.

6.36 We think that there may in addition be advantage in prescribing a model form which would be non-obligatory, but which would give a statutory style that could be relied on in practice, such as for one-off transactions. Again, the Keeper would no doubt have reference to this in developing her form of digital deed.

6.37 We propose:

23. There should no longer be a statutory form of standard security. Form B, like form A should be abolished. Instead, the constitutive document of a standard security should require to:

- (a) be signed by the debtor;**
- (b) identify the property which is to be the encumbered property;**
- (c) identify the secured obligation; and**
- (d) use the words "standard security".**

6.38 We ask:

24. Should a non-obligatory model form of a standard security document be provided?

Signing: execution and authentication

6.39 As under the current law, the constitutive document of the standard security would require to be granted by or on behalf of the debtor. Today's usual practice is for a hard copy of the document to be signed in ink. This is known more formally as "executing" a traditional document in terms of the Requirements of Writing (Scotland) Act 1995.⁵⁹

⁵⁸ Title Conditions (Scotland) Act 2003 s 4(2)(a) & (3). We did not make an equivalent recommendation for statutory pledges as our advisory group favoured a more flexible approach in relation to transactions involving moveables which commonly have multi-national elements. Moreover, only statutory pledges may be registered in the recommended Register of Statutory Pledges whereas in contrast the standard security is not the only type of transaction that can be registered in the Land Register.

⁵⁹ Requirements of Writing (Scotland) Act 1995 ss 1A and 2.

6.40 Increasingly, however, documents are signed electronically, that is to say “authenticated” under the 1995 Act.⁶⁰ The deed must be an electronic document within the meaning of the 1995 Act and thus be signed electronically.⁶¹ This is currently almost always done using a Registers of Scotland or Law Society of Scotland smart card, but the relevant legislation allows other form of digital signature which meet the relevant technical standard.⁶² If digital deeds generally become mandatory obviously so too will digital signatures.

Identifying the encumbered property

6.41 We saw above that in its original form Note 1 to Schedule 2 of the 1970 Act required the property over which a standard security was being granted to be identified by means of a particular conveyancing description.⁶³ Following case law demonstrating the unsatisfactory nature of this requirement and a recommendation in our Report on Abolition of the Feudal System,⁶⁴ the note was reworded by an amendment made by the Abolition of Feudal Tenure etc. (Scotland) Act 2000:

“The security subjects shall be described sufficiently to identify them; but this note is without prejudice to any additional requirement imposed as respects any register.”⁶⁵

6.42 Thus where the standard security is being granted over property registered in the Land Register it is necessary to specify the title number.⁶⁶ A plan will also have to be used in appropriate cases.⁶⁷ We propose no change to this position. It may be that drafting the new legislation like the draft Moveable Transactions (Scotland) Bill in terms of which the property must be “identified”⁶⁸ is a more succinct way of achieving the same policy as the current wording of “shall be described sufficiently to identify them”. We ask:

25. What comments do consultees have in relation to identification of the encumbered property?

Identifying the secured obligation

6.43 We think that there should be a flexible approach here. The secured obligation may be set out within the constitutive document of the standard security if desired. It is more likely, however, that it will be described in a separate document which is then referred to in the standard security document. We ask:

26. What comments do consultees have in relation to identification of the secured obligation?

⁶⁰ 1995 Act ss 9A and 9B.

⁶¹ Land Register Rules etc. (Scotland) Regulations 2014 rule 7(4).

⁶² Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83) reg 6(1).

⁶³ See para 6.22 above.

⁶⁴ Scottish Law Commission, Report on Abolition of the Feudal System (Scot Law Com No 168, 1999) paras 9.33-9.39.

⁶⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000 sch 10 para 23.

⁶⁶ Land Registration etc. (Scotland) Act 2012 s 26(1)(c). Similarly, in countries which have a cadastral land registration system, the cadastre number will have to be given. See eg Italian Civil Code art 2826. On cadastres, see K G C Reid and G L Gretton, *Land Registration* (2017) para 5.6.

⁶⁷ Eg where the standard security is being granted over only part of the property registered under the title number. See the Land Registration etc. (Scotland) Act 2012 s 26(1)(d).

⁶⁸ See para 6.31 above.

Occupancy rights

6.44 Where the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or the Civil Partnership Act 2004 apply, it will be necessary for the creditor to obtain relevant documentation to prevent occupancy rights being asserted by any non-entitled spouse or partner (in other words a spouse or partner who does not own the home in question).⁶⁹

Standard securities granted by unregistered holders

6.45 It is competent for a party who has not completed title to land to grant a standard security over it.⁷⁰ To have power to do so that party must, in feudal language, be an “uninfeft proprietor”.⁷¹ This terminology was somewhat imprecise as such a “proprietor” did not have ownership because they did not appear on the register. The post-feudal terminology is “unregistered holder”.⁷² Such a person holds the property under an unregistered conveyance. Typically that is a general conveyance, in other words a conveyance that cannot be directly registered in the Land Register because it does not describe the property. Examples are a sequestration, a deed of assumption and conveyance in favour of new trustees and legislation transferring land to a public body. An executor who has confirmed to the estate of the deceased is also an unregistered holder.

6.46 The 1970 Act provides that on a standard security by an unregistered holder being registered “the title of the grantee shall, for the purposes of the rights and obligations between the grantor and the grantee thereof and those deriving right from them, but for no other purpose, in all respects be of the same effect as if the title of the grantor to the land or real right in land had been duly completed”.⁷³ According to Professor Halliday, this means that for other purposes such as completion of title or conveying the land, the title remains uncompleted.⁷⁴ It is no longer necessary for the grantor to deduce title.⁷⁵

6.47 We understand that standard securities granted by unregistered holders are rarely encountered in practice, but it may be that there are circumstances in which it is useful for such grants to be possible. We would welcome the comments of consultees.

27. Should it continue to be possible for unregistered holders to grant standard securities?

Acquisition of the real right: registration

6.48 A standard security becomes real, that is to say enforceable against third parties, by registration in the Land Register.⁷⁶ Formerly, it was possible to record a standard security in

⁶⁹ Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 8; Civil Partnership Act 2004 s 108. See Gretton and Reid, *Conveyancing* para 23-16 and ch 10.

⁷⁰ 1970 Act s 12.

⁷¹ See generally Gretton and Reid, *Conveyancing* ch 25.

⁷² But the word “uninfeft” still appears in the heading of the 1970 Act s 12.

⁷³ 1970 Act s 12(2).

⁷⁴ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6.25. See also Halliday Report Appendix B. Professors Gretton and Reid state that the “precise meaning [of the provision] is complex”. See Gretton and Reid, *Conveyancing* para 25-07 n 25.

⁷⁵ This is because all new standard securities must now be registered in the Land Register. Deduction of title was necessary for recording in the Register of Sasines. See 1970 Act s 12(1A).

⁷⁶ 1970 Act s 11(1).

the Register of Sasines if the land in question had not yet moved to the Land Register, but since 1 April 2016 this is no longer allowed.⁷⁷

6.49 The act of registration satisfies the publicity principle of property law. In the words of Gloag and Irvine: “All rights in security . . . require for their constitution not only an agreement between the parties but some overt act.”⁷⁸ In our Discussion Paper on Moveable Transactions,⁷⁹ we identified four reasons behind the principle: (1) fairness to third parties; (2) economic efficiency, allowing third parties to discover property rights easily; (3) prevention of fraudulent antedating; and (4) legal certainty. The requirement of registration to create security over land is long-established in Scotland as well as comparatively.⁸⁰ It is generally unquestioned.⁸¹ We propose:

28. A standard security should continue to be made real by registration.

Company charges registration

6.50 Part 25 of the Companies Act 2006 requires that most security rights granted by companies are registered in the Companies Register. There are parallel provisions for LLPs (limited liability partnerships) and certain other corporate bodies,⁸² but in the interests of brevity we will refer only to companies.

6.51 The provisions in the 2006 Act require the registration of “charges” in order for these to be effective in the company’s insolvency and generally as against other creditors.⁸³ A “charge” is defined as including:

“a standard security, assignation in security, and other right in security constituted under the law of Scotland, including any heritable security, but not including a pledge.”⁸⁴

6.52 What is meant by “any heritable security” is a mystery, given that since 1970 the standard security has been the only heritable security that can be granted.⁸⁵ Charges must be registered within 21 days of “creation”.⁸⁶ In respect of a standard security, creation is the

⁷⁷ Land Registration etc. (Scotland) Act 2012 s 48(2); Registers of Scotland (Voluntary Registration, Amendment of Fees, etc.) Order 2015 (SSI 2015/265) art 3.

⁷⁸ Gloag and Irvine, *Rights in Security* 8. Mortgage law in other countries generally takes the same approach. See eg F Fiorentini, *Le garanzie immobiliari in Europa* (2009) 526.

⁷⁹ See Scottish Law Commission, Discussion Paper on Moveable Transactions (Scot Law Com DP No 151, 2011) para 11.2.

⁸⁰ See eg O Stöcker and R Stürmer, *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe Volume III* (2nd edn, 2010) 36-37. In some countries such as France a security over land can be created without registration but is ineffective against good faith third parties unless it is registered.

⁸¹ But see *Halifax plc v Gorman’s Tr* 2000 SLT 1409 discussed in G L Gretton, “The Integrity of Property Law and of the Property Registers” 2001 SLT (News) 135 and K G C Reid and G L Gretton, *Conveyancing 2000* (2001) 98-101. This case involved a standard security granted by an undischarged bankrupt that had not been registered being held to be effective in terms of insolvency law. It pre-dates *Burnett’s Tr v Grainger* 2004 SC (HL) 19 which reaffirmed the importance of registration to obtain a right in property and must be regarded as incorrect.

⁸² See the Limited Liability Partnerships Regulations 2001 (Application of Companies Act 2006) Regulations 2009 (SI 2009/1804) as amended by the Limited Liability Partnerships (Application of Companies Act 2006) (Amendment) Regulations (SI 2013/618).

⁸³ Companies Act 2006 s 859H.

⁸⁴ Companies Act 2006 s 859A(7)(b).

⁸⁵ See paras 3.3-3.11 above.

⁸⁶ 2006 Act s 859A(2) & (4).

date of registration in the Land Register.⁸⁷ This means that a standard security granted by a company must be registered *twice*: once in the Land Register and once in the Companies Register. It has been held that where there is a failure to register a standard security in the latter register this cannot be cured by re-registering the security in the Register of Sasines in an attempt to reset the clock.⁸⁸

6.53 We considered companies charges registration in some detail in our Report on Moveable Transactions.⁸⁹ Dual registration is undoubtedly cumbersome. There exists, however, the power of the Secretary of State under section 893 of the Companies Act 2006 to dispense with the need for registration in the Companies Register where appropriate information-sharing arrangements have been entered into between that register and a specialist register such as the Land Register. But that power has not been used. In our view it should be. We appreciate that this would require financial resources.⁹⁰ Nevertheless, there would be clear benefits to business in making such a change as it would simplify the registration process. We propose:

- 29. The power under section 893 of the Companies Act 2006 should be used so that standard securities granted by companies do not require to be registered twice.**

Creation of servitudes in standard security deeds

6.54 Some practitioners with whom we have spoken would like it to be confirmed that a servitude can be created in a standard security deed. This is best explained by an example. Gordon owns a rural estate. He grants a standard security over *part* of it to a bank. If that part were ever to be sold separately on enforcement, it would then need a right of access over the remaining part.⁹¹ Equally, it is possible that the remaining part would need the right to run drainage pipes through the encumbered part.

6.55 It is possible to create servitudes here by using a separate deed and these would not come into effect until ownership of the two properties is separated.⁹² In other words, the servitude would have a *suspended* existence at that time. But to try and do this in the standard security deed might risk it being held to be invalid because it deviates too much from the statutory forms.⁹³ There are also drafting challenges in that the servitude cannot

⁸⁷ 2006 Act s 859E(1). This refers also to recording in the Register of Sasines, but this is no longer possible. See para 6.48 above.

⁸⁸ *Bank of Scotland v T A Neilson & Co* 1990 SC 284. The same logic would presumably apply to re-registering in the Land Register.

⁸⁹ Report on Moveable Transactions chap 36.

⁹⁰ See Report on Moveable Transactions para 36.18. For that reason and others, after considerable thought, we recommended in that Report that the new statutory pledge over moveable property should initially be registered in both the new Register of Statutory Pledges and the Companies Register, but that the possibility of an order under section 893 should be kept under review. Inevitably, this drew criticism on the basis that double registration is cumbersome. See J Hardman, "Three Steps Forward, Two Steps Back: A View from Corporate Security Practice of the Moveable Transactions (Scotland) Bill" (2018) 22 Edin LR 266. But the alternative possibility of registering in the Companies Register only is a non-starter for standard securities because the Land Register is an asset-based register (unlike the Register of Statutory Pledges which would be a debtor-based register) and it is essential that standard securities appear in it.

⁹¹ Of course a servitude could in principle be created by implication here but that would depend on how necessary it was.

⁹² Title Conditions (Scotland) Act 2003 s 75(2).

⁹³ See paras 6.20-6.24 above.

simply be granted or reserved in favour of the creditor as it is not an owner of the affected property at the time the deed is granted. In contrast, we are informed that it was common to create servitudes in the old *ex facie* absolute disposition, where the land was actually transferred to the creditor.

6.56 Our proposal above,⁹⁴ that there should be no mandatory form of standard security deed, would remove the worry about deviation from the statutory style. We can also see an advantage that where there is no default and the security is discharged the servitude (which has never come into existence) is deleted from the Land Register. On the other hand, the ability to create servitudes and standard securities in the same deed might create challenges for the Keeper's digitalisation programme which aims to have standardised deeds so far as possible. It may also be that creating a servitude in a standard security deed should attract an additional registration fee (as separate deeds would incur two fees).⁹⁵ We ask:

30. What comments do consultees have on whether it should be permissible to create a servitude in a standard security deed?

⁹⁴ See paras 6.31-6.37 above.

⁹⁵ The approach of the current fees order is that fees are typically attributed to deeds. See The Registers of Scotland (Fees) Order 2014 (SSI 2014/188).

Chapter 7 The standard conditions

Introduction

7.1 In this chapter we examine the standard conditions. These are the conditions which are incorporated by force of law into every standard security. Most of these are variable by the parties, but some, in particular those relating to enforcement, are not. We propose significant changes here.

Background: the Halliday Report

7.2 As discussed in Chapter 2, the genesis of the standard conditions lies in the Halliday Report.¹ It proposed:

“The rights and obligations of the parties [to the new Statutory Security] would in general be similar to those which are normally provided conventionally in transactions at present effected by the *ex facie* absolute disposition and agreement.

The form of the [new] Statutory Security should be prescribed and there should be implied by statute, without the need of express provision, the terms of the security contract as to (a) the personal obligation, (b) the conveyance in security, (c) the management, maintenance and insurance of the property, observance of conditions of title and requirements of public authorities and payment of all proper charges, (d) calling up by the lender, (e) the rights of the lender upon default by the borrower, including power to sell publicly or privately and to foreclose, and (f) the borrower’s right of redemption.

... The parties should be free to omit, vary, or add to most of the provisions implied by statute, such omissions, variations or additions being specified in a schedule annexed to the security deed.”²

7.3 Prior to the 1970 Act being brought into force the heritable security most commonly used was the *ex facie* absolute disposition.³ This was because it was the most flexible in terms of the debts that could be secured. Since, however, it was not a true heritable security but a transfer, it was not subject to the statutory rules on heritable securities, in particular in relation to enforcement.⁴ This meant that detailed provision needed to be made on enforcement and other matters in the unrecorded agreement which accompanied the disposition.⁵ The approach of the Halliday Report was that the conditions typically found in agreements qualifying *ex facie* absolute dispositions could be set out in statute.⁶ This would mean that security documentation could be much shorter. It notes that on examination of

¹ See paras 2.26-2.27 above.

² Halliday Report para 120.

³ See paras 2.14-2.16 above.

⁴ See the definition of “heritable security” in section 3 of the Titles to Land Consolidation (Scotland) Act 1868.

⁵ See para 2.22 above.

⁶ See also Cusine and Rennie, *Standard Securities* para 4.01.

the styles of agreement used by local authorities, banks, building societies and other lenders much commonality can be found.⁷

7.4 Part II of Appendix F of the Report provides 28 suggested standard conditions. These were tested against three typical styles then in use and it was found that approximately 70% of the clauses were covered by the proposed standard conditions.⁸

7.5 The Report states that the conditions can be grouped under four heads: (i) management of security property (conditions 1 to 14); (ii) calling-up (condition 15); (iii) default (conditions 16 to 27); and (iv) redemption (condition 28).

7.6 Head (i) comprises principally the following obligations of the debtor:

- (1) to maintain the property;
- (2) to allow the creditor to enter the property to inspect it;
- (3) to repair the property;
- (4) to complete unfinished buildings and thereafter not to alter these without the creditor's consent;
- (5) to observe and perform title conditions;
- (6) to fulfil requirements of public authorities;
- (7) to pay feu duty etc;
- (8) to inform the lender of any planning notifications;
- (9) to insure the property;
- (10) to pay the insurance premiums;
- (11) to intimate to the creditor any insurance claims; and
- (12) not to lease the property without the creditor's consent.

7.7 Finally, the lender is given power (13) to require any sums received in an insurance claim to be used to repair the relevant damage or to be applied towards the secured debt; and (14) to make good any default by the debtor to perform obligations under the standard conditions and to recover the cost of doing so from the debtor.

7.8 Head (ii) comprises only condition (15), which deals with calling-up notices. These would give the debtor two months' notice to repay the debt. This condition is modelled on the provisions for calling-up notices in bonds and dispositions in security, namely sections 33

⁷ Halliday Report para 121.

⁸ Halliday Report Appendix F Part II para 10.

and 34 of the Conveyancing (Scotland) Act 1924. But it is not readily apparent why provision on such a notice should be formulated as a standard condition.

7.9 Head (iii) deals with the creditor's rights on default. What is striking is that these rights amount to a self-contained code, dealing with all aspects of enforcement, including the three routes towards it now familiar from the 1970 Act (the calling-up notice, the notice of default and application to the sheriff), how a sale is to be conducted, the effect of a disposition following that sale, the distribution of the sale proceeds and foreclosure. In relation to foreclosure (the process for when the property cannot be sold because no reasonable offer has been made to purchase it), application would require to be made to the sheriff for authorisation.

7.10 Head (iv) concerns the debtor's right to redeem the security, which would be exercisable by giving two months' notice to the creditor of the intention to repay the full amount due, including interest.

7.11 The Report notes that all of the conditions could be excluded, varied or added to except the condition relating to foreclosure, where it would "not be permissible to contract out of the necessity of court procedure . . . since it would be inequitable to permit a Lender to acquire a proprietorial title without judicial process."⁹ A court order was required for foreclosure in relation to the bond and disposition in security,¹⁰ but not for the *ex facie* absolute disposition. But with the exception of foreclosure, the conditions would be freely variable. In relation to enforcement, this is striking as it seems to give little regard to debtor protection.

The 1970 Act: section 11

7.12 The concept of standard conditions as recommended in the Halliday Report was taken forward into the 1970 Act, but with some noticeable changes. Section 11(2) provides:

"Subject to the provisions of this Part of this Act, the conditions set out in Schedule 3 to this Act, either as so set out or as with such variations as have been agreed by the parties in the exercise of the powers conferred by the said Part (which conditions are hereinafter in this Act referred to as the 'standard conditions') shall regulate every standard security."

7.13 Professor Kenneth Reid has described the standard conditions as a type of "real condition", that is to say a condition which is attached to property and which runs with that property when it is transferred.¹¹ Thus the standard conditions will be binding on the grantor of the standard security and any successor owner of the encumbered property and enforceable by the grantee of the security and any assignee to whom it has been assigned.

7.14 As can be seen, section 11(2) refers to the possibility of "variations". The term "variation" is subsequently defined to include having additional conditions and excluding

⁹ Halliday Report Appendix F Part II para 8 (on p 113).

¹⁰ Heritable Securities (Scotland) Act 1894 s 8.

¹¹ See K G C Reid, "Real Conditions in Standard Securities" 1983 SLT (News) 169 and 189; K G C Reid, "Defining Real Conditions" 1989 JR 69 at 79; and Reid, *Property* para 351. For a comparative account, see S Demeyere, *Real Obligations at the Edge Between Contract and Property*, Unpublished PhD Thesis, KU Leuven and Université de Lille (2019).

conditions.¹² Section 11(3) sets out the conditions which cannot be varied: “standard condition 11 (procedure on redemption) and the provisions of Schedule 3 to this Act relating to the powers of sale and foreclosure and to the exercise of these powers.”¹³ A purported variation in breach of this provision is declared to be void and unenforceable.¹⁴ The 1970 Act can be seen to deviate from the Halliday Report because that Report recommended that only the condition relating to foreclosure, in respect of the requirement to obtain a court order, should be invariable.

7.15 A variation can be made either (i) within the body of the standard security deed and thus appear on the face of the Land Register; or (ii) set out in a separate unregistered document, which is typically referred to in the standard security deed.¹⁵ In *Trade Development Bank v Warriner and Mason (Scotland) Ltd*,¹⁶ Lord President Emslie expressed the opinion that variations which do not appear in the standard security deed and thus on the grantor’s title do not have real effect and therefore do not affect third parties.¹⁷ This view appears unjustified by the 1970 Act and would seem to be incorrect.¹⁸ Such variations will bind the successors of the grantor and grantee of the standard security.

The 1970 Act: Schedule 3

General

7.16 Schedule 3 duly lists the standard conditions. In contrast to the 28 standard conditions suggested in the Halliday Report, there are only 12. There are two reasons for the smaller number. First, some of the conditions suggested in the Report are brought together within the same condition in Schedule 3. Secondly, some of the suggested conditions on enforcement are relocated into sections in the 1970 Act.

7.17 In his commentary on the 1970 Act,¹⁹ Professor Halliday groups the 12 standard conditions into four heads, but these are not the same as those in his Report. They are as follows: (i) maintenance, management and insurance of the security subjects by the debtor (conditions 1 to 6); (ii) rights and remedies of the creditor on failure or default by the debtor (conditions 7 to 10); (iii) redemption (condition 11); and (iv) expenses (conditions 7(3) and 12).

Conditions 1 to 6

7.18 These conditions deal essentially with the preservation of the value of the encumbered property.²⁰ Condition 1 draws heavily on the first three suggested conditions in the Halliday Report and comprises duties of the debtor to (a) maintain the property in good

¹² 1970 Act s 11(4)(a).

¹³ This provision was amended in relation to redemption by the Redemption of Standard Securities (Scotland) Act 1971. See paras 11.18-11.21 below.

¹⁴ 1970 Act s 11(4)(b).

¹⁵ 1970 Act Sch 2 Note 4. See Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* paras 8-10 to 8-13. As discussed at para 7.29 below, in the case of institutional lenders the deed of variation is typically registered in the Books of Council and Session.

¹⁶ 1980 SC 74.

¹⁷ 1980 SC 74 at 92-93.

¹⁸ Reid, *Real Conditions in Standard Securities* at 171-173; Cusine and Rennie, *Standard Securities* para 4-61.

¹⁹ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 8-01.

²⁰ See Paisley, *Land Law* para 11.6; Higgins, *The Enforcement of Heritable Securities* para 1.6.

and sufficient repair to the reasonable satisfaction of the creditor; (b) allow the creditor to enter the property to inspect it on seven days' notice; and (c) make all necessary repairs notified by the creditor in writing. While these matters may be of interest to lenders at the time that the 1970 Act was passed, Professors Cusine and Rennie note that "[t]he trend, however, has been very much to ignore questions of the maintenance of the property, especially if the amount of the loan is not high in relation to the actual value of the property."²¹ They add that they are unaware of lenders making routine checks on properties as to their state of repair. This is our understanding too.

7.19 Condition 2 is based on the fourth suggested condition and deals with completing unfinished buildings, as well as forbidding demolition and alteration without the creditor's consent. Nowadays, new housing is typically constructed by volume builders rather than on an individual basis. In respect of unfinished buildings, therefore, this condition is more relevant to larger development sites and corporate debtors. But individuals often add extensions to houses.

7.20 Condition 3 draws on the fifth, sixth and seventh suggested conditions. It makes provision in relation to observing conditions affecting the property (an example would be real burdens), paying sums due in relation to the property and complying with statutory requirements (an example would be planning law). In relation to types of sums payable, the condition lists several that have been abolished, such as teinds, stipends, standard charges and rates.²²

7.21 Condition 4 implements the eighth suggested condition. It deals with planning notices and orders affecting the property, such as a proposal to develop neighbouring land which may have an adverse impact on the value of the property. The debtor is obliged to inform the creditor within 14 days of receipt of the notice, to take as soon as reasonably practicable all reasonable or necessary steps to comply with the notice or order and, if the creditor so requires, to object to the notice or order.

7.22 Condition 5 draws on the ninth, tenth and eleventh suggested conditions. It sets out the debtor's obligation to insure the property (or to allow the creditor to insure the property) to the extent of market value against the risk of fire and any other risks that the creditor may reasonably require. There are further obligations in relation to this, including depositing the insurance policy with the creditor and paying the premiums that are due.

