Pledge and Lien

STUDIES IN SCOTS LAW

Previous volumes in the Series

1. Ross Gilbert Anderson, *Assignation* (2008)

STUDIES IN SCOTS LAW
VOLUME 2

Pledge and Lien

Andrew J M Steven

Lecturer in Law, University of Edinburgh

EDINBURGH LEGAL EDUCATION TRUST

2008

Published by
Edinburgh Legal Education Trust
School of Law
University of Edinburgh
Old College
South Bridge
Edinburgh
EH8 9YL

First published 2008

ISBN 978-0-9556332-1-8

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

Typeset by Etica Press Ltd, Malvern
Printed and bound by Bell & Bain Ltd, Glasgow

Contents

Preface

This book is an updated and restructured version of my doctoral thesis. It was submitted to the University of Edinburgh in 1997 and the doctorate awarded in 1998. Some of the thesis has been used heavily in my chapter on 'Rights in Security over Moveables' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2000) volume 1, and in my chapter with Gerrit Pienaar on 'Rights in Security' in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004). Much of it, however, has remained unpublished, but has been referred to in a number of works, notably David Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, 2005). I was therefore pleased to accept the invitation of the series editor to publish it in *Studies in Scots Law.*

There have been no reported cases on pledge in Scotland since 1997 and only a few on lien. Other developments, such as human rights legislation and more academic literature, nevertheless, have necessitated substantive updating of the text. I have also taken the opportunity to reflect further on the more difficult areas and in some places have revised my views. It remains my opinion that there is much room for development in the law of lien. Moreover, the current 'credit crunch' has apparently significantly boosted business for pawnbrokers, so we may yet see pledge being litigated again.

My primary debt of gratitude is owed to Professor Kenneth Reid and Professor George Gretton, my supervisors between 1994 and 1997, for their help and inspiration, then and since. I am also grateful to Professor John Murray and Professor David Carey Miller, my examiners, for their helpful comments. I acknowledge also the kind assistance of Dr Ross Anderson, Margaret Cherry, David Irvine, Professor Duard Kleyn, Professor Hector MacQueen, Professor Roderick Paisley, Professor Gerrit Pienaar, Alison Struthers, Professor Niall Whitty, Scott Wortley and the librarians at the University of Edinburgh Law Library. Finally, I thank my family for all their support. This book is dedicated to the memory of my grandparents.

Andrew J M Steven
Edinburgh
July 2008

Table of Cases

References are to paragraph numbers

Table of Statutes

References are to paragraph numbers

Table of Statutory Instruments

References are to paragraph numbers

Abbreviations

Balfour, *Practicks*	Peter G B McNeill (ed), *The Practicks of Sir James Balfour of Pittendreich,* Stair Society, vol 21 (1962); vol 22 (1963)
Bankton	Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between them and the Laws of England* (1751–53, reprinted Stair Society, vols 41–43, 1993–95)
Begg, *Law Agents*	J H Begg, *Law Agents* (1873)
Bell, *Commentaries*	George Joseph Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (7th edn, by Lord McLaren, 1870, reprinted 1990)
Bell, *Personal Property*	A P Bell, *The Modern Law of Personal Property in England and Ireland* (1989)
Bell, *Principles*	George Joseph Bell, *Principles of the Law of Scotland* (10th edn, by W Guthrie, 1899, reprinted 1990)
Buckland, *Roman Law*	W W Buckland, *A Textbook of Roman Law* (3rd edn, by P Stein, 1963)
Carey Miller with Irvine, *Corporeal Moveables*	D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2nd edn, 2005)
Cobbett, *Pawns or Pledges*	J P Cobbett, *The Law of Pawns or Pledges and the Rights and Liabilities of Pawnbrokers* (1841)
Cross, *Lien*	J Cross, *A Treatise on the Law of Lien and Stoppage in Transitu* (1840)
Denis, *Pledge*	H Denis, *A Treatise on the Law of the Contract of Pledge as governed by both the Common Law and the Civil Law* (1898)
Encyclopaedia of the Laws of Scotland	Viscount Dunedin et al (eds), *Encyclopaedia of the Laws of Scotland* (3rd edn, 16 vols, 1926–35)
Erskine	John Erskine, *An Institute of the Law of Scotland* (8th edn, by J B Nicholson, 1871, reprinted 1989)
Gloag and Henderson, *The Law of Scotland*	W M Gloag and R C Henderson, *The Law of Scotland* (12th edn, by Lord Coulsfield and H L MacQueen, 2007)

Gloag and Irvine, *Rights in Security*	W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897, reprinted 1987)
Hall, *Possessory Liens*	L E Hall, *Possessory Liens in English Law* (1917)
Halsbury's Laws of England	Lord Hailsham of St Marylebone et al (eds), *Halsbury's Laws of England* (4th edn) (56 vols, 1973–87) with reissues
Hume, *Lectures*	Baron David Hume, *Lectures*, vols I–VI (Stair Society vols 5 (1939), 13 (1949), 15 (1952), 17 (1955), 18 (1957) and 19 (1958), ed G C H Paton)
LAWSA	W A Joubert et al (eds), *The Law of South Africa* (1st and 2nd reissues) with cumulative supplements
McBryde, *Contract*	W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007)
Montagu, *Lien*	B Montagu, *A Summary of the Law of Lien* (1821)
Reid, *Property*	Kenneth G C Reid (with G L Gretton, A G M Duncan, W M Gordon and A J Gamble), *The Law of Property in Scotland* (1996)
Reid and Zimmermann, *History*	Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland*, vols 1 (Introduction and Property) and 2 (Obligations) (2000)
Shaw, *Security over Moveables*	W Shaw, *Security over Moveables* (1903)
Stair Memorial Encyclopaedia	Sir Thomas Smith et al (eds), *The Laws of Scotland: Stair Memorial Encyclopaedia* (25 vols, 1987–96) with cumulative supplements and reissues
Stair	James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (6th edn, by D M Walker, 1981)
Thomas, *Roman Law*	J A C Thomas, *Textbook of Roman Law* (1976)
Whitaker, *Lien*	R Whitaker, *A Treatise of the Law Relative to the Rights of Lien and Stoppage in Transitu* (1812)
Zimmermann, Visser and Reid, *Mixed Legal Systems*	Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004)

‘ “The Fifteen”, as the full Bench of the old Court of Session of Scotland was popularly called, were deliberating on a bill of suspension and interdict relative to certain caravans with wild beasts on the then vacant ground which formed the beginning of the new communication with the new Town of Edinburgh spreading westwards and the Lawnmarket – now known as the Mound. In the course of the proceedings Lord Bannatyne fell fast asleep. The case was disposed of and the next called, which related to a right of lien over certain goods. The learned lord who continued dozing having heard the word “lien” pronounced with an emphatic accent by Lord Meadowbank, raised the following discussion:

Meadowbank: “I am very clear there was a lien on this property.”

Bannatyne: “Certain, but it ought to be chained, because –”

Balmuto: “My lord, it’s no’ a livin’ lion, it’s the Latin word for lien” [leen].

Hermand: “No, sir; the word is French.”

Balmuto: “I thought it was Latin, for it’s in italics.”’

G A Morton and D M Malloch, *Law and Laughter* (1913) 164–165

(The judges mentioned in this story are pictured on the front cover of this book. The ‘dozing’ Lord Bannatyne is third from the left, with his elbow leaning on the table.)

1 General

A. SECURITY OVER MOVEABLE PROPERTY

1-01. Scots law, like most if not all other jurisdictions, makes a distinction between immoveable and moveable property.[1] While property law is a unitary subject, the clear difference between these two types of property necessitates a variance in the rules in particular areas. The law concerning real security is a notable example.

1-02. As to immoveable property – alternatively heritage or land – the law is relatively straightforward. Since the passing of the Conveyancing and Feudal Reform (Scotland) Act 1970, effectively only one form of heritable security is recognised: the standard security.[2] Three previous forms of security over land were abolished by the Act, simplifying the law.[3]

1-03. In the field of moveable security the picture could hardly be more different. As regards corporeal moveables, there exist a significant number of different types of security, for example, pledge, lien, landlords' hypothec, ship and aircraft mortgage.[4] As regards incorporeal moveables, there is the assignation in security.[5] Further, a company may grant a floating charge over any part or all of its property and undertaking. This may include over its moveable property.[6] Finally, there have been a number of reports over the

[1] Reid, *Property* para 1; K Reid and C G van der Merwe, 'Property Law: Some Themes and Some Variations' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 637 at 639; Carey Miller with Irvine, *Corporeal Moveables* paras 1.03–1.05; Bell, *Personal Property* 19–21.

[2] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3).

[3] Namely the bond and disposition in security, the bond of cash credit and disposition in security and the *ex facie* absolute disposition. See G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) para 19.01.

[4] See, eg, Gloag and Henderson, *The Law of Scotland* paras 37.12–37.27.

[5] See P Nienaber and G Gretton, 'Assignation/Cession' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 787 at 814–818.

[6] Companies Act 1985 s 462(1) to be replaced by the Bankruptcy and Diligence etc (Scotland) Act

years calling for fundamental reform and the introduction of new forms of security, although none of these has been implemented.[7] Following devolution, it is now the Scottish Parliament which has legislative competence in this area.[8]

1-04. The law of security over moveables can be seen to be a complicated subject. Moreover it, like the law of real security in general, has had little detailed research since Gloag and Irvine's magisterial *Law of Rights in Security* was published in 1897.[9] In the words of Zimmermann and Dieckmann: 'The largest hole in modern Scottish literature gapes in the area of security.'[10] This book, however, considers only two types of moveable security, namely pledge and lien.

B. THE LAW OF PROPERTY AND THE LAW OF OBLIGATIONS

1-05. The law of real security is found at the intersection of property law and the law of obligations,[11] a fact which makes the subject intrinsically interesting.[12] On the one hand, property law governs matters such as the creation, transfer and extinction of the real right in security. On the other, the law of obligations governs the obligation the performance of which the real right secures.

2007 s 38. Much has been written on floating charges in Scotland. Three recent discussions are G L Gretton, 'Reception without Integration? Floating Charges and Mixed Systems' (2003) 78 *Tul LR* 307; G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 768–770 and D Cabrelli, 'The Case Against the Floating Charge in Scotland' (2005) 9 *Edin LR* 407. Floating charges may also be granted by limited liability partnerships and certain other bodies.

[7] See D O'Donnell and D L Carey Miller, 'Security over Moveables: A Longstanding Reform Agenda in Scots Law' (1997) 5 *Z Eu P* 807; G L Gretton, 'The Reform of Moveable Security Law' 1999 *SLT (News)* 301 and D L Carey Miller, 'Present and Future of Real and Personal Security: Scotland' in J Bell (ed), *Studies in UK Law 2002* (2002) 123 at 136. See also Scottish Central Research Unit, *Business Finance and Security over Moveable Property* (2002).

[8] As moveable security is part of private law: see Scotland Act 1998 s 126(4)(d). A recent example of reform is the limitation of the landlord's hypothec by the Bankruptcy and Diligence etc (Scotland) Act 2007 s 208.

[9] See, however, A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) paras 1–107 and Carey Miller with Irvine, *Corporeal Moveables* ch 11. For a retrospective on Gloag and Irvine, see A J M Steven, 'One Hundred Years of Gloag and Irvine' 1997 *JR* 314.

[10] R Zimmermann and J A Dieckmann, 'The Literature of Scots Private Law' (1997) 8 *Stell LR* 3 at 10.

[11] See generally, 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 and A J M Steven, 'The Effect of Security Rights *Inter Partes*' and E Dirix, 'Effect of Security Rights vis-à-vis Third Persons' in U Drobnig, H J Snijders and E-J Zippro (eds), *Divergences of Property Law, an Obstacle to the Internal Market?* (2006) 47–62 and 69–93.

[12] See the comments of W S Holdsworth, in 'The History of the Treatment of Choses in Action by the Common Law' (1919–20) 33 *Harv L Rev* 997 at 1030 quoted in R G Anderson, *Assignation* (2008) para 1-01.

1-06. It is very important when approaching the law of real security that its binary background is fully appreciated. In particular, over the last century and a half when property law in Scotland was in a state of malaise, the emphasis was sometimes placed too heavily on the obligational side of the subject.[13] This book will attempt to focus equally on the property law aspects of pledge and lien.

C. HISTORICAL AND COMPARATIVE MATTERS

1-07. As with most areas of law, the modern law of pledge and lien is the product of its historical development. A key objective of this book is to trace the development of these types of security from the very beginning. This means examining the relevant Roman law, Anglo-Norman law, institutional writings and case law. It need hardly be stated that Scots law is a mixed system, the mixture to a large extent being a Roman and English one.[14] An attempt will be made to show which parts of the law of pledge and lien are principally based on Roman law and which on English law.

1-08. A feature of the law of real security in general is the great variations between different legal systems.[15] One of the aims of this book will be to make some comparisons between Scots law and the law of other jurisdictions. Particular attention will be paid to English law, which has been of clear influence over the years.[16] A considerable number of references will be made to the law of South Africa because it is another mixed system and also because, like Scots law, it is uncodified.[17] The rules of other jurisdictions, such as France, Germany, Quebec and Spain will also be considered where appropriate. Human rights law also has a relevance, if not a large one.[18]

[13] See, eg, the discussion of pledge by a pledgee at paras 6-52–6-65 below.

[14] See, eg, N R Whitty 'The Civilian Tradition and Debates on Scots Law' 1996 *TSAR* 227 and 442; H L MacQueen 'Mixture or Muddle? – Teaching and Research in Scottish Legal History ' (1997) 5 ZEuP 369; V V Palmer, *Mixed Jurisdictions Worldwide* (2001); K G C Reid, 'The Idea of Mixed Legal Systems' (2003) 78 *Tul LR* 5 and A J M Steven, 'Transfer of Title in Scottish Law' in J M Rainer and J Filip-Fröschl, *Transfer of Title Concerning Movables Part 1 – Eigentumsübertragung an beweglichen Sachen in Europa Teil 1* (2006) 155.

[15] See eg J G Sauveplanne (ed), *Security over Corporeal Movables* (1974); M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe* (1988); E-M Kieninger (ed), *Security Rights in Movable Property* (2004) and Drobnig, Snijders and Zippro (eds), *Divergences of Property Law, an Obstacle to the Internal Market?*

[16] See, eg, paras 16-62–16-71 below.

[17] See, eg, paras 13-46–13-47 below.

[18] See, eg, *Wilson v First County Trust (No 2)* [2003] 3 WLR 568. See also below, paras 8-07, 16-40 and 16-83.

D. THE APPROACH TAKEN

1-09. The remainder of the book deals first with pledge, the main type of conventional moveable security under Scots common law.[19] There follows a discussion of lien, a form of security which mostly arises by implication rather than being created expressly.[20] The final chapter of the book compares pledge and lien.[21]

[19] See below, chs 2 to 8.
[20] See below, chs 9 to 17.
[21] See below, ch 18.

2 Pledge: Introduction

A. DEFINITION

2-01. A pledge[1] is a real right in security over corporeal moveable property, created by the delivery of the property from its owner to another, in terms of an agreement for the property to secure an obligation owed to the other.[2] The party who is granting the right in security is known as the 'pledger' or 'pledgor'.[3] The party receiving the security is known as the 'pledgee'.[4]

[1] In other languages: *pignus* (Latin); *vuistpand* (Dutch); *käteispantti* (Finnish); *gage* (French); *Faustpfand* (German); *kino enechyro* (Greek); *håndpant* (Danish); *pegno* (Italian); *penhor* (Portugese); *prenda* (Spanish) and *handpant* (Swedish). Source: E-M Kieninger (ed), *Security Rights in Movable Property in European Private Law* (2004) 163. See also M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe* (1988) 219.

[2] See Stair I.xiii.11; Bankton I.xvii.1; Erskine III.i.33; A Smith, *Lectures on Jurisprudence* (1978, eds R L Meek, D D Raphael and P G Stein) 78; Bell, *Commentaries* II, 19; Bell, *Principles* § 1363; Hume, *Lectures* IV, 2; Gloag and Irvine, *Rights in Security* 199–200; Shaw, *Security over Moveables* 10; L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 519 and *Robertson & Baxter v Inglis* (1897) 24 R 758 at 777 *per* Lord M'Laren.

[3] Débiteur (French law); Verpfänder (German law); håndpantsaetter (Danish law); pandgever (Dutch law); datore di pegno (Italian law); devedor pignoratício (Portugese law) and deudor pignoraticio (Spanish law). See Dickson, Rosener and Storm, *Security on Movable Property and Receivables in Europe* 221.

[4] Créancier gagiste (French law); Pfandgläubiger (German law); håndpanthaver (Danish law); pandhouder (Dutch law); creditore pignoratizio (Italian law); credor pignoratício (Portugese law) and acreedor pignoraticio (Spanish law). See Dickson, Rosener and Storm, *Security on Movable Property and Receivables in Europe* 220–221.

B. ORIGINS OF THE WORD 'PLEDGE'

2-02. The word 'pledge' in most languages is an assimilation of three basic notions.[5] These are a stake or a forfeit; a promise; and a collateral security.

(1) Pledge as a stake or a forfeit

2-03. In the beginning, if the owner of property pledged it in security of an obligation which he or she did not manage to perform subsequently then the property was simply forfeited.[6] Hence, the owner could be seen as gambling that performance would be made. If not, then the goods were forfeited. It is rare to view pledge in this manner nowadays, as it seems universally to have become a term for collateral security.[7]

(2) Pledge as a promise

2-04. A day does not usually pass without a newspaper using the word pledge in the sense of promise, for example 'Chancellor pledges to back small firms'[8]. Thus, too, if a person 'takes the pledge' then that individual vows to abstain from intoxicating liquor from then on. Similarly one can take a pledge of allegiance to one's country.[9] Another example is the 'negative pledge' agreement where a debtor undertakes not to grant further securities.[10] This meaning of the word 'pledge' coheres with the idea of the

[5] See the important three-part article, J H Wigmore, 'The Pledge-Idea: A Study in Comparative Legal Ideas' (1897) 10 *Harv LR* 321; (1897) 10 *Harv LR* 389 and (1897) 11 *Harv LR* 18, particularly (1897) 10 *Harv LR* 321–325. The same ideas are found in the Hebrew expressions for pledge used in the Old Testament: see J Hastings, *Dictionary of the Bible* (1900) sv 'Pledge'. Likewise, these notions lie behind the old Scots word for pledge, *wad*: see *An Etymological Dictionary of The Scottish Language*, vol 4 (1882) sv 'wad' and *The Scottish National Dictionary* vol x (1976) sv 'wad'.

[6] See Wigmore, n 5 above. For more on the Roman law, see R J Goebel, 'Reconstructing the Roman Law of Real Security' (1961–62) 36 *Tul LR* 29 at 32–33 and for the old English law, see F Pollock and F W Maitland, *The History of English Law before Edward I* (2nd edn, 1896, reprinted with new introduction by Milsom, 1968) 186.

[7] For an examination of pledge in a number of legal systems, see J G Sauveplanne (ed), *Security over Corporeal Movables* (1974). And Wigmore writes at (1897) 11 *Harv LR* 18 at 38: 'there are evidences in nearly a dozen systems of law that the progress has been from a primitive forfeit-idea to a later collateral-security idea.' But Adam Smith describes pledge as a 'wager': *Lectures* 79. Further, the old Scots word for pledge, 'wad' is also used to mean 'bet' or 'wager'. Robert Burns in his *Earnest Cry* (1786) writes 'Faith! I'll wad my new pleugh-pettle/Ye'll see't or lang.' One of the lines from Sir Walter Scott's *Heart of Midlothian* (1818) is 'I could risk a sma' wad.' Even in the twentieth century in the unattributed work *Swatches o' Hamespun* (1924) comes 'I'll wad a croon it's Jamie Broon.' For the full references to these and many other works using *wad* in this sense, see *The Scottish National Dictionary* vol x (1976) sv 'wad'. See too below, para 8-05.

[8] *The Daily Telegraph* 21 September 2007.

[9] Eg, in the United States of America: 'I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.'

[10] See, eg, D Cabrelli, 'Negative pledges and ranking reconsidered' (2002) 7 *SLPQ* 18.

owner of the property promising to perform his or her obligation. It is the intermediary between the idea of pledge as complete forfeiture and pledge as collateral security. Rather than placing the emphasis on forfeiture, it places it on the moral duty to perform.[11]

(3) Pledge as a collateral security

2-05. Pledge as a collateral security is a straightforward progression from the notion of 'promise'. For, if the emphasis is now on the moral duty to perform, then failure to do so should only see steps being taken against the property as a direct surrogate for performance. In other words the person to whom the obligation was owed should only be able to recover the level of loss caused by non-performance and no more.[12]

C. VARIATIONS ON THE THEME OF COLLATERAL SECURITY

2-06. Within its meaning as a form of security, 'pledge' can be viewed in at least five different ways.

(1) Generic security

2-07. 'Pledge' has often been used as a general term for security.[13] Stair, to an extent, adopts this treatment.[14] Voet makes express reference to it,[15] as does *Las Siete Partidas,* the major law code of thirteenth-century Spain.[16] The reason probably lies in Roman law, where the equivalent term, '*pignus*', could be used as a generic term for security.[17] This scheme is indeed adopted by Baron Hume and Professor Reid in their respective studies of the real rights recognised by the law of Scotland.[18] However, while the approach may be

[11] See Wigmore (1897) 10 *Harv LR* 321 at 323. It is suspected that the reason why S C Johnson & Son Inc have called their furniture polish 'Pledge' and obtained a registered trade mark for the word is because they are promising that their polish will perform well. This, however, is conjecture.

[12] See Wigmore (1897) 10 *Harv LR* 321 at 325 and H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, 1972) 302.

[13] Eg, by the Court of Session in *Ker of Greenhead v Scot and Elliot* (1695) Mor 9122.

[14] Stair I.xiii.11. In the sense that he treats hypothec under the subject of pledge. So too does Bankton I.xvii.7. As does Adam Smith, *Lectures* 78–81.

[15] J Voet, *Commentarius ad Pandectas* (trans by P Gane, 1956) 20.1.1. Voet of course uses the term '*pignus*'.

[16] R I Burns (ed), *Las Siete Partidas* (trans by S P Scott) vol 4, *Family, Commerce and the Sea: The Worlds of Women and Merchants* (2001) Title XIII, Law I: 'A pledge, properly speaking, is something which a man places in the hands of another as security, giving him possession of the same, and it especially applies to movable property; but according to the broad interpretation of the law, every description of property, whether movable or immovable, which is placed in the hands of another party as a security, can be called a pledge, although it may not be delivered to the party to whom it is pledged.'

[17] See D 13.7.1 pr (Ulpian) and D 20.1.5.1 (Marcian) and paras 3-13–3-14 below.

[18] Hume, *Lectures* IV, 38 and Reid, *Property* para 4.

justified by reference to Roman law it is perhaps best avoided now as it is capable of engendering confusion. In particular, the courts have persisted in designating a security over the shares of a company as a 'pledge of shares', when it is in fact an assignation in security.[19] There are many other examples in legal literature of using 'pledge' in an unduly wide fashion.[20]

(2) Real right in security

2-08. 'Pledge' is a real right in security over the moveable property of another, as more fully defined above.[21] This is the sense in which the word will be used in this book.

(3) Contract

2-09. 'Pledge' is often used to mean the contract between pledger and pledgee.[22] It will be more convenient to refer here to the 'contract of pledge' when this sense is meant.

(4) Property

2-10. 'Pledge' is sometimes used to denote the piece of property which is subject to the security.[23] To avoid confusion, the expression 'pledged property' will be adopted here instead.

(5) Verb

2-11. So far 'pledge' has been used as a noun. It is also a verb and this use will often be made.[24]

[19] Eg, *Barron v National Bank* (1852) 14 D 565 and *Coats v Union Bank of Scotland* 1929 SC (HL) 114. The correct analysis is found in *Morrison v Harrison* (1876) 3 R 406. See too W M Gloag, 'Pledge' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 11 (1931) para 757.

[20] Eg, W A Wilson, 'Security over Corporeal Movables in Scotland' in J G Sauveplanne (ed), *Security over Corporeal Movables* (1974) 43 at 45–46. D M Walker, *Principles of Scottish Private Law* vol 3 (4th edn, 1989) 394–396 classes all manner of things under the heading 'Pledge', eg attempts to circumvent the Sale of Goods Act 1979 s 62(4).

[21] See above, para 2-01.

[22] Eg, Bell, *Principles* § 203; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 14 and E A Marshall, *Scots Mercantile Law* (3rd edn, 1997) para 7-78.

[23] Eg, A Smith, *Lectures* 78 writes under the heading 'Pledges': 'That is, a subject which is given or pledged to an other for the security of a debt due to him.' Another example is found in Gloag and Irvine, *Rights in Security* 219, where the debtor is referred to as the 'owner of the pledge'.

[24] The verb is equally applicable to using 'pledge' in the sense of a promise.

D. ETYMOLOGY

2-12. 'Pledge' comes from the old French law term 'plege' which meant 'personal security' or 'surety'.[25] This at first seems surprising as pledge is a real security.[26] However, as will be seen, the distinction between personal and real security in medieval times was somewhat blurred.[27] The French term for real security has left its mark on our legal system too. 'Gage' shares the same Germanic root as 'wad', which was the term for pledge in Scotland in the Middle Ages.[28] 'Wadset', the principal form of real security over land at that time, also shares the root.[29] Another member of the family is the word 'wager'.[30] This supports the earlier analysis that one of the connotations of 'pledge' is that of a stake. Also stemming from the same root are the terms 'engagement' and 'wedding'.[31] These reflect the 'promise' notion.

2-13. In English law there is evidence of the same French roots. 'Pledge' is a term of art in England.[32] The more formal term is '*vadium*'.[33] This has been stated to come from the same Germanic root as 'wad' and 'wadset'.[34] There is also probably a link with the Latin '*vadimonium*' which meant 'bail' in Roman law.[35] This suggestion is supported by the fact that pledge is a type

[25] The modern French term is 'pleige'. 'Plege' itself comes from the early Frankish Latin, '*plevium*' which derives from the medieval Latin, '*plivium*'. '*Plivium*' is a derivation of the medieval Latin verb 'plevire', meaning 'to warrant, assure, undertake for, engage'. This probably has Germanic origins. For a full discussion of the etymology, see *The Oxford English Dictionary* (2nd edn) vol xi (1989) sv 'pledge'. See also V S Meiners, 'Formal Requirements of Pledge under Louisiana Civil Code Article 3158 and Related Articles' (1987) 48 *La LR* 129 n 6 and Denis, *Pledge* 3.

[26] That is, security over a thing (*res*).

[27] See below, paras 3-48–3-50.

[28] For 'wad' as 'pledge' see Balfour, *Practicks* 194–196. Erskine II.viii.3 writes: '*Wad*, in the old Saxon language, signified a pledge'. For the etymology see *An Etymological Dictionary of The Scottish Language* vol 4 (1882) sv 'wad' and *The Scottish National Dictionary* (vol x, 1976) sv 'wad'. See also F Pollock and F W Maitland, *The History of English Law before Edward I* (2nd edn, 1896; reprinted 1968) vol 2, 117 and J H Wigmore, 'The Pledge Idea: A Study in Comparative Legal Ideas' (1897) 10 *Harv LR* 321 at 322–323.

[29] See reference cited, above, in n 28 and W Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence* (2nd edn, 1822) II, 330.

[30] Pollock and Maitland, *History of English Law* vol 2, 117.

[31] Pollock and Maitland, vol 2, 117; T F T Plucknett, *A Concise History of the Common Law* (5th edn, 1956) 628–629.

[32] See Bell, *Personal Property* ch 6 and N E Palmer, *Bailment* (2nd edn, 1991) ch 22.

[33] Pollock and Maitland, vol 2, 117 and Palmer, ch 22.

[34] See Pollock and Maitland, vol 2, 117 and Wigmore, 'The Pledge Idea' (1897) 10 *Harv LR* 321 at 322–323. In fact it seems that the Latin '*vadium*' derives from *wad* and not the other way around. 'Wad' originally meant 'cloth' in Gothic. With the Goths, cloth was anciently given and received instead of money and if a pledge was made, it would be done by leaving a piece of cloth. A pledge thus became known as a 'wad'. See *An Etymological Dictionary of The Scottish Language* sv 'wad'.

[35] For *vadimonium* as bail, see Gaius IV, 184.

of bailment in English law.[36] The English term for security over immoveables is 'mortgage', which clearly comes from 'gage'.[37]

2-14. The Roman law term for pledge, '*pignus*', sometimes finds itself in use in Scots law.[38] From it, we get the noun 'impignoration' and the verb 'impignorate'. These words have been used as synonyms for pledge in its narrow and wide sense, although principally in older authority.[39]

E. PAWN

2-15. The word 'pawn' has come to be used as a synonym for 'pledge', both north and south of the border and beyond.[40] Its origins are unclear, but a connection with the Latin 'ponere', to put down, seems likely.[41] The word shares the same root as the Dutch and German law terms for 'pledge', these being 'vuistpand' and 'Pfand' respectively.[42] One exception to the general proposition that 'pledge' and 'pawn' are interchangeable is the bill of lading. These apparently can only be pledged.[43] In Louisiana, 'pledge' is used as a general term for real security and 'pawn' means a pledge of moveable property.[44]

[36] See Palmer, *Bailment*; G W Paton, *Bailment in the Common Law* (1952) ch 18 and *Coggs v Bernard* (1703) 2 Lord Raym 909 at 919, 92 ER 107 at 109 per Holt CJ. '*Vadimonium*' itself probably originates in 'wad': see *An Etymological Dictionary of The Scottish Language* sv 'wad'.

[37] See A W B Simpson, *A History of the Land Law* (2nd edn, 1986) 141–143 and 242–247 and Pollock and Maitland, *History of English Law* vol 2, 117–124.

[38] Eg, Stair I.xiii.11. On the Roman law, see below, paras 3-03–3-15.

[39] Eg, *Ramsay v Wilson* (1665) Mor 9113 and *Pringles v Gribton* (1710) Mor 9123.

[40] Indeed, according to Bankton II.x.pr a pledge in respect of moveables is 'generally called a pawn'. For England, see Palmer, *Bailment* 1383. Shakespeare certainly used 'pawn' to mean 'pledge', albeit in a figurative context: 'My Honor is at pawne, And but my going, nothing can redeem it' (2 Henry IV, II, iii, 7 (1597)). Ben Jonson, *Every Man in his Humour* (1598) IV, vii uses the word in a more mundane manner: 'We haue no store of monie ... but you shall haue good pawnes ... this Iewell, and this gentlemans silke stockins'. For other literary references and the full etymology of the word see *The Oxford English Dictionary Online* (http://dictionary.oed.com/) sv 'pawn'.

[41] See Wigmore, 'The Pledge-Idea' (1897) 10 *Harv LR* 321 at 322 n 3. *The Oxford English Dictionary Online* does not recognise any such derivation.

[42] The root is the old French 'pan', which as well as meaning pledge meant piece of cloth: see *The OED*. Thus, the origins of 'pawn' seem remarkably similar to those of 'wad': see above, n 28. On the Dutch law, see W M Kleijn, J P Jordaans, H B Krans, H D Ploeger and F A Steketee in J Chorus et al, *Introduction to Dutch Law* (2nd edn, 1993) 84–87. In German law, the precise terminology is *Faustpfand* or *Vertragspfandrecht*. See E-M Kieninger and G L Gretton, 'Glossary' in Kieninger (ed), *Security Rights in Movable Property in European Private Law* 150 at 163 and F Baur, *Sachenrecht* (17th edn, by J F Baur and R Stürner, 1999) 675.

[43] This is certainly the English position: T G Ford (ed), 'Pledges and Pawns' in *Halsbury's Laws of England* vol 36(1) (4th edn, 2007 reissue) para 1 n 1 and N Palmer and A Hudson, 'Pledge' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn, 1998) 621 n 2.

[44] See R Slovenko, 'Of Pledge' (1958) 33 *Tul LR* 59.

2-16. Since the eighteenth century, 'pawn' has been more precisely used to refer to a pledge to a pawnbroker.[45] This is a person offering credit whose activities are governed by statute, currently the Consumer Credit Act 1974. Pawnbrokers operate from pawnshops. The traditional symbol of these premises is three gold balls, which may be traced to the signs used by the medieval Italian merchants in Lombard Street in London.[46] Any further reference to 'pawn' will be to a pledge to a pawnbroker.

F. PLEDGE IN PRACTICE

2-17. The economic value of pledge was appreciated by Justinian: 'Pledge benefits both parties, the debtor because it helps him get credit, and the creditor because it helps him give credit safely.'[47] The basic principle remains the same today. A potential lender will be more willing to give credit if in return he or she is given a nexus over an asset belonging to the debtor.[48] In the words of Denis, 'The precept of Shakespeare: "Neither a borrower nor a lender be," is only true when the loan is unsecured.'[49] Secured loans attract a lower interest rate than unsecured loans, for the creditor has a lesser risk.[50] If the debtor does default the creditor can go about realising the security. The facilitation of the provision of credit by securities allows capital to be obtained by would-be businesspeople who go on to benefit our national economy.[51] Further, in the non-commercial sphere pledge has been seen as a mechanism to alleviate the poverty of individuals.[52]

[45] That is, since the enactment of pawnbroking legislation. There were various pieces of legislation in the eighteenth century, the first consolidating statute being the Pawnbrokers Act of 1800. See J K Macleod, 'Pawnbroking: A Regulatory Issue' (1995) 24 *JBL* 155 at 160. See also The American Law Institute, *Restatement of the Law of Security* 8–9.

[46] The symbol may be traced to the Medici family's coat of arms. See Cobbett, *Pawns or Pledges* 7–8 and the website of the National Pawnbrokers Association of the UK: http://www.thenpa.com/pawnbroking_history.htm.

[47] J 3.14.4. (Quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum.)

[48] See Shaw, *Security over Moveables* 1–2; Eighth Report of the Law Reform Committee of Scotland, *The Constitution of Security over Moveable Property; and Floating Charges* (1960, Cmnd 1017) and M Bridge, 'The Quistclose Trust in a World of Secured Transactions' (1992) 12 *OJLS* 333 at 336–339. Not everybody agrees with the conventional view: see G L Gretton, *Remarks on the DTI Paper of November 1994 on Security over Moveable Property in Scotland* (Edinburgh University Seminar Paper, 23 February 1995) and 'The Reform of Moveable Security Law' 1999 *SLT (News)* 301. See also E-M Kieninger, 'Introduction' in Kieninger (ed), *Security Rights in Movable Property in European Private Law* 7–9.

[49] Denis, *Pledge* 4–5.

[50] See eg A Schwartz, 'The Continuing Puzzle of Secured Debt' (1984) 37 *Vanderbilt LR* 1051 at 1054.

[51] Shaw, *Security over Moveables* 1–2.

[52] Bell, *Principles* § 209.

2-18. The number of pledge decisions in modern times has been small.[53] The reason for this is that pledge is rarely in use to secure large commercial loans.[54] The problem is that the debtor must deliver his or her asset or assets to the creditor. To fund a large loan a valuable amount will have to be delivered. Obviously it is very difficult to run a business if your creditor has physical detention of such assets.[55] And if you are unable to run your business you will be unable to pay back the loan. This, as will be seen, is why Roman law introduced the non-possessory *hypotheca* for agricultural tenants requiring credit, whose only valuable assets were their implements.[56]

2-19. Whilst the Scottish courts have made some concessions to the needs of commerce, such as allowing securities to be created over documents of title,[57] the overriding principle remains unchanged. There is no security over moveable property in Scots common law without possession.[58] For possession satisfies the publicity principle of property law.[59] The approach has been criticised but the courts remain intransigent.[60]

2-20. Unsurprisingly, the need for security with possession in the debtor has led to statutory reform. Floating charges were introduced for the use of companies in 1961 and, although their regulating legislation is considered to have been badly drafted, they fulfil a clear commercial need.[61] They are

[53] See below, para 3-85.

[54] D L Carey Miller, 'Present and Future of Real and Personal Security: Scotland' in J Bell (ed), *Studies in UK Law 2002* (2002) 123 at 124. The statement in Denis, *Pledge* 8 that the 'contract of pledge may, therefore, well be said to be the pivot of commerce' is not true of Scotland today.

[55] The whisky industry, however, has been able to make use of pledge through the system of bonded warehousing.

[56] See below, para 3-07.

[57] See below, paras 6-29–6-32.

[58] See Gloag and Irvine, *Rights in Security* 187–191; Sim, 'Rights in Security' para 8.

[59] See, eg, L P W van Vliet, *Transfer of movables in German, French, English and Dutch law* (2000) 30 and A J M Steven, 'Transfer of Title in Scottish Law' in J M Rainer and J Filip-Fröschl, *Transfer of Title Concerning Movables Part 1 – Eigentumsübertragung an beweglichen Sachen in Europa Teil 1* (2006) 155 at 159.

[60] For discussion, see Gloag and Irvine, *Rights in Security* 187–188; G L Gretton, 'Security over Moveables Without Loss of Possession' 1978 *SLT (News)* 107; D O'Donnell and D L Carey Miller, 'Security over Moveables: A Longstanding Reform Agenda in Scots Law' (1997) 5 *Z Eu P* 807 at 808–809 and G L Gretton, 'The Reform of Moveable Security Law' 1999 *SLT (News)* 301. The courts have on occasion gone too far: see *Emerald Stainless Steel Ltd v South Side Distribution Ltd* 1982 SC 61 overruled by *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891.

[61] Professor Gretton is sceptical about the commercial need: see his 'What Went Wrong with Floating Charges?' 1986 *SLT (News)* 325. But compare R B Jack, 'The Coming of the Floating Charge to Scotland' in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 33–46 and consider the number of bodies which wished to see the introduction of the floating charge: Eighth Report of the Law Reform Committee for Scotland (Cmnd 1017, 1960) 1–3. More recently, see D Cabrelli, 'The Case Against the Floating Charge in Scotland' (2005) 9 *Edin LR* 407. The new legislation on floating charges, the Bankruptcy and Diligence etc (Scotland) Act 2007 ss 37–49 (at the time of writing not yet in force) is a considerable improvement on the drafting in the existing legislation.

not as alien to Scots law as has been suggested, for as Sir Thomas Smith pointed out, security *retenta possessione* is consistent with the civilian foundation of modern Scots law.[62] The introduction of receivership in 1972 without regard to the differences in English and Scots private law is more difficult to justify.[63] However, the practical point is that floating charges are used to secure large commercial loans and if there is default the company will go into receivership.[64]

2-21. In a consultation paper published in 1994, the Department of Trade and Industry proposed an extension to the current law in respect of non-possessory security.[65] It wished to see all businesses being able to create floating charges over their property.[66] Further, it proposed the introduction of a new registered hypothec over moveables, to be known as the 'moveable security'.[67] The consultation paper did not suggest making any alterations to the existing common law securities.[68] Its proposals have not been implemented, probably because of later research commissioned by the Scottish Executive which concluded:

> 'Our research has confirmed that the relationship between access to finance and the ability to provide security is a complex one. Despite the perceived deficiencies in Scots law concerning the ability to provide security over moveable property, our research has found that neither the inability of unincorporated businesses to offer the floating charge, nor the inability of Scottish SMEs[69] to offer a non-possessory security over moveable security, significantly affects the ability of Scottish SMEs to access finance.'[70]

[62] On the 'alien' nature of the floating charge, see Gretton, 'What Went Wrong with Floating Charges?'. Sir Thomas Smith makes his point in his *Short Commentary* at 474 and in Appendix 1 to the Eighth Report. On this, see K G C Reid, 'While One Hundred Remain: T B Smith and the Progress of Scots Law' 1 at 17 and G L Gretton, 'The Rational and the National: Thomas Broun Smith' 30 at 40–41 in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005).

[63] See, eg, Lord President Hope's invective in the last page of his judgment in *Sharp v Thomson* 1995 SC 455 at 481. Compare the House of Lords judgment: 1997 SC (HL) 66.

[64] For most floating charges created since 15 September 2003 an administrator rather than a receiver must be appointed. See the Enterprise Act 2002 s 250, discussed in D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 23.4.

[65] Department of Trade and Industry Consultation Paper, *Security over Moveable Property in Scotland*, November 1994. Discussed by J Murray, 'Reform of Security over Moveable Property' 1995 *SLT (News)* 31; H Patrick, 'Reform of Security over Moveable Property: Some General Comments' 1995 *SLT (News)* 42; A J M Steven, 'Reform of Security over Moveable Property: Some Further Thoughts' 1995 *SLT (News)* 120 and D O'Donnell and D L Carey Miller, 'Security over Moveables: A Longstanding Reform Agenda in Scots Law' (1997) 5 *Z Eu P* 807. See also L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 536–540.

[66] Consultation paper, para 2.10.

[67] Consultation paper, para 2.11.

[68] Consultation paper, para 2.9.

[69] Scottish Small and Medium Sized Enterprises.

[70] Scottish Executive Central Research Unit, *Business Finance and Security over Moveable Property* (2002) 99–100.

It remains clear, however, that pledge other than by means of documents of title, is little used in modern commercial practice.[71]

[71] The position is the same elsewhere in Europe. See Kieninger, 'Evaluation: a common core?' in Kieninger (ed), *Security Rights in Movable Property in European Private Law* 647 at 652–654. For example, in 2006 France introduced a non-possessory pledge constituted by registration: see art 2337 *Code civil* and D Legeais, 'Le gage de meubles corporeals' *La Semaine Juridique* No 20, 17 May 2006, Supplement 12.

3 History of Pledge

A. EARLY SYSTEMS

(1) Ancient law: Biblical evidence

3-01. As one commentator has put it, 'pledge springs from natural law and is of the farthest antiquity', securing debts 'in the primitive relations of men'.[1] 'Pledge' is mentioned no less than twenty-four times in the Old Testament, the first time being in Genesis Chapter 38.[2] This can be dated approximately to 1700 BC and concerns the pledge of a seal, its cord, and a staff.[3] The items were to secure the delivery of a young goat and it appears that they simply were to be forfeited if the kid was not delivered. Later, in Deuteronomy, God through Moses lays down rules to try to protect debtors. For example, millstones used for grinding corn are not to be taken in security, because they are a man's means of preparing food to keep his family alive.[4]

(2) Other early systems

3-02. The concept of pledge was also known in ancient Egypt.[5] There, a gruesome practice developed whereby a debtor would deliver the mummy of his father to his creditor.[6] The latter was very happy to lend on this basis, for the pledged property was of significant religious value to the debtor. He would be sure to discharge the debt so he could get his mummy back. Further, according to Pufendorf, were the debtor indeed to fail to redeem the pledge, he would be held in the greatest disgrace and be denied burial after his own death.[7] The ancient Greeks also widely used the pledge device, although probably in less macabre a fashion.[8] A mix of Tartarian and Arabian

[1] Denis, *Pledge* 2 quoted in V S Meiners, 'Formal Requirements of Pledge Under Louisiana Civil Code Article 3158 and Related Articles' (1987) 48 *La LR* 129. See also Cobbett, *Pawns or Pledges* 1.

[2] See R Young, *Analytical Concordance of the Bible* (1879) sv 'pledge'.

[3] Genesis 38:18.

[4] Deuteronomy 24:6. See also Deuteronomy 24:10–13. Echoes of this can be found in the Debtors (Scotland) Act 1987 s 16 (articles exempt from attachment). Deuteronomy 24:6 was also the basis of the old crime of poinding oxen in time of labouring. See Sir George Mackenzie, *The Laws and Customes of Scotland in Matters Criminal* (1678, reprinted 2005 with a new introduction by J Chalmers, C Gane and F Leverick) para 31.2. There are also echoes of it in the law of medieval Spain, where animals, ploughs and other items essential to agriculture could not be pledged. See R I Burns (ed), *Las Siete Partidas* (trans by S P Scott) vol 4, *Family, Commerce and the Sea: The Worlds of Women and Merchants* (2001) Title XIII, Law IV.

[5] Meiners, 'Formal Requirements of Pledge' at 129.

[6] Cobbett, *Pawns or Pledges* 26–27.

[7] S Pufendorf, *De Jure Naturae et Gentium* (1672) V.10.13.

[8] Meiners, 'Formal Requirements of Pledge' at 129 and J H Wigmore, 'The Pledge-Idea: A Study in Comparative Legal Ideas III' (1897) 11 *Harv LR* 18 at 18–21.

jurisprudence, supplanted by Greek law, was the basis of the law in old Turkey. Ancient Turks in dispute about what this meant for a pledge transaction, would refer the matter to the Mufti at Constantinople.[9] Pledge was also recognised in early India.[10]

B. ROMAN LAW

(1) General

3-03. The most developed system of ancient law with respect to pledge and unsurprisingly the most influential on the Scots law of today is that of ancient Rome.[11] A comprehensive account of this will not be given here for two reasons. First, the subject has already been the subject of extensive research by eminent scholars.[12] Secondly, references to the specific rules of Roman law will be made later, when consideration is given to the parallel Scots law rules.[13] However, it will be convenient at this stage to give an overview of the Roman law of security.

(2) Real and personal security

3-04. In ancient Rome, personal security was in fact far more common than real security.[14] This conjures up images of the debtor finding a third party to act as a cautioner, and indeed often this was what happened.[15] But equally, 'personal security' meant that the debtor contracted with the creditor that if he defaulted upon the loan he would become the creditor's slave until he discharged the debt.[16] Understandably, not all debtors would wish to take that risk and consequently would, if they were rich enough to have valuable assets, opt for real security.

[9] Sir William Jones, *An Essay on the Law of Bailments* (1781) 84–85. His source is a manuscript kept in the University of Cambridge Library.

[10] Wigmore (1897) 10 *Harv LR* 389 at 416–417.

[11] See below, para 3-67.

[12] See M Kaser, *Das Römische Privatrecht* (6th edn, 1968) trans by R Dannenbring as *Roman Private Law* (2nd edn, 1968) 129–134; R Sohm, *Institutionen: Geschichte und System des Römischen Privatrechts* (12th edn, 1905) trans by J C Ledlie as *Institutes of Roman Law* (3rd edn, 1907) 351–357; R W Lee, *The Elements of Roman Law* (4th edn, 1956) 175 and 295–297; B Nicholas, *An Introduction to Roman Law* (1962) 149–153; Thomas, *Roman Law* 329–334; Buckland, *Roman Law* 470–478; H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, 1972) 301–304; F Schulz, *Classical Roman Law* (1951) 400–427; D L Carey Miller, 'Property' 42 at 70–74 and R Evans-Jones and G MacCormack 'Obligations' 127 at 133–134 in E Metzger (ed), *A Companion to Justinian's* Institutes (1998); A Borkowski and P du Plessis, *Textbook on Roman Law* (3rd edn, 2005) 303–305; R J Goebel, 'Reconstructing the Roman Law of Real Security' (1961–62) 36 *Tul LR* 29 and texts cited therein.

[13] See below, eg, para 8-14.

[14] Nicholas, *An Introduction to Roman Law* 151. The distinction between the two types of security was very well established: see D 50.16.188.1.

[15] Thomas, *Roman Law* 334–339.

[16] Meiners, 'Formal Requirements of Pledge' at 129.

(3) *Fiducia cum creditore*

3-05. *Fiducia cum creditore* was the original form of real security in Roman law.[17] It involved the debtor transferring ownership of the *res* to the creditor by *mancipatio* or *in iure cessio*, subject to a covenant, *fiducia* or *pactum fiduciae*, that the creditor would reconvey upon the debtor fulfilling his obligation.[18] The *fiducia* would also contain conditions governing the circumstances in which the creditor could sell the thing, much like an 'events of default' clause in a modern commercial loan. The essence of *fiducia cum creditore* was the transfer of ownership. The debtor lost his real right. This meant that the creditor could alienate the property to a third party, even in breach of his *fiducia*, leaving the debtor with only a personal *actio fiduciae* against the creditor.[19] There were other disadvantages to the debtor of this type of security too.[20] Unless there was a special arrangement by way of *precarium*, possession of the property was with the creditor, so the debtor could not utilise it. Further, successive securities over the asset were impossible.

(4) *Pignus*

3-06. The unsatisfactory nature of *fiducia* led to the development of *pignus*, which was in widespread use before the time of the Empire.[21] It became one of the recognised 'real contracts' and involved the debtor transferring merely the possession of the *res* to the creditor.[22] The debtor retained *dominium*.[23] He was therefore protected from the creditor making a wrongful sale, although remaining unable to make use of his property. On the other hand, for a long time, the creditor was only protected by the possessory interdicts and was not regarded as having a real right.[24]

(5) *Hypotheca*

3-07. The drawbacks of *pignus* were particularly felt in agricultural areas, where any valuable property a debtor had was needed to work the land. A practice consequently developed of tenants 'pledging' to their landlord in security of their rent the property they had brought onto the land (*invecta et*

[17] Buckland, *Roman Law* 471; Nicholas, *An Introduction to Roman Law* 151; Borkowski and du Plessis, *Textbook on Roman Law* 303.

[18] Nicholas, *An Introduction to Roman Law* 151; Goebel, 'Reconstructing the Roman Law of Real Security' at 33–34.

[19] Nicholas, *An Introduction to Roman Law* 151; Goebel, 'Reconstructing the Roman Law of Real Security' at 33–34; Thomas, *Roman Law* 329.

[20] Nicholas, *An Introduction to Roman Law* 151.

[21] Buckland, *Roman Law* 472.

[22] Nicholas, *An Introduction to Roman Law* 151; Evans-Jones and MacCormack, 'Obligations' in Metzger (ed), *A Companion to Justinian's* Institutes 127 at 133.

[23] Zimmermann, *Obligations* 220.

[24] Buckland, *Roman Law* 472; Thomas, *Roman Law* 330; Carey Miller, 'Property' in Metzger (ed), *A Companion to Justinian's* Institutes 42 at 72.

illata).[25] However, this form of pledge amounted merely to an agreement that if the rent were not duly paid, the landlord would be entitled to take possession of the property.[26] Probably around the end of the Republic, this arrangement was given force of law by the Praetor Salvius who granted the landlord an interdict (*interdictum Salvianum*) to seize the *invecta et illata*.[27] However, this simply amounted to a personal right against the tenant.

3-08. Sometime later, but before Hadrian consolidated the Edict in c 130 AD, the right became real when another Praetor, named Servius, granted the landlord an *actio in rem*, the *actio Serviana*.[28] Later Praetors granted an *actio Serviana utilis* (or *actio quasi Serviana*) in other cases of *hypotheca*. This area of law grew at an explosive rate, the Romans having even come up with a hypothec resembling the modern floating charge.[29] However it was Julian, when codifying the Edict for Hadrian, who took the last step and made the *actio Serviana* available in all cases of *hypotheca* and *pignus* also.[30] By the middle of the second century AD therefore, *pignus* and *hypotheca* had become *iura in re aliena*.[31]

(6) Forfeiture versus collateral security

3-09. In the earlier eras of the civil law the property given in security was almost certainly automatically forfeited to the creditor upon non-performance by the debtor.[32] Whether the security was *fiducia* or *pignus* does not seem to have mattered.[33] Support for the existence of the forfeiture type of pledge is found in the Digest. Reference is made there to a creditor who has the right to sell the property under a special clause conferring the right to sue the creditor for any unrealised deficiency.[34] The thesis is that such a clause only existed because initially the creditor had purely the forfeiture right.[35] Further, evidence of the forfeiture type of pledge is found in the early laws of the Germans and Greeks.[36]

[25] Nicholas, *An Introduction to Roman Law* 152.

[26] Nicholas, *An Introduction to Roman Law* 152; F Schulz, *Classical Roman Law* (1951) 408; Borkowski and du Plessis, *Textbook on Roman Law* 304.

[27] Schulz, *Classical Roman Law* 408; Thomas, *Roman Law* 332.

[28] Buckland, *Roman Law* 472–473.

[29] D 20.1.34.pr; Thomas, *Roman Law* 332; Buckland, *Roman Law* 475. See also Scottish Executive Central Research Unit, *Business Finance and Security over Moveable Property* (2002) 113 n 82.

[30] Schulz, *Classical Roman Law* 408.

[31] To use the terminology of the Commentators: see Nicholas, *An Introduction to Roman Law* 141. Compare Buckland, *Roman Law* 471 n 1.

[32] Goebel, 'Reconstructing the Roman Law of Real Security' at 32; Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law* 302; Zimmermann, *Obligations* 223.

[33] Goebel, 'Reconstructing the Roman Law of Real Security' at 33.

[34] D 20.5.9.1 (Pomponius) and D 46.1.63 (Scaevola).

[35] Goebel, 'Reconstructing the Roman Law of Real Security' at 32.

[36] Goebel, 'Reconstructing the Roman Law of Real Security' at 33; Wigmore, 'The Pledge-Idea: A Study in Comparative Legal Ideas I' (1897) 10 *Harv LR* 321 at 327–329 and 'The Pledge-Idea: A Study in Comparative Legal Ideas III' (1897) 11 *Harv LR* 18 at 19.

3-10. The forfeiture pledge acted as an *in rem* surrogate for any *in personam* rights the creditor otherwise had. This meant that the risk (*periculum*) lay with the creditor. If the property was worth less than the debt, the creditor could not recover the deficiency (*reliquum*) from the debtor. Conversely, if the property exceeded the value of the debt, he could retain the surplus (*hyperocha*).[37] The inequity here was clear and the forfeiture pledge was consigned to history around the middle of the Republican era.[38] Pledge had become a collateral security and forfeiture occurred only if there was an express agreement (*lex commissoria*) to that effect.[39]

3-11. The demise of the automatic forfeiture rule meant that the creditor had to stipulate how he intended to realise his security. As just mentioned, he could agree with the debtor on an express forfeiture clause (*lex commissoria*). The alternative was to stipulate for a right to sell (*pactum de vendendo* or *distrahendo*).[40] Pledge now being a collateral security, the creditor had to account to the debtor for any profit made upon the sale. Similarly, he could sue the debtor for any deficit.[41] The *pactum de vendendo* became implied in the classical era. However, to avoid abuse by the creditor an elaborate system of notice was enacted.[42] As for abuse of the *lex commissoria*, this was brought to a halt by the Emperor Constantine abolishing it.[43] The last remnant of the concept of the forfeiture pledge had been removed.

(7) The distinction between *pignus* and *hypotheca*

3-12. What has been said thus far is an account of the development of the Roman law of real security, upon which there is general academic consensus. However, the presence of conflicting texts in the *Corpus Iuris Civilis*, plus the universally accepted fact that many of the passages in the Digest were interpolated by Tribonian and his compilers, opens the door to scholarly disagreement. In the area of pledge, the greatest controversy is perhaps the inter-relationship between *pignus* and *hypotheca*. The orthodox view is the one which finds support from Ulpian: '*Proprie pignus dicimus, quod ad creditorem transit, hypothecam, cum non transit nec possessio ad creditorem*.'[44] This has certainly been accepted by leading Romanists.[45] And it has been accepted by modern Scots law as the orthodoxy too.[46]

[37] Goebel, 'Reconstructing the Roman Law of Real Security' at 33.

[38] Goebel at 33.

[39] Thomas, *Roman Law* 331.

[40] Buckland, *Roman Law* 474; Goebel, 'Reconstructing the Roman Law of Real Security' at 35.

[41] Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law* 302.

[42] Thomas, *Roman Law* 331; Buckland, *Roman Law* 474.

[43] Thomas, *Roman Law* 331; Zimmermann, *Obligations* 224.

[44] D 13.7.9.2 ('strictly speaking, we use *pignus* for the pledge which is handed over to the creditor and *hypotheca* for the case in which he does not even get possession'). Translation from T Mommsen, P Kruger and A Watson (eds), *The Digest of Justinian* (4 vols) (1985). See also J 4.6.7.

[45] Eg, Thomas, *Roman Law* 332–334.

[46] Eg, Stair, I.xiii.11; Gloag and Henderson, *The Law of Scotland* para 37.12.

3-13. The alternative thesis is that *pignus* and *hypothec* can be condensed into the same notion.[47] Support for this may be found in the following opinion of Marcianus: '*Inter pignus autem et hypothecam tantum nominis sonus differt.*'[48] Persuasive arguments may be adduced to discredit the dichotomous approach. In the first place, it was formerly believed that *hypotheca*, due to its Greek name, was a legal transplant from the law of ancient Greece.[49] This is now generally accepted to be untrue.[50] Secondly, the *actio Serviana* (the relevant real action) was common to both.[51] Indeed, the word *pignus* occurs in the *formula* of the action.[52] Leading on from this and thirdly, whereas *hypotheca* grew out of *pignus*, *pignus* only became a real right through *hypotheca*.[53] Fourthly, the passages set out above from Ulpian and Justinian both use the similar expressions 'strictly speaking' and 'properly' which indicate that *pignus* and *hypotheca* were used interchangeably.[54] Fifthly, it is argued that the discrete categorisation represents the Justinianic rationalisation of the law and not what the situation was in classical Rome.[55] Sixthly, it has been doubted whether the above passage attributed to Ulpian did indeed come from his pen.[56] Certainly, the same great jurist writes elsewhere: '*Pignus contrahitur non sola traditione, sed etiam nuda conventione, etsi non traditum est.*'[57]

3-14. These arguments are cumulatively powerful. Goebel's analysis is difficult to resist:

[47] Wigmore, 'A Study in Comparative Legal Ideas III' (1897) 11 *Harv LR* 18 at 21–25; Goebel, 'Reconstructing the Roman Law of Real Security' at 37–44; Nicholas, *An Introduction to Roman Law* 152; Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law* 303; Carey Miller, 'Property' in Metzger (ed), *A Companion to Justinian's* Institutes 42 at 73; Denis, *Pledge* 3.

[48] D 20.1.5.1 ('the difference between *pignus* and *hypotheca* is purely verbal').

[49] See Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law* 303. This was the prevalent view amongst the older writers, eg R Sohm, *Institutes of Roman Law* (trans J C Ledlie, 3rd edn, 1907) 354. W Burdick, *Principles of Roman Law and Their Relation to Modern Law* (1938) 381 adheres to this view.

[50] Goebel, 'Reconstructing the Roman Law of Real Security' at 35; Thomas, *Roman Law* 332; Nicholas, *An Introduction to Roman Law* 152.

[51] Goebel at 35; Thomas, *Roman* Law 332; Nicholas, *An Introduction to Roman* Law 152; Buckland, *Roman Law* 472–473.

[52] Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law* 303.

[53] That is to say, the *actio in rem*, the *actio Serviana*, was available to a hypothecary creditor before being available to a pledgee: Buckland, *Roman Law* 472–473; Schulz, *Classical Roman Law* 408.

[54] Or at least *pignus* was: see Wigmore, 'A Study in Comparative Legal Ideas III' (1897) 11 *Harv LR* 18 at 23 n 3.

[55] Goebel, 'Reconstructing the Roman Law of Real Security' at 30–31. Wigmore's thesis in fact is that *hypotheca* was used as a substitute for *fiducia* in the Digest, in other words that *fiducia* by Justinian's time had become absorbed into *pignus*: Wigmore, 'A Study in Comparative Legal Ideas I' (1897) 11 *Harv LR* 18 at 32. However, this radical revisionism has been questioned: see Goebel at 41–43.

[56] G F Puchta doubts this: *Pandekten* (12th edn, 1877) 193. See Wigmore, 'A Study in Comparative Legal Ideas III' (1897) 11 *Harv LR* 18 at 23 n 3.

[57] D 13.7.1.pr ('*pignus* is contracted not only by delivery but also by mere agreement even in the absence of any delivery').

> 'Roman law in both its classical and post-classical eras knew only one basic form of real security. Whether this form was known as *pignus* or *hypotheca* or both, or whether preferred usage required *pignus* to indicate possession in the creditor and *hypotheca* ... to indicate possession in the debtor, is a topic of fairly minor importance. ... Accordingly, it is quite inappropriate to speak of the legal rules of *pignus* or the legal rules of *hypotheca* as such. It is preferable to adopt a neutral terminology and present the doctrines applicable to pledge as a whole, organized in categories strictly according to the basic factual situations which engender these doctrines.'[58]

(8) A unitary law of pledge

3-15. Another important point about *pignus* and *hypotheca* is that each was competent for both immoveable and moveable property.[59] Here, for example, is Burdick:

> 'In Roman law, both pignus and hypotheca applied to movables and immovables alike. The notion entertained by some that pignus applied only to movables while hypotheca applied exclusively to immovables, is erroneous. Each applies to both classes of property.'[60]

The modern Scots law of pledge, it goes without saying, is only applicable to moveables.[61] As regards heritable property and excepting the floating charge, the standard security is the only competent method of conventionally securing an obligation upon land in Scotland.[62]

C. EARLY SCOTS LAW

(1) *Regiam Majestatem*

(a) General

3-16. The earliest reference to pledge in Scots law seems to be in the *Regiam Majestatem*. Few legal treatises have generated greater controversy. The fact that it is a collection of old laws written in Latin is beyond question. However, the date of the work and its accuracy as an account of medieval

[58] Goebel, 'Reconstructing the Roman Law of Real Security' at 44.

[59] Thomas, *Roman Law* 332–333; Wigmore, 'A Study in Comparative Legal Ideas III' (1897) 11 *Harv LR* 18 at 22; Buckland, *Roman Law* 475–476; Denis, *Pledge* 3–4.

[60] W Burdick, *Principles of Roman Law and Their Relation to Modern Law* (1938) 382. See also W M Gordon, 'Roman Influence on the Scots Law of Real Security' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 157 at 158–159. In Louisiana today 'pledge' remains a general term for security. A pledge of moveables is known as 'pawn' and one of immoveables as 'antichresis'. See R Slovenko, 'Of Pledge' (1958) 33 *Tul LR* 59.

[61] See below, para 5-10.

[62] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3).

Scots law are matters upon which there has been significant dissensus.[63] As to the first of these, c 1318 seems the likeliest time of publication.[64] However, with regard to accuracy, the basic problem is that much of *Regiam* has been copied from the English work of c 1187, the *De Legibus et Consuetudinibus Angliae* of Glanvill.[65] Thus Stair regarded it as 'no part of our law'.[66] However, this statement is somewhat exaggerated, given that he was clearly aware of the influence of English law upon our legal system.[67] As Sellar writes, '*Regiam Majestatem* was an important, although not necessarily authoritative, repository of Scottish customary law.'[68] Further, its influence on later works is not difficult to show.[69]

3-17. Pledge merits five chapters in Book 3 of *Regiam*.[70] The terminology is interesting. The word used for pledge is '*vadium*'. '*Pignus*' does get a passing reference in the title to chapter 2, in the derivative form '*pignoris*'. It reads: '*De rebus creditis et mutuo dato sub vadii vel pignoris positione*'. The use of '*vel*', i.e. 'or', suggests that '*vadium*' and '*pignus*' were alternatives. However, in the body of the text it is '*vadium*' which is used. The origin of the word '*vadium*' is not difficult to trace and indeed has been dealt with previously, in the discussion of etymology.[71] '*Vadium*' is the Latin term used by English law to mean pledge. It was in the Middle Ages and is, to some extent, today.[72] More significantly, chapters 2 to 6 of Book 3 of *Regiam* are based closely upon parallel passages in Glanvill.[73]

(b) The old English law

3-18. As it is clear that the old English law heavily influenced *Regiam*, it is appropriate to refer to it here. It will be particularly helpful because some

[63] See Lord Cooper's introduction to *Regiam Majestatem* (Stair Society vol 11, 1947, ed Lord Cooper); A A M Duncan, '*Regiam Majestatem*. A Reconsideration' 1961 *JR* 199; P Stein, 'The Source of the Romano-canonical part of *Regiam Majestatem*' SHR xlviii (1969) 107; A Harding, 'Regiam Majestatem among Medieval Law-Books' 1984 *JR* 97; H L MacQueen, *Common Law and Feudal Society* (1993), 89–98; H L MacQueen, '*Regiam Majestatem*, Scots Law and National Identity' (1995) 74 *Scot Hist Rev* 1; J W Cairns, 'Historical Introduction' in Reid and Zimmermann, *History* vol 1, 14 at 42–44.

[64] MacQueen, *Common Law and Feudal Society* 90–91.

[65] See texts cited in n 63. The edition of Glanvill used here is G D G Hall (ed), *Tractabus de Legibus et Consuetudinibus Angliae qui Glanvilla voccator* (1965).

[66] Stair I.i.16. See also Craig, *Jus Feudale* (1603; 1934 edition, trans Lord Clyde) I.viii.11.

[67] See W D H Sellar, 'English Law as a Source' in *Stair Tercentenary Studies* (Stair Society vol 33, 1981) 140–150. See also his contribution to *The Scottish Legal Tradition* (2nd edn, 1991) entitled 'A Historical Perspective' 29 at 39.

[68] Sellar, 'English Law as a Source' at 144 and 'A Historical Perspective' at 39.