7.23 Condition 6 implements the twelfth suggested condition and prohibits the debtor from letting the property without the creditor's consent. We deal with the issue of the inter-relationship between standard securities and leases in the next chapter.

Conditions 7 to 10

7.24 Condition 7 draws on the fourteenth suggested condition and empowers the creditor to perform any obligation under the standard conditions which the debtor has failed to perform. In this regard the creditor can enter the property on seven days' written notice.

²¹ Cusine and Rennie, *Standard Securities* para 4.04.

²² The first three were abolished by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 56 and the fourth, in respect of residential property, by the Abolition of Domestic Rates etc. (Scotland) Act 1987.

Expenses and charges (including interest thereon) arising out of the creditor acting become secured by the security.

7.25 Conditions 8 (calling-up), 9 (default) and 10 (rights of creditor on default) respectively draw on the fifteenth, sixteenth and seventeenth suggested conditions. These will be considered in detail in our forthcoming second Discussion Paper. But when compared with the Halliday Report what is most striking is that the other suggested conditions are missing. This is because, rather than appearing as standard conditions in Schedule 3, they appear in the sections of the 1970 Act. The notice of default procedure, which features in the twentieth and twenty-first conditions, is implemented by sections 21 and 22, with further provision in section 23.²³ The procedure under which application can be made to the sheriff for authority to enforce (suggested condition 22) is implemented by section 24.²⁴ The rules on how the creditor is to dispose the property following its sale (suggested condition 25) are implemented by section 26, those on application of the proceeds (suggested condition 26) by section 27 and those on foreclosure (suggested condition 27) by section 28.

7.26 Moreover, calling-up is not only governed by condition 8. Detailed provision is made in sections 19 and 20.²⁵ Furthermore, the part of the seventeenth suggested condition in the Halliday Report in relation to the obligations of the creditor as to how the property is to be sold (by private agreement or auction) is taken into section 25.

Condition 11

7.27 This deals with redemption, which was the subject of suggested condition 28. But redemption is also regulated by section 18. We look at redemption in detail in Chapter 11 below.

Condition 12

7.28 The final condition is not directly foreshadowed in the suggested conditions in the Halliday Report. It imposes liability on the debtor to the creditor (first) for the whole cost of preparation of deeds in relation to the standard security and (second) for the expenses reasonably incurred in relation to enforcement. The difference between “whole” and “reasonably incurred” may be noted.

The standard conditions in practice

7.29 As noted above,²⁶ the aim of the Halliday Report was to produce a set of conditions generally acceptable to lenders with a view to reducing the documentation needed in relation to a heritable security. In the words of Professor Paisley, however, if “the aim of the statutory standard conditions was to save paper it has signally failed.”²⁷ Lenders almost universally deviate to some extent from the conditions in Schedule 3, typically adding their own terms.²⁸ Financial institutions which lend in relation to residential property have “mortgage conditions” which are registered in the Books of Council and Session and then

²³ And following the 2010 Act, in relation to residential property, also by s 23A.

²⁴ And following the 2010 Act, in relation to residential property, also by ss 24A to 24E.

²⁵ And following the 2010 Act, in relation to residential property, also by ss 19A and 19B.

²⁶ See para 7.3 above.

²⁷ Paisley, *Land Law* para 11.5.

²⁸ Higgins, *The Enforcement of Heritable Securities* para 1.6.

incorporated into their *pro forma* standard security deeds.²⁹ Thus the practice here is to vary the standard conditions by means of a separate document, rather than within the deed itself.³⁰ Similarly, in the commercial property sector, there are significant departures from what is set out in Schedule 3.

7.30 Professors Cusine and Rennie identify no less than thirty-eight variations to the standard conditions, which they say are commonly encountered.³¹ Examples include (i) requiring the debtor to advise the creditor of notices received under any legislation and not just under the Planning Acts (compare standard condition 4); (ii) requiring insurance for reinstatement value rather than market value (compare standard condition 5); and (iii) forbidding the debtor granting servitudes without the lender's consent.

7.31 In his commentary on the 1970 Act, Professor Halliday gives characteristically sensible advice on drafting variations to the standard conditions. This includes (i) avoiding minor changes in wording; (ii) building on what is in Schedule 3 so that the reader only has to read one document, rather than having to hold the variation document in one hand and Schedule 3 in the other; and (iii) keeping the variation separate from the conditions of the loan.³² In a study published in 2008, Dr Steven and Mr Massaro show how this advice is in practice often ignored.³³ They go on to highlight other difficulties, including out-of-date variations and wording using English law terminology.

Case law

7.32 So far as we are aware, the only standard conditions which have been the subject of case law are those on leasing,³⁴ enforcement and expenses.³⁵ There appears to be an absence of decisions on the scope of the power to vary the standard conditions under section 11. Thus, for example, there has been no judicial ruling on Professor Halliday's suggestion that the non-variable conditions on enforcement can be varied in a way which is more favourable to the debtor, because the purpose of the prohibition on variation is to protect the debtor.³⁶

Discussion

7.33 While the recommendation of the Halliday Report to introduce the standard conditions was understandable in terms of the prevailing practices in relation to the *ex facie* absolute disposition in 1966, half a century on this aspect of the 1970 Act is clearly unsatisfactory. First, as already noted,³⁷ it has not resulted in briefer security documentation.

²⁹ Gretton and Reid, *Conveyancing* para 23-13. For example in the current RBS style, the variations were registered in the Books of Council and Session on 4 July 2011. See <https://www.rbs.com/credit-docs/land-in-scotland/rbs-forms.html>.

³⁰ See para 7.15 above.

³¹ Cusine and Rennie, *Standard Securities* paras 4.17-4.56. And in Appendix 3 of their book there is a table correct at the time of publication as to which lenders make which variations.

³² Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 8-14.

³³ A J M Steven and D A Massaro, "Standard conditions and variations to the standard conditions" 2008 SLT (News) 271.

³⁴ Standard condition 6. We look at this in the next chapter.

³⁵ Standard conditions 9, 10 and 12.

³⁶ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 8-07. This issue may never come to court for the reason given by Professors Cusine and Rennie in their *Standard Securities* para 4-02 that they are unaware of creditors taking such a step.

³⁷ See para 7.29 above.

The lengthy agreements qualifying *ex facie* absolute dispositions which were not recorded in the Register of Sasines³⁸ have been replaced by lengthy variation documentation which is not registered in the Land Register. In fact, the position is comparatively worse, because the pre-1970 Act agreements could be read as stand-alone documents. In contrast, today's variation documentation has to be read hand-in-hand with Schedule 3, which is not straightforward.

7.34 Secondly, there is also unnecessary complexity in relation to enforcement and redemption. The Halliday Report recommended that the regulation of these matters should be dealt with entirely by the standard conditions. The approach taken by the 1970 Act is to distribute the rules in these areas between the sections of the legislation and Schedule 3. Moreover, while the Report recommended that only the foreclosure standard condition should be invariable in relation to requiring court authorisation, the 1970 Act takes a broader approach as outlined above.³⁹ In the words of Professors Gretton and Reid:

“Although the standard conditions were intended as a ready-made contract, the 1970 Act fails to keep consistently to this idea. Thus some parts of the standard conditions are in fact mandatory requirements: the parties cannot vary them. Indeed, the relationship between the body of the Act and the standard conditions is a difficult one.”⁴⁰

7.35 Thirdly, as we have seen, some of the standard conditions have obsolete content (such as condition 3 in relation to teinds etc.) or are universally considered not to reflect what creditors nowadays want (such as condition 5 requiring insurance only for market value).

Reform

7.36 Our provisional view is that the law here requires major overhaul. We consider that rules regulating the enforcement of a standard security should not appear in the standard conditions. As described above,⁴¹ the 1970 Act moved from the position in the Halliday Report that all the enforcement rules should be set out in the standard conditions to a position where only some were to be so located and further that there would be restrictions on varying these. We think that this journey now should be completed by moving all the enforcement rules into substantive provisions in the new legislation.⁴² This would considerably simplify matters. It would be the first step out of Professors Gretton and Reid's “veritable maze”.⁴³

7.37 We believe that the regulation of the creditor's entitlement to expenses in relation to enforcement, presently covered in standard condition 12, should be similarly relocated.⁴⁴

³⁸ Although they may have been registered in the Books of Council and Session in terms of a consent to registration for preservation and execution clause.

³⁹ See para 7.14 above.

⁴⁰ Gretton and Reid, *Conveyancing* para 23-13.

⁴¹ See paras 7.9 and 7.25-7.26 above.

⁴² This suggestion was previously made by Steven and Massaro, “Standard conditions and variations to the standard conditions” at 276.

⁴³ See para 1.8 above.

⁴⁴ This matter will be examined in our forthcoming second Discussion Paper.

7.38 Further, we think that redemption should also be dealt with entirely by substantive statutory provision. As we have seen,⁴⁵ at the moment it is partly governed by such a provision (section 18 of the 1970 Act) and partly by standard condition 11, but is subject to a bar on the procedure being varied (section 11(3) of the 1970 Act).⁴⁶

7.39 We propose:

31. Rules on enforcement (including the recovery of expenses by the creditor) and redemption in relation to a standard security should not be dealt with in standard conditions but in the substantive provisions of the new legislation.

7.40 If this proposal is accepted by consultees, then what remains are standard conditions:

- 1 to 6, which deal with the preservation of the value of the encumbered property;
- 7, which empowers the creditor to perform any obligation imposed by the standard conditions on the debtor and to recover the costs from the debtor of so doing; and
- 12, in so far as it deals with the creditor's entitlement to recover expenses not relating to enforcement from the debtor.

7.41 Standard condition 6 regulates the inter-relationship between standard securities and leases subsequently granted by the debtor. We deal with this issue in the next chapter.

7.42 As regards the other conditions, we think that there are various reform possibilities.⁴⁷ The first would be to produce a modern default set of conditions which would apply in so far as not varied by the parties. All the conditions would be freely variable. Having stripped away the conditions in relation to enforcement and redemption, there would be no reason to restrict the parties making their own choices. As under the current law, a variation could be effected by a deed which is not registered in the Land Register.

7.43 To achieve greater flexibility, the conditions might be set out in secondary rather than primary legislation, allowing easier updating. A parallel would be the Companies (Model Articles) Regulations 2008.⁴⁸ These provide model articles of association for UK companies. The approach of having a default set of conditions has the support of members of our advisory group. Their reasons are twofold. First, it is helpful if the law provides a safety net where no express conditions are made. This is particularly true in one-off transactions, for example where there is a loan from one family member to another. Adapting a style used by an institutional lender would not be easy. Secondly, a default set of conditions avoids the need to argue over each condition that is to be included in a security transaction. Default conditions provided by statute will generally be accepted as reasonable to both parties because their interests will have been considered when these were passed by Parliament.

⁴⁵ See para 7.27 above.

⁴⁶ On redemption, see paras 11.15-11.39 below.

⁴⁷ See also Steven and Massaro, "Standard conditions and variations to the standard conditions" at 276.

⁴⁸ SI 2008/3229.

7.44 The second possibility would be to abolish the conditions, but to have some limited general rules within the substantive provisions of the new legislation. For example, the debtor could be required to manage the encumbered property in a way which protects its value.⁴⁹ This is probably already the law. Professor Reid writes:

“It is a general principle of security law that the debtor, while remaining free to carry out ordinary acts of administration on the security subjects, must not act in a way which prejudices the security.”⁵⁰

7.45 Despite that statement, it is a principle which has limited exposition⁵¹ and one Inner House judge has said *obiter* that it does not apply to standard securities.⁵² On this basis, express provision would be desirable.

7.46 We consider that there should also be a default rule in relation to insuring the property. The debtor could be required to insure for reinstatement value and the creditor given power to insure too. In practice, the parties will typically decide who will actually obtain the insurance. It is common for the debtor to agree to either insure the property in the joint names of the debtor and the creditor or to note the interest of the creditor on the policy of insurance. Examples can be found elsewhere in Scots law of statutory duties to insure.⁵³ This is effectively the approach of standard condition 5 (other than it refers to market value) and there are other precedents for this both in Scotland⁵⁴ and elsewhere. An alternative approach, which applies in relation to the old bond and disposition in security and is the position in English law⁵⁵ is that the creditor is given statutory power to insure the property.

7.47 The parties would of course be free to supplement these rules with more detailed provisions. The approach of having no standard conditions as such reflects the position in other jurisdictions, such as England and Wales.

7.48 To avoid uncertainty in the event of no express provision being made, we think that there should be a default rule that the debtor should be liable for the creditor’s reasonable expenses in relation to the security (but we postpone consideration of the debtor’s liability in relation to enforcement expenses until our second Discussion Paper.) This would be a

⁴⁹ Compare the German Civil Code §§ 1133-1135, the Italian Civil Code art 2813 and the Estonian Law of Property Act 1993 §§ 333 to 336. Under the Dutch Civil Code art 3:267 an express clause is required in the security deed to enable the creditor, with court permission, to take over management of the property where the debtor is failing to fulfil his obligations under that deed.

⁵⁰ Reid, “Real Conditions in Standard Securities” at 191. See also Gordon, *Scottish Land Law* para 20-12 (discussing the bond and disposition in security) and Cusine and Rennie, *Standard Securities* para 4.57.

⁵¹ For example, Gloag and Irvine, *Rights in Security* 130 states: “There is not much authority on the position and rights of the grantor of a bond and disposition in relation to the subjects.” In the subsequent case of *Reid v McGill* 1912 2 SLT 246 at 250 (see para 8.6 below), Lord Cullen declared that a lease granted by the debtor was ineffective against the creditor because it “unfairly trenches” on the security.

⁵² See *Trade Development Bank v Warriner Mason (Scotland) Ltd* 1980 SC 74 at 107 per Lord Kissen: “The Act of 1970 . . . has changed the law and prejudice to a creditor’s security is irrelevant.” See para 8.16 below. This view seems open to question.

⁵³ Notably the Tenements (Scotland) Act 2004 s 18 in relation to flats.

⁵⁴ Section 25(1)(a) of the Conveyancing (Scotland) Act 1924 gave the creditor in a bond and disposition the power to insure.

⁵⁵ Sections 101(1)(ii) and 108 of the Law of Property Act 1925 allow mortgage creditors to insure, but due to the limitations of these provisions, further duties are normally imposed expressly. See E F Cousins, I Clarke and S Hornett (eds), *Cousins on the Law of Mortgages* (4th edn, 2017) paras 31-01 to 31-02.

change from the current wording of standard condition 12 which refers to “whole expenses”.⁵⁶

7.49 We ask consultees for their views on the following alternative proposals:

32. Statute should provide for a freely variable default set of standard conditions in relation to preservation of the value of the encumbered property and expenses (other than in relation to enforcement). If consultees agree:

(a) should these conditions be set out in primary or secondary legislation?

(b) what default conditions should be included?

33. The standard conditions should be abolished, but statute should set out:

(a) a broad rule requiring the debtor to preserve the value of the encumbered property;

(b) a default rule that the debtor should be liable for the creditor’s reasonable expenses (with enforcement expenses being dealt with separately in terms of the rules on enforcement); and

(c) a default rule allowing the creditor either to (i) require the debtor to insure the property for reinstatement value or to (ii) insure the property directly.

Should there be any additional rules?

⁵⁶ See para 7.28 above.

Chapter 8 Interaction with leases and other real rights

Introduction

8.1 In Chapter 4 we considered the types of lease over which a standard security can be granted. Our focus in this chapter is different. We look here at the inter-relationship of standard securities with leases. In particular, we consider what the law should be where a debtor who has already granted a standard security grants a lease over the encumbered property without the consent of the creditor. This is a matter which is currently governed by standard condition 6. We examine also the interaction of the standard security legislation with the legislation on private sector residential tenancies. Finally, we consider the interaction of standard securities with other real rights.

Where a lease pre-dates a heritable security

8.2 In Scots law a lease of land is a right which can be made real, that is to say a right which can be made effective not only against the person who granted it, but also against third parties.¹ For a lease to become real requires either that the tenant has taken possession, in the case of a short lease (twenty years or under),² or registration in the case of a long lease (longer than twenty years).³ In contrast, a right of occupation which falls short of the requirements of a lease is known as a *licence* and will not bind third parties.⁴

8.3 The interaction of a lease that has become a real right⁵ with a subsequent standard security is straightforward. The tenant is unaffected, because the tenant's right pre-dates the security: *prior tempore potior jure* (prior by time, stronger by right).⁶ For example, Aberchirder Assets Ltd grants a 25-year lease of a shop to Brian. The lease is registered in the Land Register. Aberchirder Assets subsequently grants a standard security over the shop to the Banff Bank, which is also registered in the Land Register. This is to secure a loan. The company subsequently defaults on the loan and the bank proceeds to sell the shop. But Brian's lease continues. The only change is that he will eventually have a new landlord.⁷ The law in other countries takes the same approach.⁸

¹ Reid, *Property* para 5(5). Other countries do not necessarily take this approach.

² Leases Act 1449. This is the second oldest piece of Scottish legislation still in force.

³ Registration of Leases (Scotland) Act 1857 s 20B.

⁴ On the distinction between leases and licences, see *St Andrews Forest Lodges Ltd v Grieve* [2017] SC DUN 25, 2017 GWD 14-224, discussed in K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 155-162.

⁵ Of course a lease does not always become real. See further P Webster, "The Continued Existence of the Contract of Lease" in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 119.

⁶ J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) 132; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 103-104; Gretton and Steven, *Property, Trusts and Succession* para 20.15; A McAllister, *Scottish Law of Leases* (4th edn, 2013) para 2.30.

⁷ If the creditor enters into possession for a period prior to the sale, it becomes the landlord under the 1970 Act s 20(5). See Higgins, *The Enforcement of Heritable Securities* para 13.9.

⁸ For England and Wales, see eg *Moss v Gallimore* (1779) 1 Doug KB 279 at 282 per Lord Mansfield: "the lease protect[s] the possession of such a tenant [and] he cannot be turned out by the mortgagee." See further W Clark et al, *Fisher and Lightwood's Law of Mortgage* (14th edn, 2014) para 29.16. For Germany, see the German Civil

Where a heritable security pre-dates a lease: introduction

8.4 On a simple application of the maxim *prior tempore potior jure* it might be thought that the creditor in the security should be unaffected by a lease of the property subsequently granted by the debtor. In fact, the position is more complicated. There is also the specific issue of the interaction of the law on standard securities with the law on residential tenancies.

Pre-1970 Act

8.5 The position prior to the 1970 Act broadly was that the debtor could grant a lease of the property which would bind the creditor, if this was done as an act of ordinary administration and did not have an adverse effect on the security.⁹ The *prior tempore potior jure* principle was therefore qualified to this extent. It must be remembered that the presence of a tenant and the resulting rental income stream could be an attractive proposition, particularly where the security was over a sizeable estate which might include properties normally rented out.

8.6 There are several cases on the issue.¹⁰ In *Mitchell v Little*¹¹ the debtor had granted a 38-year lease of land for a low rent to his daughter. On the basis that this was prejudicial to the security, the creditor was held entitled to have the lease set aside. *Abbott v Mitchell*¹² concerned the grant of a 10-year lease of a “spirit shop”.¹³ This was held to be valid. In Lord Ardmillan’s words: “it was granted fairly, for a reasonable rent, and as an act of ordinary administration.”¹⁴ *Reid v McGill*¹⁵ involved the grant of a mining lease, which the court held for several reasons, including its length of 50 years and low rent, was not binding on the creditor. Lord Cullen said: “In my opinion the lease . . . does not answer to the description of fair ordinary administration, but is one which unfairly trenches on the bondholder’s security.”¹⁶

8.7 The case of *Ritchie v Scott*¹⁷ involved a 10-year lease of a grocery shop. In 1886 the shop had been conveyed by means of an *ex facie* absolute disposition to a lender. Ten years later the debtor granted a trust deed for his creditors. He subsequently granted the lease. It was held that the debtor’s implied right to carry out ordinary acts of administration ended when he granted the trust deed and that the lease could be reduced by the lender. In *Edinburgh Entertainments Ltd v Stevenson*¹⁸ the grant of a 25-year lease of a shop was held

Code § 566. For India, see *Harsh Govardhan Sondagar v International Assets Reconstruction Company Ltd* (2014) 6 SCC 1 at para 16 per Patnaik J. For the Netherlands, see the Dutch Civil Code art 3:264. For South Africa, see *Timm v Kay* 1954 (4) SA 585 (TPD) at 587 per de Wet J.

⁹ Rankine, *The Law of Leases in Scotland* 48-50; Paton and Cameron, *The Law of Landlord and Tenant in Scotland* 51; Halliday, *Conveyancing Law and Practice* para 48-06.

¹⁰ In this account we do not enter into specialities arising from the type of security in question, such as the issue of debtors in the case of an *ex facie* absolute disposition being able to grant a lease on the basis of their “radical right”. On this subject, see G L Gretton, “Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency” 1986 JR 51 and 192.

¹¹ (1820) Hume 661.

¹² (1870) 8 M 791.

¹³ Presumably a shop dealing in alcohol as opposed to ghosts.

¹⁴ (1870) 8 M 791 at 795.

¹⁵ 1912 2 SLT 246.

¹⁶ 1912 2 SLT 246 at 250.

¹⁷ (1899) 1 F 728.

¹⁸ 1926 SC 363.

to be a reasonable act of management by the debtor and could not be set aside by the secured creditor.

The 1970 Act: standard condition 6

8.8 The twelfth standard condition suggested in the Halliday Report was an obligation on the “Borrower”: “Not to let the property or any part thereof except with the prior consent of the Lender.”¹⁹ There is no policy discussion, but clearly this was a typical clause used at the time in relation to the agreement associated with an *ex facie* absolute disposition.²⁰

8.9 The obligation not to lease without creditor consent was duly adopted in the 1970 Act as standard condition 6:

“Restriction on letting

6. It shall be an obligation on the debtor not to let, or agree to let, the security subjects, or any part thereof, without the prior consent in writing of the creditor, and ‘to let’ in this condition includes to sub-let.”

8.10 In his commentary on the 1970 Act in relation to this provision, Professor Halliday merely makes reference to one of his styles in relation to “wider restrictions on use and occupation of the property and upon creation of subsequent securities or transfer of the property under burden of the security.”²¹ But the Notes on Clauses mention that “[c]reditors normally insist on this type of provision on the grounds that, once rented, property deteriorates more quickly than otherwise.” That said, where a standard security is being taken over commercial properties which will be the subject of occupational leases a variation of this condition will require to be agreed.²² The same of course would be true for a residential or agricultural let.

8.11 It can be seen that standard condition 6 puts creditors in a stronger position than the prior law. Their consent is required to the grant of *any* lease. Ten years after the passing of the 1970 Act the meaning of this provision came to be tested.

The Trade Development Bank cases

8.12 *Trade Development Bank v Warriner and Mason (Scotland) Ltd*²³ is one of the most controversial modern Scottish property law cases. Lyon Group Ltd were tenants under a 120-year lease of part of an industrial estate in Bellshill. The lease was recorded in the Register of Sasines. A standard security was granted in favour of the pursuers. It was a form B security²⁴ and the personal obligation was contained in a separate unrecorded minute of agreement. Lyon subsequently granted a sub-lease to the defenders without the consent of the pursuers. When the standard security came to be enforced, the pursuers sought reduction of the sub-lease.

¹⁹ Halliday Report Appendix F Part II para 5. On the standard conditions, see Chapter 7 above.

²⁰ Halliday Report Appendix F Part II para 4.

²¹ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 8-25.

²² Stewart and Sinclair, *Conveyancing Practice* para 10.4.1.

²³ 1980 SC 74. For discussion from the perspective of standard securities rather than general property law, see Cusine and Rennie, *Standard Securities* paras 4.58-4.64 and Higgins, *The Enforcement of Heritable Securities* para 13.9.

²⁴ See paras 6.8-6.9 above.

8.13 In the Outer House, the defenders argued that, notwithstanding the terms of standard condition 6, Lyon could grant the sub-lease as long as it did not prejudice the security. They referred to some of the case law discussed above.²⁵ Lord McDonald held that the 1970 Act had changed the law here and that where standard condition 6 is breached the creditor can successfully challenge the lease “whether it has trespassed on his security or not.”²⁶ Even although there had been an unrecorded agreement in relation to the standard security here, the recording of the standard security put the defenders on notice of the security’s existence and the terms of standard condition 6. They were not entitled to assume that the condition had been varied by the unrecorded agreement. A further argument that the pursuers were barred from objecting to the sub-lease because of certain knowledge that they had was also rejected.

8.14 The Inner House upheld the decision unanimously,²⁷ but only Lord Kissen agreed with Lord McDonald’s reasoning that the recording of the standard security put the defenders on notice of standard condition 6. Lord President Emslie and Lord Cameron held that because of the unrecorded agreement the defenders did not have notice that standard condition 6 applied. Only conditions which were clear from the face of the register affected third parties.²⁸ But the recording of the standard security gave rise to a duty of enquiry. By not searching the register and approaching the pursuers, the defenders had failed in that duty and were therefore in bad faith. The sub-lease could be set aside.