[69] In particular Balfour, *Practicks*. See below, paras 3-48–3-50. *Regiam* has been cited in court in the twentieth century. See eg *Lord Advocate v Aberdeen University & Budge* 1963 SC 533.

[70] These may be found at 192–198 of Lord Cooper's edition.

[71] See above, para 2-13.

[72] For the Middle Ages, see F Pollock and F W Maitland, *The History of English Law before Edward I* (2nd edn, 1896, reprinted 1968) vol 2, 117 and A W B Simpson, *An Introduction to the History of the Land Law* (2nd edn, 1986) 141. For today, see N E Palmer, *Bailment* (2nd edn, 1991) ch 22.

[73] That is, *Glanvill*, X.6–10.

scholarship has been already carried out on the matter.[74] Whereas '*vadium*' was the relevant Latin term, the English one was '*gage*'. This word came over from France after William the Conqueror and must have quickly established itself as the term for pledge, as there are references to gages of land in the Domesday Book.[75] It appears that the Anglo-Saxon term for pledge was 'wed', and in actual fact this shares the same Germanic roots as '*vadium*' and 'gage'.[76] The early English law of pledge was unitary in respect of moveables and immoveables.[77]

(c) A unitary law of pledge

3-19. *Regiam* states categorically that both moveable and immoveable property may be pledged.[78] The exact wording used is 'put into pledge', in Latin, '*ponuntur in vadium*'. It has already been suggested that *ponere*, the verb to put, is a precursor of 'pawn'.[79] The fact that *Regiam* recognises pledge as a security in respect of both land and moveables is important. It is suggestive of Roman influence. For, as has been seen, the civil law treated pledge as a unitary concept.[80] Moreover, the approach in *Regiam* makes the point that the law of real security like the law of property in general has a unitary foundation. As to the accuracy of the account here, Erskine seems to have been in no doubt. He uses *Regiam* as the authority for this statement of the early law of heritable security in Scotland:

> 'Originally the property of the lands ... remained with the debtor, agreeably to the genuine nature of impignoration: it was the possession only which was transferred to the creditor for his security.'[81]

3-20. Whilst the basic law of pledge applied equally to moveables and immoveables, *Regiam* does set out some particular rules restricted to each type of property. In respect of land, a pledge could be a '*mortuum vadium*', which Lord Cooper translates as 'mortgage'.[82] The correct translation is 'dead-pledge', for he translates '*vadium*' into 'pledge' everywhere else. 'Mortgage' is the correct translation for the English lawyer, because 'gage' was a term of art in medieval law, as too 'mortgage' became. *Regiam* defines a mortgage as a pledge where the fruits and rents received by the creditor as

[74] See Pollock and Maitland, vol 2, 117–124; Simpson at 141–143; T F T Plucknett, *A Concise History of the Common Law* (5th edn, 1956) 603–609; Cross, *Lien* 64–65.

[75] Plucknett at 603; Pollock and Maitland, vol 2, 118. Apparently, one of the cases involved one Eadric having gaged land to the Abbot of St Benet.

[76] Pollock and Maitland, vol 2, 117.

[77] Glanvill X.6.

[78] *Regiam Majestatem* III.2.1.

[79] See above, para 2-15.

[80] See above, para 3-15.

[81] Erskine II.viii.4. See also Gordon, 'Roman Influence on the Scots Law of Real Security' in *The Civil Law Tradition in Scotland* 157 at 159.

[82] *Regiam Majestatem* III.2.5. See Stair Society vol 11 (ed Lord Cooper) 193. Although III.2 indicates that both moveable and immoveable property could be mortgaged, in practice it was just immoveables. See III.5.

interest do not reduce the principal debt.[83] Thus, the pledge is 'dead', because its profits do not go towards the discharge of the debt.

3-21. Mortgages are regarded as usurious arrangements. Although not prohibited by the King's court, a Christian creditor sins by entering into a mortgage. If he dies while the mortgage is current his property is disposed of in the same way as that of a usurer.[84] After setting out the rules on mortgage, *Regiam* states that aside from these rules the law on pledging immoveables is 'the same as in the case of the pledge of moveable goods'.[85] The unitary nature of the medieval Scots pledge is again underlined.

(d) The need for delivery

3-22. Chapter 2 of Book 3 of *Regiam* states that in pledge the subject matter of the security is either immediately delivered by the debtor to the creditor on receipt of the loan, or it is not so delivered. This has clear echoes of *pignus* and *hypotheca*[86] and suggests a flexible approach. In practice, however, delivery was a necessity, because chapter 4 provides:

> 'When a bargain has been made between debtor and creditor regarding the pledging of some thing, if the debtor after having received the loan fails to deliver the pledge, what action is open to the creditor in such circumstances, especially in view of the risk that the same thing may have previously been pledged, and may again be pledged, to other creditors? Upon this point it must be noted that the King's court is not in use to take cognisance of or warrant such private bargains about the giving or receiving of pledges, or other agreements if made out of court, or made in some court other than the King's court. Therefore if such agreements are not observed, the King's court does not interfere; and hence it is not bound to determine the rights of different creditors, prior or postponed, or their respective preferences.'[87]

3-23. From this it is clear that agreements resembling *hypotheca* were unenforceable.[88] The long obsession of Scots law with the maxim 'no security over moveables without possession' had begun.[89]

3-24. Lord Cooper is rather sceptical as to what extent the King's courts would ignore such agreements.[90] Skene suggested that the sheriff and barony courts would act as enforcement agencies, but there is really no direct evidence on the matter.[91] However, the English authorities are clear that there

[83] *Regiam Majestatem* III.2.5.

[84] *Regiam Majestatem*, III.5.4.

[85] *Regiam Majestatem* III.5.4. Note, however, also the rules governing the situation where pledged land is wrongously withheld from the pledger: *Regiam Majestatem* III.6.

[86] See above, paras 3-06–3-08.

[87] *Regiam Majestatem* III.4.4–6.

[88] At least in the royal courts.

[89] A point which has also been made by Professor Gordon in 'Roman Influence on the Scots Law of Real Security' in *The Civil Law Tradition in Scotland* 157 at 168. For a discussion of the principle see Gloag and Irvine, *Rights in Security* ch 7.

[90] *Regiam Majestatem* (Stair Society vol 11) 196.

[91] *Regiam Majestatem* (Stair Society vol 11) 196. Professor Gordon suggests that action could be taken in the ecclesiastical courts: 'Roman Influence on the Scots Law of Real Security' 161. Once again, however, there is no clear evidence.

must be delivery.[92] Glanvill demands it, for otherwise the property might be pledged to successive creditors, resulting in a situation much too complex for royal justice to resolve.[93] As shall be seen, later authority indicates this is the Scottish position and it is therefore felt that the wording of chapter 4 is accurate.[94]

(e) Rights and obligations

3-25. There exists in *Regiam* a basic division between a pledge for a limited period and one for an unlimited period.[95] Thus a pledge could secure a term or an on-demand loan. With both types of pledge, the pledgee is under the same duty of care in respect of the property. He must keep it in safe custody and is not allowed to make use of it nor do anything to it which will cause it to deteriorate. He is liable to the pledger for any deterioration which is his fault.[96] Where the pledged property is something which requires expense, for example, an animal needing to be fed, it is a matter for the parties to decide who must bear this cost.[97] *Regiam* does not state who is liable if there is failure to come to an agreement.[98]

(f) Enforcement

3-26. Where property is pledged for a stated period the parties may agree that it becomes the creditor's on default.[99] In the absence of such an agreement, the creditor may bring the debtor to court. If the pledge is admitted by the debtor, he will be given a fixed period to discharge the debt. If he fails to do this, the property becomes the creditor's. If the debtor denies that the property is indeed his, it falls to the creditor. If the debtor denies the pledge, the onus is on the creditor to prove that the property was pledged as loan security.

3-27. What can be seen here is that the pledge set out in *Regiam* appears to be a forfeiture pledge rather than a collateral security pledge. It may be recalled that Roman law in the fourth century AD by the order of Constantine had ruled out forfeiture as a remedy for the creditor.[100] If *Regiam* was a true reflection of the medieval law, then these forfeiture rules make it seem somewhat backward.

[92] Pollock and Maitland, vol 2, 120; Plucknett at 603-604; Simpson at 141.

[93] Glanvill X.8.

[94] In particular Balfour's *Practicks* and the later obsession of Scots law with 'no security without possession'.

[95] *Regiam Majestatem* III.2.1, III.3 and III.4.

[96] *Regiam Majestatem* III.3–4.

[97] *Regiam Majestatem* III.3.3.

[98] Compare the modern position: see below, paras 7-11–7-12.

[99] *Regiam Majestatem* III.3.4–11.Presumably the same rules applied for a pledge for an indefinite period, as III.4 is silent on the matter.

[100] See above, para 3-11; Gordon, 'Roman Influence on the Scots Law of Real Security' in *The Civil Law Tradition in Scotland* 157 at 162.

(g) A real right?

3-28. It must be asked whether the medieval pledge was a real right. Of course this terminology is bound to be absent from the text as it is civilian and the reception of Roman law was still to come.[101] However, the notion is relatively straightforward. Could the creditor assert possessory rights over the property against a singular successor of the debtor and the world in general? The answer as regards the English gagee was in the negative.[102] He was not permitted to use the relevant action to protect his possession: the brieve of novel disseisin.[103] So if a stranger dispossessed him, it was the gagor who had the remedy. If the gagor himself chose to dispossess the gagee, the latter had no remedy and was reduced to being an unsecured creditor.[104]

3-29. The reason given for not allowing the gagee to regain possession was that in reality he was entitled to the debt and not the property. If the court could award the creditor his money then it did not require to award him possession.[105] This is acceptable in an insolvency-free utopia. However, insolvency existed in medieval England as it does today.[106] The technical reason why the creditor had no possessory remedy was simply that he was not regarded as being in possession.[107] For the Roman law of *pignus* filtering into medieval England at the time came from the Italian glossators who denied that a pledgee exercised possession over the property he was detaining in security.[108] Given the lack of remedy, it was therefore unsurprising that the gage in this form fell into disuse.[109]

3-30. In the case of Scotland, the passage in Glanvill which denies the pledgee a possessory remedy against the pledger and third parties has not been transplanted into *Regiam*.[110] Further, Lord Cooper states that there is 'no evidence in Scottish records' that the debtor could reduce the creditor from being a secured creditor to being an unsecured creditor by merely ejecting him from the pledged property.[111] The silence in the records does not necessarily mean anything; indeed the position could be the reverse. However, these two pieces of evidence could suggest that the medieval Scots pledgee might have had the real right which his English counterpart certainly did not. Be that as it may, given the great influence of the Norman law, it is very difficult to make any definite conclusion on the matter.

[101] The Reception of Roman law of course came in the sixteenth and seventeenth centuries. See, eg, P Stein, 'The Influence of Roman Law on the Law of Scotland' 1963 *JR* 205 and J W Cairns, 'Historical Introduction' in Reid and Zimmermann, *History* vol 1, 45–47 and 64–74.

[102] Glanvill, X.11.

[103] Glanvill, X.11; Simpson, *An Introduction to the History of the Land Law* 142.

[104] Pollock and Maitland, *The History of English Law before Edward I* vol 2, 120–121.

[105] Pollock and Maitland, vol 2, 120–121.

[106] Consequently, the gage in this form died out as it was ineffective.

[107] Glanvill X.11.

[108] Pollock and Maitland, vol 2, 121 n 2; Bracton, *De Legibus et Consuetudinibus Angliae* (ed G E Woodbine, trans with revisions and notes by S E Thorne, 1968–77) f 268.

[109] Simpson, *An Introduction to the History of the Land Law* 142.

[110] Glanvill X.11.

[111] *Regiam Majestatem* (1947 edn) 195.

(2) *Leges Quatuor Burgorum*

3-31. One title in this collection of burgh laws treats pledge.[112] It deals exclusively with land and like *Regiam* is in Latin. '*Vadimonium*' is used for 'pledge'. This surely confirms the link between '*vadium*' and '*vadimonium*' already suggested and, further, the English influence on medieval Scots law.[113] The term '*impignorata*' makes one appearance as a synonym for '*vadimonium*', which suggests as with *Regiam* that '*pignus*' had made some sort of impact, if not much.

3-32. Although the *Leges Quatuor Burgorum* was indeed originally a Latin work, a parallel text in old Scots exists. This text uses the terms 'wed' and 'wedset' for pledge. As has been seen, 'wed' was actually the term for pledge in Anglo-Saxon England, to be replaced by gage after 1066, although both terms share the same Germanic root.[114] The English influence is once more apparent.

3-33. The title states:

> 'If any man has land pledged to another he may discharge the pledge when ever he pleases except if it is pledged for a certain term. And when that term comes he shall be given the opportunity at three head courts to redeem his pledge. And if he does not redeem it, it shall be sold and the creditor shall take his debt. And all that he gets which exceeds the debt shall be given to him that owned the pledge.'[115]

It is interesting to note the grace period which the debtor is given after the loan becomes due for repayment. What however is most striking in comparison with *Regiam* is that pledge is clearly treated as a collateral security. As has been seen, *Regiam* appears to regard forfeiture from pledger to pledgee as the remedy if the latter defaults on the loan.[116] As a matter of justice, the *Leges Quatuor Burgorum* seems to be ahead of *Regiam*.[117]

D. THE PERIOD FROM 1400 TO STAIR

(1) General

3-34. As will be seen, the period from 1400 to Stair was one in which the law of pledge gradually developed.[118] At a more general level, the most important

[112] *Leges Quatuor Burgorum,* title 79, in T Thomson and C Innes (eds), *The Acts of the Parliaments of Scotland* (1814) vol 1. The collection was traditionally attributed to the reign of David I (1124–53) but it is most probably a later piece of work, maybe even as late as the thirteenth century. See MacQueen, *Common Law and Feudal Society* 87.

[113] See above, para 3-16.

[114] Pollock and Maitland, vol 2, 117.

[115] My translation from the Latin and old Scots text at APS, vol 1, 349. On the 'head courts', see D M Walker, *A Legal History of Scotland* vol 2 (1990) 294.

[116] *Regiam Majestatem* III.3.4–11.

[117] It is unclear whether this was due to any extent to Roman influence.

[118] For a discussion of this period in general, see Cairns, 'Historical Introduction' in Reid and Zimmermann, *History* vol 1, 14 at 50–142 (this covers the Middle Ages to the Union in 1707).

occurrence was the establishment in 1532 of the College of Justice and the concurrent development of the Court of Session.[119] Their foundation gave rise to case law which slowly and surely helped shape pledge into its modern form.

(2) *Acta Dominorum Auditorum*

3-35. This collection of the Acts of the Lord Auditors of Causes and Complaints between the years of 1466 and 1494 contains the three earliest reported Scots pledge cases.[120] The word used for 'pledge' in the reports is 'wed', the same as in the *Leges Quatuor Burgorum*. The items pledged were precious metallic objects, in particular silverware.[121] In *Cokburn v Twedy of Drumelior*[122] and *Fleming v Lord Crechton*[123] the Lord Auditors order pledged property to be restored to the pledger on his discharge of the debt which the pledge secured.[124]

3-36. *Elspeth of Douglas v Wach of Dawik*[125] appears to be an early example of the application of the rule *nemo plus juris ad alienum transferre potest, quam ipse haberet*.[126] The Lord Auditors decree that Wach shall deliver to Elspeth a gold chain which one David Redehuch had pledged to him. A day is set down for Elspeth to prove that she owns the chain. The Lord Auditors leave Wach with a personal action for his relief, presumably against David Redehuch.

3-37. The conclusions which may be drawn from the cases in the *Acta Dominorum Auditorum* are that pledges, certainly of precious metallic objects, took place in the fifteenth century and that the Lord Auditors were prepared to intervene to prevent proprietorial rights from being infringed in the course of such transactions.

(3) The giving in security of Orkney and Shetland

3-38. In 1468 King Christian of Norway conveyed Orkney to Scotland. In 1469 he did the same with Shetland. The islands were to secure the wedding

[119] Cairns, 'Historical Introduction' at 57–59; H L MacQueen (ed), *The College of Justice: Essays by R K Hannay* (1990); J S H, 'The Scottish College of Justice in the 16th century' (1934) 50 *LQR* 120 and M Godfrey, 'The Assumption of Jurisdiction: Parliament, the King's Council and the College of Justice in Sixteenth-Century Scotland' (2001) 22 *Journal of Legal History* 21–36.

[120] *Acta Dominorum Auditorum*: *The Acts of the Lord Auditors of Causes and Complaints 1466–1494* (ed T Thomson) (1839).

[121] Eg, in *Cokburn v Twedy of Drumelior* (1478) ADA 65, one of the pledged items was a silver cup.

[122] (1478) ADA 65.

[123] (1479) ADA 87.

[124] See Walker, *A Legal History of Scotland* vol 3 (1995) 602.

[125] (1484) ADA 149*.

[126] See below, para 6-35.

dowry of his daughter who was to marry King James III.[127] The security created by each conveyance has variously been described as that of 'pledge', 'pawn', 'wadset', 'mortgage' and 'impignoration'.[128] On examination of the relevant documents which are in Latin, the terms used to mean security are 'pignore' and 'ypotheca' and derivatives thereof.[129] Their origins are clearly Roman. It is interesting that the legal draftsman of the day was using these terms. For although '*pignus*' made a single appearance in both *Regiam* and the *Leges Quatuor Burgorum* the general term used to denote security, or at least pledge, was '*vadium*'.[130] However, an examination of similar contemporary documents giving land in security leads to the discovery of the same terms which were found in the Orkney and Shetland charters.[131]

3-39. The clue to what the precise nature of the security was lies in a basic knowledge of political geography. Orkney and Shetland are still part of Scotland. They were never redeemed by Norway.[132] If Scotland has title to the islands the contracts could never be ones of pledge in the strict sense of the word, because in pledge ownership of the pledged property remains with the pledger.[133] The relevant security is probably wadset.[134] Its roots lie in pledge, as set out in *Regiam*.[135] However, the adoption by Scotland of the feudal system meant that a mere transfer of possession of land would not give the creditor a nexus upon it. He had to become part of the feudal chain, so a conveyance *a me* or *de me* was required.[136] Pledge and wadset thereupon conceptually parted company.

[127] See generally, B E Crawford, 'The Pawning of Orkney and Shetland' (1969) xlviii *Scottish Historical Review* 35.

[128] W D H Sellar, 'A Historical Perspective' in *The Scottish Legal Tradition* (2nd edn, 1991) 43, describes it as a 'pledge'. So too does J Ryder 'Udal Law' in *Stair Memorial Encyclopaedia* vol 24 (1989) para 302. T B Smith, at para 326 of the same volume, uses 'pledge' and 'impignoration'. J Mooney in *Viking Congress* (ed W D Simpson, 1954) 82–83 uses 'mortgage'. G Donaldson, 'Problems of Sovereignty and Law in Orkney and Shetland' in *Miscellany II* (Stair Society vol 35, 1984) 13 at 20 uses 'pledge', 'impignoration' and 'wadset'. Crawford, 'The Pawning of Orkney and Shetland' uses all five terms.

[129] For the Orkney deed, see J Mooney, *Kirkwall Charters* (1952) 96–102. For the Shetland deed, see Crawford, 'The Pawning of Orkney and Shetland' at 52–53.

[130] See above, paras 3-17 and 3-35.

[131] See the deeds discussed by Walker in *A Legal History of Scotland* vol 2, 684–688.

[132] There is actually dispute amongst historians over whether Norway ever intended to redeem: compare Crawford, 'The Pawning of Orkney and Shetland' and Donaldson, 'Problems of Sovereignty and Law in Orkney and Shetland'. In March 2008 it was reported that the applicability of Scots law to Shetland was to be challenged at Lerwick Sheriff Court by the defender in a civil action on the basis that the islands are only on long-term loan to Scotland: see http://news.bbc.co.uk/1/hi/scotland/north_east/7311967.stm.

[133] Erskine III.i.33; Bell, *Principles* § 1364.

[134] On wadset generally, see Stair II.10; W Ross, *Lectures on Conveyancing* (2nd edn, 1822) II, 330; Reid, *Property* para 11 (G L Gretton).

[135] See above, paras 3-16–3-30.

[136] See the authorities cited in n 134, as well as Walker, *A Legal History of Scotland* vol 3 (1995) 784–788. But it was udal law rather than feudal law which applied in Orkney and Shetland (and still does) so the exact nature of the security is not certain.

(4) The wad-wife

3-40. The sixteenth century saw the appearance in Scotland of the *wad-wife*.[137] This was a lady merchant and moneylender. One of her business interests was the giving of loans to clients who would for security pledge some of their moveable property to her. Wad-wives received specific mention in Burgh Records of Edinburgh.[138] One wad-wife was Janet Fockhart whose place of business was in one of the closes off the High Street.[139] The pieces of property which were pledged to her were similar to those which were the subject matter of the decisions in the *Acta Dominorum Auditorum*: small precious items.[140] For example, Lady Orkney, wife of Robert Stewart, Earl of Orkney, pledged a diamond ring, a chain and a pointed diamond ring for £100.[141] When Fockhart died in May 1596, a large amount of jewellery was in her possession, much of which was probably unredeemed pledges.[142] Another wad-wife was Elspeth McNair who was a contemporary and neighbour of Fockhart's in Edinburgh. She appears, however, to have run a smaller operation. Fockhart left £22,467-3s-9d on her death; McNair £663.[143]

3-41. The wad-wife can be seen as a forerunner of the pawnbroker, although she does not seem to have been subject to any specific form of regulation. It appears that the pledges made to wad-wives were forfeiture pledges: nothing can be found to suggest otherwise.[144] However, such a hypothesis is consistent with legal writing of the time.[145]

(5) The Burgh Records

3-42. In the sixteenth century, the Records of the Scottish Burghs contain various references to pledge. Varying as these references are, a recurrent feature is the use of *wed*, or a derivative, to mean pledge.[146]

3-43. A fascinating account of life in the 1500s may be gained from the Records. When the plague hit Edinburgh on several occasions the council prohibited the pledging of clothes and similar items and provided for harsh punishment to be meted out to anyone not obeying their pronouncements. The following comes from 25 May 1530:

[137] See Walker, *A Legal History of Scotland* vol 3, 718.

[138] Extracts from the Burgh Records of Edinburgh 1403–1528 (1869) 106 (3 October 1505); Extracts from the Burgh Records of Edinburgh 1573–1589 (1882) 28 (26 October 1574).

[139] See M H B Sanderson, *Mary Stewart's People* (1987) 91–101.

[140] See above, paras 3-35–3-36.

[141] Sanderson, *Mary Stewart's People* 100.

[142] Sanderson at 100.

[143] Sanderson at 101.

[144] For example, any records of a wad-wife exposing pledged property to public sale on default upon the loan secured and thereafter paying any excess money raised to the pledger.

[145] See Balfour's *Practicks*, discussed below at paras 3-48–3-55.

[146] Eg, *Extracts from the Burgh Records of Edinburgh 1403–1528* (1869) 106 (wed); *Extracts from the Burgh Records of Lanark 1150–1722* (1893) 53 (wed); *Extracts from the Burgh Records of Stirling 1519–1666* (1887) 78 (wod).

'Item, that na maner of parsonis man nor woman tak ony claith in wedd fra vtheris, or by ony auld clais, wou or lynnyn, vnder the pane of burning of thar chekis and banasing of the toune for all the dayes of thar lyffis.'[147]

3-44. On another occasion the council provided that anyone caught breaking the rule for the second time would face death.[148] The Draconian nature of these penalties shows how concerned the city fathers were about the spread of pestilence.

3-45. The Lanark Burgh Records give an account of a complaint by one Archibald Douglas against one James Douglas in respect of the alleged wrongful withholding of a sword and two gilded knives pledged by the former to the latter a year before.[149] The complainant argued that the items should be returned upon his payment of the secured debt. Unfortunately, the Records do not tell us if and how the matter was resolved.

3-46. The Stirling Burgh Records refer to a couple of instances of pledge. One was when the council ordained that a piece of property known as the chalice of St James's altar and St Peter's chalice was to be sold at 20 shillings per ounce.[150] The money raised was to be used for repairing the calsay, that is the paved area of the town, except for four pounds which was to be paid to Baillie Johne Lescheman to whom the St Peter's chalice was pledged for that sum. What is interesting about this is the fact that it is the council, the debtor, and not the baillie, the creditor, which is doing the selling. This appears to confirm the fact that sale by the creditor upon default was not a recognised remedy in medieval Scotland.[151] The normal remedy was forfeiture of the property, either stipulated for in the contract of pledge or by court order.[152] Nevertheless, this case shows that forfeiture was not the remedy every time. Indeed, it is an example of pledge acting as a collateral security.

3-47. The other case involved a gold chain weighing 6¾ ounces which belonged to Lady Caterne, Countess of Ergile.[153] It had been pledged to one Thomas Wallace, tailor and burgess of Stirling for 120 merks. The redemption of the chain is recorded. However, it is not the countess who redeems it, but one Patrick Grahame on behalf of one Master Johne Carswele. Grahame warrants that he will relieve Wallace, his heirs, executors and assignees in the event of any action by the countess or any others in respect of the chain. It can only be conjectured what is going on here, because in principle it is only the pledger and not a third party who may take the property from the pledgee on payment of the debt.[154] Most probably the time for Lady Caterne

[147] *Extracts from the Burgh Records of Edinburgh 1528–1557* (1871) 28. See also at 41 and 44 and *Extracts from the Burgh Records of Edinburgh 1403–1528* (1869) 106.

[148] *Extracts from the Burgh Records of Edinburgh 1573–1589* (1882) 28 (26 October 1574).

[149] *Extracts from the Burgh Records of Lanark 1150–1722* (1893) 53 (15 February 1571).

[150] *Extracts from the Burgh Records of Stirling 1519–1666* (1887) 78 (10 April 1561).

[151] See Stair I.xiii.11 and below, para 3-67.

[152] See above, paras 3-26–3-27 and below, para 3-54.

[153] *Extracts from the Burgh Records of Stirling 1519–1666* (1887) 79 (4 November 1561).

[154] Simply because it is the pledger who retains ownership of the property. Only possession is transferred to the creditor: *Regiam Majestatem* III.3; Balfour, *Practicks* 194.

to perform her obligation has passed and the chain has been forfeited to Wallace. He is presumably worried in case there has been any irregularity and insists that Grahame will indemnify him if Lady Caterne takes any action.

(6) Balfour's *Practicks*

(a) General

3-48. Unlike *Regiam* and the *Leges Quatuor Burgorum*, the text of Balfour's *Practicks*[155] is originally Scots and not Latin. Under the heading 'Anent pledgis and cautioneris', Balfour treats caution, that is personal security.[156] And in the body of the text there are numerous uses of the word 'pledge'.[157]

3-49. This raises the question whether 'pledge' was in widespread use as the term for caution in medieval Scotland. On investigation, it is not difficult to corroborate Balfour's use of the word. For, on scrutinising the Latin of *Regiam* once more and not Lord Cooper's translation, it can be seen that '*plegius*' is the term used for caution.[158] The same term is used in the parallel passages in Glanvill.[159] According to the leading historians of English law, 'pledge' was the term in Norman England for personal security, *gage* of course being the term for security over a thing.[160] 'Pledge' is said to have replaced the Anglo-Saxon term, 'borh'.[161] To complete the picture, this term has been taken into the *Leges Quatuor Burgorum* as 'borch' in the old Scots version as a translation of '*plegius*'.[162] These terms are used for caution. Balfour himself uses the variant, 'borgh'.[163]

3-50. Two conclusions may be drawn. First, the English influence on Scots law continues apace. Secondly, the distinction between the law of personal security and the law of real security in both medieval Scotland and England was somewhat blurred terminologically, if not in other respects.

[155] See H McKechnie, 'Balfour's Practicks' (1931) 43 *JR* 179–192; Cairns, 'Historical Introduction' at 95–97.

[156] Balfour, *Practicks* 191–194. See also the matter discussed at 338ff under the heading 'Anent replegiatoun'.

[157] For example, in the very first sentence under 'Anent pledgis and cautioneris' (c 1), which reads 'gif ony man is borgh and pledge for ane uther'.

[158] Eg, at Book 3, chapter 1. And see Walker, *A Legal History of Scotland* vol 1 (1988) 342–344.

[159] Eg, Glanvill, X.5.

[160] Pollock and Maitland, vol 2, 185 n 2; Plucknett, *A Concise History of the Common Law* 628. See above, para 2-12.

[161] Pollock and Maitland, vol 2, 185 n 2; Plucknett, *A Concise History of the Common Law* 628.

[162] Eg, at title 87 (T Thomson and C Innes (ed), *The Acts of Parliament of Scotland* (12 vols, 1814–75) (APS, vol 1, 350).

[163] Balfour, *Practicks* 191 (c 1) first sentence.

(b) Specific references to pledge

3-51. Balfour discusses pledge in the title immediately after that on caution. The heading is 'Anent thingis laid in wad'.[164] It will be remembered that the old Scots text of the *Leges Quatuor Burgorum* used 'wed' to mean 'pledge'.[165] This has now evolved into 'wad', the root of the terms, as previously instanced, being the Anglo-Saxon 'wed'.[166] It is further noticeable that much of Balfour's account uses *Regiam* as its chief source.[167]

3-52. Balfour's first statement is that both moveables and immoveables may be pledged.[168] When heritage is to act as security the more precise term, rather than the general 'wad', is 'wadset'. This terminology was found in the *Leges Quatuor Burgorum*.[169] Balfour, however, uses the terms fairly loosely.[170] The next point made is important enough to be set out in full:

> 'ITEM, Efter that it is accordit and agreit betwix the debtour and the creditour, anent the laying of ony thing in wadset, quhat kind of thing that ever it be, movabill or immovabill, the debtour incontinent, efter he hes ressavit the thing borrowit be him, sould put the creditour in possessioun or sasine of the wad.'[171]

3-53. This passage acknowledges *Regiam Majestatem* III.3 as its source. However, its wording is somewhat original. Gone is the *Regiam* statement that either the property is delivered to the creditor or it is not.[172] Instead, the property *should* be delivered to him. There is no express statement that the courts will not uphold agreements where there is no delivery, but the implication is very clear. The creditor must receive delivery of the property. There is no security without possession.

3-54. There follows a discussion about pledges securing term and on-demand loans, much like that in *Regiam*.[173] It is curious that the creditor's remedy still seems to be the debtor forfeiting the property, particularly after the *Leges Quatuor Burgorum's* much earlier recognition of pledge as a collateral

[164] Balfour, *Practicks* 194.

[165] See above, para 3-32.

[166] See above, para 3-32.

[167] See the references at the end of c 1, c 2, c 3, c 4, c 5, c 8 and c 9 (194–196).

[168] Balfour, *Practicks* 194 c 1: 'Of divers kindis of waddis'. This certainly was the law originally. But, well before Balfour wrote in the sixteenth century, in practice there was no such thing as a simple pledge of land. The wadset, although originally a mere heritable pledge, now involved *dominium* being transferred to the creditor, with the debtor only having a personal right to a reconveyance on discharge of the debt. See above, para 3-39. Balfour seems to have followed *Regiam* too closely in this area, without looking at what was going on in practice, for which see Walker, *A Legal History of Scotland* vol 2 (1990) 683–688.

[169] See above, para 3-32.

[170] For example, in c 2 (194).

[171] C 2: 'The wad sould be deliverit to the creditour'.

[172] That is, that found in Book 3, ch 3.

[173] C 3: 'Of thingis wadset to a certane day'; c 4: 'Of thingis laid in wad without a certane day'.

security.[174] After this, Balfour looks at the distinct laws affecting pledges of moveables and immoveables respectively.[175] With respect to moveables, his emphasis is on the contractual duties of the pledger and pledgee, such as the latter's duty of care in respect of the pledged property. Indeed the two case decisions which he sets out, involve this aspect of the pledge transaction. Coming from 1566 and 1569, they are early recorded Scottish court decisions discussing pledge.[176] As regards immoveables the focus is on 'deid wad', in other words mortgage, and the consequences of such usury. The passage, bar the words 'deid wad', could have been taken straight from Glanvill.[177]

3-55. Summing up on Balfour, the continuing influence of the Anglo-Norman law and the demand for the creditor to be put in possession is noticeable. Further, although the law retains its unitary basis, moveable and heritable securities are beginning to have distinct personas. This can be seen especially in regard to terminology. The separation of the laws is a product of factual developments such as the case law and the apparent confinement of mortgage to land.[178]

(7) Hope's *Major Practicks*

3-56. Sir Thomas Hope's *Major Practicks* contains a brief section on pledge entitled 'De Pignore'.[179] Thus, for the first time, the Roman '*pignus*' is used as the principal term for 'pledge' in our law. Gone are 'vadium', 'wed' and 'wad'. The rationale behind this is surely that Hope was writing amidst the period which saw the 'Reception' of Roman law into Scotland. This period would come to fruition in 1681 with Stair's *Institutions*.[180] From Hope's work, it can be seen that the Romanisation of the law of pledge had begun much earlier in the seventeenth century.

3-57. The term 'pawne' is also used.[181] This is its first appearance in Scots law too. Further, also seemingly making its Scots law debut is 'hypotheca' in the shape of 'hypothecam'.[182] But 'wed' is also to be found and, significantly, in a subsequent title 'pledge' is used to mean caution.[183]

[174] See above, para 3-33.

[175] C 5: 'Of movabill gudis laid in wad'; c 8: 'Of immovabill gudis laid in wad.'

[176] *Foulis v Cognerlie*, 6 April 1566 (c 6) and *Douglas v Menzeis*, 1 March 1569 (c 7).

[177] Glanvill X.8.

[178] Although Balfour treats moveable and heritable security as more distinct concepts than *Regiam* does, he underestimates the gulf which existed between them by the time when he was writing. See above, n 168.

[179] Hope, *Major Practicks* (Stair Society vols 3 and 4, 1937–38, ed Lord Clyde) II, 9.

[180] See below, para 3-67.

[181] Hope, *Major Practicks* II, 9, § 1.

[182] Hope, *Major Practicks* II, 9, § 3. Further in § 4, is found 'hypothecatione' and 'hypothecation'. The term had been previously used in Latin deeds, for example in the Orkney and Shetland wadsets, but not in any work purporting to state the law in English.

[183] Hope, *Major Practicks* II, 11: 'De fidejussoribus'. In § 2 is found 'plegia' and in § 4, 'pledgis'.

3-58. Like Balfour, Hope's emphasis is on the duties of the creditor and debtor. The creditor is obliged to return the property on payment.[184] If the property is destroyed without the creditor being negligent, the debtor retains the duty to discharge the debt.[185] He draws on *Regiam* as an authority.[186]

3-59. Hope then deals with two matters relating to hypothecs which are not directly relevant here.[187] There is no suggestion that an express hypothec was permissible at that time; indeed the evidence points the other way.[188] The conclusion to be drawn from Hope's work is that there is a struggle going on between Anglo-Norman law and civil law, at the very least in respect of terminology.

(8) Sixteenth- and seventeenth-century case law

3-60. Of the five Scots cases found to deal with pledge from the sixteenth and seventeenth centuries, three deal with contractual matters and two with matters of property law. The earliest, *Foulis v Cognerlie* expresses the rule that if the pledged property is stolen or lost without the creditor being negligent, the debtor is still liable upon the debt.[189] The second, *Douglas v Menzeis* states that the debtor cannot repossess his property until he has discharged the debt.[190] These are the two cases reported in Balfour's *Practicks* and consequently use 'wad' as the term for pledge.

3-61. The three later cases, coming during the Reception, use the term 'impignorate' for the verb to 'pledge'. One concerns a contractual right of sale in favour of the creditor, he being liable to restore any surplus to the debtor.[191] Scots law at long last appears therefore to have rejected forfeiture as the principal remedy for default upon the secured obligation. The other two cases apply the *nemo plus* rule to pledge.[192]

(9) Craig's *Jus Feudale*

3-62. Craig's *Jus Feudale* focuses on feudal land law and is therefore only of interest because of the evidence of pledge as a unitary concept.[193] It deals with security over land under the heading 'Reversions'. He is in reality

[184] Hope, *Major Practicks* II, 9, § 1.

[185] Hope, *Major Practicks* II, 9, § 2.

[186] Hope, *Major Practicks* II, 9, § 1.

[187] Hope, *Major Practicks* II, 9, §§ 3 and 4. § 3 states that by Act of Parliament (1609 c 11) the Lords of Session have an express hypothec over the king's customs for their salaries. In § 4, reference is made to a 1612 case where an exception founded upon a 'gift of escheit' defeated an earlier hypothecation.

[188] Particularly § 4.

[189] 6 April 1566, Balfour, *Practicks* 195.

[190] 1 March 1569, Balfour, *Practicks* 196.

[191] *Murray of Philiphauch v Cuninghame* (1668) 1 Br Sup 575.

[192] *Ramsay v Wilson* (1665) Mor 9113; *Semple v Givan* (1672) Mor 9117.

[193] In particular in *Regiam.* See above, paras 3-16–3-30.

expositing the law of wadset.[194] Craig was a fierce opponent of giving *Regiam* any place as an authoritative Scots work.[195] Setting out the law of gage and mortgage found in that work and in Glanvill he regards these as quite distinct institutions from the wadset of lands with its integral debtor's reversionary right.[196] He states merely that the mortgage 'resembles our wadset'.[197] However, Craig is surely mistaken, for it is very clear that wadset is a developed and refined pledge of immoveable property. Leaving the etymology out, a glance at either the *Leges Quatuor Burgorum* or Balfour exposes the connection.[198] The refinement is nevertheless an important one, for in wadset, unlike pledge, ownership of the subject matter of the security may be transferred to the creditor.[199]

3-63. Craig can be seen to be aware of the development of the English law of mortgage since Glanvill. As has been seen, 'mortgage' for Glanvill meant a pledge of land where the rents and profits received by the creditor in possession did not go to reduce the debt: the pledge was thus 'dead'.[200] This definition should have caused some concern for the modern lawyer who understands 'mortgage' in English law to mean a transfer of ownership of property to the creditor in security, for example a chattel mortgage or a mortgage of realty under the Law of Property Act 1925. It contrasts with pledge where only possession is transferred.[201]

3-64. This conundrum may be easily explained. In the fifteenth century, 'mortgage' had shed its original meaning and acquired a new one. It became used to define the situation where ownership was transferred to the creditor with the debtor having a reversionary right which was extinguished if he did not discharge his obligation by a certain date.[202] At that date, the pledge 'dies' and the debtor loses his right to recover his property; 'mortgage' was thus an appropriate, though surely confusing, tag for this transaction.[203] Craig was obviously aware that the English law or at least its definitions had thus changed.[204] However, the new meaning of 'mortgage' was never to come into Scots law.[205]

[194] Craig, *Jus Feudale* 2.6 (trans Lord Clyde, 1934).

[195] See Craig, *Jus Feudale* 2.6.25-26.

[196] Craig, *Jus Feudale* 2.6.27.

[197] Craig, *Jus Feudale* 2.6.27.

[198] Both the *Leges Quatuor Burgorum* (title 79) and Balfour, *Practicks* (194–196 esp c 1 and c 8) treat wadset and the pledging of land as one and the same thing.

[199] See, eg, Erskine II.viii.4.

[200] See above, para 3-20.

[201] T G Ford (ed), 'Pledges and Pawns' in *Halsbury's Laws of England* vol 36(1) (4th edn, 2007 reissue) para 3; *Donald v Suckling* (1866) LR 1 QB 585.

[202] Sir Thomas Littleton, *Tenures* (c 1480) s 332; Plucknett, *A Concise History of the Common Law* 606–608; Simpson, *A History of the Land Law* 142–143.

[203] Craig, *Jus Feudale* 2.6.27.

[204] Craig, *Jus Feudale* 2.6.27.

[205] Balfour, writing towards the end of the sixteenth century, uses 'mortgage' in the Glanvillian sense: 196 (c 9). The new meaning might never have come into Scots law but the development of heritable security from simple pledge to transfer of *dominium* certainly did. See above, para 3-39.

3-65. The main thing to come from the *Jus Feudale* is the increasing conceptual separation of the law of security with regard to moveables and land. Pledge had become a security confined to moveables. Wadset was the security for land. The declining influence of the Anglo-Norman law may also be noted.

E. FROM STAIR TO THE PRESENT DAY

(1) General

3-66. The period from the publication of Stair's *Institutions* in 1681 onwards can to all intents be regarded as the modern law. Consequently, it will not be necessary to make a systematic examination of the authorities from this period, for this will come amid the more general analysis in due course. The treatment here should be regarded as no more than an overview of the period in question.

(2) Stair's *Institutions*

3-67. Stair's treatment of pledge is given in Book I of his *Institutions* in the section on real contracts. This has a clear Roman basis.[206] The treatment is not particularly detailed and one thing which stands out is the use of the word 'pledge' for the first time to mean what is recognised as pledge today. Somewhere along the line, this word has changed its definition, from meaning personal security to meaning real security.[207] The same thing also happened in England.[208]

3-68. It is also clear that Stair uses 'pledge' only to mean security over moveables and not land. He treats heritable security under the title 'Wadsets & c' elsewhere, in Book II of his work.[209] However, Stair is clearly aware of the unitary basis of the two forms of security. His introduction to wadsets is but one example of this:

> 'A wadset, as the word insinuates, being the giving of a wad or pledge in security; it falleth in consideration here as the last of feudal rights: for pledges are the last of real rights, as before in the title Real rights is shown'.[210]

Another point to take from this passage is the acknowledgement of pledge as a real right in Scots law. As with the use of the term 'pledge', here too Stair

[206] Stair I.xiii.11. For a discussion of the real contracts in Roman law, see, eg, Nicholas, *An Introduction to Roman Law* 167–171.

[207] As was seen above, in para 3-49, 'pledge' formerly meant personal security. Balfour, in reporting *Foulis v Cognerlie* ((1566) Balfour, *Practicks* 196) does use the term to mean real security. But otherwise he uses 'wad' to mean this and 'pledge' to mean caution.

[208] Pollock and Maitland, *The History of English Law before Edward I* vol 2, 185 n 2.

[209] Stair II.x.

[210] Stair II.x.pr. Another example is found at I.xiii.12 where he writes that 'in wadsets, or impignorations, that thereby is constitute a real right in the pledge'.

was breaking new ground. Under the heading of 'Pledge', Stair also treats hypothec.[211]

(3) Erskine's *Institute* and other eighteenth-century works

3-69. Erskine's *Institute of the Law of Scotland* deals with pledge in Book 3.[212] The structure of his treatise as a whole is different from Stair's, but pledge as in the earlier work is dealt with among the real contracts.[213] The treatment is relatively brief.[214] It is made clear that pledge is a real right and there is evidence of the concept's original unitary nature.[215]

3-70. Bankton's treatment of pledge is not unlike that of Stair and Erskine.[216] Slightly longer, he gives some useful detail. Generally, the great value of Bankton's work lies in his comparative analysis of the contemporary English law rules.[217]

3-71. Another eighteenth-century scholar who discussed pledge was the economist Adam Smith. His *Lectures on Jurisprudence* contain some useful material.[218] In particular, he was very unhappy about the effect of licensing pawnbrokers.[219]

(4) Eighteenth-century case law

3-72. The number of pledge cases in the eighteenth century was very small.[220] None of these contain any significant judicial wisdom on the subject. This contrasts sharply with England, where early on in the century Chief Justice Holt gave an exposition of the relevant law in the famous case of *Coggs v Bernard*.[221] His judgment remains influential to this day.[222]

[211] Stair I.xiii.14. See A J M Steven, 'Rights in Security over Moveables' in Reid and Zimmermann, *History* vol 1, 333 at 347–349.

[212] Erskine III.i.33.

[213] For a discussion of Erskine's structure, see W W McBryde's introduction to Erskine (1989 reprint).

[214] Merely to be found at III.i.33.

[215] At III.i.33 he describes 'a right of wadset' as 'an heritable pledge'.

[216] Bankton I.xvii.

[217] His study of the English rules on pledge may be found at I.xvii ('Observations on the Law of England').

[218] A Smith, *Lectures on Jurisprudence* (1978, eds R L Meek, D D Raphael and P G Stein) 78–81 and 471.

[219] See below, para 3-74.

[220] But see *Pringles v Gribton* (1710) Mor 9123; *Mitchell v Burnet and Mouat* (1746) Mor 4468 and *Hariot v Cuningham* (1791) Mor 12405.

[221] (1703) 2 Ld Raym 909, 92 ER 107.

[222] See N E Palmer, *Bailment* (2nd edn, 1991) ch 22.

(5) The development of pawnbroking

3-73. The professional pledge-taker or pawnbroker has been a feature of society, here and abroad, since medieval times.[223] Scotland, as has been seen, had the wad-wife. She, however, tended to be more of a general moneylender and businesswoman.[224] In England, the standard rates of interest fixed by the Usury Acts were not high enough to cover the cost of small loans for brief periods of time.[225] Specialised pawnbrokers were therefore few and far between.[226]

3-74. The coming of industrialisation brought with it an increased demand for credit. Legislation was therefore enacted in the eighteenth century to allow such businessmen to charge higher rates of interest fixed by Parliament.[227] Despite the fixing of interest rates, the borrower risked exploitation by the broker. Many of the borrowers were poverty-stricken and in no position to negotiate.[228] One of the main types of exploitation was providing for forfeiture on non-payment. It led Adam Smith to lambast the licensing of pawnbrokers as 'one of the great nuisances in the English constitution, especially in great cities'.[229]

3-75. The need for further legislation was seen, and this came, with the whole area eventually being consolidated upon the passing of the Pawnbrokers Act 1800. This statute appears to have triggered the development of pawnbroking elsewhere in the United Kingdom. It was at first not clear that the 1800 Act applied north of the border.[230] Local Acts also regulated the business.[231] Attempts to evade the legislation led to Parliament intervening again and detailed work by the House of Commons

[223] See J K Macleod, 'Pawnbroking: A Regulatory Issue' 1995 *JBL* 155 at 159f. Thus the plot of Fyodor Dostoyevsky's *Crime and Punishment* (1866) involves the murder of an elderly woman pawnbroker. In fact, pawnbroking in China can be traced back to between 2000 and 3000 years ago: see *The New Encyclopaedia Britannica* (15th edn) vol 9 (1991) sv 'pawnbroking'. For the history of pawnbroking in England generally, see Cobbett, *Pawns or Pledges* ch 1.

[224] See above, paras 3-40–3-41. According to Cobbett, *Pawns or Pledges* 30–31, Scottish pawnbrokers had less business than their English counterparts. His reasons were that Scottish bankers often lent small amounts upon the security of caution and that the law of arrestment allowed shopkeepers to recover small debts very expeditiously so goods did not have to be pawned.

[225] Macleod, 'Pawnbroking: A Regulatory Issue' at 160. For example, under the Usury Act 1571 the rate was 10%. It was lowered by subsequent legislation, culminating with the Usury Act 1713, which set it at 5%.

[226] That said, the earliest legislation relating to pawnbroking in England was enacted in 1604. See N Palmer and A Hudson, 'Pledge' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn, 1998) 621.

[227] Palmer and Hudson, 'Pledge' at 621.

[228] For, as Bell (*Principles*) writes, 'Pawnbroking is one species of pledge, affording a resource to poverty'. See also Cobbett, *Pawns or Pledges* 12–15.

[229] Smith, *Lectures on Jurisprudence* at 80. According to Barrington 'one of the evils of Irish pawnbroking [is] that the pawn-shop is under the same roof with the public house': see Cobbett at 22.

[230] Macleod, 'Pawnbroking: A Regulatory Issue' at 161.

[231] Such as the Glasgow Police Acts: see Macleod, at 161.

Select Committee on Pawnbroking came to fruition with a new consolidation statute, the Pawnbrokers Act 1872.[232]

3-76. The main features of the pawnbroking legislation require the broker to have a licence, require him to issue a receipt to the borrower, prohibit pawn taking from those of nonage, regulate the redemption procedure and regulate the procedure for realisation of the pawn if there is default. Where there is no specific statutory provision, the common law applies.[233]

3-77. Whilst pawnbroking in the United Kingdom is subject to detailed state regulation,[234] it remains essentially a matter of private enterprise. The continental system of 'Montes Pietatis' (government pawnshops) has never been introduced here.[235]

(6) Bell's *Commentaries* and other nineteenth-century works

3-78. Bell's treatment of pledge in his *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* and *Principles of the Law of Scotland* is more detailed than anything before. In the *Commentaries* he analyses it as part of his section on real security.[236] In his *Principles* he gives equal coverage to it as a contract and later on as a real right in security.[237]

3-79. David Hume, Bell's predecessor as Professor of Scots Law in the University of Edinburgh, deals with pledge under the heading 'Pledge and Hypotheck' in his *Lectures* which were eventually published a century after his death.[238] Notwithstanding the late publication, Hume's work was influential much earlier, with judges referring to their personal lecture notes.[239] Thus in an important nineteenth-century pledge case, Lord Benholme says:

> 'I cannot refrain from reading a passage [upon pledge] from a copy of Baron Hume's lectures in my possession, the accuracy of which I have tested by several comparisons, and particularly by comparing it with an extract from the notes taken in the class by my brother Lord Cowan.'[240]

Hume's *Lectures*, by this time published, were the decisive authority used by the Second Division in the most recent Scots pledge case.[241]

[232] For the committee's report, see *House of Commons Parliamentary Papers, 1870* vol VIII, para 391 *et seq*. See now the Consumer Credit Act 1974 ss 116–121.

[233] See Bell, *Principles* § 209. The same principles are found in the present legislation, the Consumer Credit Act 1974.

[234] For Jersey, see P Matthews and S Nicolle, *The Jersey Law of Property* (1991) para 6.31.

[235] See Bell, *Commentaries* (7th edn, 1870) II, 20; Bell, *Principles* § 208 and art 1873 *Codigo civil*. The literal meaning of 'Montes Pietatas' is 'mountain of piety': see Cobbett, *Pawns or Pledges* 12–15.

[236] Bell, *Commentaries* II, 19–24.

[237] Bell, *Principles* §§ 203–209 and 1362–1367.

[238] See D M Walker, *The Scottish Jurists* (1985) 316–336.

[239] See, eg, *Biggart v City of Glasgow Bank* (1879) 6 R 470 at 475–476 *per* Lord Deas.

[240] *Christie v Ruxton* (1862) 24 D 1182 at 1186.

[241] *Wolifson v Harrison* 1977 SC 384.

3-80. W M Gloag and J M Irvine are the final Scottish jurists who require particular mention here. Their *Law of Rights in Security*, published in 1897, is the first and remains the only monograph devoted to the subject. The book remains influential today.[242] It includes a detailed discourse on pledge.[243]

3-81. It would be inappropriate to conclude this section without mentioning the American legal writer, Joseph Story. His *Commentaries on the Law of Bailments* contains a very erudite and comprehensive account of the civil and common law on pledge. It has proved to be a highly influential work.[244]

(7) Nineteenth-century case law

3-82. After a slow start, the nineteenth century sees the great mass of case law which, along with the institutional writings, amounts to the common law of pledge. The latter fifty years, stretching into the first decade of the twentieth century, contain all the leading cases in this area.[245] For the first time there are reasonably detailed judicial opinions on matters such as what may be pledged and what quality of delivery is required.[246] In particular there is much discussion on the pledge of documents of title.[247]

3-83. The profusion of case law reflects the fact that this period was commercially very significant.[248] Queen Victoria ruled much of the globe and there was significant trade with the many parts of the Empire. Important commercial statutes were being passed. The Mercantile Law Amendment Act Scotland 1856, the Factors Act 1889 and the Sale of Goods Act 1893 all resulted in case law relating to rights in security in general and pledge in particular.[249]

[242] See, eg, *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891 at 894 *per* Lord Keith of Kinkel. See also A J M Steven 'One Hundred Years of Gloag and Irvine' 1997 *JR* 314.

[243] Gloag and Irvine, *Rights in Security* 199–219.

[244] J Story, *Commentaries on the Law of Bailments* (8th edn, revised by E H Bennett, 1870). Bell makes reference to it in his *Principles*, for example (4th edn, 1839) § 203. Story is cited by the Sheriff in *Kirkwood and Pattison v Brown* (1877) 1 Guth Sh Cas 395. The work clearly influenced the decision of the English court in the important case of *Donald v Suckling* (1866) LR 1 QB 585.

[245] Cases such as *Hamilton v Western Bank of Scotland* (1856) 19 D 152; *Moore v Gedden* (1869) 7 M 1016; *Tod and Son v Merchant Banking Co of London Ltd* (1883) 10 R 1009; *North-Western Bank Ltd v Poynter, Son and Macdonalds* (1894) 22 R (HL) 1 and *Hayman & Son v M'Lintock* 1907 SC 936.

[246] On the first of these matters see *Christie v Ruxton* (1862) 24 D 1182; *Liquidator of Garpel Haematite Co Ltd v Andrew* (1866) 4 M 617 and *Robertson v British Linen Co* (1890) 18 R 1225. On the second, see *Hamilton*, n 245 above; *Mackinnon v Max Nanson* (1868) 6 M 974 and *Connon v Lindsay and Oakeley* (1869) 6 SLR 552.

[247] See Gloag and Irvine, *Rights in Security* ch 8.

[248] See Lord Rodger of Earlsferry, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *LQR* 570. However, pledges of small valuable items went on as they had for centuries: see, eg, Sir Arthur Conan Doyle, 'The Adventure of the Beryl Coronet' in *Sherlock Holmes: The Complete Illustrated Short Stories* (1985) 192.

[249] The Factors Act 1889 was extended to Scotland by the Factors (Scotland) Act 1890.

(8) The twentieth and twenty-first centuries

3-84. There has been little development in the law relating to pledge. A number of textbooks on the general law and on commercial and property law have given an account of the subject.[250] It would be fair to say that the same information has often been given.[251]

3-85. In terms of the case law, the first twenty years of the twentieth century saw a batch of Sheriff Court cases dealing with pawnbroking.[252] After that time there appears only to be one further Scots case which turns on a substantive question of the law of pledge.[253] The main legislative development has been the replacement of the Pawnbrokers Act 1872 by provisions of the Consumer Credit Act 1974.[254] Concern has been expressed that these provisions are too open to evasion.[255] It has been commented that whilst pawnbroking is not as important in practice as it once was 'Yellow Pages in less prosperous areas still contain many entries for pawnbrokers'.[256]

[250] See Shaw, *Security over Moveables* 10–22; W M Gloag, 'Pledge' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 11 (1931) paras 753–778; T B Smith, *A Short Commentary on the Law of Scotland* (1962) 472–475; J J Gow, *Mercantile and Industrial Law of Scotland* (1964) 272–275; J Lillie, *The Mercantile Law of Scotland* (6th edn, 1970) 88–91; D M Walker, *Principles of Scottish Private Law* (4th edn, 1989) vol 3, 394–398; 5; W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) 90–93; W Wallace and A McNeil, *Banking Law* (10th edn, ed D B Caskie, 1991) 163–166; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992), paras 14–25; E A Marshall, *Scots Mercantile Law* (3rd edn, 1997) paras 7-78–7-119; A D M Forte (ed), *Scots Commercial Law* (1997) 181–185 (S C Styles); Gloag and Henderson, *The Law of Scotland* paras 37.13–37.14; F Davidson and L Macgregor, *Commercial Law in Scotland* (2003) paras 6.3–6.4; T Guthrie, *Scottish Property Law* (2nd edn, 2005) paras 8.8–8.11; Carey Miller with Irvine, *Corporeal Moveables* paras 11.04–11.12; N Busby et al, *Scots Law: A Student Guide* (3rd edn, 2006) paras 8.32–8.33; J Thomson, *Scots Private Law* (2006) paras 2-07 and 4-13; C Ashton et al, *Understanding Scots Law* (2007) para 12-26; L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 519–540.

[251] In particular there has been an emphasis upon actual, constructive and symbolical delivery: see below, para 6-12. See, however, now Steven, 'Rights in Security over Moveables' in Reid and Zimmermann, *History* vol 1, 333 at 334–345 and G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 761–766.

[252] *Singer Manufacturing Co v Martin* (1904) 20 Sh Ct Rep 125; *Niven v M'Arthur's Trs* (1907) 23 Sh Ct Rep 299; *M'Millan v Conrad* (1914) 30 Sh Ct Rep 275; *Singer Sewing Machine Co v Quigley* (1914) 30 Sh Ct Rep 56; *Elliot v Conway* (1915) 31 Sh Ct Rep 79; *M'Phater v Smith Premier Typewriter Co Ltd* (1917) 33 Sh Ct Rep 301; *M'Kellar v Greenock and Port-Glasgow Loan Co Ltd* (1918) 34 Sh Ct Rep 93 and *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

[253] *Wolifson v Harrison* 1977 SC 384. However, there have been a number of recent English cases on pawnbroking: *Wilson v First County Trust (No 2)* [2003] 3 WLR 568; *Advanced Industrial Technology Corp Ltd v Bond Street Jewellers Ltd* [2006] EWCA Civ 923 and *Wilson v Robertsons (London) Ltd* [2006] EWCA Civ 1088.

[254] Consumer Credit Act 1974 ss 116–121.

[255] Macleod, 'Pawnbroking: A Regulatory Issue' (1995) 24 *JBL* 155. The Consumer Credit Act 2006 does not contain provisions specific to pawnbroking. However, s 2 removes the rule that loans for more than £25,000 are not regulated by consumer credit legislation which will have implications for banks taking pledges of goods of a value above that sum. See Crerar, *The Law of Banking in Scotland* 532–535.

[256] Palmer and Hudson, 'Pledge' in *Interests in Goods* at 621 n 8.

The decrease in importance has been caused by the greater availability of credit from banks and other lenders. Nevertheless, the pawnbroking profession remains very much in business. The National Pawnbrokers Association of the UK maintains an active website,[257] has a quarterly magazine entitled 'The Pawnbroker' and an annual awards ceremony.[258] At the time of writing, its members have 36 premises in Scotland. It was reported in July 2008 that in the preceding six months business at pawnbrokers had noticeably increased due to the 'credit crunch'.[259]

3-86. Away from pledge, there have been important statutory reforms to the law of real security in general.[260]

[257] http://www.thenpa.com/.

[258] The awards include one for the best-looking pawnshop and one for lifetime achievement.

[259] http://news.bbc.co.uk/newsbeat/hi/the_p_word/newsid_7497000/7497642.stm.

[260] The law of heritable security was overhauled by the Conveyancing and Feudal Reform (Scotland) Act 1970 which introduced the standard security, the only competent method of now creating a heritable security: see D J Cusine and R Rennie *Standard Securities* (2nd edn, 2002). Agricultural credits were introduced by the Agricultural Credits (Scotland) Act 1929. Floating charges were introduced by the Companies (Floating Charges) (Scotland) Act 1961. Receivership was introduced by the Companies (Floating Charges and Receivers) (Scotland) Act 1972. See now the Companies Act 1985 ss 462–464 and the Insolvency Act 1986 ss 50–71. The Enterprise Act 2002 s 250 greatly limited the circumstances in which receivers can be appointed. In future floating charges will be regulated by the Bankruptcy and Diligence etc (Scotland) Act 2007 ss 37–49 (not yet in force). See also the Companies Act 2006 s 893.

4 Pledge: The Obligation Secured

A. A VALID OBLIGATION

4-01. As a right in security, pledge is parasitic upon the obligation which it secures.[1] Consequently, the validity of the pledge is dependent on the validity of the underlying obligation. Any valid *causa* may be secured, be it a monetary debt or an obligation *ad factum praestandum*.[2] The law is the same in other jurisdictions and is well established.[3] Thus in Genesis, a pledge

[1] 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 128. As F Baur, *Sachenrecht* (17th edn, by J F Baur and R Stürner, 1999) 672 puts it: '*Das Pfandrecht ist streng akzessorisch*'. See also § 1252 *BGB*; art 3138 *Louisiana Civil Code* and Denis, *Pledge* 70.

[2] Bell, *Principles* § 203. In the vast bulk of cases the pledge secures a debt. Indeed this is why many writers (eg Erskine III.i.33) do not mention any other form of obligation. However, it is clear that a non-monetary obligation may be secured: *Moore v Gledden* (1869) 7 M 1016. This is also the position in England. See Cobbett, *Pawns or Pledges* 34 and N Palmer and A Hudson, 'Pledge' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn, 1998) 621 at 622.

[3] See the valuable discussions by J Story, *Commentaries on the Law of Bailments* (8th edn, revised by E H Bennett, 1870) s 286 and Denis, *Pledge* 63–66. See also arts 3136 and 3140 *Louisiana Civil Code* and R Slovenko, 'Of Pledge' (1958) 33 *Tul LR* 59 at 65; art 1861 *Codigo Civil*; arts 2660 and 2687 *Quebec Civil Code*; and § 1204 *BGB*.

secured the delivery of a young goat.[4] The question as to what extent a pledge can secure a contingent debt is an open one. As a general rule, it is suggested that if a debt is too contingent to be assigned, then it is too contingent to be secured by a pledge.[5]

4-02. Unless there is express agreement to the contrary, the entire obligation will be secured.[6] Thus, where it is a monetary debt, in the words of Bell:

> 'Pledge operates as a security for the whole debt, and is not weakened by payment of a part of the debt, but remains as complete for the last shilling as for the whole.'[7]

This will obviously include interest due upon the debt.[8] The statutory rules on pawnbroking do not alter the basic rule.[9]

B. RETENTION FOR OTHER DEBTS

(1) General

4-03. A vexed question is whether the creditor can detain the subject matter of the pledge for debts other than those which the pledge was contracted to secure. What is the position, for example, if the creditor makes the debtor further advances? Indeed, it is not clear even if the creditor expressly provides that the pledge is to secure 'all sums' due to him or her by the debtor that such an agreement will be upheld. As a matter of contract such an agreement is valid. The problem is if there are third parties involved, such as other creditors of the debtor executing diligence or – if the debtor becomes insolvent – a trustee in sequestration or liquidator.

(2) Bell's approach

4-04. It was not until the fourth edition of his *Principles* that Bell properly addressed this matter. By mistake he introduces it as 'where additional advances have been made to the creditor'.[10] He of course meant to say 'debtor'. Bell's first statement is that when an item of property is transferred by the debtor to the creditor *ex facie* absolutely but truly in security, the debtor

[4] Genesis 38:17–18.

[5] See G L Gretton, 'The Assignation of Contingent Rights' 1993 *JR* 23.

[6] A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992), para 16; L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 521.

[7] Bell, *Principles* § 1365. See also Story, *Bailments* s 301; Cobbett, *Pawns or Pledges* 41 and art 1860 *Codigo Civil*.

[8] Carey Miller with Irvine, *Corporeal Moveables* 306 n 73. The law is the same in Germany: § 1210 *BGB* and South Africa: G F Lubbe, 'Mortgage and Pledge' in *LAWSA* vol 17 (revised T J Scott, 1999) para 522.

[9] *M'Millan v Conrad* (1914) 30 Sh Ct Rep 275.

[10] Bell, *Principles* (4th edn, 1839) § 1367. Sheriff Guthrie corrected the mistake when he edited the 6th edition, 1872. Bell briefly considered the subject in his *Commentaries* (II, 22). However, the analysis was lacking: see Lord Handyside in *Hamilton v Western Bank* (1856) 19 D 152 at 156.

has no right to demand a reconveyance until the entire debt due to the creditor is discharged. Future advances are encompassed by this. To provide authority, Bell refers to the heritable security by absolute disposition with an unrecorded back-bond, the mortgage of a ship and the assignation of a debt.[11] The specialised example of the ship apart, none of these cases involves a corporeal moveable. Nevertheless, Bell attempts to provide an all-embracing rationale for the rule applicable to all forms of property when he writes that in these situations the creditor has 'a right ostensibly universal and absolute' rather than an express security.[12]

4-05. Bell's second statement is that where a moveable has been given in pledge without limitation of security, the fact that the creditor has possession suggests that any further advances are made because of that possession. Therefore any further advances are secured. However, if the pledge is expressly limited to a specific advance at the time of constitution, as against third parties it is limited to this advance. Bell cites only English authority to support this.[13] Thirdly, he states that the security may be expressly extended to cover further advances. However such an agreement is only good if made before third parties take any action against the creditor.[14]

(3) Subsequent authority

4-06. Since Bell there has been some case law development. There is the important judgment of the Lord Ordinary (Handyside) in *Hamilton v Western Bank of Scotland*,[15] which begins by stating that apart from Bell there is little authority on the matter.[16] The facts of the case were that some warehoused brandy had been made the subject of a security by the owner indorsing the delivery order to his bank, with intimation to the warehousekeeper. This was done to secure the discount of some bills. The bank then made a further advance. Lord Handyside viewed the transaction as pledge. He accepted Bell's opinion that a pledge originally specific to its subject may not be tacitly extended to cover other debts due. Nevertheless, he reserved judgment on the validity of Bell's comments with regard to third parties.[17] In the Inner House, his decision was reversed on the basis that the transaction was not pledge but absolute transfer in security.[18] However, in an *obiter* part of his judgment Lord Deas states that he would have concurred with Lord Handyside had he regarded the matter as one of pledge.[19]

[11] The heritage case was *Brough's Creditors v Jollie* (1793) Mor 2585; the ship case, *Balleny v Raeburn and Co* 7 June 1808 FC and the debt case *Dougal's Crs* 1794 Bell's Ca 41.