8.15 *Trade Development Bank v David W Haig (Bellshill) Ltd*²⁹ involved another sub-lease of the same lease involved in *Warriner and Mason*. Once again, the bank was held entitled to have it reduced because the recording of the standard security publicised its existence and the defenders were thus put under a duty of enquiry.

8.16 In an article published in 1983,³⁰ Professor Reid criticises the conclusion reached in *Warriner and Mason* on two grounds.³¹ The first is that conditions which do not appear on the register cannot have real effect. He gives the examples of leases³² and servitudes, which can become real without registration. Secondly, he argues that although standard conditions are real, they are only real in the sense that they “run” with the standard security and thus bind only successors of the debtor (as owners of the encumbered property) and successors of the creditor (as assignees of the security). He develops this argument in his later work.³³ On this view the lessee is unaffected by the breach of standard condition 6, although there may be a remedy against that party in terms of the case law mentioned above.³⁴ Lord Kissen, however, specifically rejected the latter point in the Inner House in *Warriner and Mason*, following the approach of Lord McDonald.³⁵

²⁵ See paras 8.5-8.7 above.

²⁶ 1980 SC 74 at 81.

²⁷ In his diaries, Lord Hope, who was Senior Counsel for the defenders and reclaimers, describes the reclaiming motion as “very interesting but exhausting”. See Lord Hope of Craighead, *Senior Counsel 1978-1986: Lord Hope’s Diaries* (2017) 77.

²⁸ 1980 SC 74 at 90 per Lord President Emslie.

²⁹ 1983 SLT 107 and 510.

³⁰ K G C Reid, “Real Conditions in Standard Securities” 1983 SLT (News) 169 and 189.

³¹ See also Cusine and Rennie, *Standard Securities* para 4.61.

³² Nowadays only short leases (20 years or less) can become real without registration.

³³ See K G C Reid, “Defining Real Conditions” 1989 JR 69. And note also Reid, *Property* para 351.

³⁴ See paras 8.5-8.7 above.

³⁵ 1980 SC 74 at 107.

8.17 In other later work, however, Professor Reid changes his mind on the correctness of the decision in *Warriner and Mason*. Under reference to the doctrine which has now become known as the “offside goals rule”,³⁶ he argues that the bank was entitled to have the sub-lease reduced because the sub-tenants were in bad faith in relation to the prohibition on letting.³⁷ In analysing the doctrine, Professor Reid refers also to the third *Trade Development Bank* case: *Trade Development Bank v Crittall Windows Ltd*,³⁸ which involved the same lease in Bellshill. This time Lyon, rather than sub-letting, contracted to assign the lease in respect of part of the subjects. But before the assignation was carried out they granted a standard security to the bank. The bank was aware of the pre-existing contract and thus was regarded as being in bad faith. The assignees were held entitled to have the standard security reduced. While its existence did not prevent the assignation, the fact that it burdened the lease meant that the assignees would suffer loss by being removed if it were enforced.

8.18 For Professor Reid, one of the key aspects of the offside goals rule is the breach of an antecedent obligation, such as a warrandice obligation to give a good and unencumbered title, or standard condition 6.³⁹ Before the *Trade Development Bank* cases the doctrine was most clearly recognised in “double sale” cases, where Fred, having agreed to sell his property to Gillian, sells it instead to Ian, who knows about the prior agreement with Gillian. In general also before *Warriner and Mason*, the party relying on the offside goals rule had to have a personal right to a real right in property (typically a right under missives).⁴⁰ By way of contrast, in *Warriner and Mason* the bank already had a real right.

8.19 The last thirty years have seen further case law on the offside goals rule,⁴¹ as well as a significant amount of academic analysis as to the scope and conceptual basis of the doctrine.⁴² In our Report on Land Registration we mooted the possibility of the abolition of the offside goals rule.⁴³ We said that it was viewed as a bad rule, because it complicated land transactions and its criteria were uncertain. We noted that it was unpopular with many conveyancers and that two members of the land registration advisory group – Professors Reid and Rennie - favoured its abolition. The discussion in the Report was in the context of our recommendations on advance notices, which were implemented by the Land

³⁶ The metaphor comes from a statement of Lord Justice-Clerk Thomson in *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 501. It is inaccurate. See *Law Basics: 100 Cases That Every Scots Law Student Needs to Know* (2001) 79-81 (S Wortley).

³⁷ Reid, *Property* paras 695-700.

³⁸ 1983 SLT 510.

³⁹ Reid, *Property* paras 696-698.

⁴⁰ See especially *Wallace v Simmers* 1960 SC 255. For discussion see D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 32.55.

⁴¹ In particular *Davidson v Zani* 1992 SCLR 1001; *Optical Express (Gyle) Ltd v Marks and Spencer plc* 2000 SLT 644; *Alex Brewster and Sons Ltd v Caughey* 2002 GWD 15-506; *Advice Centre for Mortgages Ltd v McNicoll* 2006 SLT 591; and *Gibson v Royal Bank of Scotland* 2009 SLT 444.

⁴² See especially *Professor McDonald's Conveyancing Manual* paras 32.52-32.62; S Wortley, “Double Sales and the Offside Trap: Some Thoughts on the Rule Penalising Private Knowledge of a Prior Right” 2000 JR 291; R G Anderson and J MacLeod, “Offside Goals and Interfering with Play” 2009 SLT (News) 93; R Rennie, “Marching towards equity – blindfolded” 2009 SLT (News) 187; D L Carey Miller, “A Centenary Offering: the Double Sale Dilemma – Time to be Laid to Rest” in M Kidd and S Hctor (eds), *Stella Juris: Celebrating 100 years of Teaching Law in Pietermaritzburg* (2010) 96; J MacLeod, “The Offside Goals Rule and Fraud on Creditors” in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 115; and N J M Tait, “The Offside Goals Rule: A Discussion of Basis and Scope” in D Bain, R R M Paisley, A R C Simpson and N J M Tait (eds), *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (2018) 153.

⁴³ Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) paras 14.61-14.66.

Registration etc. (Scotland) Act 2012. These render the offside goals rule less important. But unlike that rule, they offer only a limited period of protection to the person relying on the notice – 35 days. Ultimately we concluded that the suggestion which we received as to abolition of the rule had come too late in the day, meaning that we had not formally consulted on the subject. We made no recommendation, but said:

“If the law of heritable security is reviewed, and if that review includes the topic of advance notices, considered as a form of heritable security, it might be that one outcome might be a recommendation for the offside goals rule to be abrogated in relation to heritable property. But this is to speculate.”⁴⁴

8.20 In Chapter 4 above we proposed that this Commission should undertake a separate project in relation to whether there should be a new form of notice which could be registered to protect option agreements and the like.⁴⁵ It may be that abolition of the offside goals rule should be considered in that project. Our provisional view, however, is that statute should make clear what should happen where a lease is granted over property which is subject to a standard security. In order to inform our consideration of this, we look at some comparative law.

Comparative law

England and Wales

8.21 Prior to statutory reforms made in 1881, the position generally was that a lease granted over land subject to a mortgage, without the consent of the mortgagee, was ineffective against the mortgagee. This was perhaps unsurprising as a mortgage involved the transfer of the interest in land of the mortgagor to the mortgagee.⁴⁶ In the words of Lord Mansfield, which will strike a familiar chord with those in jurisdictions such as Scotland, whose property law is based on Roman law: “whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title”.⁴⁷

8.22 The Conveyancing Act 1881 gave the mortgagor in possession of land, following any mortgage granted after 31 December 1881, statutory permission to grant certain leases.⁴⁸ These will bind the mortgagee. This provision is repeated in the Law of Property Act 1925.⁴⁹ The 1925 Act also reformed the nature of a legal mortgage, requiring it either to be constituted as a lease or a charge (security right) rather than as a transfer.⁵⁰

8.23 The permissible leases are:

“(i) agricultural or occupation leases for any term not exceeding twenty-one years, or, in the case of a mortgage made after the commencement of this Act, fifty years; and

⁴⁴ Report on Land Registration para 14.65.

⁴⁵ See paras 4.81-4.86 above.

⁴⁶ See *Fisher and Lightwood's Law of Mortgage* para 1.7.

⁴⁷ *Keech v Hall* (1778) 1 Doug KB 21 at 23.

⁴⁸ Conveyancing Act 1881 s 18.

⁴⁹ Law of Property Act 1925 s 99.

⁵⁰ 1925 Act ss 85 and 86. In terms of s 85(1)(a), where land is purportedly conveyed by mortgage the first (or only) mortgage is to operate as a lease of 3000 years. To Scottish eyes, this is a very strange provision.

(ii) building leases for any term not exceeding ninety-nine years, or, in the case of a mortgage made after the commencement of this Act, nine hundred and ninety-nine years.”⁵¹

8.24 There is a duty to get the best rent that can reasonably be obtained having regard to the circumstances of the case but without taking any fine (premium),⁵² as well as certain other requirements.⁵³

8.25 Importantly, the parties can agree to exclude the statutory power to lease.⁵⁴ In practice this is normally done.⁵⁵ Present mortgages will make it a breach of the terms of the mortgage to grant a lease without permission of the mortgagee.⁵⁶ The result is that the mortgagee is not bound by the lease, unless consent is given or the doctrine of estoppel (personal bar) applies.⁵⁷

France and Belgium

8.26 Under French and Belgian law, a distinction can be drawn between *emphyteusis* and *lease*. An emphyteusis is the right to use land for a period of between 18 years in France (or 27 years in Belgium) and 99 years.⁵⁸ It is a real right, which can be assigned. In contrast, a lease may be for a shorter period. It only has effect between the parties but, subject to contrary agreement, can be assigned.⁵⁹

8.27 The rule is that a heritable security will prevail over a subsequent right of emphyteusis on the principle of *prior tempore potior jure* and therefore the creditor can sell the property free of this right. In contrast, the security will usually be subject to a subsequent lease, unless (a) the lease is for longer than nine years and has not been registered in the Land Register (in which case the lease is not binding after nine years); or (b) the lease contains a provision requiring the tenant to remove if the property is sold.⁶⁰ Such a clause would allow the lease to be terminated where the security is enforced. Therefore for leases it is the principle *huur gaat voor koop* (literally hire goes before sale, in other words sale⁶¹ is subject to a lease) which governs the position. We understand that the reasons for this include that lease is a less extensive right than emphyteusis and that someone taking a right of emphyteusis in practice will check the Land Register, but prospective tenants will typically not do so.

Germany

8.28 In German law the holder of a heritable security is unable to evict the tenant under a lease which has subsequently been granted. The secured creditor is, however, entitled to

⁵¹ 1925 Act s 99(3). And see s 99(9) and (10) in respect of building leases.

⁵² 1925 Act s 99(6).

⁵³ See *Fisher and Lightwood's Law of Mortgage* para 29.21; E F Cousins, I Clarke and S Hornett, *Cousins on The Law of Mortgages* (4th edn, 2017) paras 31-05 to 31-07.

⁵⁴ 1925 Act s 99(13). They can also extend it: 1925 Act s 99(14).

⁵⁵ *Fisher and Lightwood's Law of Mortgage* para 29.22; *Cousins on The Law of Mortgages* para 31-08.

⁵⁶ See *Bishop v Blake* [2006] EWHC 831 (Ch).

⁵⁷ *Fisher and Lightwood's Law of Mortgage* para 29.27.

⁵⁸ French Rural Code art L 451-1; Belgian Right of Emphyteusis Act of 10 January 1824 art 2.

⁵⁹ See S van Erp and B Akkermans (eds), *Cases, Materials and Text on Property Law* (2012) 273-274.

⁶⁰ French Civil Code art 1743 (also applicable in Belgium).

⁶¹ Including sale on enforcement of a mortgage.

receive the rent, although the tenant will be discharged if the tenant continues to pay this to the landlord. If, however, the security is enforced payment must be made to the creditor.⁶²

India

8.29 The English Act of 1881 mentioned above⁶³ is broadly replicated in the Transfer of Property Act 1882.⁶⁴ A mortgagor in possession may grant a lease “such as would be made in the ordinary course of management of the property concerned”.⁶⁵ But the mortgage deed may exclude or extend the power.⁶⁶ More recent legislation limits the right to grant a lease where enforcement proceedings have commenced.⁶⁷

Louisiana

8.30 The rule in Louisiana is that a mortgage will have priority over a subsequent lease and the tenant can therefore be removed on the mortgage being enforced.⁶⁸ The tenant will be left as an unsecured creditor of the debtor with a damages claim for being removed.⁶⁹

The Netherlands

8.31 In Dutch law the starting point is the principle *huur gaat voor koop* (sale is subject to a lease).⁷⁰ Thus where there is (1) the grant of a heritable security, followed by (2) the grant of a lease, followed by (3) sale of the property following enforcement of the security, the buyer takes the property subject to the lease. But article 3:264 of the Dutch Civil Code provides that the deed creating the security may limit the debtor’s power to grant a lease without the creditor’s permission. We understand that Dutch security deeds normally contain such clauses. The effect is that on enforcement of the security the creditor can have the tenant removed, although we are told that in practice it is often left to the buyer at the sale auction to do this. Thus the right to remove the tenant is only on enforcement but not before. The rationale is that the tenancy only affects the creditor if it is enforcing the security.⁷¹

New Zealand

8.32 The Land Transfer Act 2017 provides in New Zealand that a lease instrument cannot be registered without the consent of a mortgagee.⁷² Registration is needed to make the lease effective against third parties.⁷³ The previous law was to similar effect.⁷⁴

⁶² German Civil Code § 1124.

⁶³ See para 8.22 above.

⁶⁴ Transfer of Property Act 1882 s 65A.

⁶⁵ 1882 Act s 65A(2)(a). There are further rules in the remainder of subsection (2), including one on building leases in subsection (2)(e).

⁶⁶ 1882 Act s 65A(3).

⁶⁷ Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 s 13(13). See *Harsh Govardhan Sondagar v International Assets Reconstruction Company Ltd* (2014) 6 SCC 1.

⁶⁸ Louisiana Civil Code art 3307(2).

⁶⁹ Louisiana Civil Code art 3307(3).

⁷⁰ See para 8.27 above.

⁷¹ A tenant who is damaging the property and thus devaluing the security can be dealt with separately by means of a clause under art 3:267 which allows the creditor to apply to the court to take possession of the property if it is being damaged.

⁷² Land Transfer Act 2017 s 91(5). See T Gibbons, *A Practical Guide to the Land Transfer Act* (2018) 99.

⁷³ 2017 Act s 24.

⁷⁴ Section 119 of the Land Transfer Act 1952 provided: “No lease of mortgaged or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto.” Failure to obtain consent

South Africa

8.33 In South Africa it is permissible for the mortgagor to grant a lease without the mortgagee's consent, unless the mortgage bond forbids this.⁷⁵ But such a lease will be vulnerable in the event of the mortgage being enforced. When the land is being sold, it must normally be first auctioned subject to the rights of the tenant. If, however, the highest bid is not large enough to satisfy the debt owed to the mortgagee, it must then be sold free of the lease.⁷⁶ The requirement to try first to sell subject to the lease would seem not to apply where it is obvious that doing this will not recover the debt.⁷⁷ It has been said that the law here is trying to achieve a balance between two fundamental principles: *huur gaat voor koop* and *prior tempore potior jure*. Thus: "the lessee's right is preserved if the mortgagee's prior right is not thereby prejudiced, but yields to the mortgagee's prior right if there is such prejudice".⁷⁸

Discussion

8.34 As we have seen, the current Scottish law here consists of standard condition 6 interacting with the conceptually opaque offside goals rule. We think that it would be desirable to replace this with clear statutory rules.

8.35 Our provisional view is that the default position should be that where (1) the debtor grants a standard security and then (2) subsequently leases the property⁷⁹ without the creditor's permission, the creditor should be entitled to enforce the security without being bound by the lease. In other words, the tenant can be required to remove. Below we discuss the special situation of residential tenancies.⁸⁰

8.36 Where there is a pre-existing standard security it will be visible from the Register of Sasines or Land Register. The legal advisers of prospective commercial and agricultural tenants can find it by instructing a search. This is effectively the result of the *Warriner and Mason* case. As a default position, however, as in Dutch law, the creditor would not be able to remove the tenant prior to enforcement, although this would be subject to any rules giving the creditor a right to take action in the case of the property being damaged, as discussed in Chapter 7.⁸¹ Our thinking here is that it is principally on enforcement that the presence of a tenant may adversely affect the creditor.

8.37 We propose:

- 34. Where property which is encumbered by a standard security has a lease granted over it without the creditor's consent, the secured creditor should be entitled to remove the tenant if the security is enforced.**

resulted in the mortgagee being able to remove the tenant on enforcement. See N Campbell, *Campbell on Mortgages* (2014) para 15.075.

⁷⁵ See P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) 365. See also the Deeds Registries Act 47 of 1937 s 77(2).

⁷⁶ See eg *ABSA Bank Ltd v Sweet* 1993 (1) SA 318 (C). See generally Brits, *Real Security Law* 60 and K M Kritzinger, "Forced sale of let property subject to a prior mortgage" (1996) 113 SALJ 209.

⁷⁷ Brits, *Real Security Law* 61.

⁷⁸ Kritzinger, "Forced sale of let property subject to a prior mortgage" at 211.

⁷⁹ Or where the encumbered property is a long lease, sub-leases it.

⁸⁰ See paras 8.45-8.57 below.

⁸¹ See paras 7.44-7.49 above.

8.38 There may also be a case for allowing a creditor to make express provision in the security documentation that any lease granted by the debtor can be brought to an end even without enforcement of the security.⁸² The most obvious scenario is where the tenant is damaging or neglecting the property, which was the reason for standard condition 6.⁸³ But here, as already noted, the creditor would already have a remedy under our aforementioned proposals in Chapter 7.⁸⁴ It may be, however, that the creditor would want to reduce a lease where it is for a low rent as the failure of the debtor to lease for the open market rent will reduce the debtor's income and make it more likely that the secured debt is unpaid.

8.39 We incline to the view that such a prohibition would not need to appear in the registered standard security deed. As in *Warriner and Mason*, the fact that the standard security can be seen by inspecting the Land Register would seem sufficient to put a prospective tenant on notice that there may be a prohibition, but we would welcome the views of consultees.

8.40 We ask:

- 35. Should the secured creditor be entitled to remove a tenant under a lease granted after a standard security prior to enforcement if express provision is made in the security documentation prohibiting the grant of a lease? Should that provision require to be on the face of the Land Register?**

Other juridical acts in relation to leases

8.41 While less likely than the unauthorised grant of a lease, it is possible to think of other juridical acts concerning leases which may adversely affect the security. For example, the encumbered property may be the subject of a valuable lease with an unexpired term of 20 years of which the creditor approves. The debtor agrees without the creditor's permission that the tenant can renounce the lease. Should the creditor be entitled to set aside the renunciation?

8.42 This is a difficult subject. As well as being a property right,⁸⁵ a lease is a contract and the creditor is not a party to that contract. It is questionable whether the secured creditor should be able effectively to dictate its terms. Where a lease itself is the encumbered property, the creditor can find its security extinguished because there is a conventional irritancy clause enabling the landlord to terminate the lease for breach of contract.⁸⁶ This is a much more adverse effect than where the encumbered property is the land itself and there is a transaction in relation to the lease.

8.43 If an express prohibition, for example, on an existing lease being renounced, is made in the security documentation clearly there would be a contractual claim if this is breached.

⁸² In England and Wales, the case of *Iron Trades Employers Insurance Association Ltd v Union Land and House Investors Ltd* [1937] Ch 313 suggests that the creditor can step in before enforcement where there is a prohibition on leasing.

⁸³ See para 8.10 above.

⁸⁴ See paras 7.36-7.49 above.

⁸⁵ Provided that it has been made real. See para 8.2 above.

⁸⁶ For discussion, see Scottish Law Commission, Discussion Paper on Aspects of Leases: Termination (Scot Law Com No 165, 2018) paras 7.22-7.23.

We are uncertain whether the creditor should have any greater rights than this, but we would welcome the views of consultees.

8.44 We ask:

- 36. What comments do consultees have on the rights of the secured creditor where the debtor carries out a juridical act in relation to an existing lease without the secured creditor's consent?**

Private residential tenancies

Assured and short assured tenancies

8.45 Private sector leases of houses and flats are the subject of special statutory regulation. Until recently, such leases were governed by the Housing (Scotland) Act 1988, which makes provision for “assured tenancies”.⁸⁷ After the end of the contractual period of the lease, if the tenant stays on the tenancy becomes “assured” and there are limited statutory grounds of removal. Normally, however, tenancies were established as “short assured tenancies”.⁸⁸ These have a minimum period of six months, but no security of tenure beyond the contractual period. Where there is a short assured tenancy which has not reached the end of that period (or where there is an assured tenancy), ground 2 of the mandatory grounds of removal relates to mortgage default. It provides:

“The house is subject to a heritable security granted before the creation of the tenancy and—

(a) as a result of a default by the debtor the creditor is entitled to sell the house and requires it for the purpose of disposing of it with vacant possession in exercise of that entitlement; and

(b) either notice was given in writing to the tenant not later than the date of commencement of the tenancy that possession might be recovered on this Ground or the First-tier Tribunal is satisfied that it is reasonable to dispense with the requirement of notice.”⁸⁹

8.46 In *Tamroui v Clydesdale Bank plc*⁹⁰ the pursuer took a short assured tenancy of a flat in Dundee. But, unknown to her, the landlord had previously granted a standard security over the flat to the bank and the tenancy was granted without its permission. The landlord defaulted on the secured loan and the bank obtained decree to allow it to eject him. The bank then instructed sheriff officers to eject the pursuer. She successfully obtained interim interdict to prevent this. Her argument was that because she had a short assured tenancy the bank required to proceed separately in terms of ground 2 of the 1988 Act. Merely proceeding under the statutory provisions on standard securities was insufficient. Sheriff Richard Davidson agreed, noting that the 1988 Act provisions post-dated the 1970 Act and

⁸⁷ See generally A McAllister, *Scottish Law of Leases* (4th edn, 2013) ch 17.

⁸⁸ The tenant required to be given written notice at the outset that the lease was to be a short assured tenancy: Housing (Scotland) Act 1988 s 32.

⁸⁹ Housing (Scotland) Act 1988 Sch 5 rule 2.

⁹⁰ 1997 SLT (Sh Ct) 20. Reported as *Tamouri v Clydesdale Bank plc* 1996 SCLR 732.

therefore must have taken account of it.⁹¹ It would be a matter for the court in the separate proceedings to decide whether it was reasonable to dispense with the requirement that the tenant must be notified before the lease commenced that possession could be recovered because of mortgage default. A similar result was reached in *Cameron v Abbey National plc*.⁹²

8.47 The conclusion reached in these decisions was apparently confirmed by the Housing (Scotland) Act 2010. It amended the 1970 Act to provide “[f]or the avoidance of doubt, a decree granted [entitling the creditor to eject the debtor] is not an order for possession of a house let on an assured tenancy (within the meaning of Part II of the Housing (Scotland) Act 1988”,⁹³ although Professors Gretton and Reid describe the effect of the amendment as “arguable”.⁹⁴ Certainly, the provision could state more explicitly that a standard security is subject to a subsequent assured tenancy and that the creditor can only attempt to remove the tenant by proceedings under the 1988 Act.⁹⁵

Private residential tenancies

8.48 Since 1 December 2017 it is no longer possible to enter into a short assured tenancy or a tenancy which can become an assured tenancy after the end of the contractual period.⁹⁶ The Private Housing (Tenancies) (Scotland) Act 2016 introduced a new compulsory form of lease for residential properties,⁹⁷ known as the “private residential tenancy”. Such tenancies, in contrast to the short assured tenancy, give their tenants security of tenure and landlords can only remove the tenant by obtaining an eviction order from the First-tier Tribunal on the basis of limited statutory grounds.⁹⁸

8.49 There are only two provisions in the 2016 Act which relate directly to standard securities. The first is section 63, which provides that in certain provisions in the Act relating to eviction of the tenant “references to the landlord under a private residential tenancy include a creditor in a heritable security over the let property who is entitled to sell the property.” The term “entitled to sell the property” is not defined⁹⁹ and presumably must be interpreted by reference to the enforcement provisions in the 1970 Act, which we will cover

⁹¹ 1997 SLT (Sh Ct) 20 at 22. He was also influenced by a passage in D J Cusine, *Standard Securities* (1991), which now appears in Cusine and Rennie, *Standard Securities* para 4.09.

⁹² 1999 Hous LR 19, discussed in K G C Reid and G L Gretton, *Conveyancing 1999* (2000) 22. See also A Stalker, *Evictions in Scotland* (2007) 167-168.

⁹³ Housing (Scotland) Act 1988 s 152, inserting a new section 24(10) into the 1970 Act. It also inserts an equivalent new provision, s 5A(9), into the Heritable Securities (Scotland) Act 1894.