[12] Bell, *Principles* (4th edn, 1839) § 1367.

[13] *Demandray v Metcalf* (1715) Prec in Ch 412, 23 ER 1048.

[14] Bell, *Principles* (4th edn, 1839) § 1367.

[15] (1856) 19 D 152 at 155–158.

[16] (1856) 19 D 152 at 156.

[17] At 157.

[18] At 158–167. See below, para 6-21.

[19] At 165.

4-07. In *Rintoul, Alexander and Co v Bannatyne*[20] goods had been pledged in security of a specific advance. This advance was repaid. However, the creditor attempted to retain the goods in security of a prior claim. Upon a petition he was ordered by the sheriff to return the goods. Although the creditor then tried some blocking tactics which became the main focus of the action, he does not seem to have disputed the general principle that a pledge cannot be tacitly extended to cover other debts.

4-08. In *Alston's Tr v Royal Bank of* Scotland[21] the Lord Ordinary (Low) seems happy to accept Lord Handyside's opinion of the law as expressed in *Hamilton*.[22] That case involved the deposit in security of negotiable instruments with a bank. In the reclaiming motion the bank argued that the deposit was an *ex facie* absolute transfer in security so that it therefore could retain the instruments against all debts. The depositor, conversely, argued it was a pledge and consequently that the bank could not retain for a general balance. Hence, on this point of law, although not on the interpretation of the facts, both sides agreed with the Lord Ordinary. In the Inner House it was held that the securities were pledged in security 'as against any sum which might be due ... on [the] current or cash account ... [and] deposited not as against any specific debt or obligation'.[23] Thus the court appeared content with the notion of an 'all sums' pledge. Of course, here no third parties were involved.

4-09. Since Bell, other writers have attempted to treat the subject. Gloag and Irvine examine the case law, as has been done here, with the same conclusions.[24] Indeed, given that there have been no relevant decisions since their time of writing, their statement that it 'seems never to have been settled' whether a pledge can be tacitly extended, remains true today.[25] Graham Stewart states that the property pledged is security only for the specific advance made. But it may be shown that by agreement it was extended to cover other debts or further advances. He adds that if prior to the agreement to extend an arrestment is used by another creditor of the pledger, then the arrester will be preferred as against the debt which the pledge has been extended to cover.[26]

4-10. More recent writers have also touched upon the subject. According to Professor Walker, a pledge will be good security for advances made subsequently to the original pledging.[27] However, he cites *Hamilton* as his

[20] (1862) 1 M 137.

[21] (1893) 20 R 887.

[22] At 890.

[23] (1893) 20 R 887 at 894 *per* Lord Trayner.

[24] Gloag and Irvine, *Rights in Security* 213–214.

[25] Gloag and Irvine at 213.

[26] J Graham Stewart, *The Law of Diligence* (1898) 172. Like Bell, he uses an incorporeal property case (*Clyne v Dunnet* (1833) 11 S 791 aff'd (1839) McL & Rob 28) and a heritable security case (*Union Bank of Scotland Ltd v National Bank of Scotland Ltd* (1885) 13 R 380 rev'd (1886) 14 R (HL) 1) to help justify his conclusions.

[27] D M Walker, *Principles of Scottish Private Law* vol 3 (4th edn, 1989) 396.

principal authority, where the transaction was held not to be one of pledge. Professor Wilson states that the subject cannot be retained for payment of debts other than the one for which it was pledged.[28] Professor Crerar adopts the approach of Bell.[29]

(4) Comparisons with other securities

4-11. Before trying to draw these various strands of authority together, it will be useful to examine the rules which govern this situation with respect to other forms of property. Bell himself took this approach.[30] With regard to security over incorporeal property the law appears settled. An *ex facie* absolute assignation will secure all debts owed by debtor to creditor, unless the parties have agreed otherwise.[31] On the other hand, an assignation expressly in security will only secure the original debt which it was assigned to secure.[32]

4-12. It would be easy to draw a direct comparison between pledge and an assignation expressly in security and then one between an *ex facie* absolute assignation of an incorporeal moveable and an *ex facie* absolute transfer of a corporeal moveable. In the latter case the comparison is valid.[33] The fact that there is a body of legal thought which regards an assignation expressly in security as simply a pledge of debt makes the first comparison attractive also.[34] However, on closer analysis this would seem misguided. For the correct comparison with an assignation expressly in security of an incorporeal moveable is with a transfer expressly in security of a corporeal moveable and not with pledge.[35]

4-13. With respect to land, pre-1970 the *ex facie* absolute disposition in security was good for 'all sums'.[36] The bond and disposition in security was not.[37] But the rule in the second case came not from common law, but from the Bankruptcy Act of 1696.[38] This Act affected the wadset, the direct ancestor of the bond and disposition of security.[39] And of course, as has been

[28] W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) 92. See also Sim, 'Rights in Security' para 16. Compare Carey Miller with Irvine, *Corporeal Moveables* para 11.15.

[29] Crerar, *The Law of Banking in Scotland* 521.

[30] See above, paras 4-04–4-05.

[31] *Hamilton v Western Bank* (1856) 19 D 152; *National Bank v Forbes* (1858) 21 D 79; *National Bank v Dickie's Tr* (1895) 22 R 740.

[32] See above, n 31.

[33] Both involve transfer of title to property.

[34] Particularly in South Africa. See P Nienaber and G Gretton, 'Assignation/Cession' in Zimmermann, Visser and Reid *Mixed Legal Systems* 787 at 814–818.

[35] On which see Graham Stewart, *Diligence* 157–158. Therefore it is not justifiable to equate them as does E A Marshall in *Scots Mercantile Law* (3rd edn, 1997) para 7-111.

[36] Gloag and Irvine, *Rights in Security* 142.

[37] Goag and Irvine, *Rights in Security* 142.

[38] See Erskine II.ix.36; Bell, *Principles* § 911.

[39] Very little research has been done on the wadset, but see Reid, *Property* para 112 (G L Gretton).

shown, the wadset was a development from pledge.[40] The suggestion therefore is that at common law, an 'all sums' pledge is valid, but only if expressly provided for in the agreement between the parties.

(5) Conclusion

4-14. The relevant law may be tentatively summarised:

(a) If a pledge is expressly stated to be specific to a certain debt, then there may be no retention for any other debt. On this the authorities agree.[41]

(b) Where a pledge is originally specific to a particular debt but both parties later agree that it will cover another debt or other debts, this arrangement will be upheld.[42] This agreement may be express or implied but obviously it is best to have something in writing.[43] However, if there has been an arrestment executed or some other third party intervention prior to this new agreement, the creditor will be preferred only to the extent of the original debt.[44]

(c) An 'all sums' pledge is valid.[45] In this situation it is suggested, however, that if a third party creditor of the pledger gives notice to the pledgee that he or she has made an advance to the pledger, then that party should be preferred in the event of the pledger's insolvency as against any later contracted advances made by the pledgee. In short the equitable rule which applied at common law and is now provided for by statute in respect of heritable security should be applied to pledge.[46]

(6) Other systems

4-15. Story, writing in 1829, attempted to compare the common and the civil law on this important matter. He states that under the former, subsequently contracted debts will be secured by the pledge if there is express or implied agreement by the parties to this effect.[47] Otherwise the later debt or debts will be unsecured. This would appear to remain the position under modern English law.[48]

[40] See above, paras 3-52 and 3-62.

[41] See Bell, *Principles* § 1367; Graham Stewart, *Diligence* 172; Sim, 'Rights in Security' para 16 and Lord Handyside's judgment in *Hamilton v Western Bank* (1856) 19 D 152 at 155–158.

[42] Bell, *Principles* § 1367; Graham Stewart, *Diligence* 172. Compare Wilson, *Debt* 92 and Sim, para 16.

[43] It is risky to rely upon Bell's presumption based on possession: see above, para 4-05.

[44] Graham Stewart at 172; Crerar, *The Law of Banking in Scotland* 521.

[45] *Alston's Tr v Royal Bank of Scotland* (1893) 20 R 887; Sim, 'Rights in Security' para 16. Such a clause is valid for the wadset too, pre-1696. See above, para 4-13.

[46] At common law, *Union Bank of Scotland Ltd v National Bank of Scotland Ltd* (1885) 13 R 380 rev'd (1886) 14 R (HL) 1. By statute, the Conveyancing and Feudal Reform (Scotland) Act 1970 s 13.

[47] Story, *Bailments* s 304. See also Denis, *Pledge* 247–249.

[48] G W Paton, *Bailment in the Common Law* (1952) 359. He relies on *Demandray v Metcalf* (1715) Prec in Ch 419, 23 ER 1048 (cited by Bell, and Story himself). See also Cobbett, *Pawns or Pledges* 41-42.

4-16. As regards the civil law, Story points out that the law may well be different and that a pledgee has an automatic right to detain for 'all sums'. He tells us that Pothier was convinced that this was the civil law, in particular being the law of France.[49] Story then states it to be the law of Scotland that unless there is the 'clearest evidence' that the pledge is restricted to a particular debt it will secure all debts. However, for this he relies on a brief passage from Bell's *Commentaries* which predated Bell's thorough analysis of the subject in his *Principles* in which he departs from his previous viewpoint.[50] Leaving this apart, Story is not wholly in agreement with Pothier's statement of the civil law:

> 'Perhaps it yet remains doubtful, whether the rule of the civil law was intended to apply to any cases, except those, in which there was an implication, that the subsequent debts should be tacked to the preceding by the consent of the parties.'[51]

Such a conclusion is consistent with the views tentatively suggested above with regard to Scots law. However, in Spanish law where the parties have contracted further debts, the pledgee has the right to retain the property in respect of those debts which were demandable prior to the original debt being paid.[52]

4-17. In South Africa an express 'all sums' pledge appears to be valid.[53] On the other hand, if there is no express provision it is doubtful whether the pledged subject can be retained for debts other than the one for which it was first pledged.[54] Moreover, it is clear that any such detention in the absence of express provision would be ineffective as against third parties.[55]

C. ASSIGNATION BY THE CREDITOR

(1) The accessoriness principle

4-18. The principle of accessoriness is recognised in Scotland. Erskine writes:

> 'Assignations, when properly perfected, carry to the assignee all rights which corroborate or strengthen the right conveyed'.[56]

[49] Story, *Bailments* s 305, citing R Pothier, *Du Contrat de Nantissement* (1767), n 47. See now art 2082 *Code civil.*

[50] Bell, *Commentaries* (5th edn, 1826) II, 22. Proper analysis was lacking here: see Lord Handyside in *Hamilton v Western Bank* at 156 for a full discussion.

[51] Story, *Bailments* s 305. See also Denis, *Pledge* 249–251.

[52] Art 1866 *Codigo Civil.*

[53] Lubbe, 'Mortgage and Pledge' para 521.

[54] Lubbe, 'Mortgage and Pledge', para 523.

[55] Lubbe, 'Mortgage and Pledge' para 523, *Brink's Trs v SA Bank* (1848) 2 M 381; *Smith v Farrelly's Tr* 1904 TS 949.

[56] Erskine III.v.8. See also Stair III.i.17; Bankton III.i.7 and R G Anderson, *Assignation* (2008) para 2-01. For a recent example, see *Trotter v Trotter* 2001 SLT (Sh Ct) 42.

It follows that where a debt is secured by a bond of caution, the cautioner remains liable where the debt is assigned.[57] The general principle may be referred to by the maxim *accessorium sequitur principale*.[58] It is not easy to reconcile with certain principles of the law of pledge. As a preliminary point, where the pledged property is of a special character, for example, a valuable painting, the pledger will not wish to see it leave the pledgee's hands. In this situation the right of pledge cannot be assigned.[59]

(2) The need for delivery

4-19. Only in limited circumstances will assignation of the pledge be prevented for the foregoing reason. The general position must now be considered. Pledge depends on the pledgee being in possession.[60] However, the application of the *accessorium sequitur principale* doctrine would mean that a party to whom a debt secured by a pledge is assigned, automatically and immediately becomes pledgee. This is although he or she is not necessarily put in possession of the impignorated property. It is difficult to believe that the principle requiring a pledgee to be in possession does not take priority here. Erskine, addressing the remedies a pledgee has if the pledger defaults upon the secured obligation, states:

> 'Some creditors have attempted to make a pledge effectual for their payment by assigning the debt to a trustee; who, upon that conveyance may arrest the pledge in the hands of his cedent, the original creditor, and then pursue a forthcoming against him. But in this way the original creditor may, by a prior arrestment of the pledge used by another creditor, lose his right of impignoration; which, from the nature of all real contracts, cannot subsist but where he who is in the right of the debt is also in the possession of the pledge.'[61]

4-20. This is authority for the position that the *accessorium sequitur principale* doctrine is subject to the general rules of pledge. That the assignee must be put in possession is made clear by Professor Reid.[62] It is also settled in South African law that cession (assignation) of the debt does not itself transfer the pledge.[63] This, it is argued, is the position in Scotland too.[64]

[57] *Lyell v Christie* (1823) 2 S 288 (NE 253).

[58] See W Bell, *Dictionary and Digest of the Law of Scotland* (7th edn by G Watson, 1890) sv '*Accessorium sequitur principale*'. See also *Comments by Scottish Law Commission on Consultation Paper by DTI on Security over Moveable Property in Scotland (November 1994)* (March 1995) 43.

[59] See discussion on this with regard to a pledge by a pledgee, below para 6-56. Note Sim, 'Rights in Security' para 25.

[60] Bell, *Principles* § 1464. See below, para 8-20.

[61] Erskine III.i.33.

[62] Reid, *Property* para 657. This is also the view of the French jurist Gabriel Baudry-Lacantinerie expressed in his *Du nantissement des priviléges et hypothèques et de l'expropriation forcée* (3rd edn, 1906) s 95, referred to in Denis, *Pledge* 181.

[63] P Nienaber, 'Cession' in *LAWSA* (2nd edn) vol 2(2) (2003) para 49; S Scott, *The Law of Cession* (2nd edn, 1991) 131.

[64] But compare Anderson, *Assignation* para 2-06 under reference to art 1263(2) *Codice civile* (Italian civil code).

(3) Separation of debt and security

4-21. However, Erskine's statement seems to deny that even putting the assignee in possession will transfer the right of pledge. For what he is saying is that when the pledgee assigns the debt the right of pledge is extinguished. This is because the holder of the pledge is no longer the creditor in the debt. The difficulty is that once a right is extinguished it is gone. Simply transferring possession of the formerly impignorated property will not revive it. The only way to make the assignee pledgee is to get the co-operation of the owner of the property, that is the pledger. The assignee will only validly obtain the right of pledge, if the pledger is willing to recognise him or her as pledgee. Again, this is the position in South Africa[65] and may well be the law here too.

4-22. Counter arguments should be considered. First, it might be argued that the cedent is holding the property on behalf of the assignee until it is actually handed over. This may be discarded, on the ground that there is insufficient publicity to count as delivery.[66] Moreover, the cedent will probably not know when intimation of the assignation occurs, as it is not made to him or her, but to the debtor. Secondly, it may be argued that the gap is inevitable and must simply be accepted.[67] In actual fact, it is not. It could be arranged for intimation to the debtor and delivery of the property to the assignee to be contemporaneous. Would this work? Susan Scott, writing on South African law, would say that it would not, on the basis of the general rule that if the pledgee gives up possession the pledge is extinguished.[68] But a court could surely hold that this rule does not apply in a transfer to a substitute pledgee.

(4) Assignation of obligations

4-23. A more powerful argument against permitting assignation without the pledger's agreement is that such an arrangement does not merely involve the assignation of a real right. It involves the assignation of obligations, such as to exercise ordinary care in respect of the property and, importantly, to restore the property upon payment of the secured debt.[69] In general, obligations cannot be assigned, unless the person to whom the obligation is

[65] See *Oertel v Brink* 1972 (3) SA 669 (W) at 675 *per* Boshoff J: 'A pledgee has no right to cede pledged property to another without the owner's consent.' See also *Deutschmann v Mpeta* 1917 CPD 79 and T J Scott and S Scott (eds), *Wille's Law of Mortgage and Pledge in South Africa* (3rd edn, 1987) 146.

[66] See below, paras 6-26–6-28.

[67] See the arguments made by Anderson, *Assignation* paras 2-13–2-14 in relation to assignation of a Form B standard security. He argues 'where the real right is a subordinate real right *in security*, the publicity principle requires only that the creation of the right is publicised'. But surely publication of the transfer is required, in case the cedent has acted fraudulently and already transferred the debt to someone else.

[68] Scott, *Cession* 131: see below, para 8-20. For criticism, see K M Kritzinger, *Principles of the Law of Mortgage, Pledge and Lien* (1999) 24.

[69] See below, paras 7-01 and 7-13–7-15.

owed agrees.[70] A comparison may be made with the law of leases, lease being another subordinate real right. Bar a couple of exceptions which the common law has developed, a lease may not be assigned without the landlord's consent.[71] Of course, it is possible to give the tenant express power to assign in the lease. It might also be stressed that pledge, like lease, is a possessory real right and therefore involves more obligations in relation to the property than a non-possessory right such as a standard security.

4-24. Ross Anderson argues, contrary to the view taken here, that assignation is not problematic because the obligations to look after the property 'arise *ex lege* from the fact of the possession' and thus automatically transfer to the assignee.[72] This may be doubted. The better view is that they arise out of the contract of pledge.[73] Dr Anderson goes on to argue that if the obligations do indeed arise out of the contract, the pledger will not be prejudiced by the assignation because the original pledgee will remain liable thereunder. This conclusion, if it is correct,[74] would surely discourage pledgees from assigning.

(5) Concluding thoughts

4-25. There is an old Scottish case in which the court seemed to recognise an assignee as a pledgee where possession had been transferred to him.[75] However, the matter was not discussed, the main point of the case being something else.[76] It is suggested that for the reasons set out above, the only sure way of assigning a pledge is get the express co-operation of the pledger.

4-26. By way of contrast, English law allows the assignment (assignation) of a pledge without the pledger's consent. This is because it is regarded as an assignment of the 'interest' or 'special property' which the English pledgee has in the pledged property.[77] English law regards such an 'interest' to be

[70] Reid, *Property* para 662.

[71] J Rankine, *Law of Leases in Scotland* (3rd edn, 1916) 173; A McAllister, *Scottish Law of Leases* (3rd edn, 2002) paras 6.15–6.18.

[72] Anderson, *Assignation* para 2-06.

[73] Stair I.xiii.13; A J M Steven, 'The Effect of Security Rights *Inter Partes*' in U Drobnig, H J Snijders and E-J Zippro (eds), *Divergences of Property Law, an Obstacle to the Internal Market?* (2006) 47 at 51.

[74] It may be argued that this obligation is tied to the pledge, in the same way as certain obligations under a lease, such as the duty to pay rent, are the obligation of the current tenant alone. See K G C Reid, 'Real Rights and Real Obligations' in S Bartels and M Milo (eds), *Contents of Real Rights* (2004) 25 at 41–44.

[75] *Ramsay v Wilson* (1666) Mor 9113.

[76] The claim of the assignee against a subsequent pledgee of the property. The property had been unlawfully removed from the assignee and pledged to the latter who was in good faith. The court held that the pledgee had no right to retain the goods, his pledger having no title to pledge.

[77] *Donald v Suckling* (1866) LR 1 QB 585; *Halliday v Holgate* (1868) LR 3 Ex 299; Bell, *Personal Property* 146; T G Ford (ed), 'Pledges and Pawns' in *Halsbury's Laws of England* vol 36 (4th edn, 2007 reissue) para 125.

disponible.[78] Under German law, the assignation of the secured debt causes the right of pledge to be assigned too, unless the parties agree otherwise.[79]

4-27. Ross Anderson has made a number of arguments as to why this is the position in Scotland too,[80] one of which has already been discussed.[81] Two more should be mentioned. Dr Anderson notes that the Consumer Credit Act 1974 recognises the competency of the assignation of claims secured by pledge.[82] Of course, this legislation applies in England as well as Scotland, but it is not incompatible with the argument advanced here, that assignation is possible, but only with the co-operation of the pledger. Secondly, Dr Anderson argues that on policy grounds claims secured by pledge should not be unassignable, unless the parties have expressly or impliedly agreed or otherwise. This argument must be correct, but again it is not incompatible with the author's view. The claim is clearly assignable. The point at issue is whether the pledge is too.

[78] See above, n 77.

[79] §§ 1250–1251 *BGB.*

[80] Anderson, *Assignation* para 2-06.

[81] See above, para 4-24.

[82] Consumer Credit Act 1974 s 189, which defines 'pawnee' and 'pawnor' to include 'any person to whom rights and duties have passed by assignment or operation of law'.

5 Subject Matter of Pledge

A. GENERAL

5-01. Bell's basic statement is that the 'subject of pledge must be capable of delivery'.[1] By this he means capable of *actual* delivery.[2] Therefore if a subject is not capable of such delivery, for example underground pipes, another method of creating a security must be found.[3]

B. CORPOREAL MOVEABLES

(1) General

5-02. In general any item of corporeal moveable property may be made the subject of a pledge.[4] Examples include silver plates;[5] clothing;[6] yarn;[7]

[1] Bell, *Principles* § 205. The rule is the same in England: see *Harrold v Plenty* [1901] 2 Ch 314 and N Palmer and A Hudson, 'Pledge' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn, 1998) 621 at 625. See also Denis, *Pledge* 26.

[2] For of course land is capable of delivery: symbolical delivery. See Reid, *Property* para 640.

[3] *Darling v Wilson's Tr* (1887) 15 R 180 at 183 *per* Lord Justice-Clerk Moncreiff. The example is a bad one. Such pipes would be heritable as a result of accession: *Crichton v Turnbull* 1946 SC 52. A better example might be industrial growing crops, which do not accede. See *Boskabelle Ltd v Laird* 2006 SLT 1079, discussed in D L Carey Miller, 'Right to Annual Crops' (2007) 11 *Edin LR* 274.

[4] Bell, *Principles* § 205; Bell, *Commentaries* II, 21; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992), para 15.

[5] *Murray of Philiphauch v Cuninghame* (1668) 1 Br Sup 575.

[6] *Hariot v Cuningham* (1791) Mor 12405.

[7] *Paton v Wyllie* (1833) 11 S 703.

brandy;[8] horses;[9] and jewellery.[10] In practice only goods of a reasonable value which will be easily marketable in the event of the debtor's default are pledged.[11] For example, a litre of milk will not be acceptable to secure a term loan of six months.

5-03. Where a pledge will frustrate the purpose of a statute, it will not be allowed. Thus in one case a company attempted to impignorate its Register of Shareholders.[12] This breached its statutory duty to keep the document at its office to be open for public inspection and was consequently held to be invalid. Other subjects which may not be pledged are the letters of guarantee of a company limited by guarantee.[13]

(2) Bills of lading

5-04. On one view bills of lading in law are regarded as the symbols of goods being shipped.[14] Therefore the question of whether they may be pledged can be resolved into the question of whether it is permissible to constitute a pledge by symbolic delivery. Alternatively the bill may be viewed as a document of title and transfer of it as a *sui generis* device.[15] Given the delivery specialities, this matter is dealt with primarily elsewhere.[16] For the sake of convenience it is submitted here that bills of lading may indeed be pledged.

C. INCORPOREAL PROPERTY

(1) General

5-05. Normally, incorporeal property may not be pledged.[17] The way in which a security is created over such property is by assignation.[18] It is of course

[8] *Hamilton v Western Bank* (1856) 19 D 152. See below, paras 6-21–6-25.

[9] *Kirkwood and Pattison v Brown* (1877) 1 Guth Sh Cas 395.

[10] *Wolifson v Harrison* 1974 SLT (Notes) 55 rev'd 1977 SC 384, 1978 SLT 95.

[11] Hume, *Lectures* IV, 6–7. According to the website of the National Pawnbrokers Association of the UK, the most commonly pawned items are things made of gold, jewellery and watches: http://www.thenpa.com/pawnbroking.htm.

[12] *Liquidator of Garpel Haematite Co Ltd v Andrew* (1866) 4 M 617.

[13] *Robertson v British Linen Co* (1890) 18 R 1225.

[14] Reid, *Property* para 621 (W M Gordon).

[15] Carey Miller with Irvine, *Corporeal Moveables* para 8.27. 'Title' however should be equated with possession rather than ownership of the goods. See R M Goode *Commercial Law* (3rd edn, 2004) at 890: 'The bill of lading should therefore be seen as a control document by which constructive possession is transferred rather than as a document by which title is passed.' See also M D Bools, *The Bill of Lading* (1997).

[16] See below, paras 6-30–6-33.

[17] Bell, *Commentaries* II, 22. The position is the same in England. See L Smith, 'Security' in A Burrows (ed), *English Private Law* (2nd edn, 2007) para 5.66.

[18] Bell, *Commentaries* II, 22; *Strachan v M'Dougle* (1835) 13 S 954; L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 522.

possible for a debtor to deliver documents evidential of such property, for example a personal bond, into the hands of a creditor. If the debtor requires the documents, for example to get payment, then the creditor may be given a feeling of security. However, the creditor has no real right to enforce against third parties, except that over the actual documents.[19] Despite the continual description by the courts of a security over shares as a 'pledge of shares', such a security is no such thing.[20] It is an assignation and the creditor gets no real right in security until registered by the company as the shareowner.

5-06. In Germany it is possible to pledge rights in much the same conceptual way as corporeal moveables.[21] The laws of other European countries take a similar approach.[22] The position is much the same in South Africa. Its version of our assignation expressly in security, the *cessio in securitatem debiti*, has been viewed on occasion as amounting to a pledge of a debt.[23] The result of this is that there needs to be no retrocession of the incorporeal which is the subject of the security, if and when the debtor/cedent discharges the debt due to the creditor/cessionary. Whether such jurisprudence will come to Scotland is a matter of conjecture.[24]

(2) Negotiable instruments

5-07. As an exception to the general rule regarding incorporeals, negotiable instruments such as bills of exchange may be pledged.[25] The rationale is that the debt is inseparable from the piece of paper.[26] This leads to a major problem. If there is such inseparability, it does not seem that there can be a valid pledge. For in pledge title remains in the pledger. Further, the giving of the instrument to a creditor will in most circumstances make that person *holder* of the instrument.[27] As holder, he or she is entitled to payment upon

[19] *Innes v Craig* 22 June 1821 FC, (1821) 1 S 82. Except if it is bearer paper.

[20] Eg, *Barron v National Bank* (1852) 14 D 565; *Coats v Union Bank of Scotland* 1929 SC (HL) 114; *Braithwaite v Bank of Scotland* 1999 SLT 25.

[21] § 1273–1296 *BGB: 'Das Pfandrecht an Rechten'*. See J Wilhelm, *Sachenrecht* (2nd edn, 2002) paras 1720–1728 and M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe* (1988) 65–66.

[22] Eg, Belgium, Italy, Portugal and Spain. See Dickson, Rosener and Storm, *Security on Movable Property*. For Holland, see W M Kleijn, J P Jordaans, H B Krans, H D Ploeger and F A Steketee, in J Chorus *et al*, *Introduction to Dutch Law* (2nd edn, 1993) 84–87.

[23] See S Scott, *The Law of Cession* (2nd edn, 1991) ch 12 and P Nienaber and G Gretton, 'Assignation/Cession' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 787 at 814–818. The leading case is *National Bank of South Africa v Cohen's Trustee* 1911 AD 235.

[24] The Scottish Law Commission is to start a project on assignation: see Seventh Programme of Law Reform (Scot Law Com No 198, 2005) paras 2.31–2.39. In England, the question has also been posited as to whether a pledge of intangibles might one day be recognised. See Palmer and Hudson, 'Pledge' at 625 and 635.

[25] Bell, *Principles* § 205; Hume, *Lectures* IV, 7; Gloag and Irvine, *Rights in Security* 545. See also the American Law Institute, *Restatement of the Law of Security* (1941) s 1.

[26] Bell, *Commentaries* II, 23.

[27] Unless it is an order bill which is not indorsed to the creditor.

the instrument.[28] This means that the security can be enforced without going to court, which is where a pledgee must normally go for realisation.

5-08. These matters are difficult. In the second edition of his *Commentaries* Bell states:

> 'The possession of a bill [of exchange] is held to be so strictly connected with the right, that the whole interest passes by indorsing the bill. And as bills thus impledged are blank indorsed, they are, in the eye of the law, completely transferred to the pledgee, under such condition as the parties have agreed upon.'[29]

This passage clearly denies the possibility of a true pledge of a bill. However, in the fourth and subsequent editions of the same treatise, it has been reworked. Instead, Bell begins by writing that where the instrument is indorsed to the creditor or blank indorsed by the debtor, the creditor has all the rights of an onerous indorsee being able to realise his security without judicial aid.[30] Such a transaction, is the implication, should be treated as assignation rather than pledge.

5-09. This interpretation is confirmed by what Bell writes next. In the fourth edition he says that sometimes 'a bill is pledged without being indorsed'.[31] But in the fifth edition this has become sometimes 'a bill is more correctly pledged without being indorsed'.[32] In this situation the creditor merely has the right to detain and can only indirectly operate payment of the debt secured.[33] Obviously this means by going to court. As Gloag and Irvine point out, this passage can be interpreted narrowly or widely.[34] It definitely covers the delivery of an order bill without indorsement to the creditor. However, it may also mean where a bearer bill has been similarly delivered in security. English authority, which would be persuasive on this matter, is inconclusive, but logic at the end of the day points to the narrower interpretation.[35] In brief then, the following is suggested as being a statement of Scots law:

(a) If an order negotiable instrument is indorsed in special or in blank by the holder to a creditor, or a bearer instrument is merely delivered to the creditor, then this operates as a transfer rather than a pledge of the

[28] Bills of Exchange Act 1882 s 38.

[29] Bell, *Commentaries* (2nd edn, 1810) 443–444. A similar statement is made by Hume, *Lectures* IV, 7.

[30] Bell, *Commentaries* (4th edn, 1821) II, 28; (5th edn, 1826) II, 23; (7th edn, 1870) II, 23.

[31] Bell, *Commentaries* (4th edn, 1821) II, 28.

[32] Bell, *Commentaries* (5th edn, 1826) at II, 23. In the 7th edn also at II, 23.

[33] Bell, *Commentaries* (5th edn, 1826) at II, 23; 7th edn also at II, 23. *Hogg v Muir, Wood and Co* 18 May 1820 (unreported), which Bell discusses in note 3 suggests outright assignation rather than pledge, as 'all sums' detention was allowed. His disapproval of it seems justified by logic.

[34] Gloag and Irvine, *Rights in Security* 608.

[35] On the English authority, *Byles on Bills of Exchange and Cheques* (28th edn by N Elliot, J Odgers and J M Phillips, 2007) para 18-018 (a similar statement from an earlier edition being referred to by Gloag and Irvine, *Rights in Security* 608) suggests the wider interpretation in denying the creditor a power of realisation. However, *Paget's Law of Banking* (13th edn by M Hapgood, 2007) para 31.34 suggests no such limit.

instrument.[36] In other words if the creditor becomes the holder then the transaction is not pledge.

(b) If an order negotiable instrument is delivered without indorsement to the creditor, then it is being pledged and not transferred.[37] In this situation the creditor does not become the holder and will require judicial assistance to realise his or her security.

D. HERITABLE PROPERTY

(1) General

5-10. As has been seen, in early Scots law land could be pledged in much the same way as moveables.[38] However, as the centuries went on the law of heritable and moveable security became bifurcated and it is clear that land may not be pledged nowadays. The only way of granting a security over heritable property is the standard security.[39]

(2) Title deeds to heritable property

5-11. There is a disagreement between Hume and Bell on whether title deeds may be pledged. Hume opines that they 'cannot be detained from the purchaser, or heritable creditor [of the land] under the pretence of a pledge ... in any one who has got the possession of the *ipsa corpora* as in security'.[40] In contrast, Bell writes that as corporeal moveables they can be pledged, but do not give any right in the land.[41] The matter was settled in the Inner House in *Christie v Ruxton*,[42] where Hume was preferred, the court regarding title deeds as having 'no intrinsic value in themselves'.[43]

5-12. *Christie v Ruxton* is often stated as being authority for the proposition that a security over heritage cannot be created by mere deposit of title deeds.[44] In England such action results in an equitable mortgage over the land in favour of the depositee.[45] However, it was clear that no such result

[36] Bell, *Commentaries* II, 23.