⁹⁴ Gretton and Reid, *Conveyancing* para 23-18 n 70. Compare Higgins, *The Enforcement of Heritable Securities* para 13.9.

⁹⁵ Note also the Bankruptcy and Diligence etc. (Scotland) Act 2007 s 216(2A) which prevents assured tenants from being removed on the basis only of a decree for removing under s 5A of the Heritable Securities (Scotland) Act 1894 or s 24(1B) of the 1970 Act.

⁹⁶ 1988 Act ss 12, 32, 33 and Sch 4, as amended by the Private Housing (Tenancies) (Scotland) Act 2016 s 75 and sch 1 paras 1 and 2.

⁹⁷ As with the 1988 Act, certain residential properties are excluded. See the 2016 Act s 1(1)(c) and Sch 1.

⁹⁸ 2016 Act s 51. See generally, SPICe Briefing, *Overview of private rented housing reforms in Scotland* (by K Gibb, M Livingston and K Berry), (2019) available at <https://digitalpublications.parliament.scot/ResearchBriefings/Report/2019/5/14/Overview-of-private-rented-housing-reforms-in-Scotland>.

⁹⁹ The explanatory notes to the Act state: “Section 63 ensures that a lender who has a security over the let property (a mortgage) and is entitled to sell the property because the owner has defaulted on his or her repayments can apply for an eviction order against a tenant of the let property in the same way as a landlord can.” This apparently limits default to repayments, but default (admittedly rarely) can be for other reasons such as failure to insure.

in our forthcoming second Discussion Paper. But the principal effect of the provision seems to be that such a creditor is entitled to apply to the First-tier Tribunal to evict the tenant.

8.50 This leads to the only other provision. This is schedule 3 para 2, which is the second in the list of eviction grounds:

“Property to be sold by lender

2(1) It is an eviction ground that a lender intends to sell the let property.

(2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if—

(a) the let property is subject to a heritable security,

(b) the creditor under that security is entitled to sell the property, and

(c) the creditor requires the tenant to leave the property for the purpose of disposing of it with vacant possession.”

8.51 The drafting of this provision raises some issues.¹⁰⁰ First, it is not clear why the term “lender” is used in para 2(1) but “creditor” is used in para 2(2). Surely the terms ought to be consistent. Secondly, para 2(2)(a) is drafted more broadly than its equivalent in the 1988 Act and can conceivably be interpreted as applying to not only heritable securities which *pre-date* the lease, but also those which *post-date* it. But in policy terms such an interpretation seems open to question.¹⁰¹ It may be argued that a tenant should not be prejudiced by a subsequent security to which the tenant has not consented. A counter-argument is that as the 2017 Act gives tenants a considerable amount of security of tenure, the likelihood of mortgage enforcement on the landlord defaulting is relatively low and that the tenant should have to accept this risk.

8.52 We ask:

37. Should the Private Housing (Tenancies) (Scotland) Act 2016 be amended to make it clear that a heritable creditor cannot evict a tenant whose lease was granted prior to the creation of the security?

8.53 Secondly, there is the issue of how para 2 of schedule 3 of the 2017 Act interacts with the 1970 Act. As we saw above, that legislation was amended in 2010 apparently to make it clear (“for the avoidance of doubt”) that proceedings will be required under the 1988 Act to remove a tenant whose lease was granted after the security was created. No similar amendment is made by the 2016 Act.¹⁰² But, section 216(2A) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 prevents assured tenants from being removed on the basis only of a decree for removing under s 5A of the Heritable Securities (Scotland) Act 1894 or s 24(1B) of the 1970 Act.¹⁰³

¹⁰⁰ The explanatory notes to the Act offer no assistance, merely stating the ground of eviction: “Property to be sold by the mortgage lender.”

¹⁰¹ We wonder whether the provision is deliberately drafted widely to cover mortgage refinancing.

¹⁰² A point noted in Gretton and Reid, *Conveyancing* para 23-18 n 70.

¹⁰³ We are grateful to Adrian Stalker for drawing this provision to our attention.

8.54 A further aspect here is that under the amendments made to the 1970 Act by the Home Owner and Debtor Protection (Scotland) Act 2010 there are a number of categories of occupier of a residential property who are entitled to protection if a heritable security is enforced. These parties include spouses and cohabitants of the debtor.¹⁰⁴ They do not include tenants, but there is an argument that they should. This is a matter for our forthcoming second Discussion Paper on enforcement. On reflection, we think that is the appropriate place to deal with the consequences of enforcement of a heritable security where there is a residential tenancy. It would, however, help us at this stage to have consultees' comments.

8.55 We therefore ask:

38. What comments do consultees have on the situation where a heritable creditor is enforcing its security and there is a residential tenant whose lease was granted after the security?

8.56 Earlier, we asked consultees whether it should be possible to make express provision in a standard security allowing the creditor to bring a lease which has been granted without its consent to an end *prior* to enforcement.¹⁰⁵ We noted that the standard security would be registered and the tenant could be expected to check whether the creditor is agreeable to the lease. This logic, however, while applicable to prospective commercial tenants who are being professionally advised, does not hold up in relation to the ordinary would-be holder of a private residential tenancy. Our provisional view is that such individuals should be unaffected by such a prohibition unless they have knowledge of it. We understand from our advisory group that currently where a lender finds that a residential property has been leased without its consent it will normally change the mortgage product (ie the form of mortgage) to a buy-to-let loan product rather than seek to remove the tenant.¹⁰⁶

8.57 We propose:

39. The holder of a private residential tenancy should prior to enforcement be unaffected by a prohibition on leasing in a standard security encumbering the property unless that person knows of the prohibition at the date of entry under the lease.

Agricultural leases

8.58 In the preceding section we looked at the interaction of standard securities with residential tenancies. Like residential tenancies, agricultural leases are the subject of special legislation.¹⁰⁷ Our enquiries have thus far not identified any specific issues but we would welcome any comments from consultees.

40. Do consultees have any comments on the interaction of standard securities with agricultural leases?

¹⁰⁴ 1970 Act s 24C.

¹⁰⁵ See paras 8.38-8.40 above.

¹⁰⁶ We are advised that mortgage lenders have different capital holding requirements in relation to residential mortgages when compared with buy-to-let mortgages.

¹⁰⁷ In particular the Agricultural Holdings Acts and the Crofting Acts.

Other property rights

8.59 This chapter so far has considered the interaction of standard securities with leases, but similar issues arise in relation to other property law rights. Where the other property right has been granted first, the standard security will not affect it: *prior tempore potior jure*.¹⁰⁸

8.60 The difficulty is where the chronology is reversed. For example, what happens if the debtor who has previously granted a standard security grants a servitude of access through the encumbered property which devalues that property?¹⁰⁹ Similarly, the debtor might grant a real burden in favour of a neighbour undertaking not to build. A third example would be the grant of a liferent. It is not only creation of a right which could adversely affect the creditor. Variation or extinction could too. For example, the debtor might agree to discharge a servitude right held over neighbouring property.

8.61 The offside goals rule may provide a remedy here, but as we have seen its parameters are unclear.¹¹⁰ It may also be that (a) the parties can deal with this by express provision in the security agreement; (b) there could be a provision in a future model set of standard conditions; or (c) a general rule requiring the debtor to preserve the value of the encumbered property would be engaged.¹¹¹ Without the offside goals rule, the creditor's remedy for breach of such conditions may lie only against the debtor in terms of breach of contract. As we saw in relation to leases, at common law the operation of the *prior tempore potior jure* rule is not entirely clear here as the grant etc of a property right seems permissible if it can be seen to fall within the principles of ordinary administration.¹¹²

8.62 We think that it would be better to have clear rules here along the same lines as those which we proposed above for leases. First, on enforcing the security the creditor should in principle be able to set aside any juridical act in relation to the property which has been carried out without its consent. This would not necessarily result in the act being cancelled because of land registration law. Thus imagine that the encumbered property is owned by Alan. It is a benefited property in relation to a real burden providing that no building can be carried out on neighbouring property which would affect the benefited property's view. Alan discharges the real burden in favour of the neighbouring property, which is owned by Ben. Ben sells that property to Carol who commences building. On enforcement the secured creditor reduces the discharge. This is taken to have retrospective effect, but Carol will be protected from the Land Register being rectified.¹¹³ The secured creditor will have a compensation claim against the Keeper.¹¹⁴

8.63 Secondly, where the creditor makes express provision in the security documentation prohibiting any juridical act in relation to the encumbered property, we ask whether the creditor should be entitled to set that act aside prior to enforcement. This rule would also be subject to land registration law.

¹⁰⁸ See para 8.3 above.

¹⁰⁹ See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 4.17-4.20.

¹¹⁰ See paras 8.17-8.20 above.

¹¹¹ See Chapter 7 above.

¹¹² See paras 8.5-8.7 above.

¹¹³ Land Registration etc. (Scotland) Act 2012 s 91.

¹¹⁴ Land Registration etc. (Scotland) Act 2012 s 94.

8.64 We propose:

- 41. Where property is encumbered by a standard security and the debtor carries out a juridical act in relation to a right affecting that property without the creditor's consent, the creditor should be entitled to reduce the debtor's act if the security is enforced.**

8.65 We ask:

- 42. Should the creditor prior to enforcement be entitled to reduce any juridical act by the debtor which is prohibited in the security documentation?**

Chapter 9 Variation and restriction

Introduction

9.1 In this chapter we consider how a standard security once created can be amended. This is known in the 1970 Act as “variation”. We look also at a special form of amendment, known as “restriction”,¹ whereby the security can be altered so that it encumbers less land than when it was first created.

Variation

Halliday Report

9.2 The Halliday Report covers the subject of variation fairly briefly, stating that this should be simple to do and could where appropriate be done by means of endorsement on the original security deed. It recommends:

“(1) Forms of deeds for effecting variations of the security contract (including additional advances, alterations or additions to the parties or guarantors, restrictions in the security property and changes in the standard conditions or any special conditions), postponed securities, and assignation and discharge of the security, should be adjusted after consultation ...

(2) There should be prescribed by statute styles of deeds, endorsed or separate, to effect such variations, postponed securities, assignations and discharges, and the import of such deeds should be effected by statute.”²

9.3 Appendix F Part II to the Report goes on to provide for three style dockets which could be added to the original deed. These cover (1) additional advances (of loan finance); (2) advance by the same lender to a new owner of the encumbered property; and (3) alterations in the conditions in the recommended schedule to the deed (the schedule excluding, varying or adding to the standard conditions).³

9.4 Today, these three situations are encountered rarely. As regards (1), standard securities are almost always granted for “all sums due or to become due”.⁴ In relation to (2), an existing security will normally be discharged and a new one granted where ownership changes. As regards (3), the usual practice is for a standard security to make reference to a lender’s variations to the standard conditions which are set out in a separate document which is not registered in the Land Register and can be subsequently varied without such a registration.⁵

¹ The scheme used by the 1970 Act is to define “restriction” distinctively from variation. See para 9.7 below.

² Halliday Report para 126.

³ Halliday Report Appendix F Part II paras 13-16.

⁴ Gretton and Reid, *Conveyancing* para 23-20.

⁵ Eg the RBS style documentation states: “The Bank’s Standard Security Terms dated and registered in the Books of Council and Session on 4 July 2011 form part of this standard security and are available to be read and printed online.” See <https://www.rbs.com/panel-firms/security-documents---templates/land-scotland/rbs.html>. See also para 7.29 above.

1970 Act

9.5 The Halliday Report's recommendations were in broad terms taken into the 1970 Act, where variation is dealt with in section 16. It provides, as amended:

“(1) Any alteration in the provisions (including any standard condition) of a standard security duly registered or recorded, other than an alteration which may appropriately be effected by an assignation, discharge or restriction of that standard security, or an alteration which involves an addition to, or an extension of, the land or real right in land mentioned therein, may be effected by a variation endorsed on the standard security in conformity with Form E of Schedule 4 to this Act, or by a variation contained in a separate deed in a form appropriate for that purpose, duly registered or recorded in either case.

(2) Where a standard security has been duly registered or recorded, but the personal obligation or any other provision (including any standard condition) relating to the security has been created or specified in a deed which has not been so registered or recorded, nothing contained in this section shall prevent any alteration in that personal obligation or provision, other than an alteration which may be appropriately effected by an assignation, discharge or restriction of the standard security, or an alteration which involves an addition to, or an extension of, the land or real right in land mentioned therein, by a variation contained in any form of deed appropriate for that purpose, and such a variation shall not require to be registered in the Land Register of Scotland or recorded in the Register of Sasines.

(3) [repealed].⁶

(4) Any variation effected in accordance with this section shall not prejudice any other security or right over the same land or real right in land, or over any part thereof, effectively constituted before the variation is registered or recorded, or, where the variation is effected by an unregistered or unrecorded deed, before that deed is executed, as the case may be.”⁷

9.6 It can be seen from subsection (1) that a variation may either be endorsed on the standard security deed itself, or made in a separate document. Where it is endorsed the statutory style in Form E of Schedule 4 “may” be used. Although the word “may” might suggest that compliance with the statutory style is optional, the better view is that it is used in an enabling rather than a permissive sense.⁸

9.7 It is not lawful to make a variation where what is actually being done is an assignation, discharge or restriction of the security. These juridical acts are regulated by other provisions in the 1970 Act with their own statutory forms.⁹ Nor can the encumbered property be increased.¹⁰ For example, if Maarja grants a standard security to the Northern Bank over a field which she owns, the security cannot be varied to extend to a second field. A new security must be granted.¹¹

⁶ This dealt with liability for stamp duty and was repealed by the Finance Act 1971 s 69(7) and Sch 14 Part VI.

⁷ See generally Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* paras 9-38 to 9-49.

⁸ S Brymer, G Gretton, R Paisley and R Rennie, “Memorial and Opinion *Intus Re: Automated Registration of Title to Land*” 2005 JR 201 at 227.

⁹ 1970 Act ss 14, 17 and 15. For assignation, see the next chapter. For discharge, see Chapter 11. For restriction, see paras 9.17-9.23 below.

¹⁰ The difference between “addition” and “extension” is not readily obvious.

¹¹ Cusine and Rennie, *Standard Securities* para 5.09.

9.8 Subsection (2) makes it clear that a variation of a term which does not appear within the registered standard security deed does not require registration to be effective. For example, if a form B security is used, where the debt provisions are set out in a separate unregistered document, no registration is required if these are varied. Indeed Professor Halliday says that it “will avoid confusion if, in any standard security where the personal obligation is constituted by a separate instrument, any variations originally made in the standard conditions are not recorded.”¹²

9.9 Subsection (4) provides that the variation cannot adversely affect a third party who has acquired a right in the encumbered property before the variation is made.¹³ For example, in 2018 Paul grants a standard security over his land to the Stirling Bank. In 2019 he grants a servitude right of access over the land to Roderick. In 2020 the bank agrees a variation of the standard security with Paul prohibiting the grant of servitude rights.¹⁴ Roderick is unaffected by this prohibition.¹⁵

Variations in practice

9.10 We noted above that the variations which the Halliday Report envisaged are rarely encountered today.¹⁶ In practice the most common variations are where the personal circumstances of the debtor(s) change.¹⁷ For example, Stella and Tom are a married couple who are joint-debtors of the Unst Bank to which they have granted a standard security. They divorce and agree that Stella will stay on in their house, taking on sole liability for the mortgage. Title to the house will be transferred solely into her name. The loan agreement and standard security will also be varied.

9.11 Conversely, Vivian may own her flat and have granted a standard security over it to the Excellent Bank. Vivian falls in love with Wanda and agrees that Wanda should become a co-owner of the flat. A half share of it is transferred to her. The loan agreement and standard security are varied so that Wanda is also a party to these. Another possible variation is where a corporate debtor amalgamates with another corporation to create a new legal person.¹⁸

Reform: general

9.12 It seems self-evident that it should continue to be possible to vary a standard security.¹⁹ As mentioned above,²⁰ there is currently only a statutory style for where the variation is to be endorsed on the standard security deed. But that style would appear to be mandatory if there is to be endorsement. For the reasons which we gave in relation to

¹² Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 9-40.

¹³ The Notes on Clauses (clause 15) state that the effect of the provision is that “any preference or [sic] intervening securities is preserved.” But cf Gretton and Reid, *Conveyancing* para 23.20 n 72.

¹⁴ Cf Cusine and Rennie, *Standard Securities* para 4.27.

¹⁵ In contrast if the prohibition had been granted before the servitude, its grant would at least be a breach of contract. We deal with the question of whether it could be set aside in Chapter 8 above.

¹⁶ See paras 9.3-9.4 above.

¹⁷ Gretton and Reid, *Conveyancing* para 23.20.

¹⁸ Cusine and Rennie, *Standard Securities* para 5.09.

¹⁹ Thus in s 60 of our draft Moveable Transactions (Scotland) Bill we made provision for the amendment of a statutory pledge.

²⁰ See para 9.6 above.

creation of standard securities,²¹ we do not think that there should be a mandatory style. The wording should be left to the parties. Since, however, variations are relatively rare and potentially diverse in content, we do not think that there should be a model form. It would of course be necessary where a variation was being registered to comply with the 2012 Act and the Keeper's requirements, in particular by stating the title number of the relevant property.

9.13 We think that it should remain possible for variations in relation to matters not covered in the standard security deed to be carried out off-register. On the other hand, a variation, for example, to change who is the debtor would need registration. Clearly, a variation should not adversely affect a property right obtained before it. We refer to the example above.²²

9.14 We propose:

- 43. It should continue to be possible to vary a standard security as under the 1970 Act, except that there should be no mandatory form of deed.**

Reform: forbidden variations

9.15 As we have seen, it is not permissible to vary a standard security in respect of "an alteration which may more appropriately be effected by an assignation, discharge or restriction".²³ We think that this policy should be maintained, although we would question whether an assignation, being a transfer, and a discharge, being an extinction, can actually be regarded as a variation.

9.16 The 1970 Act also prohibits a variation being used to add to or extend the encumbered property.²⁴ One law firm to whom we spoke suggested that this prohibition should be removed. If it were, however, the general principles of ranking, as effectively declared in section 16(4) would mean that the security in respect of the added part would only rank from the time of the variation, which would be upon registration of the variation.²⁵ It would seem as easy to prepare a new security.²⁶ We therefore make the following proposal:

- 44. It should continue to be impermissible to vary a standard security to increase the encumbered property.**

Restriction

9.17 A restriction is effectively a special form of variation under which part of the encumbered property is released from the security. For example, a builder may grant a standard security over a development site to a bank. As the individual houses are built and sold, the bank will grant deeds of restriction in respect of these as the purchasers (or their

²¹ See paras 6.31-6.36 above.

²² See para 9.9 above.

²³ 1970 Act s 16(1) and (2).

²⁴ 1970 Act s 16(1) and (2).

²⁵ An off-register variation would clearly be unacceptable from the perspective that a registration is required to create a real right of heritable security.

²⁶ Thus the Notes on Clauses (clause 15) state: "Additions or extensions to the subjects of the security are really matters for fresh security documentation."

solicitors) will insist on being given an unencumbered title.²⁷ Part or all of the purchase price may be given to the bank in return.²⁸ Another example would be where a company grants a security over all its properties, but later, possibly to acquire other funding, wants to release some of the properties from the security.²⁹

9.18 Statutory provision for deeds of restriction for the old bond and disposition in security was made by section 30 of the Conveyancing (Scotland) Act 1924.³⁰ It required the deed to be “in or as nearly may be in the terms of Form No. 5 of Schedule K” to the Act. The Halliday Report recommended that there should be a statutory form for restriction of a standard security and that it should be modelled on the form in the 1924 Act. Further, it was suggested that a deed of restriction should always be a separate deed and not be endorsed on the standard security deed.³¹

9.19 Section 15 of the 1970 Act, which is based on section 30 of the 1924 Act, provides:

“(1) The security constituted by any standard security duly registered or recorded may be restricted, as regards any part of the land or real right in land burdened by the security, by a deed of restriction in conformity with Form C of Schedule 4 to this Act, and, upon that deed being duly registered or recorded, the security shall be restricted to the land or real right contained in the standard security other than the part of that land or real right disburdened by the deed; and the land or real right thereby disburdened shall be released from the security wholly or to the extent specified in the deed.

(2) A partial discharge and deed of restriction of a standard security, which has been duly registered or recorded, may be combined in one deed, which shall be in conformity with Form D of the said Schedule 4.”

9.20 As can be seen, the provision refers to two types of transactions. Subsection (1) deals with a simple restriction, whereas subsection (2) covers the situation where the secured debt is also being partly discharged. For example, a standard security for £100,000 may have been granted over two fields. If one field is sold, in return for receiving the purchase price the creditor agrees to restrict the security to the other field and reduce the secured debt to £50,000. In practice nowadays, as we have seen, standard securities will be for all sums so such a deed is unlikely to be encountered.

9.21 As with variation, it is clear that it should continue to be possible to restrict a standard security, but we do not think that there should be a statutory form of deed.³² Having no such required form should enable the parties to combine a variation of the secured debt and a restriction in the same deed.³³ A more radical approach would be to amalgamate restrictions with variations, but there are counter-arguments. One of course is continuity with there apparently being no difficulties with the separate provision for restrictions at present. A

²⁷ Stewart and Sinclair, *Conveyancing Practice* para 10.3.5.

²⁸ Gretton and Reid, *Conveyancing* para 23-22; Gretton and Steven, *Property, Trusts and Succession* para 21.55.

²⁹ See the Notes on Clauses (clause 14).

³⁰ This provision was repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. See paras 12.7-12.8 below.

³¹ Halliday Report Appendix F Part II para 20.

³² For a style deed, see <http://www.psglegal.co.uk/residential.php>.

³³ This point could be made clear in the new legislation.

second is that restrictions always require registration to take effect, whereas this is not true of variations. We therefore incline to the view that restrictions should continue to be treated separately.

9.22 Finally, we should mention that another way for a standard security to be restricted is for the creditor to sign the disposition of the piece of land which is to be freed from the security "*in gremio*"³⁴ as consentor. In practice, we understand that this method is rarely used.³⁵ This is because the creditor will not release the security until it receives the sale proceeds. If the deed used is a disposition, the buyer will not pay until the deed is delivered by the seller (in practice by the seller's solicitors to the buyer's solicitors). But the creditor will not want to deliver until it has been paid (by the seller's solicitor transmitting the money to it). Hence the use of a separate deed of restriction. Nevertheless, we see no reason why it should not be possible for this method of releasing the property to be used if the parties wish.

9.23 We propose:

45. It should continue to be possible to restrict a standard security:

- (a) as under the 1970 Act, except that there should be no mandatory form of deed; or**
- (b) by means of a consent *in gremio* in a disposition transferring the property.**

³⁴ In the body of the deed. See J Trayner, *Latin Maxims and Phrases* (4th edn, 1894) 262.

³⁵ Compare Gretton and Reid, *Conveyancing* para 23-22.

Chapter 10 Assignment

Introduction

10.1 In this chapter we consider how a standard security is transferred by the creditor to another person by assignment. In commercial practice, it has become common for portfolios of mortgages to be assigned by one lender to another. Securitisations are another reason for mortgage transfers.¹ Recent years have seen court decisions which have exposed difficulties and uncertainties in relation to the 1970 Act in this area. A particularly problematic area is assignment of all sums standard securities.

Accessoriness: general

10.2 Many of the complexities arise because a standard security is not a stand-alone right. It is accessory upon a debt or debts. For the security to be successfully transferred, the secured debt² must be too. For example, John borrows £100,000 from the Kelvin Bank. He grants a standard security for the debt over his house to the bank which is registered in the Land Register. The Lochgilphead Bank agrees to purchase the standard security. But, for the transfer of it to have any value, it needs to acquire the Kelvin Bank's right to repayment of the £100,000 sum too.

The rule *accessorium sequitur principale*

10.3 When a debt is assigned, the general rule is that any accessory rights are transferred with it by operation of law: *accessorium sequitur principale*.³ For example, Arabella owes £1000 to Ben. Arabella's debt is guaranteed by her father Charles.⁴ Ben assigns his claim for the £1000 to David. Charles is now liable as guarantor to David.⁵

10.4 Under current Scottish law,⁶ intimation to the debtor is required to complete the assignment.⁷ To continue with our example, the assignment to David would be completed on him intimating it to Arabella. Where, however, a debt is secured by a standard security there is the complication that such securities require registration in the Land Register to be real rights.⁸ Mere intimation of the assignment of the debt does not update the register. The more fundamental question then becomes whether such updating is or should be required to transfer the security.

¹ A practice which began in the USA. See C K Odinet, *Foreclosed: Mortgage Servicing and the Hidden Architecture of Homeownership in the USA* (2019).

² Strictly speaking, it is the claim against the debtor which is assigned rather than the debt. A debt as an obligation cannot be assigned. But it is common to refer to assignment of debts. See eg Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 9-02.

³ The accessory follows the principal. Stair, *Institutions* 3.1.17; Bankton, *Institute* 3.1.7; Erskine, *Institute* 3.5.8 and R G Anderson, *Assignment* (2008) para 2-01.

⁴ Charles is acting as cautioner.

⁵ *Lyell v Christie* (1823) 2 S 288 (NE 253).

⁶ But see Report on Moveable Transactions vol 1 for reform recommendations.

⁷ Eg Stair, *Institutions* 3.1.6. More than three hundred years after Stair wrote, the rules on assignment have changed little in Scotland. See A J M Steven, "Scottish Property Law 2017" 2017 JR 21 at 27.

⁸ 1970 Act s 11(1).

Historical note: pre-1970 forms of heritable security

10.5 The *accessorium sequitur principale* rule did not apply to the *ex facie* absolute disposition. This was because it was not an accessory security right, but rather a transfer of the land.⁹

10.6 For the old heritable bond, which was to develop into the bond and disposition in security, an early case established that the security would not transfer merely as a result of the secured debt being assigned.¹⁰ Recording of an assignation of the bond in the Register of Sasines was needed to do this. Heritable bond documents set out both: (1) the debt contract; and (2) the security, which in the words of Lord Curriehill in a later case were therefore “inseparably connected”.¹¹ Any assignation therefore required to be of both. Further it had to be recorded to transfer the security.

10.7 The Heritable Securities (Scotland) Act 1845 made statutory provision for assignations of bonds and dispositions in security, including a form of document.¹² The assignation required to be recorded in the Register of Sasines for the security to be transferred.¹³ The provisions in the 1845 Act were replaced in substantially the same terms by the Titles to Land Consolidation (Scotland) Act 1868.¹⁴ Later, section 28 of the Conveyancing (Scotland) Act 1924 provided for a shorter form but recording continued to be required to transfer the security.¹⁵

Halliday Report

10.8 There is limited discussion of assignation in the Halliday Report. As for variations,¹⁶ there is a recommendation that there should be statutory forms for an assignation of the new security. It should be possible to use a stand-alone document or to endorse the assignation on the original security document.¹⁷ Appendix F Part II to the Report sets out what these forms might look like.¹⁸ There is no mention of any specialities for the assignation of all sums securities. It is recommended, however, that the legal effect of the assignation should be set out “very much on the lines of section 28 of the 1924 Act”.¹⁹ Accordingly, the assignation would not only transfer the security, but also the right of the assignee to delivery of the writs (title deeds), the benefit of all corroborative or substitutional obligations (eg where a purchaser of the encumbered property agrees in a bond of corroboration to take on the debtor’s obligations), the right to properly incurred expenses in relation to the security and the benefit of all notices (eg enforcement notices) and procedures which have already been commenced.

⁹ See paras 2.14-2.16 above.

¹⁰ *Anstruther v Black* (1626) Mor 829. See Gloag and Irvine, *Rights in Security* 123.

¹¹ *McCutcheon v McWilliam* (1876) 3 R 565 at 569.

¹² Heritable Securities (Scotland) Act 1845 s 1 and Sch 1.

¹³ 1845 Act ss 1 and 6.

¹⁴ Titles to Land Consolidation (Scotland) Act 1868 s 124 and Sch GG.

¹⁵ Conveyancing (Scotland) Act 1924 s 28 and Sch K form 1.

¹⁶ See para 9.2 above.

¹⁷ Halliday Report para 126.

¹⁸ Halliday Report Appendix F Part II para 18.

¹⁹ Halliday Report Appendix F Part II para 18.

1970 Act

10.9 The recommendations made in the Halliday Report are implemented by the 1970 Act. Section 14 is the principal provision and it provides (as amended):

“(1) Any standard security duly registered or recorded may be transferred, in whole or in part, by the creditor by an assignation in conformity with Form A or B of Schedule 4 to this Act, and upon such an assignation being duly registered or recorded, the security, or, as the case may be, part thereof, shall be vested in the assignee as effectually as if the security or the part had been granted in his favour.

(2) An assignation of a standard security shall, except so far as otherwise therein stated, be deemed to convey to the grantee all rights competent to the grantor to the writs, and shall have the effect *inter alia* of vesting in the assignee—

- (a) the full benefit of all corroborative or substitutional obligations for the debt, or any part thereof, whether those obligations are contained in any deed or arise by operation of law or otherwise,
- (b) the right to recover payment from the debtor of all expenses properly incurred by the creditor in connection with the security, and
- (c) the entitlement to the benefit of any notices served and of all procedure instituted by the creditor in respect of the security to the effect that the grantee may proceed as if he had originally served or instituted such notices or procedure.”

10.10 The Notes on Clauses state:

“This clause is based on the existing law regarding the assignation of bonds and dispositions in security. It rewrites, with appropriate adaptation as to form rather than substance, the provisions of section 28 of the Conveyancing (Scotland) Act 1924 the terms of which are well known to the legal profession. So minor are the changes from the terms of the 1924 Act that at one stage it was thought possible simply to attract²⁰ these provisions to this Bill, subject to scheduled amendments. In the light of representations from the legal profession and of the views of Professor Halliday, however, it is now considered that it would be more convenient for practitioners if [the] provisions as amended were set out in full.”²¹

10.11 In fact, section 14 has notable differences to the predecessor provision. Subsection (1) makes reference to two statutory forms in Schedule 4, in contrast to the single form to which section 28 of the 1924 Act refers.²² The two forms follow from the Halliday Report’s recommendations. Form A is a stand-alone document, whereas form B is endorsed on the standard security deed. This lettering creates the possibility of confusion when it is remembered that a standard security itself can be a form A or a form B.²³ In fact each assignation form can be used for each form of standard security, leading to four possibilities.²⁴

²⁰ The use of the word “attract” here is an odd one.

²¹ Notes on Clauses (clause 13).

²² 1924 Act Sch K form 1.

²³ See Chapter 6 above.

²⁴ See A J M Steven, “Accessoriness and Security over Land” (2009) 13 Edin LR 407-408. See also Anderson, *Assignation* para 2-09.

10.12 The first possibility is that a form A standard security is assigned by a form A assignation. The assignation should be executed in duplicate, with one copy being intimated to the debtor and the second being registered in the Land Register.²⁵

10.13 The second possibility is that a form A standard security is assigned by a form B assignation. In this scenario, the standard security document with its endorsement will require to be registered again. A separate intimation document will be needed (since the standard security document will not be in duplicate) to tell the debtor.

10.14 The third possibility is that a form B standard security is assigned by a form A assignation. The assignation document will have to be registered. The debt will require to be assigned too.²⁶ This could be done in a separate document or by adapting the wording in the form A assignation style.²⁷ Intimation to the debtor will be required.

10.15 The fourth possibility is that a form B standard security is assigned by a form B assignation. The standard security following endorsement will require to be re-registered. There will need to be a separate assignation of the debt, which is then intimated to the debtor.

10.16 The 1970 Act here seems unduly complicated, with significant scope for mistake. Below we make some proposals in relation to simplification.

10.17 Section 14(1) also provides that the security only vests in the assignee where the assignation is duly registered. The *accessorium sequitur principale* rule is therefore excluded. This approach, which as we have seen is founded in the pre-1970 law too, creates the possibility of the debt and the security becoming split. For example, Joanne owes £100,000 to Kenneth. In May, she grants him a standard security for that amount, which he registers in the Land Register. In June, Kenneth assigns the debt and standard security to Leah. In July, Leah intimates the assignation to Joanne and thus becomes the holder of the debt. But she only registers the assignation in the Land Register in August. Between the two dates the debt and security are divided. We return to this matter below.²⁸

10.18 Once the security vests, section 14(1) provides that it is to be treated as if it has been granted in favour of the assignee. This is a somewhat mystifying provision because clearly the security was not initially granted to the assignee. The wording in earlier provisions is somewhat different. Section 28 of the Conveyancing (Scotland) Act 1924 provides that recording of the assignation:

“shall have the same force and effect as a duly recorded assignation granted in the form prescribed in section one hundred and twenty-four of the Titles to Land Consolidation (Scotland) Act, 1868”.

²⁵ Or recorded in the Register of Sasines as the standard security was recorded there. The Register of Sasines is now closed to new standard securities. See para 6.48 above.

²⁶ See *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125. Contrast *UK Acorn Finance Ltd v Smith* 2014 Hous LR 50 where the debt which it secured was not. See K G C Reid and G L Gretton, *Conveyancing 2014 (2015)* 177-182. See also para 3.29 above.

²⁷ *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125 at 129 per Sheriff Principal C G B Nicholson QC referring to the 1970 Act Sch 4 note 2.

²⁸ See paras 10.24-10.34 below.

10.19 Section 124 of the Titles to Land Consolidation (Scotland) Act 1868 in turn provides that, on the recording of an assignation of a heritable security, the security:

“shall be transferred to the Assignee as effectually as if such Security had been disposed and assigned, and the Disposition and Assignation or Conveyance had been followed by Sasine duly recorded according to the Law and Practice prior to the First Day of October One thousand eight hundred and forty-five at the Date of recording such Assignation or Conveyance; and such Assignee or Disponee shall thereupon be held to be as fully entered as if he had obtained a Renewal of the Investiture in his Favour, according to the Law and Practice in use before that Date”.

10.20 We return to the effect of section 14(1) later.²⁹

10.21 Section 14(2) is perhaps more straightforward, although over-wordy. It confirms that the assignee acquires the benefit of corroborative or substitutional obligations, as well as the right to recover expenses and rely on notices served and enforcement steps taken by the assignor.

Assignation of multiple standard securities by the same document

10.22 The 1970 Act is not explicit on the issue of whether the same assignation document can assign multiple standard securities. In practice, it has been assumed that it can. Mortgage portfolios are regularly transferred in this way. This practice, however, was challenged in Banff Sheriff Court in *OneSavings Bank plc v Burns*.³⁰ Here the standard security had been assigned successively by two bulk assignments. The debtors argued that the 1970 Act and in particular the forms in Schedule 4 required separate assignation deeds for each security and thus the assignments were invalid. Sheriff Philip Mann, noting also section 6(c) of the Interpretation Act 1978,³¹ held that section 14 of the 1970 Act does not require a separate assignation for each individual standard security. He added that although the forms in Schedule 4 envisaged only one security being assigned, they could be appropriately adapted.³²

Report on Moveable Transactions

10.23 Our Report published in 2017 was of course about moveable property rather than security over land. But there were two issues which we covered in it which are relevant to standard securities.

10.24 The first was the *accessorium sequitur principale* rule. In our preceding Discussion Paper on Moveable Transactions we proposed in the interests of clarity and certainty that there should be the following statutory rule.³³ 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 if any further act is needed to vest the security in the assignee, the cedent will perform that

²⁹ See paras 10.54, 10.58 and 10.71 below.

³⁰ [2017] SC BAN 20, 2017 SLT (Sh Ct) 129, 2017 Hous LR 55.

³¹ “In any Act, unless the contrary intention appears . . . (c) words in the singular include the plural and words in the plural include the singular.”

³² Within the limits set by the 1970 Act s 53(1), on which see paras 6.20-6.24 above.

³³ Scottish Law Commission, Discussion Paper on Moveable Transactions (Scot Law Com DP No 151, 2011) para 14.77.

act. This would mean, that as section 14 of the 1970 Act currently stands, there would have to be registration of an assignation of the standard security.

10.25 We noted that it would be possible to go further and provide that the assignation of the secured claim automatically gives the assignee a completed title to the security.³⁴ But we said that this would be a radical reform which would impact on the law of standard securities and would also adversely affect the “publicity” value of registration. Our provisional view was that such a reform should not be considered further in the context of the moveable transactions project, but that it might be reconsidered in the future.

10.26 Our consultees generally agreed with our approach. But some law firm consultees were opposed. They argued that the transfer of the security should require to be dealt with expressly by the parties. A particular concern was the situation where the secured obligation is less extensive than the security. Take the following example. Ann borrows £100,000 from Bruce. 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 Ann borrows another £50,000 from Bruce under a separate loan contract. Bruce then assigns his claim to repayment under that contract to Caragh. What is to happen to the security? Probably the law says that it is shared as between Bruce and Caragh,³⁵ but this result is complex. Normally in practice the parties would regulate this expressly.

10.27 We recommended in the Report therefore 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 but which 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 thought that this should require to be made in the assignation document.

10.28 Again in the interests of simplicity, we recommended 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, Denise owes Eddie £50,000 secured by a standard security. Eddie assigns £25,000 of his £50,000 claim against Denise to Fiona. The right to the standard security should remain with Eddie, unless express provision to the contrary is made.

10.29 The second issue relevant to standard securities covered in our Report on Moveable Transactions was the related question of what should happen if there is a deed assigning the claim and the security, and this is registered in the relevant register.³⁶ We gave the example of Doris owing money to Chris, which is secured by a standard security. Chris assigns the claim and the security to Audrey and this is registered in the Land Register on 1 June. We asked in our Discussion Paper whether the law should be that the assignation of the claim is completed at the same time as the assignation of the security, that is on 1 June, even

³⁴ Discussion Paper on Moveable Transactions para 14.78.

³⁵ 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.

³⁶ Report on Moveable Transactions paras 13.34-13.35.

though there is no notification to Doris until later.³⁷ 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.

10.30 There was little support from consultees for such a reform. Some noted that it inverted the *accessorium sequitur principale* rule. Others 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) and problems with the assignation of all sums standard securities. In the light of the views of consultees we made no reform recommendation, but we said that we might revisit the matter in the heritable securities project.

General discussion

10.31 Our starting point is to ascertain whether there is any support for the radical reform which we mentioned above.³⁸ This would be to provide that an assignation of the secured debt is sufficient to transfer the standard security. The rule *accessorium sequitur principale* would be applied. Registration in the Land Register would not be needed. Such an approach can be found in other jurisdictions.³⁹ Its advantage is that it keeps the debt and security together, complying with what Dr Anderson has called the “unity principle”.⁴⁰ This avoids difficulties arising from separation.⁴¹

10.32 On the other hand the approach which requires registration is long-established in Scotland and is familiar to practitioners. It has the advantage of ensuring that the holder of the standard security can be determined from the public register.⁴² As noted above,⁴³ some of the consultees to our Discussion Paper on Moveable Transactions argued that the matter of the transfer of the security should always be something for express provision of the parties. There would also be particular challenges for the *accessorium sequitur principale* approach in the case of the assignation of an all sums standard security.

10.33 We mentioned above that consultees to that earlier Discussion Paper were generally unenthusiastic about an approach whereby a debt secured by a standard security should be

³⁷ Discussion Paper on Moveable Transactions para 14.79. It is possible that this might be the current law. But no-one can be certain. See also Anderson, *Assignation* para 2-13.

³⁸ See para 10.25 above.

³⁹ See eg Dutch Civil Code art 6:142; French Civil Code art 1692; German Civil Code §§ 401 and 1153. Despite these rules, the assignee may want to update the register. For example, in the Netherlands a notary organising enforcement of the security will only take instructions from a creditor who is registered as the holder of the security. In contrast, in England and Wales registration of the assignment is required: see Land Registration Act 2002 s 27. A form TR4 must be submitted to the Land Registry: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715055/TR4_2018-05-25.pdf. This is also the position in Estonia. See the Estonian Law of Property Act 1993 § 338(2).

⁴⁰ Anderson, *Assignation* para 2-10.

⁴¹ For example, if the creditor fraudulently assigns the same debt twice. Assignee 1 intimates to the debtor first. Assignee 2 registers its assignation first.

⁴² For counter-arguments, see Anderson, *Assignation* para 2-14. Compare A J M Steven, *Pledge and Lien* (2008) para 4-22.

⁴³ See para 10.26 above.

transferred upon registration of the document assigning the standard security. But we think that it would be helpful to consult on that question again in the context of this project.

10.34 We ask:

- 46. Should (a) the assignation of the secured debt alone be sufficient to transfer the standard security, or should (b) registration of a document assigning the standard security continue to be required?**
- 47. If registration should still be required, should the effect of registration be to transfer the debt (without intimation to the debtor)?**

Form of deed

10.35 We shall assume for the purposes of discussion here that consultees will continue to favour registration of a deed of assignation.⁴⁴ As we have seen, there is a multiplicity of statutory forms here. Our understanding is that endorsed (form B) assignations are not used in practice.⁴⁵ A majority of Scottish properties have now moved onto the Land Register, where the bundle of Sasine deeds, including security documentation, is replaced by a digital title sheet. As we have seen also,⁴⁶ the Keeper's policy is to move to electronic deeds. It is unclear how endorsement would work here. We consider that there should no longer be a statutory form of assignation by endorsement.

10.36 Consistent with our approach for standard security deeds and other deeds relating to standard securities (such as variations),⁴⁷ we consider that there should be no mandatory statutory style. The assignation should simply have to be clear in its own terms. This of course would be subject to general land registration rules.⁴⁸ It should also be made clear that the same assignation can assign multiple standard securities.⁴⁹ We discuss the issue of specialities for assignations of all sums securities below.⁵⁰

10.37 As under section 14 of the 1970 Act, the assignation upon registration should give the assignee the benefit of any corroborative and substitutional obligations, the right to recover expenses from the debtor and the right to rely on any notices sent or enforcement procedure commenced by the assignor.⁵¹

10.38 We propose:

- 48. (a) There should be no mandatory form of deed for the assignation of a standard security.**
- (b) The same deed may assign multiple standard securities.**

⁴⁴ If they do not, consideration will need to be given to how the Land Register can be updated because of the off-register assignation. The appropriate route would seem to be rectification.

⁴⁵ See K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 120.

⁴⁶ See paras 6.33-6.34 above.

⁴⁷ See paras 9.12-9.13 above.

⁴⁸ In particular, the need to specify the title number of the encumbered property or properties.

⁴⁹ See para 10.22 above.

⁵⁰ See paras 10.39-10.72 below.

⁵¹ Arguably these rights, or at least some of them, would be impliedly transferred in any case. See Report on Moveable Transactions para 23.46.

(c) Upon registration the assignation should give the assignee the benefit of any corroborative and substitutional obligations, the right to recover expenses from the debtor and the right to rely on any notices sent or enforcement procedure started by the assignor.

All sums standard securities

Introduction

10.39 As mentioned previously,⁵² standard securities nowadays are normally worded to secure all sums owed by the debtor to the creditor. This presents particular challenges in relation to their assignation.

10.40 For example, imagine that John grants an all sums standard security to the Kirkcaldy Bank. In June 2019, when he has a current indebtedness of £100,000 the bank assigns that debt and the standard security to the Letham Bank. In June 2018, the Letham Bank had made an unsecured loan of £50,000 to John. In June 2020, the Letham Bank makes a further loan to John of £25,000. The question is then whether these separate debts are also now covered by the security.

10.41 Another difficult question is what happens where only one of the several debts secured by an all sums standard security is assigned.⁵³

10.42 There are no clear answers to these questions under the 1970 Act as it currently stands. But, as regards the issue in the preceding paragraph, we mentioned above the recommendations which we made in our Report on Moveable Transactions to address this issue.⁵⁴

Halliday Report

10.43 The Report is silent on assignation of all sums standard securities.

1970 Act

10.44 Section 14 of the 1970 Act is also silent on the matter.⁵⁵ The only place in the legislation where it is addressed is in Note 2 to Schedule 4. As discussed above, that Schedule sets out the statutory forms which are to be used for assignations of standard securities. Note 2 states:

“In an assignation, discharge or deed of restriction, (1) a standard security in respect of an uncertain amount may be described by specifying shortly the nature of the debt or obligation (eg all sums due or to become due) for which the security was granted, adding in the case of an assignation, *to the extent of £ being the amount due thereunder . . .*”

⁵² See para 4.13 above.

⁵³ For discussion, see Anderson, *Assignation* paras 2-15 and 2-16.

⁵⁴ See paras 10.27-10.28 above.

⁵⁵ See A McDonald, “Our security? No, your security?” available at <https://www.scottishlegal.com/article/blog-our-security-no-your-security>: “The draftsman who gave life to the 1970 Act most likely did not envisage the bulk buying and assignation of standard securities.”

10.45 The Notes on Clauses offer no commentary on the matter. But it can be seen that Note 2 provides for a fixed amount to be stated in the assignation document. The inference therefore is that the assignee only receives a standard security for that amount.

Professor Halliday's commentary

10.46 In his commentary on the 1970 Act, Professor Halliday addresses the question of assignments of standard securities for other than fixed amounts at both a general level and at the level of practice. In relation to the former he says:

“Where the standard security has been granted for a maximum or uncertain amount, it can only be assigned to the extent of the sum outstanding at the time of assignation. That is in accordance with existing law and practice. The amount outstanding should be stated in the assignation.”⁵⁶

10.47 As authority for the first and third sentences, Professor Halliday cites the 1970 Act Schedule 4, forms A and B and note 2. To support the second sentence he refers to a passage in Burns' *Conveyancing Practice* on the assignation of the old bond of cash credit and disposition in security.⁵⁷ This says:

“The commonly accepted view is that a cash credit bond can be assigned only to the extent of the actual existing balance, and not so as to authorise further advances or operations by the assignee.”⁵⁸

10.48 Professor Halliday later turns to the issue of practice:

“In general an assignation of a standard security for a fluctuating amount is undesirable. The personal obligation of the debtor will have been created in favour of the original creditor and will have covered sums becoming due to him by the debtor: after assignation of the standard security there will normally be no further course of dealing between these parties. So if any future advances are to be made by the assignee and are to be covered by the security, then (a) if the personal obligation was contained in the original standard security either a recorded variation or a new standard security will be necessary to secure the further advances or (b) if the personal obligation was contained in a separate instrument an unrecorded instrument will be necessary to constitute the new personal obligations for the further advances or a new standard security may be granted in respect of them. In practice it will probably be simpler and clearer to discharge the existing standard security and have a new comprehensive standard security.”⁵⁹

10.49 It can be seen that Professor Halliday's view is that in the absence of a variation or a new security, any debt owing to the assignee, which was not owed to the assignor prior to the assignation will not be secured.

⁵⁶ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 9-03.

⁵⁷ See para 2.13 above.

⁵⁸ Burns, *Conveyancing Practice* 576. But compare A M Bell, *Lectures on Conveyancing*, vol 2 (1867) 1086: “Sometimes the bond and disposition in security for a cash-credit has to be assigned, not as a security to be operated on as it was while held by the original creditor, but to stand as a permanent loan of the amount of the balance due at the time of the transfer.”

⁵⁹ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 9-07.

Case law

10.50 The first reported case on assignation of all sums standard securities was *Sanderson's Trustees v Ambion Scotland Ltd.*⁶⁰ This was an Outer House decision of Lord Dunpark from 1977, which was not reported until 1994. The facts are rather unusual. The defenders were a building company. It was agreed that the pursuers would provide them with loan finance. But the loan was not made directly. Rather, it was made to the defenders' holding company which then passed on the money to the defenders. The defenders then granted an all sums standard security to the holding company. This security was assigned to the pursuers. The loan contract was signed by all three parties. The defenders became insolvent and the insolvency officials challenged the assignation on two grounds.

10.51 The first ground was that the assignation failed to comply with Note 2 of Schedule 4, because no monetary amount was stated. Lord Dunpark held that this did not invalidate the assignation because the contractual agreement was signed by all three parties and the assignee was therefore not a "stranger to the debtor".⁶¹ If, in contrast, the assignee was a stranger the stating of the amount would "leave the debtor free to negotiate with the assignee for further advances or, alternatively, to obtain such advances from a third party in return for the grant of a second standard security over the same subjects."⁶² He did not, however, say explicitly that so stating was mandatory. The second ground was that the assignation was not capable of securing advances made subsequent to it. Lord Dunpark held, however, given the terms of the contractual agreement signed by all three parties, these advances were covered.

10.52 Since the decision in *Ambion*, which concerned the assignation of a single standard security, bulk assignations of standard securities have become common.⁶³ Here the practice has been not to specify the sum outstanding at the time of the assignation and thus to deviate from Note 2 of Schedule 4. This is for two main reasons.⁶⁴ The first is that obtaining the correct information at the relevant time can be complex.⁶⁵ The second is that doing so would prevent the security securing further advances made by the assignee following the assignation. We note, however, Professor Halliday's views here which we set out above.⁶⁶ More generally, some comfort was provided in relation to the deviation from Note 2 by section 53(1) of the 1970 Act.⁶⁷

10.53 For banking lawyers, the decision of Sheriff Philip Mann in March 2017 at Banff Sheriff Court in *OneSavings Bank plc v Burns*,⁶⁸ was therefore deeply unwelcome.⁶⁹ As

⁶⁰ 1994 SLT 645. For discussion see G L Gretton, "Assignations of All-Sums Standard Securities" 1994 SLT (News) 207; Cusine and Rennie, *Standard Securities* para 6.01 and K Swinton, "Assigning Heritable Securities" 2017 Scottish Law Gazette 23 at 24-25.

⁶¹ 1994 SLT 645 at 650.

⁶² 1994 SLT 645 at 650.

⁶³ See Swinton, "Assigning Heritable Securities" at 23.

⁶⁴ See "*OneSavings Bank plc v Burns*: Enforcement concerns for lenders in the Scottish market place" available at https://shepwedd.com/sites/default/files/OSB_v_Burns_overview_0.pdf.