[37] Bell, *Commentaries* II, 23. See also Sim, 'Rights in Security' para 60.

[38] See above, para 3-19.

[39] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3). Of course a floating charge may be granted by certain bodies, eg companies and limited liability partnerships, over any or all of their assets including land. See above, para 1-03.

[40] Hume, *Lectures* IV, 7.

[41] Bell, *Principles* § 205.

[42] (1862) 24 D 1182.

[43] At 1185 *per* Lord Benholme. This point was also made by Hume. See also L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 522.

[44] Eg, W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) 99.

[45] Bell, *Commentaries* II, 23–24. A written document signed by the parties is now also required. See the Law of Property (Miscellaneous Provisions) Act 1989 s 2 and *United Bank of Kuwait plc v Sahib* [1997] Ch 107.

would happen in Scotland long before *Christie* and the point was not argued in the case.[46] In Bell's words, the English position is 'inconsistent with the genius of the Scottish law'.[47]

[46] Hume, *Lectures* IV, 7–8.
[47] Bell, *Commentaries* II, 24.

6 Constitution of Pledge

A. GENERAL

6-01. The real right of pledge in a moveable subject is constituted by delivery of the subject to the pledgee, in terms of an agreement between pledger and pledgee to do the same.[1] Consequently, pledge involves an *animus* or mental element in terms of the parties' respective intentions to transfer and to receive possession for this purpose, along with a *corpus* or physical element in terms of the act of delivery.[2] The agreement between the parties is a matter governed by the law of obligations; the delivery thereupon by the law of property.[3]

B. THE CONTRACT

(1) Pledge as a real contract

6-02. Under Roman law, pledge or *pignus* was one of the four real contracts.[4] By that law, such contracts were not constituted until delivery. Therefore, originally at least, an agreement to pledge was unenforceable until the debtor delivered the subject matter to the creditor.[5] The acceptance of non-possessory security by the later Roman law greatly reduced the importance of this rule. Nevertheless, all the major Scots institutional works treat pledge as a real contract.[6] The logical deduction is that if Alan agrees to pledge his watch to Beth and then changes his mind before delivery, there is no contract. It follows that Alan is not compelled to deliver nor liable in damages. Such a conclusion is unattractive and it is therefore not surprising that the law is in fact otherwise. Here is Erskine:

> 'If there was barely an obligation to give [a subject in pledge with no delivery], it resolved into a *nudum pactum*, which by the Romans, was not productive of an action. But, by the law of Scotland, one who obliges himself to give ... in pawn, may be compelled by an action to perform; though indeed, before the subject be ... impignorated, it does not form the special contract of ... *pignus*.'[7]

[1] See above, para 2-01. A similar approach is taken in most systems. See, eg, arts 1857 and 1863 *Codigo Civil* (Spain); § 1205 *BGB* (Germany); art 2337 *Code civil* (France) and arts 3.227 and 3.236 *BW* (Netherlands). See also Denis, *Pledge* 109–120 and Cobbett, *Pawns or Pledges* 36–37.

[2] Carey Miller with Irvine, *Corporeal Moveables* para 11.04.

[3] The position is the same in South Africa: see G F Lubbe, 'Mortgage and Pledge' in *LAWSA* vol 17 (revised by T J Scott, 1999) para 518.

[4] See B Nicholas, *An Introduction to Roman Law* (1962) 167–171 and R Zimmermann, *The Law of Obligations* (1990) chs 6–7. The others were *mutuum* (loan for consumption), *commodatum* (loan for use), and *depositum* (deposit).

[5] Nicholas, *An Introduction to Roman Law* 167; Zimmermann, *Obligations* 221.

[6] Stair I.xiii.11; Bankton I.xvii.1; Erskine III.i.33; Bell, *Principles* § 203. In actual fact, *Regiam*, Balfour and Hope treat pledge in close proximity to the other real contracts, indicating the Roman influence upon them. See above, paras 3-16–3-31 and 3-48–3-59.

[7] Erskine III.i.17.

6-03. Bell says something similar.[8] It is fair to take issue with the statement that the special contract is not formed until delivery. What he is perhaps attempting to say is that the contract is useless in terms of creating a security unless there is delivery, for until then the creditor has no real right. Bankton seems to have a better understanding of the matter:

> '[I]f the proprietor only covenants a pledge, or hypothec on his goods ... and retains them still in his own possession, all who purchase from him the same are safe ... no conventional pledge in moveables being competent by our law, without delivery of the same to the creditor; at the same time the debtor who evacuates such covenanted security is guilty of breach of faith, and liable to the creditor in damages upon that head.'[9]

Hence an agreement to pledge is a contract which may be enforced by specific implement and which will give rise to a claim for damages if its terms are breached.[10]

(2) Validity of the contract

6-04. Like any other contract certain pre-requisites are required for validity. In particular, the parties must have reached consensus about what they are doing, they must not be under undue influence and they must have the relevant legal capacity.[11] Writing, although in practice desirable, is not required except in the case of a pledge regulated by the Consumer Credit Act 1974, i.e. a pawn.[12] The legislation only applies to pledges by 'consumers', i.e. not bodies corporate.[13] Additionally, the debt must be for less than £25,000,[14] but this limit was removed in April 2008.[15] This contrasts with some other jurisdictions. In France, a civil pledge (*gage civil*) requires writing.[16] In Spain, a pledge is not valid against third parties unless its terms

[8] Bell, *Principles* § 17.

[9] Bankton I.xvii.1. See also Hume, *Lectures* IV, 1.

[10] The measure of damages is unclear.

[11] McBryde, *Contract* chs 3, 5 and 13–19; H L MacQueen and J Thomson, *Contract Law in Scotland* (2nd edn, 2007) paras 2.2–2.43 and 4.3–4.66.

[12] Bell, *Principles* § 204; *Taylor v Nisbet* (1901) 4 F 79 at 86 *per* Lord Moncreiff. Under the Consumer Credit Act 1974, the pawnee is obliged to issue the pawner with a copy of their agreement, notice of his cancellation rights and a pawn-receipt with a specified form and content: s 115; Consumer Credit (Pawn-Receipts) Regulations 1983, SI 1983/1566. The position is the same in England: see L Smith, 'Security' in A Burrows (ed), *English Private Law* (2nd edn 2007) para 5.66. See also *Wilson v First County Trust (No 2)* [2003] 3 WLR 568 where a human rights challenge to the paperwork requirements of the legislation failed, principally on the ground that the events giving rise to the case took place before the Human Rights Act 1998 came into force.

[13] Consumer Credit Act 1974 s 189(1).

[14] Consumer Credit Act 1974 s 8(2) as amended by the Consumer Credit (Increase of Monetary Limits) Order 1983, SI 1983/1878 and the Consumer Credit (Increase of Monetary Limits) (Amendment) Order 1998, SI 1998/996.

[15] The Consumer Credit Act 2006 s 2 came into force then. See L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 532–533.

[16] Art 2336 *Code civil*. In contrast, a pledge in the course of a business (*gage commercial*) does not require writing.

are set out in a public deed executed before an authenticating officer such as a notary public.[17]

6-05. In the absence of writing the parties' intentions will be inferred from their actings in relation to possession.[18] The intentions must indicate nothing which is inconsistent with the creation of a real right of pledge.[19]

(3) Proof

6-06. Pledge has always been provable by parole evidence.[20] There is an evidential presumption in favour of the pledgee as against the pledger because the pledgee is in possession of the property.[21] The acceptance by the law of parole evidence to prove a pledge contrasts with the position of loans of money at common law. These required to be proved by writ or oath.[22] Given that pledges invariably secure loans, this led to a somewhat perplexing situation. When the matter once came up for decision in the Sheriff Court, the sheriff noted the 'apparent inconsistency'.[23] However, he was of the view that the favour which the law shows to possession sufficiently accounted for the relaxation in the case of pledge of the rule that loan must be provable by writ or oath. The matter has been made academic by the Requirements of Writing (Scotland) Act 1995, which abolished proof by writ or oath.[24]

C. DELIVERY

(1) General

6-07. The subject matter of the pledge must be delivered to the pledgee to give that person a real right in it.[25] On this subject, Scots law has affixed itself to the original principles of the Roman *pignus*.[26] Anything resembling the later *hypotheca*, which as was seen became assimilated with *pignus*, is not countenanced.[27] Here is Stair:

[17] Art 1865 *Codigo civil.* See M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe* (1988) 255.

[18] Carey Miller with Irvine, *Corporeal Moveables* para 11.05.

[19] The parties did not pass this test in *Mackinnon v Max Nanson & Co* (1868) 6 M 974, where the contract allowed the debtor to remove the items from the creditor's possession. See Carey Miller with Irvine, para 11.05.

[20] Bell, *Principles* § 204; A G Walker and N M L Walker, *Law of Evidence* (1964) 152 (there is no equivalent passage in the 2nd edn by M Ross with J Chalmers (2000)); *Hariot v Cuningham* (1791) Mor 12405; *Walker v Scottish & Newcastle Breweries Ltd* 1970 SLT (Sh Ct) 21.

[21] *Hariot v Cuningham* (1791) Mor 12405.

[22] Stair IV.xliii.4.

[23] *Niven v M'Arthur's Trs* (1907) 23 Sh Ct Rep 299.

[24] Requirements of Writing (Scotland) Act 1995 s 11(1).

[25] Bankton I.xvii.1; Bell, *Principles* § 1364.

[26] See above, para 3-06.

[27] See above, paras 3-12–3-14.

> 'But our custom hath taken away express hypothecations, of all or a part of the debtor's goods, without delivery ... [so] that commerce may be the more sure.[28]

6-08. The rule which demands possession for accomplishment of the real right has been explained by Gloag and Irvine and subsequently repeated by others as a general rule embracing all security over moveable property.[29] Sim explains the thesis the most succinctly:

> 'The rule expressed in the maxim *traditionibus, non nudis pactis, dominia rerum transferentur* makes possession by the creditor a pre-condition for the validity of his security right in a question with a competing purchaser for value or a liquidator or trustee in sequestration.'[30]

6-09. Surely, however, the thesis is misguided. The Latin maxim comes from the Codex of Justinian and concerned transfer of *dominium*, i.e. ownership.[31] It had nothing to do with the creation of security in Roman law. One can correctly use it when referring to an *ex facie* absolute transfer of moveables which will require delivery. But that is not because it is a method of creating a security; it is because it involves transfer of ownership. Pre-1893 in Scotland the maxim applied to every transfer of moveables. Then statute altered the position for sale, while expressly providing that transfers in security were still to be governed by the common law.[32] All the cases where attempts were made to avoid delivery by using a sham sale were simply attempts to avoid the general common law on transfer of ownership.[33] Casting them as attempts to avoid a specific principle of no security without possession is misleading.

6-10. As for pledge, the demand for delivery comes from two specific sources and has little if anything to do with the brocard *traditionibus, non nudis pactis, dominia rerum transferentur*. First, as Stair says, it comes from custom – in other words Scots common law.[34] It has been shown that in the Middle Ages the royal courts were unwilling to enforce pledges where there had been no delivery.[35] As Bell wrote:

> 'In this country the common law very early declared itself against conventional hypothecs. This repugnance may be traced back to the days of Sir James Balfour (p 194) and even to the Regiam Majestatem (lib 3, c 3).'[36]

[28] Stair I.xiii.14. See too Bankton I.xvii.7; Erskine III.i.34; Bell, *Principles* § 1385.

[29] Gloag and Irvine, *Rights in Security* 188–196. Disciples of this approach include J Lillie, *The Mercantile Law of Scotland* (6th edn, 1970) 88; E A Marshall, *Scots Mercantile Law* (3rd edn, 1997) para 7-15 and Crerar, *The Law of Banking in Scotland* 517.

[30] A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 8.

[31] C 2.3.20 (Diocletian, 293): *Traditionibus et usucapionibus dominia rerum non nudis pactis transferentur*. See also D 50.17.54. See W M Gordon, 'Roman Influence on the Scots Law of Real Security' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 157 at 170. See also *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 88 *per* Lord Rodger of Earlsferry.

[32] Sale of Goods Act 1893 ss 17, 18 and 61(4). See now the Sale of Goods Act 1979 ss 17, 18 and 62(4).

[33] Gloag and Irvine, *Rights in Security* 221–236.

[34] Stair I.xiii.14.

[35] See above, paras 3-22–3-24.

[36] Bell, *Commentaries* II, 25.

6-11. The second source is the continental civilian systems which have also shunned conventional hypothecs.[37] When Stair wrote his *Institutions* in 1681, he must have been aware that the non-possessory pledge had been rejected in early Scots law and in civilian Europe. Commerce is indeed 'the more sure' without the conventional hypothec over moveables, which has been almost completely rejected by our common law.[38]

(2) Types of delivery: introduction

6-12. The law recognises three categories of delivery: actual, constructive and symbolical delivery. The traditional textbook treatment of moveable security, typically after the recitation of *traditionibus, non nudis pactis* is to have a general discussion of the three types, stating that they apply to the creation of any form of moveable security at common law.[39] This approach is open to question for two reasons. First, delivery is properly a matter for general property law and not security law in particular.[40] Secondly, it overlooks a leading case the ratio of which is that pledge may only be created by actual delivery.[41] The approach taken here will be to analyse the forms of delivery with specific reference to pledge.

(3) Actual delivery

6-13. Actual delivery is where the pledger has natural possession of the property to be pledged and physically delivers it to the pledgee or that party's agent.[42] Actual delivery is also recognised to take place where the property is locked up and the creditor is given the only key to the enclosure in which it is locked.[43] The basic concept of actual delivery is not difficult to grasp. The case law, however, has on occasion conflicted.

6-14. In *Johnston v Sprott*,[44] the owner and occupier of a mine was lent money by his grieve. He agreed to pledge for this horses, machinery and implements at the mine. However there was no outward change in the possession of these subjects and in the words of the successful argument 'for aught the lieges

[37] See Bell, *Commentaries* II, 25; T B Smith, *A Short Commentary on the Law of Scotland* (1962) 472–474. The need for delivery remains in these systems today. See, eg, § 1205 *BGB* and art 1863 *Codigo civil*.

[38] The exceptions being the (now obsolete) bonds of bottomry and respondentia. See Gloag and Irvine, *Rights in Security* 297–302.

[39] See, eg, Lillie, *The Mercantile Law of Scotland* 88–89; S Styles, 'Rights in Security' in A D M Forte (ed), *Scots Commercial Law* (1997) 179 at 181–184 and F Davidson and L Macgregor, *Commercial Law in Scotland* (2002) para 6.3. E A Marshall in her *Scots Mercantile Law* (3rd edn, 1997) paras 7.80–7.92 purports to discuss the three forms of delivery with specific regard to pledge. However, most of the cases cited are not in fact true pledge cases.

[40] Admittedly, many of the cases involve attempts to create securities.

[41] *Hamilton v Western Bank of Scotland* (1856) 19 D 152. See below, para 6-21.

[42] See Sim, 'Rights in Security' para 10.

[43] *Liquidator of West Lothian Oil Co v Mair* (1892) 20 R 64.

[44] (1814) Hume 448.

could discover Johnston [the grieve] continued to possess as servant'.[45] The court in what Hume described as a 'wholesome judgment'[46] thus held there was no valid pledge.

6-15. Contrast *Moore v Gledden*.[47] There, a building contract provided that 'all plant brought or left on or near the site of the works contracted for should ... be held to be the property of and belong to the [railway company]'.[48] The purpose of this provision was to ensure that the contract was duly performed. The plant was duly brought on to the company's property. It later came up for decision whether the company had a valid security. It was held by seven judges (an eighth judge dissenting) that a real right of pledge had been constituted in favour of the company.[49] This case is a problematic one and difficult to reconcile with *Johnston*.

6-16. Although the plant was brought on to the company's ground the contractor continued to use it to perform the contract. While the difference with *Johnston* is that there was no movement there at all, the very nature of a contractor's job is to take his plant around with him. His tools, machinery, wagons and so forth exist for a specific purpose: they are there to be taken to his jobs. Just because they are situated at the site of his present job does not mean he has ceased to possess them: in the words of the dissenting judge, Lord Kinloch: 'Possession of moveables is an individual and personal, not a territorial thing.'[50]

6-17. The two reasoned judgments of the majority place too much emphasis on the terms of the building contract.[51] They are in reality giving effect, in Lord Kinloch's words, to a 'paper possession'[52] and when Lord Neaves states that '[p]action cannot supply the place of possession',[53] it is difficult to be convinced that he puts this principle into practice in his decision.

(4) Other forms of delivery

6-18. Other forms of delivery will be summarised here. Constructive delivery is where the subject matter is not physically delivered. The main form is where the property is in the custody of a third party such as a warehouseman and the owner intimates to the third party, usually via a delivery order, that

[45] At 450.

[46] At 450.

[47] (1869) 7 M 1016.

[48] At 1017.

[49] Compare the modern English case of *Re Cosslett Contractors Ltd* [1998] Ch 495, where a similarly worded contract was held to create an equitable charge. I am grateful to Mr W James Wolffe QC for drawing this case to my attention.

[50] (1869) 7 M 1016 at 1024.

[51] At 1021 *per* Lord Neaves and at 1025–1026 *per* Lord Cowan.

[52] At 1024.

[53] At 1021.

it is now to be held on behalf of the transferee.[54] It is essential that the custodier is informed; otherwise there is no delivery.[55]

6-19. An examination of most textbook treatments of moveable security suggests that the form of constructive delivery outlined is the only form.[56] There are in fact three other forms. *Traditio brevi manu* is where the property is already in the possession of the would-be pledgee, for example under a contract of hire.[57] Delivery is effected by a change in that party's *animus* as to the nature of the detention. *Traditio longa manu* involves possession being transferred by the pointing out of the property to the transferee so that party may deal with it at his or her pleasure.[58] *Constitutum possessorium* is where the transferor undertakes to detain the property on behalf of the transferee but retains physical control of it throughout the transaction.[59]

6-20. Symbolical delivery is effected by the actual delivery of a thing which the law regards as amounting to a symbol of the goods.[60]

(5) The apparent monopoly of actual delivery

6-21. In *Hamilton v Western Bank of Scotland*,[61] cases of brandy belonging to the debtor were in a warehouse. The bank desired security over them. A delivery order for the cases was executed in favour of the bank and delivered to it. Intimation was made to the storekeeper. The debtor later became bankrupt. The bank sought to realise its security. There was a dispute over whether it covered an additional loan made by the bank. In the Outer House, Lord Handyside regarded the transaction as pledge so therefore the further advance was not secured.[62] After an amendment of the pleadings, the First Division held in contrast that the transaction was one of *ex facie* absolute transfer and therefore that the additional loan was secured.[63]

6-22. The principal reason behind the Inner House decision is that pledge may only be constituted by actual delivery.[64] Constructive delivery is not allowed. Neither is symbolical delivery. These are only permitted for transfer of ownership. The fact that the parties intended to pledge the property is irrelevant. Given, as has already been stated, that delivery is a general property law notion relevant to the creation of all real rights, this reasoning

[54] Gloag and Henderson, *The Law of Scotland* para 37.13; Carey Miller with Irvine, *Corporeal Moveables* para 11.08; Reid, *Property* para 620 (W M Gordon).

[55] *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70.

[56] Eg, Gloag and Henderson, *The Law of Scotland* para 37.13.

[57] Reid, *Property* para 622 (W M Gordon); Lubbe 'Mortgage and Pledge' para 535.

[58] Reid, *Property* para 622 (W M Gordon); Lubbe 'Mortgage and Pledge' para 535.

[59] Reid, *Property* para 623 (W M Gordon); *Milligan v Ross* 1994 SCLR 430.

[60] Gloag and Henderson, *The Law of Scotland* para 37.13; Reid, *Property* para 621 (W M Gordon).

[61] (1856) 19 D 152.

[62] At 155–158.

[63] At 158–167.

[64] At 159–160 *per* Lord President M'Neill.

is jurally illogical. *Hamilton* has therefore been subject to criticism over the years; beginning with Lord M'Laren; moving through Gloag and Irvine, and Graham Stewart; and up to the present day with Lord Rodger and Professor Gretton.[65] Rather than reiterating their criticisms here, an attempt to express some new argument will be made.

6-23. The justification of the decision, given by Lord President M'Neill, is:

> 'By presenting the delivery order to the storekeepers ... the defender obtained what has not been unfrequently called constructive delivery ... . But it is not a thing which has been recognised by any authority I know, as coming in place of that custody, which is of the essence of the contract of pledge – the value of which consists in having the custody without the property of the goods. Nor is there in the dicta of our writers any encouragement to go farther in that direction.'[66]

Stair, however, writes about delivery:

> 'yet *utiliter* and *equivalenter*, possession lawfully attained by virtue of the disposition, although not delivered by the disponer, will be sufficient; as if the disponer were not in possession himself, and so cannot deliver it; yet the acquirer may recover it from the detainer'.[67]

Then he makes clear that this statement is not confined to transfer of ownership: 'Possession is requisite, not only to the conveyance of the property of moveable goods, but also of ... pledges'.[68] Stair seemingly has no objection to pledge being constituted by constructive delivery.

6-24. In terms of earlier case law, there is nothing to support *Hamilton*: in fact quite the opposite. In *Bogle v Dunmore and Co*[69] the court recognised that a bill of lading represented possession and not title to goods. The clear implication is that the pledge of such a document title is possible. In *Colquhoun v Findlay, Duff and Co*[70] goods were in a warehouse. Their owner granted a delivery order in favour of his creditor which was intimated to the storekeeper. It was held on the particular facts in question that the nature of the transaction was an absolute transfer in security. However, in the references made to pledge both by pursuer, defender and the court, nowhere is it suggested that a pledge by constructive delivery was incompetent.

[65] Bell, *Commentaries* II, 21 (n 1); Gloag and Irvine, *Rights in Security* 256–257; J Graham Stewart, *The Law of Diligence* 155 n 3; A F Rodger, 'Pledge of Bills of Lading in Scots Law' 1971 *JR* 193; G L Gretton, 'Pledge, Bills of Lading, Trusts and Property Law' 1990 *JR* 23. See also Gloag and Henderson, *The Law of Scotland* para 37.13; A J M Steven, 'Rights in Security over Moveables' in Reid and Zimmermann, *History* vol 1, 333 at 343–344; Carey Miller with Irvine, *Corporeal Moveables* para 11.07 and G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 763–764. See also Scottish Executive Central Research Unit, *Business Finance and Security over Moveable Property* (2002) 113.

[66] (1856) 19 D 152 at 159.

[67] Stair III.ii.5. See D L Carey Miller in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (1992) 13 at 21–23.

[68] Stair III.ii.6.

[69] (1787) Mor 14216.

[70] 15 Nov 1816 FC.

6-25. The sharpest denial of the principle expressed in *Hamilton* comes in *Auld v Hall and Co*.[71] There, goods once more were in a warehouse. The owner purported to sell them to a third party. However, no intimation was made to the storekeeper. The owner became bankrupt. The sale was held invalid. Lord President Hope stated:

> 'This case, although new in some respects, must be determined according to principles long established in law. Moveables cannot be effectually transferred or pledged without delivery, if in the possession of the party transferring or pledging, or if in the possession of a third party, without intimation to the custodier.'[72]

Although the comments on pledge are obiter they are unequivocal. The authority of *Hamilton* is gravely weakened. This is particularly true, because Lord Deas, one of the judges in *Hamilton*, in a later judgment expressly approved Lord President Hope's statement.[73] The conclusion is that *Hamilton* is not good law.

(6) Pledge by constructive delivery

6-26. It is submitted that pledge by intimation to a third party custodier is competent. As well as what has been said in the preceding paragraphs, reference may be made to the decision of the Whole Court in *Robertson & Baxter v Inglis*.[74] There, an attempt was made to utilise the Factors Acts to evade the requirement of intimation to the custodier which the common law demands for constructive delivery.[75] The case actually involved an assignation in security. The judges did, however, discuss constructive delivery as regards pledge.[76] A number of them believed that the common law sanctioned pledge by constructive delivery. Here is Lord Moncreiff:

> 'Pledge being a real right requires for its completion delivery of the goods pledged or equivalents for delivery; and where the goods are in possession of a third party, the mere transfer to the pledgee of a delivery-order or warrant is not of itself sufficient, without intimation to the custodier to complete the pledgee's right.'[77]

Further, the judges who pronounced that actual delivery was a necessity seemed to hide behind the case of *Hamilton*.[78] Acceptance of delivery by intimation to a third party custodier brings Scots law into line with other systems.[79]

[71] 12 June 1811 FC.

[72] 12 June 1811 FC.

[73] *Wyper v Harveys* (1861) 23 D 606 at 629–630.

[74] (1897) 24 R 758.

[75] Factors Act 1889 ss 1(1), 3.

[76] Basically, because the definition of pledge in the Factors Act is wider than the common law meaning: 1889 Act s 1(5).

[77] (1897) 24 R 758 at 817. See also at 777 *per* Lord M'Laren (Lord President and Lord Adam concurring), at 780 *per* Lord Kinnear and at 789 *per* Lord Stormonth Darling.

[78] (1897) 24 R 758 at 785 *per* Lord Kincairney.

[79] See Lubbe, 'Mortgage and Pledge' para 535; § 1205(2) *BGB*. Note too the American Law Institute, *Restatement of the Law of Security* (1941) s 8; Uniform Commercial Code § 9-305(c) discussed in J J White and R S Summers, *Uniform Commercial Code* (5th edn, 2000) vol 4, para 22-8.

6-27. It is suggested that pledge by *traditio brevi manu* is also permissible. No authority can be offered to support this conclusion, other than that which is comparative.[80] However, it seems illogical that where the intended pledgee already has possession, for example under a contract of hire, that he must hand it back to its owner and then have it redelivered to him to effect a valid pledge. A change in *animus* is surely enough.

6-28. Pledge by either *traditio longa manu* or *constitutum possessorium* both have very doubtful validity. In each of these there is lacking the publicity which the law of security generally demands to protect third parties. Professor Gordon, however, would not object to a pledge being created in these ways.[81]

(7) Pledge by symbolical delivery

6-29. There is no authority to suggest that a moveable may be effectively pledged by handing over a symbol of it. Such a pledge would almost certainly be invalid.[82]

(8) Pledge of bills of lading

6-30. While bills of lading can be regarded as a symbol of the goods being shipped, the better view is to regard them as a document of title.[83] The story of pledging bills of lading has been well set out by Lord Rodger.[84] It begins of course with *Hamilton*.[85] Then comes the unequivocal view of the House of Lords in an English case, *Sewell v Burdick*,[86] that a bill of lading symbolises the possession of goods and not title thereto. Possession and title may coincide but they do not have to. Consequently, bills of lading may be validly pledged in English law.[87]

6-31. The most important Scottish development is the case of *North-Western Bank Ltd v Poynter, Son and Macdonalds*.[88] There, an importer had expressly agreed to pledge a bill of lading to his bank. It was duly delivered, but later handed back so that the merchant could sell the goods on the bank's behalf, the bank having a power of sale under the contract of pledge. After an arrestment of the price of the goods, there was a dispute as to whether the

[80] See Lubbe, 'Mortgage and Pledge' para 535; American Law Institute, *Restatement of the Law of Security* (1941) s 7; § 1205(1) *BGB*; art 3152 *Louisiana Civil Code.*

[81] See his commentary to *Milligan v Ross* 1994 SCLR 430 at 435–436.

[82] Carey Miller with Irvine, *Corporeal Moveables* para 11.09.

[83] Carey Miller with Irvine, *Corporeal Moveables* para 11.10. See above, para 5-04.

[84] A F Rodger, 'Pledge of Bills of Lading in Scots Law' 1971 *JR* 193.

[85] *Hamilton v Western Bank* (1856) 19 D 152.

[86] (1884) LR 10 App Cas 74.

[87] *Chitty on Contracts* (29th edn, by H G Beale et al, 2004) vol 2, para 33-125; R Cranston, *Principles of Banking Law* (2nd edn, 2002) 401. This is also the position in France and Louisiana: see Denis, *Pledge* 189.

[88] (1894) 22 R (HL) 1.

right of pledge had been lost by redelivery to the pledger. If *Hamilton* was to be followed the court would have dismissed all the arguments based on pledge, for there was no actual delivery of the goods. However, in both the Court of Session and the House of Lords there was no reference to *Hamilton*. The judges were willing to treat the transaction as one of pledge and on the facts held that the real right had not been lost by redelivery. Consequently, *Poynter sub silentio* overrules *Hamilton*.[89]

6-32. In a later case, *Hayman & Son v M'Lintock*,[90] *Hamilton* was once again upheld as governing the situation where pledge is attempted of a bill of lading. The judgments in *Hayman* upon the matter are difficult to comprehend and the decision has been cogently criticised by Professor Gretton.[91]

6-33. One further argument has produced itself since Professor Gretton wrote. In England, one result of *Sewell* was to hold that a pledgee of a bill of lading did not have the statutory rights that one having *dominium* had through his detention of the same. This was felt to be unsatisfactory and the law was amended by the Carriage of Goods by Sea Act 1992.[92] The relevant provisions therein apply to Scotland also. This means that Parliament must regard a pledge of a bill of lading in Scotland as valid, for if *Hamilton* was still good law there would be no need for these provisions to apply north of the border.

(9) Limitation of *Hamilton* by the Factors Acts

6-34. By the Factors Act 1889 a mercantile agent may validly pledge goods in his possession.[93] It is further provided that 'A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.'[94] 'Document of title' includes any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods.[95] The natural reading of these provisions is that when it comes to a mercantile agent *Hamilton* has no application. Also seemingly irrelevant are the normal rules on constructive delivery. In *Robertson & Baxter v Inglis*[96] the Whole Court employed all manner of means to avoid this conclusion. The House of Lords circumvented the problem by stating that on the facts the provisions did not apply, as the

[89] See Rodger, 'Pledge of Bills of Lading in Scots Law' at 213 and G L Gretton, 'Pledge, Bills of Lading, Trusts and Property Law' 1990 *JR* 23 at 31. Pledging of bills of lading is competent in other jurisdictions. See, eg, Lubbe, 'Mortgage and Pledge' para 535 and art 2708 *Quebec Civil Code.*

[90] 1907 SC 936.

[91] Gretton, 'Pledge, Bills of Lading, Trusts and Property Law' at 25.

[92] Carriage of Goods by Sea Act 1992 s 2.

[93] Factors Act 1889 s 2.

[94] Factors Act 1889 s 3.

[95] Factors Act 1889 s 1(4).

[96] (1897) 24 R 758.

purported pledge was by the owner of the goods and not a mercantile agent.[97] Nevertheless, the Lord Chancellor seemed willing to read the provisions literally were the right factual situation to arise.[98] Certainly, these provisions impinge upon *Hamilton*.

D. THE RULE *NEMO PLUS JURIS AD ALIENUM TRANSFERRE POTEST, QUAM IPSE HABERET*

(1) General

6-35. For a person to be able to give a right of pledge over property, he or she must own that property or be authorised by its owner to pledge it.[99] The rule *nemo plus juris ad alienum transferre potest, quam ipse haberet*[100] applies equally to the creation of a pledge as it does to the creation of any other real right. Here is Lord Kinnear:

> 'The general rule is perfectly well settled, that the possessor of corporeal moveables can give no better title to a purchaser or pledgee than he has himself acquired from the owner.'[101]

The rule is axiomatic and applies in other legal systems.[102] In one case a relict impignorated the moveables of the deceased including his heirship moveables. The heir had a good action against the possessor for their return.[103] Good faith on the part of the pledgee is irrelevant.[104] Thus where the owner of jewels gave custody of them to another individual who pledged them to a third party, the good faith of that party was held to be no defence in an action for recovery of the property by the owner.[105]

[97] *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70. The case actually involved an assignation; however the definition of pledge in the 1889 Act s 1(5) includes this.

[98] (1898) 25 R (HL) 70 at 71. See Sim, 'Rights in Security' para 18.

[99] Bell, *Principles* § 1364; W M Gloag, 'Pledge' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 11 (1931) para 773. The law of medieval Spain was to similar effect: see R I Burns (ed), *Las Siete Partidas* (trans by S P Scott) vol 4, *Family, Commerce and the Sea: The Worlds of Women and Merchants* (2001) Title XIII, Law IX. See also Denis, *Pledge* 189.