⁶⁵ See also *Promontoria (Henrico) Ltd v Portico Holdings (Scotland)* [2018] SC GRE 5, 2018 GWD 6-87 at para 26 per Sheriff Derek Hamilton.

⁶⁶ See paras 10.46-10.49 above.

⁶⁷ On which see paras 6.20-6.24 above.

⁶⁸ [2017] SC BAN 20, 2017 SLT (Sh Ct) 129, 2017 Hous LR 55.

⁶⁹ One solicitor commented that it gave those working in the area a "scare". See B Fairgrieve, "Further decision on assigned securities" available at <https://www.morisonslp.com/further-decision-on-assigned-securities/>. Two

mentioned earlier,⁷⁰ this case involved successive bulk assignments of standard securities. The debtors in one of the securities challenged the validity of the assignments. This challenge was unsuccessful in respect of the argument that bulk assignments were impermissible, but successful on the basis that Note 2 was mandatory. In Sheriff Mann's view the failure to specify the outstanding sum was fatal to the validity of the assignment.⁷¹ He held that the *Ambion* decision was special to its facts and accepted Counsel for the debtors' suggestion that "it would have been a very easy matter to include an additional column in the schedule to each assignment to specify the amount outstanding in respect of each standard security as at the date of the assignment."⁷²

10.54 Sheriff Mann's decision attracted numerous online articles and commentaries in early 2017, many discussing its adverse consequences for mortgage transfers.⁷³ Relief, however, was to come swiftly. Two months later, Lord Bannatyne in the Outer House case of *Shear v Clipper Holding II SARL*⁷⁴ reached the opposite result when a bulk standard security assignment was challenged in interim interdict proceedings. He was clear that Sheriff Mann was wrong. It was not mandatory for a monetary amount to be stated under Note 2. Lord Bannatyne relied on an English Court of Appeal case⁷⁵ and a Privy Council case⁷⁶ to justify his position "that the courts have adopted a more flexible approach"⁷⁷ to statutory interpretation. Professors Reid and Gretton have noted these are not conveyancing cases, or even private-law cases.⁷⁸ We cannot help but note a contrast with the approach taken to interpretation of the 1970 Act by the Supreme Court in *Royal Bank of Scotland plc v Wilson*.⁷⁹ But, reference can also be made to case law which holds that the correct question is whether Parliament can be taken to have intended the consequences of non-compliance with a statutory requirement to be invalidity, having regard to what is just in all the circumstances.⁸⁰ Lord Bannatyne went on to say that the pursuer "is doing nothing more than relying on a technicality to delay payment."⁸¹ Like Sheriff Mann he thought that Lord Dunpark's decision in *Ambion* was special to its facts and not of direct assistance. Finally,

others said it "came as a shock for the industry". See A Spiers and L Walker, "Differing legal views" available at <https://www.mortgagefinancegazette.com/legal-news/legal-cases/differing-legal-views-15-03-2018/>.

⁷⁰ See para 10.22 above.

⁷¹ Instead the assignment had stated that the securities were assigned "to the extent of all sums now due or at any time or times hereafter to become due".

⁷² [2017] SC BAN 20 at para 28.

⁷³ See eg "*OneSavings Bank plc v Burns*: Enforcement concerns for lenders in the Scottish market place" available at https://shepwedd.com/sites/default/files/OSB_v_Burns_overview_0.pdf; *OneSavings Bank plc v Burns*: FAQs" available at https://shepwedd.com/sites/default/files/OSB_v_Burns_FAQs.pdf; "Assignment of standard securities: Case update" available at <https://www.morton-fraser.com/knowledge-hub/assignment-standard-securities-case-update>; R Aberdein, "*OneSavings Bank plc v Burns* and its impact on repossessions with traded mortgage portfolios" available at <https://www.mortgagefinancegazette.com/features/onesavings-bank-v-burns-impact-repossessions-within-traded-mortgage-portfolios-03-07-2017/>; A McDonald, "Our security? No, your security?" available at <https://www.scottishlegal.com/article/blog-our-security-no-your-security>. See also Reid and Gretton, *Conveyancing 2017* 120-127.

⁷⁴ The decision is available at <https://www.addleshawgoddard.com/globalassets/insights/litigation/shear-v-clipper.pdf>. See also Axiom Advocates News, "Assignations of "all sums due" securities: a silver bullet for OneSavings?" available at <https://www.axiomadvocates.com/news/view/assignment-of-all-sums-due-securities-a-silver-bullet-for-onesavings>.

⁷⁵ *Newbold v The Coal Authority* [2014] 1 WLR 1288.

⁷⁶ *Central Tenders Board v White* [2015] UKPC 39.

⁷⁷ Para 2 of judgment.

⁷⁸ Reid and Gretton, *Conveyancing 2017* 124.

⁷⁹ [2010] UKSC 50, 2011 SC (UKSC) 66. See para 1.8 above.

⁸⁰ See eg *R v Secretary of State for the Home Department, ex parte Jeyeanthan* [2001] 1 WLR 354 at 358-359 per Lord Woolf MR; *R v Soneji* [2006] 1 AC 340 at paras 14-23 per Lord Steyn and *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at para 16 per Lord Hughes JSC.

⁸¹ Para 3 of judgment.

Lord Bannatyne agreed with the argument for the creditor that the wording of section 14(1) of the 1970 Act⁸² meant that the assignment of an all sums security does not convert it into a security for a fixed amount. The security is as “effectual” as it was pre-assignment. This is contrary to Professor Halliday’s view.⁸³

10.55 Three months after *Shear* there was a third case: *Promontoria (Henrico) Ltd v Portico Holdings (Scotland)*.⁸⁴ This was a decision of Sheriff Derek Hamilton at Greenock Sheriff Court again about the validity of a bulk assignment of standard securities. No monetary amounts were stated in respect of the securities in the assignment document. Both previous decisions were cited. Sheriff Hamilton found *Shear* more persuasive. A further sheriff court case in Edinburgh was also similarly decided.⁸⁵ Lawyers acting for financial institutions breathed a collective sigh of relief. In the view of one: “the advice is to file Burns under ‘rogue bad decision’ and move on.”⁸⁶ It is not, however, definite that the decision in *OneSavings Bank plc v Burns* is wrong, inconvenient as it clearly is to lenders. In a careful analysis, Professors Reid and Gretton weigh up the arguments and conclude that the position is “uncertain”.⁸⁷ The new legislation that results from this project must make the position clear.

10.56 It should also be said that the principal focus of the case law just described was whether Note 2 of Schedule 4 was mandatory, that is to say whether the sum outstanding at the date of the assignment had to be stated in the assignment document. There was less discussion of the questions of whether the assignment meant that (1) subsequent advances made by the assignee would be secured⁸⁸ and (2) sums owed to the assignee pre-dating the assignment would be secured. There has, however, been some academic commentary on these matters.

Academic commentary

10.57 In an article published in 1994,⁸⁹ Professor Gretton examines the *Ambion* case.⁹⁰ He essentially agrees with Professor Halliday’s analysis⁹¹ that an assigned standard security will not cover advances made by the assignee following the assignment. Either a deed of variation or a new security will be needed. As for sums already owing to the assignee at the time of the assignment, Professor Gretton is of the clear view that these are not covered. He gives the example of a debtor having granted an all sums security to a bank and having a

⁸² That is to say: “. . . upon such an assignment being duly registered or recorded, the security . . . shall be vested in the assignee as effectually as if the security or the part had been granted in his favour.”

⁸³ See paras 10.46-10.49 above.

⁸⁴ [2018] SC GRE 5, 2018 GWD 6-87.

⁸⁵ *Clipper Holding II SARL v SF & SX*, Edinburgh Sheriff Court, 18 January 2018 (Sheriff William Holligan).

⁸⁶ R Aberdeen, “*OneSavings Bank plc v Burns* and its impact on repossessions with traded mortgage portfolios available at <https://www.mortgagefinancegazette.com/features/onesavings-bank-v-burns-impact-repossessions-within-traded-mortgage-portfolios-03-07-2017/>. See also A Spiers and L Walker, “Tide runs for lenders” 2018 JLSS Apr/32; B Fairgrieve, “Further decision on assigned securities” available at <https://www.morisonslp.com/further-decision-on-assigned-securities/> and S Sandham, “Assignment of Securities: some clarity for lenders” available at <https://andersonstrathern.co.uk/news-insight/assignments-of-securities-some-clarity-for-lenders/>.

⁸⁷ Reid and Gretton, *Conveyancing 2017* 126. For another close analysis, see K Swinton, “Assigning Heritable Securities” 2017 Scottish Law Gazette 23.

⁸⁸ On this question see *Shear* at para 10 and *Promontoria (Henrico) Ltd* at para 33.

⁸⁹ G L Gretton, “Assignations of All-Sums Standard Securities” 1994 SLT (News) 207.

⁹⁰ See paras 10.50-10.51 above.

⁹¹ See paras 10.46-10.49 above.

present indebtedness to that bank of £1,000. The bank then assigns the debt and the security to a second bank, which is owed £100,000 (unsecured) by the debtor. If Professor Halliday's view is wrong the result is that the second bank becomes secured for £101,000. Professor Gretton points out the difficulties of this result.⁹² For example, the debtor may be about to sell the property and rather than having to repay £1,000 to obtain a discharge of the security, £101,000 will now have to be paid. If the debtor shortly becomes insolvent, the second bank will have therefore levered itself into a position above other creditors in a way which might be regarded as obtaining an unfair preference, although the law on unfair preferences is not engaged.⁹³

10.58 More recently, Dr Ross Anderson has challenged Professor Gretton's view.⁹⁴ In his opinion, the standard security can secure pre-assignment debts owed to, and post-assignment advances made by, the assignee.⁹⁵ He makes no less than ten separate arguments in this regard. Space precludes us from examining these one by one. We consider that some are stronger than others. We mention three. The first is that by granting an all sums security the debtor has consented to all sums owed to the creditor and any assignee being covered. We wonder if debtors would always appreciate this. The second is that the effect of section 14 of the 1970 Act is to vest the security in the assignee as effectually as if it had been granted to the assignee in the first place. As we saw above,⁹⁶ this was an argument accepted by Lord Bannatyne in *Shear*.

10.59 The third argument is based on what would happen in Professor Gretton's example if, rather than the security being assigned by the first bank to the second bank, the £100,000 debt was assigned by the second bank to the first bank. The result according to Dr Anderson would be that the first bank would then be secured for £101,000. The effect on the debtor attempting to sell the property would be the same. This is a clever argument, although it would doubtless depend on the exact wording used in the standard security documentation.⁹⁷ But there is something rather uncomfortable about it. In the words of an Australian judge:

“[W]hen a person gives an “all obligations” mortgage or debenture he does not ordinarily contemplate that the property the subject of the security will secure not only his present and future obligations to the mortgagee or debenture holder but also any debt or liability of his which may be assigned by a third person to the secured creditor. It does seem strange that a man may lock up his counting-house and go home for the night, in the comfortable knowledge that his only secured creditor is his

⁹² See also *Sandhurst Holdings Ltd v Grosvenor Assets Ltd*, 17 July 2001, Chancery Division (available on Lexis) where such a result was described by Counsel as being “dramatic and astonishing”.

⁹³ This is because the law of unfair preferences only strikes at acts of the debtor (the insolvent party).

⁹⁴ See R G Anderson, “Assignment of All Sums Securities” in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 73-95.

⁹⁵ Provided that the assignation is intimated to the debtor.

⁹⁶ See para 10.54 above.

⁹⁷ For example the style deed for a standard security to Nationwide Building Society states that the security covers “all sums due and to become due under the Mortgage Conditions”. See <https://www.nationwide.co.uk/-/media/MainSite/documents/about/media-centre-and-specialist-areas/information-for-lawyers/S21-Mortgage-Deed-Scotland.pdf>. The “Mortgage Conditions” document para 3.1 states that “The mortgage secures (a) the debt and (b) any other money you owe us at any time and which you agree can be secured by the mortgage (this may include an overdraft).” In para 2.1, “debt” is defined as “the total amount of money outstanding under the mortgage offer and these conditions, including any arrears and all interest, expenses and product fees which become owing from you under the mortgage”. This wording appears not to cover a debt assigned by another bank unless the debtor agrees.

banker, to whom he owes a trifling sum secured by the usual boundless bank instrument, and unlock the door in the morning to find that, by virtue of assignment of the large but unsecured debts owed by him to his fellow merchants, and indeed to the butcher, the baker and the candlestick maker, all his unsecured debts have gone to feed his banker's insatiable security, so that every one of his debts is now secured."⁹⁸

10.60 Before discussing what the law in Scotland should be here, we will consider the position in other jurisdictions.

Comparative law

10.61 The issues covered in the debate between Professor Gretton and Dr Anderson are discussed by Professor Roderick Wood in the context of security over moveable property in Canada.⁹⁹ His helpful article also mentions some English case law. He notes that the courts have accepted that sums advanced to the assignee *after* the assignation can be covered by the security and cites decisions from the USA to support this statement.¹⁰⁰ We understand separately from an expert¹⁰¹ whom we have consulted that mortgages in the USA will normally cover further advances up to a fixed amount and that sums lent by an assignee mortgage holder will be covered up to that amount. As a matter of policy, Professor Wood notes that the assignee is simply stepping into the shoes of the assignor. Any lower ranking creditor is not going to be prejudiced because they would be in the same position if there had been no assignation and the (original) creditor had lent further sums.¹⁰² We understand, however, that in England, in commercial practice, security documentation is normally not drafted to cover debts due to an assignee of a charge (security) and if there is lending by the assignee a fresh charge will be taken.¹⁰³

10.62 In contrast, courts have generally been unwilling to allow the security to cover debts owed to the assignee which *pre-date* the assignation.¹⁰⁴ They have reached this conclusion by finding the terms of the secured obligation to be not clear and unequivocal enough to reach this result.¹⁰⁵ Two Canadian decisions have gone further and held that as a matter of law a security cannot cover previously unsecured indebtedness to the assignee. In *Canamsucco Road House Co v Lngas Ltd*¹⁰⁶ the court said that this "would mean a person with a third charge could gain priority over one with a second charge simply by paying off the

⁹⁸ *Re Clark's Refrigerated Transport Pty Ltd (in liquidation)* [1982] VR 989 at 995 per Brooking J.

⁹⁹ See R J Wood, "Turning Lead into Gold: The Uncertain Alchemy of All Obligations Clauses" (2004) 41 *Atlanta L Rev* 801. See further R C C Cuming, C Walsh and R J Wood, *Personal Property Security Law* (2nd edn, 2012) 426-431; M Gedye, R C C Cuming and R J Wood, *Personal Property Securities in New Zealand* (2002) 274-277 and 279-281 and R J Wood, "All Obligations Clauses and All Assets Clauses: Something Less than Everything" (2016) 32 *Banking and Financial Law Review* 151.

¹⁰⁰ Wood, "Turning Lead into Gold" at 809. See *In Re Cycle Products Distributing Co*, 12 UCC Rep Serv 2d 889 (Bankr SD Ill 1990) and *In Re Robert B Lee Enterprises Inc* 980 F 2d 606 (9th Cir 1992).

¹⁰¹ Professor Chris Odet.

¹⁰² In Scotland, a notice under s 13 of the 1970 Act can be used by a lower ranking creditor to protect itself from further advances by a higher ranking creditor. We discuss this provision in our second Discussion Paper, which will deal with ranking.

¹⁰³ We thank Richard Calnan and Sian Skerratt-Williams for this information. For the position in England as regards debts assigned to a secured creditor, see paras 10.69-10.70 below.

¹⁰⁴ See eg *Sandhurst Holdings Ltd v Grosvenor Assets Ltd*, 17 July 2001, Chancery Division (available on Lexis) and *OGB Ltd v Allan* [2001] BPIR 1111 (England); *Katsikalis v Deutsche Bank (Asia) AG* [1988] 2 Qd R 641 (Australia); *Kerr v Ducey* [1994] 1 NZLR 577 (New Zealand) and *Ex parte Chandler* 477 So 2d 360 (Sup Ct Ala 1985).

¹⁰⁵ See more generally the English case of *Re Quest Cae Ltd* [1985] BCLC 266.

¹⁰⁶ (1991) 2 PPSAC (2d) 203 (Ont Ct Gen Div), revd on other grounds (1997) 12 PPSAC (2d) 227 (Ont CA).

first charge and obtaining an assignment of the same.”¹⁰⁷ In *Near Horbay v Great West Golf & Industrial*,¹⁰⁸ Justice Watson was concerned about the potential effect on the supply of secured credit:

“Other potential creditors in the business community and commercial economy knowing that, as a matter of law, earlier security instruments astutely drafted and assigned might permit assignees to later add later claims that might be completely unrelated to advances of the business up to the ceiling, if any, of the original security instrument, would only have, if anything, the ability to take very limited protective or cautionary steps. The predictability and reliability of the system, and the integrity of the priority structure designed by the [relevant legislation] would not be served by this, and yet the risk of stultifying credit would be real.”¹⁰⁹

10.63 But, as Professor Wood shows, a lower ranking creditor is vulnerable generally because a higher ranking creditor may make further advances (including to “pay out” another creditor) which could ultimately leave the lower ranking creditor unsecured.¹¹⁰ There may also be good commercial reasons for the secured obligation to be drafted to cover debts not originally contracted with the assignor, such as debts due to a subsidiary company. In a more recent decision, *CPC Networks Corp v Eagle Eye Investments Inc*,¹¹¹ the Saskatchewan Court of Appeal has held that there is no general rule against an assigned security being able to cover prior indebtedness to the assignee. The question must be determined instead by interpretation of the security documentation.

10.64 Professor Wood is against a blanket ban on an assigned security covering debts due to the assignee which pre-date the assignment.¹¹² But he favours intervention where such an assignment takes place in the period leading up to the debtor’s bankruptcy and is tantamount to an unfair preference.¹¹³ Moreover, where insolvency is imminent there could be a bidding war between two lower ranking creditors, S2 and S3 to procure an assignment of the first ranking creditor S1’s all sums security: “[t]hese 11th hour or post-default manoeuvres are unproductive in that they lead to the investment of resources by the parties simply to wrest a larger slice of the pie from the grasp of other creditors”.¹¹⁴

10.65 We have also considered the position in a couple of civil law jurisdictions, Germany and the Netherlands. In Germany, the heritable security normally used is the non-accessory *Grundschuld*. It is accompanied by a security agreement (*Sicherungsvertrag*) which specifies the debts in respect of which the creditor can enforce the security. Such agreements normally specify the debts arising out of the creditor and debtor’s business relationship and not debts due to other parties. Therefore the transfer of the *Grundschuld* will not result in debts due to the assignee automatically being secured. We are advised, however, that under the standard form contract of the German Bankers’ Association (AGB

¹⁰⁷ (1991) 2 PPSAC (2d) 203 at 205 per Justice Mercier.

¹⁰⁸ [2001] 3 WWR 734 (Alta QB).

¹⁰⁹ [2001] 3 WWR 734 (Alta QB) at 757.

¹¹⁰ Wood, “Turning Lead into Gold” at 817-818.

¹¹¹ 2012 SKCA 118, [2013] 2 WWR 260.

¹¹² Wood, “Turning Lead into Gold” at 813-817 and 822-823. See also Cuming, Walsh and Wood, *Personal Property Security Law* at 430-431.

¹¹³ As noted at para 10.57 above it is not an unfair preference because it is not an act of the *debtor*.

¹¹⁴ Wood, “Turning Lead into Gold” at 818.

Banken des deutschen Bankenverbands)¹¹⁵ an assignee bank can demand that the debtor modifies the security agreement so that debts due to it are covered. In the Netherlands we understand that an assigned security will not cover pre-assignment debts owed to the assignee as the security is limited to debts arising out of the (normally banking) relationship between the debtor and the assignor. The practice is for a specific amount of debt to be assigned and for the security to be varied to become a security for that amount prior to the assignment.

Discussion

10.66 We have seen that the decision in *OneSavings Bank plc* principally concerned the issue of whether the outstanding debt has to be stated in a deed assigning an all sums standard security for the assignment to be valid. But this is a subsidiary question to that of the effect of the assignment of an all sums standard security.

10.67 Having now considered the position in other jurisdictions, we incline to the view that where such a security is assigned it should be capable of securing sums advanced by the assignee to the debtor following the assignment. Thus where Bank A is assigning a portfolio of mortgages to Bank B the mortgage relationship shifts from being between the debtor and Bank A to being between the debtor and Bank B. Bank B steps into the shoes of Bank A. On this basis and contrary to the views of Professors Halliday and Gretton, the assignment should not turn an all sums standard security into a security for a fixed amount. On that basis there should also be no requirement for the assignment document to have to specify the amount due to the assignor at the time of the assignment. Of course this would be subject to the terms of the agreement between the parties. That agreement might preclude future advances from an assignee being secured.

10.68 We propose:

- 49. The effect of an assignment of a standard security should not be to limit the standard security to the amount due at the time of the assignment and future advances made by the assignee may be secured depending on the terms of the security contract.**

10.69 The question of whether other debts may be secured is in our view a more controversial one. This includes debts owed to the assignee which pre-date the assignment. We set out above the debate between Professor Gretton and Dr Anderson on this issue.¹¹⁶ But, as we saw from it and the comparative law which we examined, the question in fact resolves into a broader one of what debts should be capable of being secured by an all sums security.¹¹⁷ Should debts originally owed to other parties and then assigned to the holder of a standard security be covered? We understand that English security documentation is now typically drafted to cover such debts with wording along the following lines:

¹¹⁵ See https://bankenverband.de/media/40000_0718_muster.pdf art 13(1). We are grateful to Dr Jakob Gleim for his assistance.

¹¹⁶ See paras 10.57-10.59 above.

¹¹⁷ We leave, however, the question of notices under s 13 of the 1970 Act and ranking questions generally to our forthcoming second Discussion Paper.

“**Secured Liabilities**” means all present and future obligations and liabilities of the Borrower to the Lender, whether actual or contingent and whether owed jointly or severally, as principal or surety or in any other capacity *and whether or not the Lender was an original party to the relevant transaction* and in whatever name or style, together with all interest (including, without limitation, default interest) accruing in respect of those obligations or liabilities”(our emphasis).¹¹⁸

10.70 The purpose of this wording is to overcome the conclusion reached in the case of *Re Quest Cae Ltd*¹¹⁹ that “all sums” wording did not cover liabilities of the debtor to a third party which the secured creditor later acquired from the third party.¹²⁰ It is also now being used in Scottish security documents.

10.71 While this matter could simply be left to freedom of contract in terms of the breadth of the secured obligation and a court’s interpretation of that, we saw above the potential for difficulty where the debtor becomes insolvent. The law of unfair preferences does not assist. We would welcome the views of consultees. If there were to be restrictions, we consider that the wording of section 14 of the 1970 Act would have to be revised in the new legislation.¹²¹

10.72 We ask:

- 50. (a) Should there be any restrictions on what an all sums standard security may secure?**
- (b) In particular, should there be restrictions on**
- (i) pre-assignment debts owed to the assignee; and**
 - (ii) debts originally owed to other parties**
- being secured?**

¹¹⁸ We are grateful to Andrew Kinnes for providing us with this clause.

¹¹⁹ [1985] BCLC 266.

¹²⁰ See R Calnan, *Taking Security* (4th edn, 2018) paras 3.197-3.198.

¹²¹ See paras 10.17-10.18, 10.54 and 10.58 above.

Chapter 11 Extinction

Introduction

11.1 In this chapter we consider the ways in which a standard security can be extinguished. This will normally happen by means of a discharge. We look also at the subjects of redemption, compulsory purchase and *confusion*. Finally, we ask whether there should be a sunset rule to declutter the Land Register of obsolete standard securities.

The accessoriness principle

11.2 Under this principle, which we considered earlier, a security is parasitic on a debt.¹ It follows that if the debt is extinguished then so is the security.² An example is the case of *Albatown Ltd v Credential Group Ltd*.³ Here a purchaser of land could not pay the price on the agreed date. The seller said that the sale could go ahead if the buyer granted a standard security over the land for the amount due. The buyer's obligation to pay, however, was under the contract of sale, which contained a clause limiting its enforceability to two years. In an action between the parties after that time it was held that there was no longer a debt and thus no longer a security.

11.3 Of course, the mere extinction of the secured debt will not magically remove the security from the Land Register. A deed of *discharge* will need to be recorded. But that discharge is merely bringing the register up to date with legal reality, sometimes known as "clearing the record".⁴

11.4 The foregoing discussion is limited to securities for a fixed amount. If the security is for a fluctuating amount or for all sums it will persist even if there is not an amount currently owing. For example, a standard security might be granted in respect of an overdraft facility. If the balance on the account goes into credit, the security is not extinguished as there is the possibility that further sums may be debited in the future. The standard security has a suspended existence.⁵ A discharge is required to extinguish the security. That discharge has substantive effect rather than only being to update the register.

Discharges

General

11.5 The approach of the Halliday Report to discharges is similar to its approach to other deeds. There should be statutory forms.⁶ One form would be stand-alone, the other would

¹ See paras 3.21-3.27 above.