[100] D 50.17.54. Also known as the rule *nemo dat quod non habet*: see Reid, *Property* para 669. This abbreviated brocard may have come from the Commentators: see Carey Miller in *Comparative and Historical Essays in Scots Law* 13 at 17.

[101] *Mitchell v Heys & Sons* (1894) 21 R 600 at 610. See also *Jaffray v Carrick* (1836) 15 S 43 at 45 *per* Lord Moncreiff: 'There can be no question, that, abstractedly and on general principles, the rule of law is, that a man cannot pledge property that is not his own: Res aliena pignori dari non potest.'

[102] For English law, see *Attenborough v Solomon* [1913] AC 76 at 84 *per* Lord Haldane LC. See also art 1857 *Codigo civil* and art 3142 *Louisiana Civil Code.* In German law, however, pledge by a non-owner will give the pledgee a real right (*dingliches Recht*) if the pledgee is in good faith. See § 1207 *BGB* and F Baur, *Sachenrecht* (17th edn, by J F Baur and R Stürner, 1999) 681.

[103] *Semple v Givan* (1672) Mor 9117. See also *Ramsay v Wilson* (1665) Mor 9113 and *Tweddel v Duncan* (1841) 3 D 998.

[104] Gloag and Irvine, *Rights in Security* 203.

[105] *Pringles v Gribton* (1710) Mor 9123. See also *M'Kellar v Greenock and Port-Glasgow Loan Co Ltd* (1918) 34 Sh Ct Rep 93 and *M'Phater v Smith Premier Typewriter Co Ltd* (1917) 33 Sh Ct Rep 301.

(2) Agents

6-36. Property may be pledged on behalf of its owner by an agent.[106] The validity of the pledge will depend on whether the agent has authority, express or otherwise, to pledge the goods.[107] A mere depositary certainly has no such authority.[108]

6-37. It appears that at common law in Scotland factors had a general power to pledge the goods of their principals.[109] Therefore pledgees were protected if it turned out that in fact there was no express authority for the particular pledge in question.[110] However, this was not the position in England where a series of statutes was passed in the nineteenth century to give those transacting with factors some protection.[111] The consolidating statute was extended to apply to Scotland also[112] and its inter-relation with the common law is somewhat unclear.[113] It is not intended to pursue the matter here, where focus will be placed upon the statutory provisions.

6-38. The Factors Act 1889 applies to mercantile agents and 'mercantile agent' is defined as:

> 'a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'.[114]

The Act goes on to provide that where such an agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall be valid as if he were expressly authorised by the owner of goods to make the same.[115] The person taking under the disposition, for present purposes the pledgee, must be in good faith and not have notice at the time of the disposition that the agent had no authority to do what he is doing.[116] It has been held that a

[106] Bell, *Principles* § 1364 ('delivery can be given effectually only by one having the ownership or disposal'); Gloag and Irvine, *Rights in Security* 203; Sim, 'Rights in Security' para 21. See also arts 3145 and 3146 *Louisiana Civil Code.*

[107] Sim, 'Rights in Security' para 21; Reid, *Property* para 670. On the authority of agents generally, see L J Macgregor, 'Agency and Mandate' in *Stair Memorial Encyclopaedia* (Reissue, 2002) paras 49–50, 55–56 and 75–83.

[108] *Stuarts & Fletcher v M'Gregor* & Co (1829) 7 S 622; *Smith v Allan & Poynter* (1859) 22 D 208.

[109] *Mitchell v Burnet & Mouat* (1746) Mor 4468; *Colquhoun v Findlay, Duff and Co* 15 Nov 1816 FC.

[110] See Rodger, 'Pledge of Bills of Lading in Scots Law' 1971 *JR* 193 at 211.

[111] See J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 101–105.

[112] Factors Act 1889 extended to Scotland by the Factors (Scotland) Act 1890 s 1.

[113] See Gow, *The Mercantile and Industrial Law of Scotland* 105–116.

[114] Factors Act 1889 s 1(1). Nowadays, a factor is known as a commercial agent: see below, para 17-48.

[115] Factors Act 1889 s 2(1). See Macgregor, 'Agency and Mandate' para 58.

[116] See Macgregor, 'Agency and Mandate' para 58. See also E C Reid and J W G Blackie, *Personal Bar* (2006) para 16-05 and Carey Miller with Irvine, *Corporeal Moveables* para 11.12.

forwarding agent who had goods left in his hands to be forwarded was not a factor and could not validly pledge.[117]

(3) Buyers and sellers in possession

6-39. By statute, where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery by that person, or by a mercantile agent acting for him, of the goods or documents of title, under a pledge, to any person receiving the same in good faith and without notice of the original seller's rights will have the same effect as if the person making the delivery were a mercantile agent in possession of the goods or documents of title with the consent of the owner.[118] Likewise, where the seller of goods or his mercantile agent, having sold the goods, remains in possession of the goods or documents of title to them, a pledge of these to a pledgee receiving the same in good faith and without notice of the previous sale, will have the same effect as if the owner of the goods had given express authority to the seller to pledge.[119] These statutory provisions amount to an exception to the rule *nemo plus*.

(4) Possessor under contract of sale or return

6-40. If goods are sent to someone under a contract of sale or return (or sale on approbation) it may be asked whether that person may validly pledge the goods. In *Brown v Marr, Barclay and Co*[120] a party had fraudulently obtained jewellery upon such a contract and then pawned it. The court viewed a contract of sale or return as a sale under a resolutive condition. In other words ownership passed to the fraudulent party subject to reversion to the seller if the goods were returned to him. Given this, the pledge was valid and despite the fraud the pawnbroker obtained an absolutely good title as he was in good faith.[121]

6-41. In the later case of *Macdonald v Westren*,[122] the court took a different view of the contract of sale or return. It held that it was a sale under a suspensive condition, so where a person had obtained goods upon such a contract and then been sequestrated, the ownership of the goods in his possession was held to be with the seller. The opinions expressed in the two cases conflict.[123]

[117] *Martinez y Gomez v Allison* (1890) 17 R 332.

[118] Sale of Goods Act 1979 s 25(1); Factors Act 1889 s 9. See P S Atiyah, J N Adams and H L MacQueen, *The Sale of Goods* (11th edn, 2005) 399–410 and Carey Miller with Irvine, *Corporeal Moveables* paras 10.22 and 11.12.

[119] Sale of Goods Act 1979 s 24; Factors Act 1889 s 8. See Atiyah, Adams and MacQueen, *The Sale of Goods* 395–399 and Carey Miller with Irvine, *Corporeal Moveables* paras 10.21 and 11.12.

[120] (1880) 7 R 427.

[121] (1880) 7 R 427. See also Sim, 'Rights in Security' para 23.

[122] (1888) 15 R 988.

[123] See Gloag and Irvine, *Rights in Security* 246–247.

6-42. Not long after *Macdonald*, the Sale of Goods Act 1893 was passed. It provided that:

> 'Where goods are delivered to the buyer on approval or "on sale or return", or other similar terms, the property therein passes to the buyer: (a) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction … .'[124]

As Gloag and Irvine point out, it is clear that such a contract is one of sale under a suspensive condition.[125] Their conclusion is that a pledge in the circumstances outlined would be invalid.[126] However, there is an alternative conclusion. That is that by pledging the property the buyer is doing an act which adopts the transaction.[127] Thus ownership passes to him and the pledgee gets a good title. This alternative conclusion is the one which both the Scottish and the English courts have adopted.[128] Further, its application happily is consistent with the conclusions reached by the courts in both *Brown* and *Macdonald*, although not with the reasoning expressed in the first case.[129]

(5) Hire purchasers

6-43. A contract of hire purchase is one where property is taken on hire and the hirer is granted an option to purchase it on fulfilling certain conditions stipulated in the contract.[130] Therefore a hire purchaser does not have ownership of the property and it would be presumed that the rule *nemo plus* would apply if he or she purported to pledge them. However, in two Sheriff Court cases it has been held that a pledge by a hire purchaser is valid. In *Acme Machine Co v Scanlan*,[131] where two Acme wringing machines had been pawned, the parties found themselves before Sheriff Guthrie. He opined that Acme in allowing their property to be hire purchased were responsible for letting the fraudulent pawning be committed.[132] He said that pawnbrokers were under no duty to take 'extraordinary precautions to ascertain that the title to the machines is satisfactory'. 'In general', he continued, 'the actual possession of moveables presumes property'.[133] The case at its heart seems based upon a vague notion of personal bar.

[124] Sale of Goods Act 1893 s 18(4). See now the Sale of Goods Act 1979 s 18 rule 4.

[125] Gloag and Irvine, *Rights in Security* 247. See also *Ross v Plano Manufacturing Co* (1903) 11 SLT 7.

[126] Gloag and Irvine, *Rights in Security* 247; *Ross v Plano Manufacturing Co*.

[127] Atiyah, Adams and MacQueen, *The Sale of Goods* 329.

[128] *Bryce v Ehrmann* (1904) 7 F 5; *Kirkham v Attenborough* [1897] 1 QB 201; *London Jewellers Ltd v Attenborough* [1934] 2 KB 206. However, the wording of the contract may override the operation of the rule. Compare here *Bryce* with *Weiner v Gill* [1906] 2 KB 574. See Carey Miller with Irvine, *Corporeal Moveables* para 9.11.

[129] That was, that a contract of sale or return amounted to a sale under a resolutive condition.

[130] K R Wotherspoon, 'Sale and Supply of Goods' in A D M Forte (ed), *Scots Commercial Law* (1997) 26 at 72–76.

[131] (1887) 3 Sh Ct Rep 148.

[132] At 149.

[133] At 149–150.

6-44. The second case, *Benton & Co v Rowan*,[134] has much the same ratio. The sheriff makes a questionable comparison with a case where a person had fraudulently obtained goods on sale or return.[135] In that situation the person can confer good title; a hire purchaser generally cannot.[136]

6-45. The sheriffs' conclusions are too wide an interpretation of personal bar to accept. As will be seen, personal bar only operates where the true owner has acted in a manner calculated to mislead third parties and there has been reliance on his actings by the party raising the doctrine.[137] Entering into a contract of hire purchase and handing over possession in terms of that contract cannot be said to be activity which is calculated to mislead. Pressed to a logical conclusion, the sheriff's conclusions mean that one who hires out goods to someone who then pawns them, would also have to pay the pawnbroker to get them back. And, to be consistent, if the goods were sold rather than pawned, the buyer would get a good title. Acceptance of this would confer on a hirer the same power to confer title as a buyer or seller in possession, a power which only exists under statute.[138]

6-46. The true backdrop to the cases is judicial dislike of hire purchase. The sheriff in *Benton* described it as:

> 'a bad system, leading to deception, imposition, and litigation, and worst of all, involving the ignorant and improvident of the poor into undertaking to pay for articles prices far beyond their true value'.[139]

However, he makes a concession at the end of the judgment. He does not allow the pawnbroker interest and expenses because of the nature of the items pawned. He says:

> 'I think the look of these new, paltry toys ought to have excited manifold suspicions in the mind of any man of skill who would pause to conjecture the probabilities of their history.'[140]

The items in question were wrist watches.

6-47. In the same year as *Benton*, the House of Lords in an English case held that as a hire purchaser does not own the goods subject to the contract of hire purchase, he therefore may not validly pledge them.[141] Further, that person does not fall within the provisions of the Factors Acts as a person who has 'bought or agreed to buy goods' and therefore cannot validly pledge upon that basis.[142] This decision was followed without question or discussion in a

[134] (1895) 11 Sh Ct Rep 144.

[135] *Brown v Marr, Barclay & Co* (1880) 7 R 427. See above, para 6-40 and below, para 6-50.

[136] A person who obtains goods upon sale or return, adopts a sale by pledging them and thus can confer a good title. This is the case even if he is a fraudster provided that the pledgee is in good faith and the pledge takes place before the original contract is avoided. See above, para 6-41.

[137] See below, para 6-48.

[138] See above, para 6-38.

[139] (1895) 11 Sh Ct Rep 144 at 145 *per* Sheriff Campbell Smith.

[140] At 145.

[141] *Helby v Matthews* [1895] AC 471.

[142] Factors Act 1889 s 9; Sale of Goods Act 1979 s 25(1).

later Scottish Sheriff Court case.[143] *Acme* and *Benton* cannot be regarded as good law.

(6) Personal bar

6-48. Where the pledger has neither title nor authority to pledge the property but the owner of it has acted in such a way as to let the pledgee be misled into believing that the pledger is the owner or has authority to pledge it, then the owner is personally barred from denying the pledge.[144] Personal bar is a general legal doctrine[145] and its application to pledge is carefully examined by Gloag and Irvine.[146] In their view two factors must be present to enable personal bar to operate against an individual, namely (1) that he must have conducted himself in a manner calculated to mislead another, and (2) that the other must have been actually misled by reliance on that conduct.[147]

6-49. Giving another individual possession of one's property does not amount to an act calculated to mislead third parties, for mere possession of a corporeal moveable generally does not give the possessor power to transfer it or create rights over it.[148] As Gloag and Irvine state, it is difficult to imagine circumstances in which personal bar will arise in a pledge context.[149] The point is borne out by an absence of case law.[150]

(7) Owner with voidable title

6-50. The rule is that if a person holding a voidable title to property pledges the goods to another who is in good faith and gives value before his or her own title is avoided, then the pledge is absolutely good.[151] The cardinal example of the voidable title holder is the fraudster.[152] This echoes the rule where ownership is being transferred.[153] According to Gloag, the onus of proof that the pledgee, in such circumstances, did not take in good faith, rests

[143] *Singer Sewing Machine Co Ltd v Quigley* (1914) 30 Sh Ct Rep 56.

[144] See Sim, 'Rights in Security' para 23; Carey Miller with Irvine, *Corporeal Moveables* para 11.12. The rule is the same in England: see *Chitty on Contracts* (29th edn, by H G Beale et al, 2004) vol 2, para 33-127.

[145] See generally Reid and Blackie, *Personal Bar.*

[146] Gloag and Irvine, *Rights in Security* 203–206.

[147] Gloag and Irvine at 204. See *Mitchell v Heys and Sons* (1894) 21 R 600 at 610 *per* Lord Kinnear.

[148] Gloag and Irvine, *Rights in Security* 204–205; Reid and Blackie, *Personal Bar* para 16-06.

[149] Gloag and Irvine, *Rights in Security* 204–205; Reid and Blackie, *Personal Bar* para 16-06.

[150] The two cases analysed by Gloag and Irvine are not true pledge cases. *Mitchell v Heys and Sons* concerns lien. *Pochin & Co v Robinow & Marjoribanks* (1869) 7 M 622 concerns a transfer in security.

[151] *Brown v Marr, Barclay & Co* (1880) 7 R 427; Carey Miller with Irvine, *Corporeal Moveables* para 11.12.

[152] As in *Brown v Marr, Barclay & Co.* See Gloag 'Pledge' para 776.

[153] Sale of Goods Act 1979 s 23.

on the owner of the goods.[154] He can only cite English authority to support this conclusion.[155]

(8) Lack of title or authority: consequences

6-51. If the pledger neither owns the property in question nor has authority from its owner to pledge then the pledgee does not obtain a real right in the property.[156] He or she will have a personal action against the pledger and it is suggested that the basis of this action is breach of warrandice.[157] In practice such an action would probably be pointless. If the pledger is solvent, the debt will be repaid anyway and the non-existence of the pledge will not matter. If the pledger is insolvent, a personal action against him or her will be of no avail.

E. PLEDGE BY A PLEDGEE

(1) General

6-52. The issue of whether pledgees may validly pledge the property already pledged to them, while retaining their own right of pledge, has never been authoritatively resolved in Scots law. Such a transaction has been called both 'subpledge'[158] and 'repledge'.[159] Neither word seems satisfactory. 'Subpledge' suggests a subordinate pledge being created over the original pledge, in other words a right in security in a right in security. This inaccurately reflects what is happening, for a pledge is an incorporeal right and incorporeals generally cannot be pledged.[160] Rather what is happening is that property already pledged is purportedly being made the subject of a second pledge, with the original pledgee now acting as a pledger. 'Repledge' is too wide a term. For instance, it could simply refer to the situation where property released from a pledge is pledged once more.

[154] Gloag, 'Pledge' para 776.

[155] *Whitehorn v Davison* [1911] 1 KB 463. The same rule probably applies here due to the presumption in favour of the evidence of the pledgee arising out of his possession: see *Hariot v Cuningham* (1791) Mor 12405.

[156] Bell, *Principles* § 1364.

[157] Compare English law where the pledger warrants title to the property and is liable in damages if that guarantee is breached: *Cheesman v Exall* (1851) 6 Ex 341, 155 ER 574; G W Paton, *Bailment in the Common Law* (1952) 353 and *Advanced Industrial Technology Corp Ltd v Bond Street Jewellers Ltd* [2006] EWCA Civ 923. But compare Cobbett, *Pawns or Pledges* 37–39.

[158] Eg, W Guthrie, in Bell, *Principles* § 206; Gloag and Irvine, *Rights in Security* 212; Sim, 'Rights in Security' para 25.

[159] Eg, Paton, *Bailment in the Common Law* 368; N E Palmer, *Bailment* (2nd edn, 1991) 1402.

[160] See above, para 5-05.

(2) The English approach

6-53. The English law in this area was set down by the Queen's Bench Division in the important case of *Donald v Suckling*.[161] There it was held by three judges to one that where a pledgee pledges the impignorated property to a third party without the pledger's authority, the pledger will be unable to recover the property from the third party until he or she discharges the debt secured by the original pledge.[162] The action of the pledgee may well amount to a breach of contract, but not one so fundamental to extinguish the pledge.[163]

6-54. The majority were influenced by Story, although in the end going further than the American writer.[164] Story had opined that a pledge by a pledgee would be upheld, but not if the second pledge was for an amount more than the original debt.[165] In fact this was the situation in *Donald*. Yet the majority would not let the pledger recover his property until he paid over the sum for which it was pledged. In a later case, *Donald* was followed, it being held that where the pledged property is damaged as a result of the second pledge, the pledger will only have a claim against the pledgee for damages once he discharges the original debt, for until then he has no right to regain possession of the subject.[166]

(3) Scots law authorities

6-55. The English rule, that a pledge by a pledgee does not amount to a repudiation of the obligations under the original pledge and that the pledger still must discharge the secured debt to recover the property, is set out in all the modern works on pledge south of the border.[167] All seem agreed. However, in Scotland there is dissensus, there being no decided case turning upon the matter.[168] Sheriff Guthrie, in one of his addenda to Bell's *Principles*, adopts the English rule *carte blanche*.[169] Gloag and Irvine effectively do the

[161] (1866) LR 1 QB 585.

[162] See generally, Paton, *Bailment in the Common Law* 368–369; Palmer, *Bailment* 1402–1404; L Smith, 'Security' in A Burrows (ed), *English Private Law* (2nd edn, 2007) para 5.66 and H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Personal Property Security* (2007) para 3.10.

[163] Cockburn CJ at (1866) LR 1 QB 585 at 618 seems to be of the view that there is a breach of contract by the pledgee. Mellor J at 608 apparently believes that there is no breach. For discussion, see Palmer, *Bailment* at 1403–1404. See also M G Bridge, *Personal Property Law* (3rd edn, 2002) 177.

[164] See Mellor J at 606–607 and Blackburn J at 613–614.

[165] J Story, *Commentaries on the Laws of Bailments* (8th edn, revised by E H Bennett 1870) s 324.

[166] *Halliday v Holgate* (1868) LR 3 Ex 299.

[167] Paton, *Bailment in the Common Law* 368–369; T G Ford (ed), 'Pledges and Pawns' in *Halsbury's Laws of England* vol 36(1) (2007 reissue) para 24; Palmer, *Bailment* 1402–1404; Bridge, *Personal Property Law* 177.

[168] There is, however, a valuable long obiter passage on the matter in the judgment of Lord Maxwell in *Wolifson v Harrison* 1974 SLT (Notes) 55 rev'd 1977 SC 384.

[169] Bell, *Principles* § 206.

same, although they put particular emphasis on the point that the original pledge contract may bar pledge by the pledgee.[170] Writing some thirty years later, Gloag simply represents *Donald v Suckling* as the law of Scotland.[171]

6-56. Much earlier, Hume had opined that a pledgee might not impignorate the pledged property himself, unless the original contract of pledge expressly permitted such action.[172] Recently, Sim doubts whether a subpledge, as he calls it, is valid unless the pledgee has either express or implied power to constitute it.[173] Here is his reason:

> 'A pledgor might be content to entrust, say a valuable painting to a pledgee of his choosing, but might be far from willing that it should be sub-pledged to another.'[174]

6-57. The law on this singular matter is surely settled. All three of the judges in the majority in *Donald* stated that where the pledged property was of a special character the pledgee was not allowed to part with it.[175] It seems safe to assume that our law too requires the same where there is *delectus personae* in the pledge contract.

6-58. Returning to the problem in general, there are in fact four reasons why the law of Scotland may not be in accordance with the law of England here. The first three are capable of variance by contract; the fourth is not.

(4) Reason 1: Absence of any right in the pledgee to use the pledged property

6-59. In English law the pledgee is generally entitled to make use of the property pledged.[176] The Scottish pledgee, bar one narrow exception, has no such right.[177] It may be argued therefore that he or she may not pledge the property. For, by doing this in order to obtain a loan from the third party to whom the pledge is being made, the pledgee is arguably using the pledged property to get credit.[178] This certainly is the obiter opinion of Lord Maxwell:

> 'I cannot see the logic of saying that a pledgee may not "use" the subjects without express agreement (Bell [§ 206]), Gloag and Irvine, *Rights in Security*, p 213) and at the same time saying that he may, for example, sub-pledge them.'[179]

[170] Gloag and Irvine, *Rights in Security* 212.

[171] Gloag, 'Pledge' para 769.

[172] Hume, *Lectures* IV, 2.

[173] Sim, 'Rights in Security' para 25.

[174] Sim, 'Rights in Security' para 25.

[175] (1866) LR 1 QB 585 at 608 *per* Mellor J; at 615 *per* Blackburn J and at 618 *per* Cockburn CJ.

[176] See below, para 7-09.

[177] See below, para 7-09. The exception is where use is necessary to maintain the value of the property.

[178] See Denis, *Pledge* 177. Admittedly this is not physical use.

[179] *Wolifson v Harrison* 1974 SLT (Notes) 55 at 57.

It must be admitted that our law does not regard the use of pledged property as a breach of the pledge contract so fundamental as to bring it to an end.[180] Nevertheless, the position with regard to use as opposed to that of English law, may be suggestive of the two systems taking a different approach as regards pledge by a pledgee in general.

(5) Reason 2: Absence of any right in the pledgee to 'deal' with the pledged property

6-60. In English law a pledgee has the 'whole present interest' in the pledged subject.[181] This interest allows him or her lawfully to give up possession of the property to an assignee or a pledgee of his or her own.[182] Further, on default the pledgee has an implied right to sell the property.[183] The power of the pledgee to deal with the subject pledged is shown by the case of *Johnson v Stear*.[184] There the pledgee sold the pledged goods a day before he was entitled to. However, the court held that 'the wrongful act of the pawnee did not annihilate the contract between [pawner and pawnee] nor the interest of the pawnee in the goods under that contract.'[185] Without discharging the debt, the pawner could not recover the property. Thus in terms of English property law, a pledgee can give third parties rights in the pledged property. This may well be a breach of contract, but the pledgee will not be liable in damages and the rights of the third party will remain protected until the pledger discharges the debt which the property secured.

6-61. In Scotland a pledgee does not have the 'whole present interest' in the pledged property, but rather a subordinate real right in it.[186] There is no established implied right to assign the pledge without the consent of the pledger.[187] There is no implied right to sell the property on default.[188] A sale by a pledgee who has no right to sell is ineffectual.[189] Scots and English law

[180] Hume, *Lectures* IV, 2–3; *Kirkwood and Pattison v Brown* (1877) 1 Guth Sh Cas 395; *Wolifson v Harrison* 1974 SLT (Notes) 55 rev'd 1977 SC 384, 1978 SLT 95. See below, paras 7-03–7-09.

[181] *Halliday v Holgate* (1868) LR 3 Ex 299 at 302 *per* Wilkes J. The 'interest' is commonly referred to as 'special property', eg by Cockburn CJ in *Donald v Suckling* (1866) LR 1 QB 585, or by Ford (ed), 'Pledges and Pawns' para 4. Lord Mersey in *The Odessa* [1916] 1 AC 145 at 158–159 prefers the term 'special interest'.

[182] *Mores v Conham* (1609) Owen 123 at 124, 74 ER 946 at 947 *per* Fleming CJ; *Donald v Suckling* (1866) LR 1 QB 585; Ford (ed), 'Pledges and Pawns' paras 22 and 24; Palmer, *Bailment* 1402–1404.

[183] *In re Morritt, ex parte Official Receiver* (1886) 18 QBD 222; *Re Hardwick, ex parte Hubbard* (1886) 17 QBD 690; *The Odessa* [1919] AC 145 at 149 *per* Lord Mersey; Palmer, *Bailment* 1410.

[184] (1863) 15 CBNS 330, 143 ER 812.

[185] (1863) 15 CBNS at 334–335, 143 ER at 814.

[186] See above, para 2-01.

[187] See above, paras 4-21–4-24.

[188] Stair I.xiii.11; Erskine III.i.33; Bell, *Principles* § 207. See below, para 8-04.

[189] *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

differ here and this is the second reason why a pledge by a pledgee may not be permissible north of the border.

(6) Reason 3: The rule *nemo plus juris ad alienum transferre potest, quam ipse haberet*

6-62. As has been seen, *the nemo plus* rule applies equally to the creation of pledge as it does to the creation of any other real right.[190] Given that a pledgee does not own the pledged property, the rule means that a pledge by that person is ineffectual, unless the pledger conferred an express or implied authorisation to do the same.[191] This very point was noted by Shee J, the dissenting judge in *Donald v Suckling*.[192] However, his fellow judges avoided the problem by focusing on the 'interest' which a pledgee under English law apparently has in the pledged property.[193] It is submitted that Scots law may be incapable of overriding the rule *nemo plus* in this fashion.

(7) Reason 4: The rule *mobilia non habent sequelam*

6-63. Three reasons have already been given why a pledgee may not validly pledge the security subjects. They would indicate that Gloag and Guthrie are wrong on this matter.[194] However, Hume may still be correct when he states that a pledgee given power to pledge may validly do so.[195] For, it must be the case that as a matter of contract a pledger can give a pledgee power to pledge, just as the pledgee can be given power to use the pledged property or a power to sell it. The rule *nemo plus* cannot apply if the pledgee's actions are authorised.

6-64. In terms of contract law Hume is correct. In terms of property law he may be incorrect. For, by the operation of the maxim *mobilia non habent sequelam*, the delivery of the pledged property by the pledgee to his or her own pledgee probably brings the right of pledge to an end.[196] Here is Erskine:

> '[I]n a pledge of moveables, the creditor who quits the possession of the subject loses the real right he had upon it.'[197]

[190] See above, para 6-35.

[191] See G Baudry-Lacantinerie, *Du nantissement des privilèges et hypothèques et de l'expropriation forcée* (3rd edn, 1906) s 95, referred to in Denis, *Pledge* 177. A parallel might be made with the power of a lessee to sub-let.

[192] (1866) LR 1 QB 585 at 600–601. The interesting point about Shee J's judgment as a whole is that he relies on Stair, Erskine and Bell, a point noted by Lord Maxwell in *Wolifson v Harrison* 1974 SLT (Notes) 55 at 58.

[193] Eg, *per* Mellor J at 613 and *per* Cockburn CJ at 618–619.

[194] That is, in regarding Scots law to be the same as English law: see above, para 6-55.

[195] Hume, *Lectures* IV, 2. See also Denis, *Pledge* 181–182.

[196] The maxim is used by Bankton I.xvii.1 and I.xvii.3 in relation to pledge but apparently not since. For discussion, see P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) 395.

[197] Erskine III.i.33.

This very statement was relied upon by Shee J, the dissenting judge in *Donald v Suckling*.[198] Bell made the same point in more than one place.[199] It may be argued that the pledgee remains in civil possession through his or her own pledgee.[200] But the law only sanctions a pledgee with natural possession delivering it to another and retaining only civil possession for the most limited of purposes.[201] Pledging to a third party has not been recognised as one of them. Of course a court might be willing to sanction such a possibility, but this has not happened to date.

6-65. Consequently, the effect of the pledgee pledging to a third party is that the third party does acquire a real right, where the pledgee has the authorisation of the pledger. However, in giving up possession the pledgee loses his or her own right of pledge. Thus only the third party now has a subordinate real right in the property. In effect the pledge has been assigned.

F. VOIDABLE PLEDGES

(1) General

6-66. A real right of pledge may be voidable in the same circumstances as where a title to property is vulnerable to challenge.[202] Examples are where the pledge has been obtained by fraud or undue influence. Special mention may be made of two cases: (a) absence of good faith on the part of the pledgee; and (b) private knowledge of a prior right.

(2) Absence of good faith on the part of the pledgee

6-67. While its exact ratio is unclear and its application has been limited by subsequent decisions, the case of *Smith v Bank of Scotland*[203] requires creditors to act in good faith. In particular, in cases of third party security, i.e. where there is someone providing security distinct from the debtor and that person is in a close relationship with the debtor, for example husband and wife, the creditor should advise the security provider to seek independent legal advice.[204] As a general doctrine of security, it will apply to pledge.[205]

[198] (1866) LR 1 QB 585 at 603.

[199] Bell, *Principles* § 206 and 1364; Bell, *Commentaries* II, 22. See also Gloag, 'Pledge' para 771.

[200] The law of Louisiana takes this approach. See R Slovenko, 'Of Pledge' (1958) 33 *Tul LR* 59 at 95. See also American Law Institute, *Restatement of the Law of Security* (1941) 83–85.

[201] See below, paras 8-20–8-28.

[202] Reid, *Property* paras 614–617.

[203] 1997 SC (HL) 111.

[204] See G L Gretton, 'Sexually Transmitted Debt' 1997 *SLT (News)* 195; K G C Reid and G L Gretton, *Conveyancing 2003* (2004) 73–82; S M Eden, 'Cautionary tales – the continued development of *Smith v Bank of Scotland*' (2003) 7 *Edin LR* 107 and 'More cautionary tales' (2004) 8 *Edin LR* 276.

[205] Carey Miller with Irvine, *Corporeal Moveables* para 11.01.

(3) Private knowledge of a prior right

6-68. Due to an absence of case law on the subject, it is not clear whether the doctrine of 'offside goals' applies to pledge.[206] To give the paradigm case, if Alexandra agrees to pledge to Barbara and then does the same with Cathie who is in bad faith and takes delivery, it is not clear whether Barbara can reduce Cathie's right. However, the position is equally unclear if having agreed to pledge to Barbara, Alexandra transferred ownership of the property in question to Cathie. In South Africa, the 'offside goals' rule, or the 'doctrine of notice' as it is called there, does apply to pledge.[207] It applies in Sweden too.[208]

6-69. Despite the lack of authority, it may be suggested that the rule will apply in the first example which has been outlined. Undertaking to pledge to Barbara and then pledging to Cathie is very similar to agreeing to sell to Barbara and then selling to Cathie. In that case of 'double sale' it is clear that the 'offside goals' rule applies. It is submitted that the rule applies for 'double pledge'.[209]

6-70. The way in which Professor Reid's reformulation of the Scots law on 'offside goals'[210] has gained acceptance by the courts would suggest that the rule applies in the second situation given above, as well as in other similar cases.[211] But it is impossible to be sure.

.

[206] On this doctrine generally, see Reid, *Property* paras 695–700; D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) paras 32.51–32.62; S Wortley, 'Double Sales and the Offside Trap' 2002 *JR* 291; R G Anderson, '"Offside goals" before *Rodger (Builders)*' 2005 *JR* 277 and Carey Miller with Irvine, *Corporeal Moveables* paras 8.28–8.32.

[207] See Lubbe, 'Mortgage and Pledge' para 532; Badenhorst, Pienaar and Mostert, *Silberberg and Schoeman's The Law of Property* 83–84; T J Scott and S Scott (eds), *Wille's Law of Mortgage and Pledge in South Africa* (3rd edn, 1987) 58–59; *Coaton v Alexander* (1879) 9 Buch 17.

[208] B Helander in J G Sauveplanne (ed), *Security over Corporeal Movables* (1974) 249 at 252.

[209] There is, however, early authority in relation to heritable security where the rule was not applied in cases between competing creditors: see *Blackwood v The Other Creditors of Sir George Hamilton* (1749) Mor 4898; *Henderson v Campbell* (1821) 1 S 103 (NE 104) and *Leslie v McIndoe's Trs* (1824) 3 S 48 (NE 31).