² This was the rule too for the bond and disposition in security: see *Cameron v Williamson* (1895) 22 R 293.

³ 2001 GWD 27-1102.

⁴ See eg Gretton and Reid, *Conveyancing* paras 7-18 to 7-19.

⁵ In the words of K G C Reid and G L Gretton, *Conveyancing 2001* (2002) 91 it is "parasitic upon, a possible debt, a debt not *in esse* but in *posse*." See also Quebec Civil Code art 2797.

⁶ Halliday Report para 126.

be endorsed on the standard security document.⁷ The Report's recommendations are taken forward into the 1970 Act where section 17 (as amended) provides:

“A standard security duly registered or recorded may be discharged, and the land or real right in land burdened by that security may be discharged thereof in whole or in part, by a discharge in conformity with Form F of Schedule 4 to the Act, duly registered or recorded.”

11.6 The reference to discharge in part relates to the obligation secured and not to the encumbered land, where the appropriate deed is a restriction.⁸ For example, a standard security for £100,000 might be discharged to the extent of £75,000 leaving £25,000 secured.⁹ Partial discharges are rare.¹⁰ Furthermore, the need for them may be doubted. If a debtor is entitled to a partial discharge every time that a repayment instalment is paid this would lead in theory in a typical residential loan to monthly partial discharges. If it is desired to limit the extent of the secured debt it could be done by variation, which is the position to increase the secured debt.¹¹

11.7 Form F of Schedule 4 in fact comprises two styles: (1) a stand-alone document; and (2) wording to be endorsed on the standard security deed. The form requires that in both cases:

“where the security is in respect of a maximum sum or of all sums due or to become due or is in respect of a personal obligation constituted in an instrument or instruments other than the standard security add being the whole amount secured by the standard security aftermentioned.”

11.8 The “whole amount” refers to the discharge being granted “in consideration of £ ”. Nowadays, however, that wording is generally not used. This can be seen from the form of digital discharge now being used by the main residential mortgage lenders, which was developed with Registers of Scotland.¹²

11.9 In line with our proposals for other deeds affecting standard securities, we do not think that there should be a mandatory style discharge. The Keeper's digitalisation programme, however, will mean in practice that discharges are often in a standard form. In addition and subject to the development of that programme it should remain possible to discharge a standard security by means of a consent *in gremio* in a disposition transferring the property.¹³ We propose:

51. It should continue to be possible to discharge a standard security in whole:

⁷ Halliday Report Appendix F Part II para 19.

⁸ On restrictions, see Chapter 9 above.

⁹ See Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 9-55.

¹⁰ In the period April 2017 to March 2018, 124,119 discharges and four partial discharges were registered in the Land Register.

¹¹ See paras 9.3-9.4 above. Presumably a variation to reduce the secured debt is currently not competent under the 1970 Act because s 16(1) forbids the use of a variation where a discharge can be used.

¹² See Appendix A.

¹³ For discussion in relation to restrictions, see para 9.22 above.

(a) as under the 1970 Act, except that there should be no mandatory form of deed; or

(b) by means of a consent *in gremio* in a disposition transferring the property.

Where a secured loan has been repaid

11.10 Our advisory group informs us that lending institutions will not necessarily proceed to discharge a standard security where the amount due under a loan is repaid.¹⁴ They may seek to keep the security, which will typically be for all sums, in case there is any future lending which would be automatically secured.¹⁵ There may be negative consequences of this for the debtor, such as a credit check which suggests that there is a secured loan whereas that loan has been paid off.

11.11 We would welcome the comments of consultees on this subject and whether they consider that any reform is needed here to encourage lenders to discharge securities where a loan has been repaid. We note that standard condition 11(5) already entitles the debtor to a discharge on paying the secured debt. There may of course be particular facts justifying the retention of the security. One possibility would be to limit the rule to residential mortgages.¹⁶ Another question is what the sanction should be for failure to comply with such a rule.

11.12 A further point is that a debtor may use the redemption procedure described below, but not all debtors will be well informed on this. We ask:

52. (a) Do consultees consider that the law should require creditors to discharge standard securities where there is no outstanding debt?

(b) If so, should such a rule be restricted to residential cases and should there be exceptions? What should be the sanction for non-compliance?

Good faith protection

11.13 Section 41 of the 1970 Act protects good faith purchasers of land where a discharge of a heritable security was recorded more than five years ago.¹⁷ Provided that the “discharge bears to be granted by a person entitled so to do”, reduction of the discharge will not affect the acquirer. This provision is only relevant to properties which are still in the Register of Sasines. Where a property has moved onto the Land Register the Keeper will have deleted the discharged security from the title sheet and it will be invisible to a prospective purchaser and anyone else for that matter.¹⁸ Good faith purchasers will be protected from any subsequent reduction of the discharge by land registration law.¹⁹

¹⁴ See also Cusine and Rennie, *Standard Securities* para 10-09.

¹⁵ And no new security would need to be prepared.

¹⁶ There is of course a definitional issue here as to what a residential case is. We will look at this in our second Discussion Paper.

¹⁷ See Cusine and Rennie, *Standard Securities* para 10-02.

¹⁸ See Gretton and Reid, *Conveyancing* para 8-37.

¹⁹ See 2012 Act s 91. For discussion, see K G C Reid and G L Gretton, *Land Registration* (2017) para 12.18.

11.14 The current target date to complete the Land Register is 2024. If that is met then no replacement for section 41 would be required if the legislation following from our project does not come into force until after that date. If not, then we think that section 41 should be re-enacted. Professors Cusine and Rennie have commented that its current drafting may be wide enough to protect against reductions of discharges granted in favour of the wrong *debtor*, whereas the appropriate policy should be protection against reductions granted by the wrong *creditor*.²⁰ We agree that any restated version should clarify that the protection is not so wide. We propose:

53. Section 41 of the 1970 Act should be restated and clarified by means of a new statutory provision.

Redemption

General

11.15 Redemption is the right of the debtor to have the security discharged on payment of the secured debt.²¹ For example, John and Karen may agree a mortgage with their bank in terms of which they will receive £100,000 which will be paid off over twenty years. But in year 3, John's long lost uncle dies and leaves him £1 million. John decides to repay the entire loan now.

11.16 It might be reasonably thought that the question of whether a loan can be repaid early is simply a matter of contract law. If the contract requires repayment over twenty years any change to this will require a variation of the contract. But the 1970 Act overrides this by giving the right to redeem.²²

11.17 As discussed in Chapter 7, the Halliday Report places the right of redemption in its suggested standard conditions.²³ The 1970 Act itself, however, divides redemption between section 18 and standard condition 11. We said that this was awkward and we proposed that the rules of redemption should not be dealt with in standard conditions but in the substantive provisions of the new legislation.²⁴

1970 Act

11.18 The provisions on redemption in the 1970 Act are complex.²⁵ They are influenced by section 32 of the Conveyancing (Scotland) Act 1924 which governed redemption for the old bond and disposition in security.²⁶ A mistake was made in the 1970 Act when the legislation was passed.²⁷ There was a blanket prohibition on varying the right to redemption. This meant that a creditor who offered a favourable interest rate for the first year or two on the basis that the debtor could not redeem for say five years could not enforce this. Less than

²⁰ Cusine and Rennie, *Standard Securities* para 10-02.

²¹ See the Notes on Clauses (clause 17).

²² Although this can be excluded by agreement. See paras 11.18-11.24 below.

²³ See paras 7.5 and 7.10 above.

²⁴ See paras 7.38-7.39 above.

²⁵ This is the word used in Higgins, *The Enforcement of Heritable Securities* para 12.21. We agree.

²⁶ See Halliday, *Conveyancing Law and Practice* paras 48-63 to 48-66.

²⁷ See Halliday, *Conveyancing Law and Practice* para 47-07.

six months after the 1970 Act came into force Parliament was forced to make an “urgent response”.²⁸ In the words of the Lord Advocate:

“Representations which have been made to the Government in a steadily increasing flow and with growing insistence over the past few months point unequivocally to the fact that the provisions are seriously disrupting the pattern of commercial lending in Scotland, and that there is indeed a real danger of commercial credit in Scotland drying up altogether, with the serious consequences for the economy which that would entail.”²⁹

11.19 He said subsequently:

“The Confederation of British Industry, the Scottish Chamber of Commerce, the Industrial and Commercial Finance Corporation, the Associated Scottish Life Offices, the Scottish Agricultural Securities Corporation, and the Housing Corporation have all made very serious representations about the effect of the legislation unless it is altered quickly . . . every hon. Member representing a Scottish constituency has had representations from the Law Society of Scotland on this matter.”³⁰

11.20 The issue was apparently not noticed prior to the 1970 Act being enacted. The former Minister who had been responsible for taking through that legislation said that this was “not surprising . . . because it was a very difficult and complex operation in which we were engaged.”³¹ But, looking back, it does seem surprising because section 32 of the 1924 Act only allows redemption of a bond and disposition in security at the term of payment of the bond or at any Whitsunday or Martinmas thereafter.³² Three months’ notice must be given.³³

11.21 The Redemption of Standard Securities (Scotland) Act 1971 was therefore passed to restrict the prohibition on varying to the redemption *procedure* only.

11.22 The first two subsections of section 18 (as amended by the 1971 Act) provide:

“(1) Subject to the provisions of subsection (1A) of this section, the debtor in a standard security or, where the debtor is not the proprietor, the proprietor of the security subjects shall be entitled to redeem the security on giving two months’ notice of his intention so to do, and in conformity with the terms of standard condition 11 and the appropriate Forms of Schedule 5 to this Act.

(1A) Without prejudice to section 11 of the Land Tenure Reform (Scotland) Act 1974 the provisions of the foregoing subsection shall be subject to any agreement to the contrary, but any right to redeem the security shall be exercisable in conformity with the terms and Forms referred to in that subsection.”

²⁸ Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 30 March 1971 col 7 (Rt Hon Norman Wylie QC MP).

²⁹ Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 30 March 1971 col 6 (Rt Hon Norman Wylie QC MP).

³⁰ Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 30 March 1971 cols 19-20 (Rt Hon Norman Wylie QC MP).

³¹ Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 30 March 1971 col 9 (Norman Buchan MP). He noted that the problem had not been noticed “despite the great volume of valuable advice which we were receiving from legal bodies, the Law Society, the Writers to the Signet and the [now Lord Advocate] himself.”

³² Halliday, *Conveyancing Law and Practice* para 48-64.

³³ A statutory form of notice is provided in Sch L to the 1924 Act (Form No 1).

11.23 It can be seen from subsection (1) that the right to redeem can be exercised by the debtor and, in the case of third-party security, by the property owner. For example, if Casey grants a standard security over her land to the Botriphnie Bank to secure a £100,000 debt due to the bank by Andreas, she is entitled to exercise the right of redemption. As can be seen, subsection (1) requires a notice period of two months, the use of a statutory form and compliance with the procedure set out in standard condition 11.

11.24 Subsection (1A), which was inserted by the 1971 Act, makes it clear that the parties can exclude the right to redemption, but this is subject to section 11 of the 1974 Act. We look at that provision below.

11.25 We understand that notices of redemption are not used in practice. This is because the question of when a debtor is entitled to pay the secured debt will be determined by the loan contract. The following examples may be given.

11.26 First, X plc lends £1 million to Y Ltd, secured by a standard security and the loan is repayable after five years at 5% interest. Soon after, market interest rates fall sharply. Y Ltd would like to refinance at a lower rate, that is to say repay the loan by receiving another loan from an alternative lender. But it has no right to do so unless the contract provides for this. It is unreasonable for section 18(1) to override the contract in this case. Hence lenders will contract out of it. As mentioned above,³⁴ the predecessor provision – section 32 of the 1924 Act – limited the right to redemption to the agreed contractual term.

11.27 Secondly, Deborah has an overdraft facility with the Elgin Bank. This is secured by a standard security. With overdrafts, customers can clear the debit balance any time by depositing sufficient sums in the account. Deborah does this and the account is now in credit. She wants the security discharged. But there is nothing to be paid. Yet the redemption procedure assumes that there is.³⁵

11.28 Subsections (2) and (3) go on to deal with the situation where redemption is sought, but a discharge of the security cannot be obtained, in particular because the creditor is dead or absent. Of course most creditors are financial institutions so these provisions rarely apply.

11.29 In the case of a monetary debt, the “whole amount due”³⁶ to the creditor as a result of the redemption must be consigned in a bank in Scotland “for the person appearing to having the best right thereto”.³⁷ In any other case, which must mean an obligation *ad factum praestandum*,³⁸ application can be made to the court for declarator that the obligation has been performed.³⁹ Following the consignation or declarator being granted the debtor’s solicitor may “expede” (draw up) a certificate to that effect in the appropriate form prescribed by form D of Schedule 5 to the 1970 Act. On the certificate being registered the security is extinguished.⁴⁰

³⁴ See para 11.20 above.

³⁵ See the 1970 Act Sch 5 form A.

³⁶ This is defined in section 18(4) as “the debt to which the security relates, so far as outstanding, and any other sums due thereunder by way of interest or otherwise.”

³⁷ 1970 Act s 18(2)(a).

³⁸ On which see Chapter 4 above.

³⁹ 1970 Act s 18(2)(b).

⁴⁰ 1970 Act s 18(3).

11.30 Standard condition 11 deals primarily with how notice of exercise of the right of redemption is to be given. Writing is required.⁴¹ But it is possible for the creditor to waive this, as well as the two months' notice period.⁴² There are rules on how the notice is to be sent, including provision for it to be sent to the Extractor of the Court of Session where the address of the creditor is unknown or where attempts to send to the creditor fail.⁴³ If the notice states the wrong amount that is due, this is not fatal.⁴⁴ The final provision in standard condition 11 is that where the debtor has exercised the right to redeem and performed the secured obligation, the creditor is required to grant a discharge in the form required under section 17 of the 1970 Act.⁴⁵ This obligation seems particularly out of place as a standard condition. It should be a substantive provision. Schedule 5 sets out four different statutory forms that are to be used as appropriate as part of the redemption procedure.

11.31 The right of redemption also appears in two of the sections in the 1970 Act dealing with enforcement of a standard security. Section 23(3) provides:

“At any time after the expiry of the period stated in a notice of default ... but before the conclusion of any enforceable contract to sell the security subjects ... the debtor or proprietor ... may ... redeem the security without the necessity of observance of any requirement as to notice.”

11.32 A notice of default is one of the ways of commencing enforcement of a heritable security and will be discussed in our forthcoming second Discussion Paper. Section 23(3) was discussed in *G Dunlop & Son's Judicial Factor v Armstrong (No. 1)*⁴⁶ which involved another enforcement process: calling-up. There is no equivalent to that provision in the calling-up provisions. Lord Kirkwood held despite this that a debtor, in terms of section 18(1), is entitled to exercise the right of redemption, although the calling-up notice is not complied with.

11.33 Section 26(2) deals with the situation where the encumbered property has been sold on enforcement by a lower ranking secured creditor. Such a sale will not disencumber the property of a higher ranking standard security.⁴⁷ But the lower ranking creditor, as was the case for the bond and disposition,⁴⁸ is entitled to redeem the higher ranking security. This will enable an unencumbered title to be conferred on the purchaser.

Discussion

11.34 We have seen that the 1970 Act provisions on redemption are complicated. They should be simplified. It would be possible to go further and just abolish them. If the debtor pays the secured debt then the debtor is entitled to a discharge, subject to any contrary agreement between the parties. For example, it might be agreed that the security is to stay in place until a certain date to provide security for any sums advanced to the debtor during

⁴¹ Standard condition 11(1).

⁴² Standard condition 11(2).

⁴³ Standard condition 11(3).

⁴⁴ Standard condition 11(4).

⁴⁵ Standard condition 11(5).

⁴⁶ 1994 SLT 199. For discussion, see Higgins, *The Enforcement of Heritable Securities* para 12.21.

⁴⁷ 1970 Act s 26(1).

⁴⁸ *Adair's Trs v Rankin* (1895) 22 R 975; *Reis v Mackay* (1898) 6 SLT 331.

that period. The view, however, taken at the time of the 1970 Act was that statutory regulation is needed:

“Redemption may be regarded as a basic right of the debtor in a heritable security transaction and it is desirable that the procedure for exercising it should be prescribed in the Bill – subject to some necessary flexibility which has been built into the provisions.”⁴⁹

11.35 It is also common to find redemption provisions in comparative legislation dealing with security rights.⁵⁰

11.36 Moreover, as we have seen, section 18(2) and (3) deal with the situation where a discharge cannot be obtained, in particular where the debtor has died or disappeared. We consider that the new legislation would also need to have provisions to cover this situation. We have our doubts about the procedures under the current provision. In respect of monetary debts, the security can be extinguished without the involvement of the court. We wonder also if it makes sense for money to be consigned where there is no realistic prospect of the creditor ever appearing to claim it. The law of negative prescription will extinguish a debt where it is not claimed and it is not obvious why a debtor should not get the benefit of prescription where the debt happens to be secured by a standard security. Our provisional view is that where the creditor cannot be found the debtor should be entitled to seek a court order which on registration should discharge the security.⁵¹

11.37 A specific issue raised by our advisory group is where the debtor and the owner of the encumbered property are different persons and the latter wants to redeem the security. Imagine that the outstanding debt is £250,000 and the encumbered property is worth £200,000. As section 18 stands the property owner would have to pay £250,000 to redeem. Yet if the security was enforced the liability of that party would be restricted to the value of the property, that is to say £200,000. It has been suggested to us that the property owner should only have to pay that lower amount in these circumstances.

11.38 Finally, as regards the interaction of redemption with the enforcement of a standard security, we leave this to our second Discussion Paper.

11.39 We ask:

- 54. (a) Do consultees agree that the rules on redemption should be replaced with a general rule entitling the debtor to a discharge on the secured obligation being performed in terms of the contractual arrangements between the parties and a court procedure for discharge where the creditor has disappeared or refuses to grant a discharge?**
- (b) What comments do consultees have on the owner of the encumbered property (where that person is not the debtor) having the**

⁴⁹ Notes on Clauses (clause 17). The “equity of redemption” is a famous feature of English mortgage law. See eg R Calnan, *Taking Security* (4th edn, 2018) paras 3.200-3.219.

⁵⁰ Eg Transfer of Property Act 1882 s 60 (India); Personal Property Security Act 1999 s 132 (New Zealand).

⁵¹ As under Estonian law. See the Estonian Law of Property Act 1993 § 331.

right to have the security discharged by paying the value of the property?

Section 11 of the Land Tenure Reform (Scotland) Act 1974

11.40 The ability to contract out of the right to redemption is subject to section 11 of the Land Tenure Reform (Scotland) Act 1974 which applies to standard securities over “private dwelling-houses” and gives a right to redeem after 20 years. According to Professor Halliday, the provision was introduced in order to circumvent a device which might be used to evade the 1974 Act’s prohibition on leases of dwelling-houses being granted for longer than 20 years.⁵² An owner of a house could create something similar to a long lease by selling the house under burden of a standard security granted by the purchaser for the full price or a substantial part of it. There would be a clause prohibiting redemption of the security for a fixed period, or allowing early redemption only on penal conditions. Interest would be payable at a flexible rate (and subject to regular review) so it acted like rent. A clause of redemption⁵³ would be added to the disposition to enable the seller to reacquire the property at the end of the agreed period. Professor Halliday states that “in practice the legislation has achieved its objective and transactions of the kind which it was intended to discourage have been virtually unknown.”⁵⁴

11.41 Section 11 is disapplied in certain circumstances. The debtor can renounce its right of redemption if it is a “social landlord”,⁵⁵ “a body connected to a social landlord”,⁵⁶ “a rural housing body”⁵⁷ or, finally, “a body prescribed, or of a type prescribed, by the Scottish Ministers by order made by statutory instrument”.⁵⁸ Moreover, certain heritable securities are excluded from the scope of redemption under the 1974 Act, including “a heritable security which is in security of a debt of a description specified in an order made by the Scottish Ministers.”⁵⁹ A recent example of such an order is the Redemption of Heritable Securities (Excluded Securities) (Scotland) Order 2018, which lists standard securities created under, among other schemes, the “Help to Buy (Scotland) Scheme” and the “Help to Buy (Scotland) Smaller Developers Scheme”.⁶⁰

11.42 Our provisional view is that the type of transaction described by Professor Halliday is unlikely to become commonplace now if section 11 were to be repealed. We note also that in terms of the Private Housing (Tenancies) (Scotland) Act 2016 there is apparently no

⁵² Halliday, *Conveyancing Law and Practice* para 55-65.

⁵³ Redemption in the sense of an option to reacquire. See para 4.75 above.

⁵⁴ Halliday, *Conveyancing Law and Practice* para 55-65.

⁵⁵ Land Tenure Reform (Scotland) Act 1974 s 11(3A)(b)(i) (within the meaning of section 165 of the Housing (Scotland) Act 2010).

⁵⁶ Land Tenure Reform (Scotland) Act 1974 s 11(3A)(b)(ii) (within the meaning of section 164 of the Housing (Scotland) Act 2010).

⁵⁷ Land Tenure Reform (Scotland) Act 1974 s 11(3A)(b)(iii) (within the meaning of section 122(1) of the Title Conditions (Scotland) Act 2003).

⁵⁸ Land Tenure Reform (Scotland) Act 1974 s 11(3A)(b)(iv).

⁵⁹ Land Tenure Reform (Scotland) Act 1974 s 11(3D).

⁶⁰ Redemption of Heritable Securities (Excluded Securities) (Scotland) Order 2018 (SSI 2018/376) art 2(2). The statutory instrument came into force on 15 February 2019, with this provision being retrospective as well as prospective. Article 3 goes on to list further securities excluded from the operation of redemption. This latter provision is *only* prospective, however, see art 3(3).

longer a policy concern about residential leases of over 20 years.⁶¹ Our understanding is that section 11 causes difficulty in practice for funding projects.

11.43 We propose:

55. Section 11 of the Land Tenure Reform (Scotland) Act 1974 should be repealed.

Compulsory purchase

11.44 When land is the subject of compulsory purchase, the acquirer will normally want to extinguish the heritable securities encumbering the property. The current law here is complex and we made proposals as to how it might be simplified in our Discussion Paper on Compulsory Purchase.⁶² The Scottish Government is currently considering how reform of compulsory purchase law should be taken forward.⁶³

Confusio

11.45 Where two rights come to be held by the same person there is said to be *confusio* (confusion). For example, Fred grants a standard security over his land to Gertrude in 2018. In 2019, Gertrude buys the land. She now owns the land as well as holding a security over it. Such a scenario will be rare, but most likely where companies in the same group lend to each other and there is a reconstruction of the group's assets.⁶⁴

11.46 The parameters of the doctrine of *confusio* are confused.⁶⁵ For while it is clear that someone cannot be both debtor and creditor in a contract of loan,⁶⁶ it is not so certain what happens where someone holding a property right acquires the property over which the right is held. The right may be extinguished or, on the other hand, it may simply be suspended.⁶⁷ We considered the position in relation to leases in our recent Discussion Paper on Aspects of Leases: Termination.⁶⁸

11.47 The 1970 Act is silent on the question of *confusio*. Professor Halliday states that the doctrine does apply to standard securities resulting in extinction.⁶⁹ Other authorities are not so clear.⁷⁰

⁶¹ Private Housing (Tenancies) (Scotland) Act 2016 s 4(a) and Land Tenure Reform (Scotland) Act 1974 s 8 (3ZA) (as inserted by the 2016 Act Sch 4 para 1).

⁶² Scottish Law Commission, Discussion Paper on Compulsory Purchase (Scot Law Com DP No 159, 2014) ch 8.

⁶³ Scottish Law Commission, Annual Report 2017 (Scot Law Com No 251, 2018) 13.

⁶⁴ Cusine and Rennie, *Standard Securities* para 10.11.

⁶⁵ See R G Anderson, "A Whimsical Subject: *Confusio*" 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) 31-45.

⁶⁶ See eg W M Gloag, *The Law of Contract* (2nd edn, 1929) 725.

⁶⁷ For real burdens, the rule is that there is not extinction merely because the benefited and burdened properties become owned by the same person: see the Title Conditions (Scotland) Act 2003 s 19.

⁶⁸ Scottish Law Commission, Discussion Paper on Aspects of Leases: Termination (Scot Law Com DP No 165, 2018) ch 8.

⁶⁹ Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 9-08. See also Gordon, *Scottish Land Law* para 20-29 and note K G C Reid and G L Gretton, *Conveyancing 2014* (2015) 181.

⁷⁰ Gloag and Irvine, *Rights in Security* 137-139 (discussing bonds and dispositions in security); Cusine and Rennie, *Standard Securities* para 10.11.

11.48 We incline to the view that *confusio* should not apply, thus removing the risk of rights being lost which the parties did not intend to extinguish. Thus, in a company group situation, the holding of the security right and ownership of the encumbered property together might only be temporary. Of course, a party holding both ownership and the security can easily extinguish the security by means of registering a discharge.

11.49 We propose:

56. The doctrine of *confusio* should not extinguish a standard security.

Sunset rule

11.50 It has been suggested by one of our advisory group members⁷¹ that there should be a “sunset rule” whereby standard securities⁷² are extinguished after a reasonably long period of time and removed from the Land Register.⁷³ This would declutter the register of effectively dead securities which are still mentioned in the digital title sheet. The relevant period should in our view be at least fifty years.⁷⁴ It would be possible to prevent the rule applying by means of renewing the registration.

11.51 We proposed such a rule for the new statutory pledge in our moveable transactions project. This attracted significant opposition.⁷⁵ There is a concern among practitioners that transactions which are still live may be invalidated. But the longer the period the less risk that there would be. A decluttered register would be a more attractive register.

11.52 We ask:

57. Should there be a sunset rule for standard securities? If so, what should be the period be? If not, why not?

⁷¹ Professor Gretton.

⁷² We deal with other heritable securities in the next chapter.

⁷³ By the time any such rule took effect the Register of Sasines would be closed.

⁷⁴ We note, however, that the registration of a mortgage (*ipoteca*) under Italian law lasts only twenty years but can be renewed. See Italian Civil Code art 2847.

⁷⁵ Report on Moveable Transactions paras 35.20-35.29.

Chapter 12 Older forms of heritable security

Introduction

12.1 Since 29 November 1970 the only type of heritable security which it has been possible to grant is the standard security.¹ That is now almost half a century ago. Consequently, relatively few securities granted in one of the older forms remain in existence.

12.2 We saw in Chapter 2 that the three older forms which could be granted prior to 1970 were: (1) the bond and disposition in security; (2) the bond of cash credit and disposition in security; and (3) the *ex facie* absolute disposition. The first two of these were *true* forms of security in which the debtor retained ownership. In the third the property was conveyed to the creditor.

12.3 Figures which we have obtained from Registers of Scotland for the 12-month period April 2017 to March 2018 show that there were only (a) four discharges of bonds and (b) fourteen discharges of *ex facie* absolute dispositions under section 40 of the Conveyancing and Feudal Reform (Scotland) Act 1970. We look at that provision below, but it must be remembered that it is possible also to bring a mortgage arrangement using an *ex facie* absolute disposition to an end by (re)conveying the property to the debtor. Therefore the figure of fourteen will be somewhat below the reality in practice. Nevertheless, the possibility of such a security being enforced nowadays must be very low.²

Making the statute book more accessible

12.4 We noted in Chapter 2 that while much of the law on heritable securities is now in the 1970 Act, there are also provisions in several other pieces of legislation. Many of these other provisions are on the older forms of heritable securities. Some may be repealed and not replaced. For example, section 7 of the Debts Securities (Scotland) Act 1856 makes provision for the bond of cash credit and disposition in security. But such securities are of course no longer competent and discharging any remaining ones can be dealt with by separate provision.³ Another example is section 120 of the Titles to Land Consolidation (Scotland) Act 1868. It provides, as amended:

“Heritable securities may be registered in the appropriate register of sasines at any time during the lifetime of the grantee, and shall in competition be preferred according to the date of the registration thereof.”

12.5 Three comments can be made about this. First, all new heritable securities ie standard securities must now be registered in the Land Register.⁴ Secondly, most grantees are legal persons rather than natural persons and do not have a “lifetime”. Thirdly, the rule

¹ See paras 3.3-3.15 above.

² See *Northern Rock (Asset Management) Plc v Doyle* 2012 Hous LR 94 at para 17 per Sheriff Anthony Deutsch.

³ See para 12.11 below.

⁴ See para 6.48 above.

of ranking by time (*prior tempore potior jure*) is a general rule of property law. Its detailed application will be discussed in our forthcoming second Discussion Paper.

12.6 Insofar as specific provisions on the older forms of security remain necessary, we think that they should appear in the new legislation. There should be no need to look at earlier legislation on heritable securities. It should be repealed. We propose:

58. The existing statutory provisions on the older forms of heritable security should be repealed. Where necessary, appropriate provision should be made in the new legislation.

Bond and disposition in security

12.7 In our Report on Abolition of the Feudal System which was published in 1999, we noted:

“The conveyancing statutes contain many provisions, often extremely detailed, relating to old forms of heritable security which are now rarely encountered in practice. The main example is the bond and disposition in security. New heritable securities in this form have been disallowed since 1970. However, for decades before that bonds and dispositions in security had in practice been replaced by the *ex facie* absolute disposition which gave the heritable creditor much better rights of enforcement. We think that the time has come to cleanse the statute book of all these obsolescent provisions.”⁵

12.8 We recommended that the forms and procedures provided by the 1970 Act should be used for juridical acts in relation to the bond and disposition in security – such as assignments and discharges – and for enforcement of that security, with appropriate modifications. Our recommendation was implemented by section 69 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Schedule 13 of that Act repealed the redundant provisions.

12.9 Our view is that the principle encapsulated in section 69 should be taken forward into the new legislation. In other words the rules in relation to standard securities should apply with appropriate modification to the bond and disposition in security.

12.10 Similarly, if the sunset rule which we suggested in the previous chapter were to be introduced,⁶ it should apply to the bond and disposition in security too.

Bond of cash credit and disposition in security

12.11 Section 69 of the 2000 Act also applies to this form of heritable security.⁷ We think that the policy here should be the same as for the bond and disposition in security. The same would go as regards the proposed sunset rule.

12.12 We therefore propose:

⁵ Scottish Law Commission, Report on Abolition of the Feudal System (Scot Law Com No 168, 1999) para 9.31.

⁶ See paras 11.50-11.52 above.

⁷ See the Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 69(1) which provides that the relevant provisions in the 1970 Act will apply to “any heritable security granted before 29 November 1970”, but subsection (2) excludes the *ex facie* absolute disposition.

59. The rules in relation to transactions involving, and the enforcement of, a

(a) bond and disposition in security, or

(b) bond of cash credit and disposition in security,

should be the same as for the standard security with appropriate modifications. Any sunset rule for standard securities should also apply to these securities.

The *ex facie* absolute disposition

General

12.13 As has been mentioned,⁸ this was the most common form of heritable security prior to the introduction of the standard security. Section 69 of the 2000 Act, however, does not apply to it, because it is a transfer rather than a true security.

Section 40 discharges

12.14 The Halliday Report noted that when the debt secured by an *ex facie* absolute disposition was repaid it was necessary to (re)convey the encumbered property to the debtor. It considered that it would be “practical and desirable”⁹ to make available a form of discharge, which would be either be a stand-alone document or could be endorsed on the disposition.¹⁰ This recommendation was implemented by section 40 and Schedule 9 of the 1970 Act.¹¹

12.15 The idea of discharging a transfer seems an incoherent one and drew criticism from an individual who would be described nowadays as a (then) emerging scholar.¹² He pointed out further difficulties with section 40, in particular the uncertainty in relation to the “person entitled thereto” to whom the discharge is to be granted. This led to a reply from Professor Halliday,¹³ but one which did not go unanswered.¹⁴

12.16 Professor Halliday’s understanding concerned the fact that in practice the *ex facie* absolute disposition could be arranged in two different ways.¹⁵ The first was the debtor, who was the owner of the property, conveying it to the creditor. The second was that the debtor, who was buying the property, instructed the seller to convey directly to the creditor. In

⁸ See paras 2.21 and 12.7 above.

⁹ Halliday Report para 116.

¹⁰ Halliday Report Appendix F Part 1.

¹¹ The Secretary of State for Scotland (Rt Hon William Ross MP), speaking to the Bill which was to become the 1970 Act, described section 40 and the other provisions in Part III of the legislation as having the “general objective [of] simplification” and being “useful, if unsensational, measures of law reform”. See Parliamentary Debates, House of Commons, Official Report, Scottish Grand Committee, 17 February 1970 col 13.

¹² G L Gretton, “*Ex facie* absolute dispositions and their discharge: exhumation” (1979) 24 JLSS 462.

¹³ J M Halliday, “*Ex facie* absolute dispositions and their discharge: post-exhumation” (1980) 25 JLSS 24.

¹⁴ G L Gretton, “Letter to the editor” (1980) 25 JLSS 139. See further G L Gretton, “Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency” 1986 JR 51 and 192 and G L Gretton and K G C Reid, *Conveyancing* (2nd edn, 1999) para 20.02. See also A J M Steven, “George Gretton and the Scots Law of Rights in Security” in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) 235 at 237.

¹⁵ See K G C Reid and G L Gretton, *Conveyancing 2004* (2005) 117-121.

Ritchie v Scott,¹⁶ Lord Kinneair said that in the first case, an *ex facie* absolute disposition is like a bond and disposition in security. Thus it is not a transfer, but the grant of a subordinate real right. The debtor remains owner. This view persuaded Professor Halliday,¹⁷ but Professor Gretton has shown that the weight of authority is against this view.¹⁸ In *Sexton v Coia*,¹⁹ Lord Emslie decided that Lord Kinneair's view is incorrect. The *ex facie* absolute disposition is therefore always a transfer.

12.17 We therefore consider that section 40 and Schedule 9 of the 1970 Act should be repealed and not replaced. It would remain possible of course to bring a mortgage arrangement involving an *ex facie* absolute disposition to an end by means of a reconveyance. We are aware that this is more expensive in relation to registration dues, but this is something which could be reviewed if our proposal is implemented.²⁰

12.18 We propose:

- 60. Section 40 and Schedule 9 of the 1970 Act (which provide for a form of discharge for the *ex facie* absolute disposition) should be repealed and not replaced.**

Ending ex facie absolute disposition arrangements

12.19 Where there has been an *ex facie* absolute disposition, the fact that ownership lies with the creditor does not reflect the functional reality. In the case of residential property, debtors will normally be living in the property and it will be their home. The impression given by the Register of Sasines,²¹ that the owner is a financial institution, while correct as a matter of law, is misleading at a practical level. This runs counter to the policy agenda in respect of transparency of ownership.²²

12.20 While, as discussed above, there must be relatively few mortgage arrangements involving an *ex facie* absolute disposition still in place, there is a question as to whether something should now be done to bring these to an end. The sunset rule mentioned in the previous chapter²³ would not seem appropriate as it is about the extinction of a true right in security.

12.21 There are various options, but all have difficulties. The first would be to extinguish the debtor's right to a reconveyance after a period of say five years following the new legislation coming into force. During that period there could be a publicity campaign, so that debtors could take steps to acquire a reconveyance before the deadline. If no steps were

¹⁶ (1899) 1 F 728.

¹⁷ See Halliday, "Ex facie absolute dispositions and their discharge: post-exhumation"; Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* paras 6-06 and 6-29.

¹⁸ See Gretton, "Ex facie absolute dispositions and their discharge: exhumation" and Gretton, "Radical rights and radical wrongs: a study in the law of trusts, securities and insolvency".

¹⁹ 2004 GWD 17-376 and 2004 GWD 38-781.

²⁰ Registration fees are set by Scottish Ministers under The Registers of Scotland (Fees) Order 2014 (SSI 2014/188) and periodically reviewed.

²¹ Being the only register of land in Scotland in operation prior to 1970. The Land Register did not become operational until 1981.

²² See the Scottish Land Rights and Responsibilities Statement (2017) Principle 5, available at <https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement/>.

²³ See paras 11.50-11.52 above.

taken the debtor would lose the right to have the property reconveyed to them. The property would unconditionally become the creditor's. We do not think that this option would be acceptable in policy terms. There will be cases where property has stayed within a family for more than one generation and no conveyancing has been carried out since before 1970, although any debt due to the creditor has long since been repaid. The family member in occupation may now be elderly and not be alerted by the publicity campaign. It would be unacceptable for that individual to lose their home.

12.22 The second option would be for the new legislation to transfer²⁴ the property to the debtor. But the debtor may well be dead and there would be difficulties in ascertaining who is entitled to the property. The result would also be to make the Register of Sasines (or more likely the Land Register)²⁵ inaccurate, which is not desirable. Most likely, the Keeper's staff would have to look at titles on an individual basis to bring the register up to date.

12.23 The third option would be for the new legislation to convert the creditor's right of ownership into that of a standard security holder. The debtor would become the owner. This raises similar practical difficulties as the second option.

12.24 While we would welcome the thoughts of consultees, our inclination is simply to leave matters as they are. This is because of the complexities and also the fact that there will be relatively few *ex facie* absolute disposition arrangements still in place.

12.25 We ask:

61. Should the new legislation make provision to bring *ex facie* absolute disposition arrangements to an end? If so, how?

Enforcement

12.26 We will deal with the question of enforcement in relation to *ex facie* absolute dispositions in our second Discussion Paper.²⁶

²⁴ Or re-transfer. See para 12.16 above.

²⁵ While *ex facie* absolute dispositions can only have been recorded in the Register of Sasines, it is a Scottish Government policy to complete the Land Register by 2024. This will be achieved in part by KIR (Keeper-induced registration). The Keeper's staff will transfer properties from the Register of Sasines to the Land Register. This will include properties where there has been an *ex facie* absolute disposition.

²⁶ For an up-to-date account of the law on this subject, see Higgins, *The Enforcement of Heritable Securities* ch 9.

Chapter 13 List of proposals and questions

1. What information or data do consultees have on:
 - (a) the economic impact of the current legislation on heritable securities in relation to pre-default issues, or
 - (b) the potential economic impact of any option for reform proposed in this Discussion Paper?

(Paragraph 1.34)
2. The Conveyancing and Feudal Reform (Scotland) Act 1970 should be repealed and replaced with a new statute regulating heritable securities.

(Paragraph 3.2)
3. The standard security should continue to be the only form of heritable security which can be granted.

(Paragraph 3.12)
4. It should remain incompetent to transfer land in security.

(Paragraph 3.13)
5. Should any transactions other than transfers in security be prohibited to ensure that a standard security is used instead?

(Paragraph 3.15)
6. The term “standard security” should be retained.

(Paragraph 3.20)
7. Should there be a non-accessory form of standard security?

(Paragraph 3.27)
8.
 - (a) The grantor of a standard security (and any successor) should not require to be the same person as the debtor in the secured obligation.
 - (b) The grantee of a standard security (and any successor) should not require to be the same person as the creditor in the secured obligation.

(Paragraph 3.40)

9. Do consultees have any comments on the use of security trustee or nominee arrangements in relation to standard securities?

(Paragraph 3.41)

10. (a) Do consultees agree that the parties to a standard security should continue to be referred to as the “debtor” and “creditor”?

(b) Do consultees agree that “grantor” and “grantee”, and “proprietor” should continue to be used where appropriate?

(Paragraph 3.42)

11. Section 47 of the Conveyancing (Scotland) Act 1874 and section 15 of the Conveyancing (Scotland) Act 1924 should be repealed and not replaced.

(Paragraph 3.49)

12. (a) It should be competent for a standard security to secure monetary obligations which are owed or which may become owed in the future.

(b) A standard security should also secure ancillary obligations, in particular obligations to pay interest, damages and expenses (subject to rules governing what expenses are allowable).

(Paragraph 4.33)

13. Which of the following approaches do consultees prefer?

(a) Standard securities should not be able to secure non-monetary obligations (but they may secure a damages claim in respect of such an obligation).

(b) Standard securities should be able to secure non-monetary obligations, but in such case it would be the damages claim for breach of the obligation which would actually be secured.

(Paragraph 4.85)

14. There should be a separate reform project in relation to making options and similar agreements enforceable against third parties by means of registration. That review should consider other models, such as a special form of standard security which could secure non-monetary obligations and which would have special ranking and enforcement rules.

(Paragraph 4.86)

15. A standard security may only be granted over immoveable property.

(Paragraph 5.4)

16. (a) The new legislation should use consistent terminology to refer to the property affected by a standard security.
- (b) What term should be used?
- (Paragraph 5.9)
17. A standard security may not be granted over a real burden.
- (Paragraph 5.15)
18. A standard security may not be granted over a proper liferent.
- (Paragraph 5.17)
19. (a) A standard security may be granted over a lease, where that lease has been recorded in the Register of Sasines or registered in the Land Register as appropriate.
- (b) A standard security may not be granted over any other lease.
- (Paragraph 5.24)
20. (a) Should it continue to be possible to create a standard security over a standard security or would it be preferable to allow a standard security to be assigned in security?
- (b) In either case what should be the rules on enforcement?
- (Paragraph 5.30)
21. Are there other types of immoveable property over which it should be possible to grant a standard security?
- (Paragraph 5.31)
22. (a) The secured obligation should be a matter for the parties to a standard security and no longer be the subject of default provisions.
- (b) Form A should be abolished.
- (Paragraph 6.30)
23. There should no longer be a statutory form of standard security. Form B, like form A should be abolished. Instead, the constitutive document of a standard security should require to:
- (a) be signed by the debtor;
- (b) identify the property which is to be the encumbered property;
- (c) identify the secured obligation; and

(d) use the words “standard security”.

(Paragraph 6.37)

24. Should a non-obligatory model form of a standard security document be provided?

(Paragraph 6.38)

25. What comments do consultees have in relation to identification of the encumbered property?

(Paragraph 6.42)

26. What comments do consultees have in relation to identification of the secured obligation?

(Paragraph 6.43)

27. Should it continue to be possible for unregistered holders to grant standard securities?

(Paragraph 6.47)

28. A standard security should continue to be made real by registration.

(Paragraph 6.49)

29. The power under section 893 of the Companies Act 2006 should be used so that standard securities granted by companies do not require to be registered twice.

(Paragraph 6.53)

30. What comments do consultees have on whether it should be permissible to create a servitude in a standard security deed?

(Paragraph 6.56)

31. Rules on enforcement (including the recovery of expenses by the creditor) and redemption in relation to a standard security should not be dealt with in standard conditions but in the substantive provisions of the new legislation.

(Paragraph 7.39)

32. Statute should provide for a freely variable default set of standard conditions in relation to preservation of the value of the encumbered property and expenses (other than in relation to enforcement). If consultees agree:

(a) should these conditions be set out in primary or secondary legislation?

(b) what default conditions should be included?

(Paragraph 7.49)

33. The standard conditions should be abolished, but statute should set out:

(a) a broad rule requiring the debtor to preserve the value of the encumbered property;

(b) a default rule that the debtor should be liable for the creditor's reasonable expenses (with enforcement expenses being dealt with separately in terms of the rules on enforcement); and

(c) a default rule allowing the creditor either to (i) require the debtor to insure the property for reinstatement value or to (ii) insure the property directly.

Should there be any additional rules?

(Paragraph 7.49)

34. Where property which is encumbered by a standard security has a lease granted over it without the creditor's consent, the secured creditor should be entitled to remove the tenant if the security is enforced.

(Paragraph 8.37)

35. Should the secured creditor be entitled to remove a tenant under a lease granted after a standard security prior to enforcement if express provision is made in the security documentation prohibiting the grant of a lease? Should that provision require to be on the face of the Land Register?

(Paragraph 8.40)

36. What comments do consultees have on the rights of the secured creditor where the debtor carries out a juridical act in relation to an existing lease without the secured creditor's consent?

(Paragraph 8.44)

37. Should the Private Housing (Tenancies) (Scotland) Act 2016 be amended to make it clear that a heritable creditor cannot evict a tenant whose lease was granted prior to the creation of the security?

(Paragraph 8.52)

38. What comments do consultees have on the situation where a heritable creditor is enforcing its security and there is a residential tenant whose lease was granted after the security?

(Paragraph 8.55)

39. The holder of a private residential tenancy should prior to enforcement be unaffected by a prohibition on leasing in a standard security encumbering the property unless that person knows of the prohibition at the date of entry under the lease.
- (Paragraph 8.57)
40. Do consultees have any comments on the interaction of standard securities with agricultural leases?
- (Paragraph 8.58)
41. Where property is encumbered by a standard security and the debtor carries out a juridical act in relation to a right affecting that property without the creditor's consent, the creditor should be entitled to reduce the debtor's act if the security is enforced.
- (Paragraph 8.64)
42. Should the creditor prior to enforcement be entitled to reduce any juridical act by the debtor which is prohibited in the security documentation?
- (Paragraph 8.65)
43. It should continue to be possible to vary a standard security as under the 1970 Act, except that there should be no mandatory form of deed.
- (Paragraph 9.14)
44. It should continue to be impermissible to vary a standard security to increase the encumbered property.
- (Paragraph 9.16)
45. It should continue to be possible to restrict a standard security:
- (a) as under the 1970 Act, except that there should be no mandatory form of deed; or
- (b) by means of a consent *in gremio* in a disposition transferring the property.
- (Paragraph 9.23)
46. Should (a) the assignation of the secured debt alone be sufficient to transfer the standard security, or should (b) registration of a document assigning the standard security continue to be required?
- (Paragraph 10.34)
47. If registration should still be required, should the effect of registration be to transfer the debt (without intimation to the debtor)?
- (Paragraph 10.34)

48. (a) There should be no mandatory form of deed for the assignment of a standard security.
- (b) The same deed may assign multiple standard securities.
- (c) Upon registration the assignment should give the assignee the benefit of any corroborative and substitutional obligations, the right to recover expenses from the debtor and the right to rely on any notices sent or enforcement procedure started by the assignor.

(Paragraph 10.38)

49. The effect of an assignment of a standard security should not be to limit the standard security to the amount due at the time of the assignment and future advances made by the assignee may be secured depending on the terms of the security contract.

(Paragraph 10.68)

50. (a) Should there be any restrictions on what an all sums standard security may secure?
- (b) In particular, should there be restrictions on
- (i) pre-assignment debts owed to the assignee; and
 - (ii) debts originally owed to other parties
- being secured?

(Paragraph 10.72)

51. It should continue to be possible to discharge a standard security in whole:
- (a) as under the 1970 Act, except that there should be no mandatory form of deed; or
- (b) by means of a consent *in gremio* in a disposition transferring the property.

(Paragraph 11.9)

52. (a) Do consultees consider that the law should require creditors to discharge standard securities where there is no outstanding debt?
- (b) If so, should such a rule be restricted to residential cases and should there be exceptions? What should be the sanction for non-compliance?

(Paragraph 11.12)

53. Section 41 of the 1970 Act should be restated and clarified by means of a new statutory provision.

(Paragraph 11.14)

54. (a) Do consultees agree that the rules on redemption should be replaced with a general rule entitling the debtor to a discharge on the secured obligation being performed in terms of the contractual arrangements between the parties and a court procedure for discharge where the creditor has disappeared or refuses to grant a discharge?

(b) What comments do consultees have on the owner of the encumbered property (where that person is not the debtor) having the right to have the security discharged by paying the value of the property?

(Paragraph 11.39)

55. Section 11 of the Land Tenure Reform (Scotland) Act 1974 should be repealed.

(Paragraph 11.43)

56. The doctrine of *confusio* should not extinguish a standard security.

(Paragraph 11.49)

57. Should there be a sunset rule for standard securities? If so, what should be the period be? If not, why not?

(Paragraph 11.52)

58. The existing statutory provisions on the older forms of heritable security should be repealed. Where necessary, appropriate provision should be made in the new legislation.

(Paragraph 12.6)

59. The rules in relation to transactions involving, and the enforcement of, a

(a) bond and disposition in security, or

(b) bond of cash credit and disposition in security,

should be the same as for the standard security with appropriate modifications. Any sunset rule for standard securities should also apply to these securities.

(Paragraph 12.12)

60. Section 40 and Schedule 9 of the 1970 Act (which provide for a form of discharge for the *ex facie* absolute disposition) should be repealed and not replaced.

(Paragraph 12.18)

61. Should the new legislation make provision to bring *ex facie* absolute disposition arrangements to an end? If so, how?

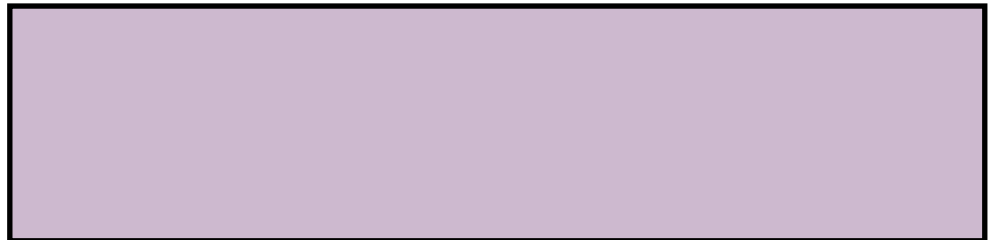
(Paragraph 12.25)

Appendix A

REGISTERS OF SCOTLAND DIGITAL DISCHARGE OF STANDARD SECURITY

In this Discharge:

“Borrower” means

A large rectangular area that has been redacted with a solid purple color, obscuring the definition of the term "Borrower".

“Lender” means

A rectangular area that has been redacted with a solid purple color, obscuring the definition of the term "Lender".

“Registration Date” means

A rectangular area that has been redacted with a solid purple color, obscuring the definition of the term "Registration Date".

“Title Number” means

A rectangular area that has been redacted with a solid purple color, obscuring the definition of the term "Title Number".

“Security” means

A large rectangular area that has been redacted with a solid purple color, obscuring the definition of the term "Security".

The Lender discharges the Security.

Signature

A rectangular area that has been redacted with a solid purple color, obscuring the signature.

Appendix B

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