[210] Reid, *Property* paras 695–700.

[211] See *Scotlife Home Loans (No 2) Ltd v Mair* 1994 SCLR 791 at 795 *per* Sheriff Principal Maguire and *The Advice Centre for Mortgages Ltd v McNicoll* 2006 SLT 591 at para 46 *per* Lord Drummond Young. For a discussion of the latter, see A J M Steven, 'Options to Purchase and Successor Landlords' (2006) 10 *Edin LR* 432.

7 Pledge: Rights and Duties of the Parties

A. THE PLEDGER

7-01. The basic right of the pledger is to have the pledged property returned upon discharge of the obligation secured. The basic duty of the pledgee is to effect that return.[1] This has been appreciated from the earliest days of our law.[2]

7-02. The pledgee must restore the subject matter of the pledge in pristine condition, subject to normal wear and tear.[3] In the words of Lord President Dunedin: 'who ever heard of a person who had a pledge being allowed to give that pledge back again in a different condition from that in which he got it?'[4] Unless there is an agreement providing otherwise, the pledgee must return the property which was actually pledged and not some equivalent article.[5]

B. THE PLEDGEE

(1) Use of the property

7-03. It is an important question whether the pledgee may make use of the pledged property. From the earliest days, when people were the subjects of

[1] Erskine III.i.33; Bell, *Principles* § 206. See D 44.7.1.6; § 1223 *BGB*; art 1871 *Codigo civil*; G F Lubbe, 'Mortgage and Pledge' in *LAWSA* vol 17 (revised T J Scott, 1999) para 538; A J M Steven, 'The Effect of Security Rights *Inter Partes*' in U Drobnig, H J Snijders and E-J Zippro (eds), *Divergences of Property Law, an Obstacle to the Internal Market?* (2006) 47 at 52.

[2] *Douglas v Menzeis* 1 March 1569; Balfour, *Practicks* 196.

[3] W M Gloag, 'Pledge' in *Encyclopaedia of the Laws of Scotland* vol 11 (1931) para 767; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 24.

[4] *Johnston v Irons* 1909 SC 305 at 317.

[5] *Crerar v Bank of Scotland* 1921 SC 736 aff'd 1922 SC (HL) 137. (The case actually involves an assignation of shares. However, it illustrates a general principle.)

pledge, the answer has been in the negative. Pufendorf tells us that in the kingdom of Pegu wives and children might be pledged.[6] If the pledgee slept with a pledged wife or daughter, however, the loan was forfeited and the wife or daughter had to be returned. He does not tell us what happened if the pledgee interfered with a son.

7-04. In Roman law, making use of a pledged subject was clearly prohibited.[7] Ulpian writes that where a slave girl has been pledged and the pledgee puts her to prostitution or engages her in some other disreputable conduct, the *pignus* of her is discharged immediately.[8] In fact usage of the subject matter of a pledge in Roman law amounted to theft.[9] The early Scots law did not have such a severe rule. Rather, the pledgee:

> 'may on na wayis use nor handle the samin, quhairby it may be maid worse then it was the time that it was gevin him in wad.'[10]

Hence usage was permitted if it was clear that the pledged property would remain in its pristine condition. Of course by that time people could not be pledged in the same manner as inanimate objects.

7-05. With the Reception of Roman law into Scotland the prohibition on use here became an absolute one.[11] However, the pledgee in breach of this rule is not regarded as being a thief.[12] Further and importantly, the right of pledge is not extinguished by the pledgee using the property.[13] Instead there is liability in damages. The quantum is the cost to hire the property for the period it was used.[14] Therefore it would seem that the theoretical basis of the claim is recompense for unauthorised use, the pledgee being liable in *quantum lucratus*.[15]

7-06. There is a general problem here. In the words of Lord Stott, the net effect of the rule is 'to give carte blanche to the pledgee to enjoy the use of items deposited with him as security. … subject only to … some sort of *post factum* accounting to the owner'.[16] The view is reinforced by the conclusion of the sheriff in *Kirkwood and Pattison v Brown*.[17] He held that where a horse was pledged to coal merchants it might be used to do work for the firm, provided that the value of the service performed was paid to the pledger. However, Lord Stott would seem to have overlooked the fact that under the traditional rule, the pledger would be able to get an interdict against the pledgee if he

[6] S Pufendorf, *De Jure Naturae et Gentium* (1672) V.10.13.
[7] Thomas, *Roman Law* 330. See also Denis, *Pledge* 167–172.
[8] D 13.7.24.3.
[9] D 47.2.55.pr; J 4.1.6.
[10] Balfour, *Practicks* 195.
[11] Bell, *Principles* § 206.
[12] G H Gordon, *The Criminal Law of Scotland* (3rd edn, by M G A Christie, 2001) para 15.41.
[13] Hume, *Lectures* IV, 2–3; *Wolifson v Harrison* 1977 SC 384.
[14] Hume, *Lectures* IV, 2–3.
[15] W M Gloag, *Contract* (2nd edn, 1929) 329.
[16] *Wolifson v Harrison* at 392.
[17] (1877) 1 Guth Sh Cas 395.

wished to stop the use. Therefore, the correct decision in *Kirkwood* should have been a reassertion of the absolute prohibition, followed by an observation that no interlocutory action had been taken and then as before an award of the relevant hire cost to the pledger.

7-07. An exception to the general rule is admitted where use is necessary to maintain the value of the pledged property.[18] The cardinal example is the impignorated animal. A horse which is not exercised will become unhealthy. However the level of use must be no more than is required for this purpose. Deploying the animal to deliver coal as in *Kirkwood* is not permissible. Nor is riding the horse in the 3.20 at Musselburgh. At the other extreme there is *obiter* authority to the effect that if a pledged horse is not exercised the pledgee will be liable to the pledger in damages for the deterioration in the animal's health caused thereby.[19]

7-08. The pledger and pledgee may agree that the latter is allowed to use the pledged property. Such an arrangement is termed a *pactum antichresis* and was common in Roman law.[20] The perceived benefit gained by the pledgee is normally set off against interest due on the debt. Further any surplus can be agreed to be set off against the principal sum. The case of *Moore v Gledden*[21] would appear to be an example of an antichretic pledge. Plant was pledged by a contractor to a railway company. However, the contractor continued to use the plant. He could only do this as the company's agent, hence the pledge was antichretic.

7-09. On the matter of the use of pledged property, South African law and most civilian systems take the same approach as Scotland.[22] However, English and Scots law part company due to the civilianism of the latter. The English rules were set out by Chief Justice Holt in the landmark decision of *Coggs v Bernard*.[23] The principal one is that the pledgee may use the property if it will not be the worse for it. Therefore the pledgee may not wear pledged clothes.[24] A second rule is that if the pledgee must incur cost in respect of the upkeep of the property, then there is a specific right to use it in recompense for this. For example, horses require to be fed and a pledgee will expend money in doing this. In return the horse may be ridden. The difference between the English and Scots law can be seen; it is unfortunate that Gloag and Irvine adopt the wrong set of rules.[25]

[18] Hume, *Lectures* IV, 2–3. See also Denis, *Pledge* 172–173.

[19] *Kirkwood and Pattison v Brown* at 397 *per* Sheriff Fraser.

[20] Bankton I.xvii.3. Indeed, there might have been such an arrangement implied in *Kirkwood*, for a harness was handed to the pledgee along with the horse.

[21] (1869) 7 M 1016.

[22] Lubbe, 'Mortgage and Pledge' para 494; § 1213(1) *BGB*; art 1870 *Codigo civil*; art 2736 *Quebec Civil Code*; art 3166 *Louisiana Civil Code*. The American Law Institute, *Restatement of the Law of Security* (1941) s 22 also prohibits use without the authorisation of the pledger.

[23] (1703) 2 Ld Raym 909, 92 ER 107. See also *Anon* (1693) 2 Salk 522, 91 ER 445; G W Paton, *Bailment in the Common Law* (1952) 369–370.

[24] Denis, *Pledge* 185–186 and Cobbett, *Pawns or Pledges* 55–57.

[25] Gloag and Irvine, *Rights in Security* 213. See also Sim, 'Rights in Security' para 24.

(2) Fruits

7-10. In general the pledgee is not entitled to appropriate the fruits of the pledged item for his or her own use.[26] An exception is admitted in the case of fruits which require to be extracted for the welfare of the property.[27] Cattle must be milked to keep them healthy. Similarly sheep require to be shorn every so often. The rule is that the pledgee may keep such natural fruits unless there is an agreement to the contrary. They are set off against the debt owed by the pledger. A similar rule applies in England.[28] According to Hume they may be set off either against the cost incurred in caring for the animal or the actual debt itself.[29] It is submitted, however, that the best way to set them off is first against the expenses incurred by the pledgee, secondly against any interest due and then thirdly against the principal debt.[30] It is possible to have a conventional *pactum antichresis* in respect of the fruits.[31] These were common in Roman practice.[32]

(3) Expense of looking after the property

7-11. The pledgee is entitled to compensation in respect of money laid out upon the care of the pledged property.[33] As has been seen, there are special rules governing where the property produces natural fruits, so that these are set off against the cost of care.[34] Erskine, however, appears to express the general rule more widely than just has been stated:

> 'The creditor is entitled to an action against the debtor for the recovery of the expenses which he has disbursed profitably on the subject while in his hands.'[35]

7-12. A similar passage appears in Mackenzie's *Institutions*.[36] The literal meaning – namely that the cost of improvements is recoverable – is very difficult to reconcile with the rule of unjustified enrichment that only *bona fide* possessors are entitled to compensation for improvements.[37] Grotius is

[26] Bankton I.xvii.3; Hume, *Lectures* IV, 2–4. See also § 1213(1) *BGB* and art 3168 *Louisiana Civil Code*.

[27] Hume, *Lectures* IV, 2–4. See too § 1213(2) *BGB*.

[28] *Mores v Conham* (1610) Owen 123, 74 ER 946; *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107.

[29] Hume, *Lectures*, IV, 4; Bell, *Principles* § 1364. The rule is the same in England: see *Chitty on Contracts* (29th edn, by H G Beale et al, 2004) vol 2, para 33-131.

[30] See also Bankton I.xvii. 3.

[31] Stair I.xiii.11.

[32] Bankton I.xvii. 3.

[33] Erskine III.i.33. The rule comes from Roman law: see D 13.7.8pr and R Zimmermann, *The Law of Obligations* (1990) 227. See also Denis, *Pledge* 227–231.

[34] See above, para 7-10.

[35] Erskine III.i.33.

[36] Sir George Mackenzie, *Institutions of the Law of Scotland* (2nd edn, 1688) III.1.

[37] See Gloag, *Contract* 324.

certainly clear that in Roman-Dutch law the pledgee can only recover necessary expenses.[38] This appears to be the rule in most systems.[39]

(4) Duty of care of pledgee

7-13. The ownership of the impignorated property remains with the pledger. Consequently, the risk remains with that party as well.[40] Thus if the pledged sheep get struck by lightning and are killed, the pledger must suffer the loss while remaining liable upon the obligation for which they were pledged as security. However, the pledgee is expected to exercise a certain level of care in respect of the property and if there is failure in that duty there will be liability for the loss.[41] In a very early case, we get an idea of the standard care which the pledgee must exercise:

> 'Gif ony man lendis to ane uther ane sowme of money, and ressavis a wad thairfoir, to be kept be him, until his money be restorit to him, and it happin the samin wad to be stollin be theivis, robberis or brigantis, or to be tint and lost, be ony chance, force or violence, without any fault or negligence of the keipar, to the quhik he could not resist, he sould not be compellit or haldin to mak restitutioun thairof; and zit nevertheless he hes gude actioun for repetitioun of his money, for the quhilk the samin pledge was gevin.'[42]

7-14. The Reception of Roman law saw the adoption of the civilian rules on the matter,[43] but there is no real difference. Stair wrote that the pledgee must exercise such diligence as prudent men used in their affairs.[44] The pledgee was not strictly liable. By Bell's time, this had come to be expressed simply that the pledgee must bestow ordinary care.[45] In the only twentieth-century case on the matter a pledged watch had been stolen from a pawnbroker's locked safe by a housebreaker.[46] The pledger sought to recover his loss from the broker. It was held that having placed the watch in the safe the broker could neither be regarded as negligent nor at fault and he was therefore not liable in damages.

[38] Grotius, *Inleidinge*, (1631) III.8.7. See too Lubbe, 'Mortgage and Pledge' para 538.

[39] See § 1216 *BGB*; art 1867 *Codigo civil*; art 2740 *Quebec Civil Code*. In terms of art 3167 *Louisiana Civil Code*, however, the pledgee may recover 'useful and necessary expenses' made for the preservation of the property. The American Law Institute, *Restatement of the Law of Security* (1941) s 25 allows recovery of 'reasonable expenses'.

[40] Bell, *Principles* § 206; Hume, *Lectures* IV, 4.

[41] *Elliot v Conway* (1915) 31 Sh Ct Rep 79.

[42] *Foulis v Cognerlie* 6 April 1566; Balfour, *Practicks* 195.

[43] On the Roman law, see Zimmermann, *Obligations* 225–227. See also Denis, *Pledge* 222–227.

[44] Stair I.xiii.12. See also Erskine III.i.33. In Spain today, the pledgee must exercise 'the diligence of a prudent administrator': art 1867 *Codigo civil.*

[45] Bell, *Principles* § 206. The American Law Institute, *Restatement of the Law of Security* s 17, imposes a 'duty of reasonable care'. Compare §1215 *BGB.* See also Steven, 'The Effect of Security Rights *Inter Partes*' 47 at 52.

[46] *Elliot v Conway* (1915) 31 Sh Ct Rep 79.

7-15. In England, Coke wrote that the pledgee 'ought to keepe [the pledged property] no otherwise than his owne'.[47] This mortified Sir William Jones, for of course people all look after their own property to greater or lesser extents than others.[48] He seems to suggest that theft of the property, as opposed to robbery, indicates a lack of care in the pledgee.[49] However, this will probably depend on the facts in question, as Chief Justice Holt's opinion in *Coggs v Bernard*[50] that the pledgee must exercise ordinary care is accepted as being a correct statement of the law.[51] Like Scots law, the root of this is the law of Rome.[52] In English law, the pledgee becomes strictly liable if he or she retains the property after payment for the debt is tendered.[53] There is analogous Scottish authority for the second of these propositions in a case involving poinding of sheep.[54]

[47] Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary on Littleton* (19th edn, by F Hargrave and C Butler, 1832) I, 89a.

[48] Sir William Jones, *An Essay on the Law of Bailments* (1781) 75.

[49] Jones, *Law of Bailments* at 75–83; Paton, *Bailment in the Common Law* 360.

[50] (1703) 2 Ld Raym 909, 92 ER 107.

[51] Palmer, *Bailment* 1405; *Chitty on Contracts* vol 2, para 33-126.

[52] Zimmermann, *Obligations* 204–205; A Borkowski and P du Plessis, *Textbook on Roman Law* (3rd edn, 2005) 305.

[53] *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107.

[54] *Fraser v Smith* (1899) 1 F 487. Poinding was replaced with attachment by the Debt Arrangement and Attachment (Scotland) Act 2002.

8 Enforcement and Extinction of Pledge

A. THE REAL RIGHT

8-01. A pledgee has a real right in the moveable property which is the subject matter of the pledge.[1] The debtor retains ownership of the property.[2] The pledgee's subordinate real right covers the entire property pledged including its fruits.[3] Pledge is a type of real right in security and as such the pledgee is entitled to enforce the right in the thing pledged against the world. If the pledger transfers title to the property, the right of pledge remains good against the singular successor.[4] Further, in the event of the pledger's insolvency the pledge will remain good as against the trustee in sequestration or liquidator.[5] A pledge will be good against a receiver if the real right was

[1] Stair I.xiii.11; Bankton I.xvii.1; Bell, *Commentaries* II, 21; Bell *Principles* § 1363; Reid, *Property*, para 5; Carey Miller with Irvine, *Corporeal Moveables* para 11.04.

[2] Bankton I.xvii.1; Erskine III.i.33; Bell, *Principles* § 1364. It is therefore not a good idea to define pledge as being the situation where property is 'transferred in security', although the transfer contemplated is that of possession. See D M Walker, *Principles of the Law of Scotland* (4th edn, 1989) vol III, 394.

[3] D 20.1.13.pr; J Story, *Commentaries on the Laws of Bailments* (8th edn, revised by E H Bennett, 1870) s 292; Cobbett, *Pawns or Pledges* 35; American Law Institute, *Restatement of the Law of Security* (1941) s 3. There is analogous Scottish authority concerning the landlord's hypothec: *Lamb v Grant* (1874) 11 SLR 672.

[4] Hume, *Lectures* IV, 4; *Moore v Gledden* (1869) 7 M 1016.

[5] H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th edn, by T A Fyfe, 1914) 522–524; *Hamilton v Western Bank* (1856) 19 D 152. See also D W Mackenzie Skene, *Insolvency Law in Scotland* (1999) 157–159.

constituted before the creation of the floating charge.[6] If created after that but before receivership its effect will be governed by the document creating the floating charge.[7] Insolvency processes apart, the real right of pledge will be effective against any diligence executed posterior to its creation,[8] in particular an attachment or an arrestment.

8-02. The pledgee has possession of the property and consequently will have a good action against anyone who wrongfully dispossesses him or her during the currency of this right.[9] It is suggested that this claim will be based upon spuilzie.[10]

8-03. In England it is said that the pledgee has a 'special property',[11] or at least a 'special interest',[12] in the pledged property. According to Gloag and Irvine, the first of these phrases, 'though unknown to Scotch law, would appear conveniently to represent the right, more than possession, though less than property, with which the pledgee is invested in Scotland'.[13] This statement shows the malaise which Scots property law was in at the time.[14] It is submitted that the term 'real right' is eminently preferable. A similar example of lack of understanding is shown in *Catherine Crossgrove or Bradley*.[15] A pawnbroker was charged with the theft of goods pledged to her. She was acquitted on the basis that the charge was irrelevant. In the words of Lord Moncreiff, pledging goods 'not merely gave a right of possession, but a title to the goods themselves, which, by lapse of time, became absolute, and enabled the party to sell, and give a valid right to all the world'.[16] Of course title actually remains with the pledger and the pawnbroker only has the right to sell by statute if the debt is not repaid.[17]

[6] Insolvency Act 1986 s 60(1)(a).

[7] Companies Act 1985 s 464. But see the Bankruptcy and Diligence etc (Scotland) Act 2007 s 40 (not in force at the time of writing).

[8] *Bridges v Ewing* (1836) 15 S 8; *North-Western Bank Ltd v Poynter, Son and Macdonalds* (1894) 22 R (HL) 1.

[9] Hume, *Lectures* IV, 4.

[10] On spuilzie, see Reid, *Property* paras 161–166 and Carey Miller with Irvine, *Corporeal Moveables* paras 10.24–10.31.

[11] *Donald v Suckling* (1866) LR 1 QB 585 at 613 *per* Blackburn J and at 619 *per* Cockburn CJ. See also M G Bridge, *Personal Property Law* (3rd edn, 2002) 176; *Chitty on Contracts* (29th edn, by H G Beale et al, 2004) vol 2, para 32-118 and N Palmer and A Hudson, 'Pledge' in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd edn, 1998) 621 at 631–635.

[12] *The Odessa* [1916] 1 AC 145 at 158–159 *per* Lord Mersey.

[13] Gloag and Irvine, *Rights in Security* 200.

[14] See K Reid, 'Property Law: Sources and Doctrine' in Reid and Zimmermann, *History* vol 1, 208–210.

[15] (1850) J Shaw 301. I am grateful to Jill Robbie for drawing this to my attention.

[16] At 305. Similarly, see *Watt v Home* (1851) J Shaw 519 at 521 *per* Lord Ivory: '[A] pledger parts with the property in the goods, and the broker acquires, by force of special contract, a *proprium jus* in them; so that not only cannot the pledger redemand them, except on repayment of the loan, but he may even steal them from the pawnbroker.'

[17] G H Gordon, *The Criminal Law of Scotland* (3rd edn, by M G A Christie, 2001) paras 14.30 and 17.08.

B. ENFORCEMENT: GENERAL

8-04. If the pledger fails to discharge the obligation which the pledge secures, or becomes insolvent, the pledgee may enforce the security.[18] In the later Roman law, the pledgee had an automatic right to sell the subject matter of the pledge, unless this was excluded by the contract of pledge.[19] This rule did not find its way into our law. Here is Stair:

> 'Our custom allows not the creditor to sell the pledge, but he may poind it, or assign his debt, and cause arrest it in his hand, and pursue to make forthcoming.'[20]

8-05. The 'custom' which does not admit a right to sale in the pledgee is surely Anglo-Norman custom, though it apparently recognised forfeiture as the remedy which the court would award.[21] However, the pledge of Stair's time is clearly a collateral security and the remedy is diligence. This remedy remained in use in the days of Bankton and Erskine, although it was becoming less popular.[22] In particular if the pledgee chooses to assign the debt to a trustee whom he then gets to arrest the property in his hands, as Erskine points out, he runs the risk that another creditor of the pledger has executed a prior arrestment.[23] Such an arrestment will prevail, as the pledge has been extinguished due to the property not being in the possession of the owner of the debt.

8-06. Instead, by Bankton and Erskine's time the preferred remedy was to apply to the judge-ordinary, i.e. the sheriff, for permission to have the property sold at a public sale or roup.[24] The debtor had to be made a party to the sale. This procedure was still going on in Hume's time, by which point the alternative route of executing diligence had become unknown in practice.[25] Bell, in discussing the pledgee's remedies, simply writes that a summary application to the sheriff to sell the property must be made.[26] This remains the law today.[27] Obviously if the sale raises more than the debt due, the surplus is paid to the pledger. Conversely if the whole debt is not discharged by it, the pledgee retains a personal right against the pledger in respect of the shortfall.[28] The title obtained by the buyer at the sale is derivative and not original.[29]

[18] Bell, *Principles* § 203.

[19] See Erskine III.i.33; R Zimmermann, *The Law of Obligations* (1990) 224–225.

[20] Stair I.xiii.11.

[21] See above, para 3-26.

[22] Bankton I.xvii.4; Erskine III.i.33.

[23] Erskine III.i.33.

[24] Bankton I.xvii.4; Erskine III.i.33.

[25] Hume, *Lectures* IV, 5.

[26] Bell, *Principles* § 207.

[27] See, eg, W A Wilson, *The Law of Scotland on Debt* (2nd edn, 1991) 92 and Carey Miller with Irvine, *Corporeal Moveables* para 11.16. In *Industrial and General Trust Ltd, Petitioners* (1890) 27 SLR 991, however, application was made to the Court of Session.

[28] *Elliot v Conway* (1915) 31 Sh Ct Rep 79. For England, see *Jones v Marshall* (1889) 24 QBD 269.

[29] *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

8-07. In South Africa, the remedy at common law for the pledgee remains that of levying execution, in other words executing diligence.[30] In *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd*[31] it was held that agreements by which creditors can sell security subjects without a court order, i.e. arrangements for *parata executie*, were unconstitutional as the debtor's right to a hearing was regarded as lost. The Supreme Court of Appeal, however, took a different approach in *Bock v Duburoro Investments (Pty) Ltd*.[32] *Parata executie* is competent, but the debtor retains the right to go to court if the sale is carried out in a prejudicial manner.[33] Forfeiture clauses are illegal, but it is permissible for the parties to agree that upon default the creditor may have the property for a fair price.[34] Thus if its value exceeds the debt, the excess must be paid to the debtor.[35]

8-08. Under English law, a pledgee has an implied power of sale.[36] If the pledge secures a term loan, then the property may be sold on default at the term.[37] If the loan is one repayable on demand then the pledgee must give notice to the pledger that there is about to be a sale.[38] Ireland has similar rules.[39]

8-09. In Germany, the pledgee does not require judicial authority to sell the pledged property. However, the *BGB* lays down specific rules about how such a sale must be carried out.[40] In particular, there must be a public auction of which the pledger is given notice.[41] Analogous rules apply in the Netherlands, where the pledgee must get permission from the president of the district court if he or she intends to do anything other than sell at a public auction.[42] In France, a distinction is made between the civil pledge (*gage civil*) and the commercial pledge (*gage commercial*).[43] In the latter, as the name

[30] G F Lubbe, 'Mortgage and Pledge' in *LAWSA* vol 17 (revised T J Scott, 1999) para 541; G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 765.

[31] 2001 (1) SA 251 (E).

[32] [2003] 4 All SA 103 (SCA). See also Pienaar and Steven, 'Rights in Security' at 765–766.

[33] *Bock v Duburoro Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA) at 107C–D.

[34] At 107E–G.

[35] P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) 394.

[36] *Pothonier v Dawson* (1816) Holt 383, 171 ER 279; *The Odessa* [1919] AC 145 at 159 *per* Lord Mersey; *Chitty on Contracts* vol 2, para 33-128; Palmer and Hudson, 'Pledge' in *Interests in Goods* at 638.

[37] *In re Morritt, ex parte Official Receiver* (1886) 18 QBD 222.

[38] *Martin v Reid* (1862) 11 CBNS 730, 142 ER 982. See generally, N E Palmer, *Bailment* (2nd edn, 1991) 1410–1412.

[39] M G Dickson, W Rosener and P M Storm (eds), *Security on Movable Property and Receivables in Europe* (1988) 80–81.

[40] §§ 1233–1245 *BGB*.

[41] §§ 1235–1237 *BGB*.

[42] Arts 3:250 and 3:251 *BW*; W M Kleijn, J P Jordaans, H B Krans, H D Ploeger and F A Steketee, 'Property Law' in J M J Chorus, P H M Gerver, E H Hondius and A K Koekkoek (eds), *Introduction to Dutch Law* (3rd edn, 1999) 116.

[43] Dickson, Rosener and Storm (eds), *Security on Movable Property and Receivables in Europe* 86.

suggests, the parties involved are transacting in the course of a business and the pledgee is legally authorised to sell. With the civil pledge, the pledgee needs to go to court to obtain the same right. In Spain, the pledgee may sell the property under the supervision of a notary public.

8-10. Given that so many of these countries give the pledgee an inherent power of sale one could be tempted into suggesting that Scots law goes down the same road. However, with the pawnbroking provisions and the fact that a right of sale is in practice universally stipulated for in commercial transactions, such a legislative move would not be worthwhile.

C. EXPRESS POWERS OF SALE

8-11. It is possible for the parties to the contract of pledge to agree that in the event of the pledger's default the pledgee will have power to sell the property without obtaining judicial authority.[44] As Lord Neaves states:

'Impignoration, with a power of sale, is an intelligible and well-known contract.'[45]

8-12. As noted above, the technical name for this arrangement is *parata executie*.[46] The theoretical basis of the agreement must be that the pledgee sells as the pledger's agent, for otherwise the rule *nemo plus* would apply. Where the pledgee is indeed given such an express power of sale, the pledger must be given a specific opportunity to discharge the secured obligation before going ahead and exercising the right.[47]

8-13. By statute, the right to sale without judicial authority is conferred upon licensed pawnbrokers if the pawn is not redeemed after six months, or such longer period that has been agreed.[48] The pawner must be given a fortnight's notice of the broker's intention to sell.[49] Within 21 working days after the sale, the pawner must be furnished with information as to the sale, its proceeds and expenses.[50] If there is a surplus, this must be returned to the pawner.[51] If there is a deficit, the debt is reduced by the net proceeds of the sale.[52] If the pawnbroker is challenged, the onus is on him or her to prove that reasonable care was used to ensure that the true market value was

[44] See, eg, *North-Western Bank Ltd v Poynter, Son and Macdonalds* (1894) 22 R (HL) 1; Gloag and Irvine, *Rights in Security* 213; Carey Miller with Irvine, *Corporeal Moveables* para 11.16 and L Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 520–521.

[45] *Moore v Gledden* (1869) 7 M 1016 at 1020. Compare W M Gordon, 'Roman Influence on the Scots Law of Real Security' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 157 at 168–169.

[46] See Lubbe, 'Mortgage and Pledge' para 539. See above, para 8–07.

[47] *Murray of Philiphauch v Cuninghame* (1668) 1 Br Sup 575.

[48] Consumer Credit Act 1974 ss 116(1)–(3) and 121(1); Consumer Credit (Realisation of Pawn) Regulations 1983, SI 1983/1568.

[49] Consumer Credit (Realisation of Pawn) Regulations 1983.

[50] Consumer Credit Act 1974 s 121(2); Consumer Credit (Realisation of Pawn) Regulations 1983.

[51] Consumer Credit Act 1974 s 121(3).

[52] Consumer Credit Act 1974 s 121(4).

obtained and that the expenses of the sale were reasonable.[53] There is Sheriff Court authority holding that a pawnbroker upon sale does not warrant title but merely that the property is the subject matter of an irredeemable pledge and that he or she was not aware of any defect in title at the time of the sale.[54] This conflicts with the Sale of Goods Act and is surely wrong.[55] According to the website of the National Pawnbrokers Association of the UK, quoting a report in *The Daily Mail* from 1996, around 88 per cent of goods are redeemed: http://www.thenpa.com/pawnbroking.htm.

D. FORFEITURE

8-14. As has been seen, in its earliest days pledge was not a collateral security but one in which the pledged property was forfeited to the creditor if the obligation secured was not discharged.[56] This indeed was the case in early Roman law.[57] However, in later times it became the law that there was no forfeiture unless there was an express agreement to that effect. Such an agreement was termed a *pactum legis commissoriae*. Later still, the Emperor Constantine prohibited such an arrangement.[58] Notwithstanding this, the Anglo-Norman law hundreds of years later still regarded forfeiture as the principal pledge remedy.[59]

8-15. By Stair's time things had changed. An express clause was required. He states that the rules governing the treatment of *pactum legis commissoriae* are the same for pledges and wadsets.[60] This glosses over the fact that with wadset the debtor may have only a reversionary right whereas a pledger has ownership. Leaving this aside for now, the rule is that a forfeiture clause is not effective unless there is a court declarator giving it effect.[61] The courts will do everything in their power to let the debtor purge the clause. In Erskine's words:

> 'The *pactum legis commissoriae* in moveable pledges has no stronger effects than in wadsets of land … and the same equity of redemption is indulged to the debtor in both cases.'[62]

[53] Consumer Credit Act 1974 s 121(6).

[54] *Hislop v Anderson* (1919) 35 Sh Ct Rep 116.

[55] Sale of Goods Act 1979 s 12 (warranty of title). At the time of *Hislop* the relevant statute was the Sale of Goods Act 1893. In England, it is accepted that the Sale of Goods Act warranties apply unless they are expressly excluded: see Palmer and Hudson, 'Pledge' at 640.

[56] See above, para 2-03.

[57] See above, paras 3-09–3-11.

[58] See above, paras 3-09–3.11.

[59] See above, paras 3-26–3-27.

[60] Stair I.xiii.14.

[61] Stair I.xiii.14.

[62] Erskine III.i.33.

8-16. Hume states the rule in similar, but less anglicised terms.[63] There are some *dicta* in a couple of nineteenth-century cases in broad agreement with the institutional writers.[64] However, little attention has been given to the subject since then.

8-17. Gloag writes simply that a court would not enforce a forfeiture clause.[65] He admits that he can only rely on heritable security cases to support this statement, but argues that the principle on which those cases were decided, namely that a forfeiture clause is oppressive, applies equally to pledge. This seems fair. The effective rejection of forfeiture by Scots law matches the position in a number of other systems.[66] In France, however, in 2006 the rule against forfeiture was lifted, but not for pledges where the debtor is a consumer.[67]

8-18. In one limited situation the legislature does sanction forfeiture. Where property has been pledged to a licensed pawnbroker for less than £75 and the pawn has not been redeemed at the end of the redemption period of six months, title to the pawn passes to the pawnbroker.[68] There is *obiter* Sheriff Court authority to the effect that if the item forfeited is worth less than the sum lent, the pawnbroker does not have a personal action in respect of the deficit.[69]

E. EXTINCTION

(1) Discharge of obligation secured

8-19. The main way in which a right of pledge is brought to an end is by the pledger fulfilling the obligation which the pledge secures.[70] Being parasitic upon this obligation, this result is none other than would be expected.

[63] Hume, *Lectures* IV, 5.

[64] *Latta v Park and Co* (1865) 3 M 508; *Earl of Hopetoun v Hunter's Trs* (1863) 1 M 1074 at 1095 *per* Lord Justice-Clerk Inglis.

[65] W M Gloag, 'Pledge' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 11 (1931) para 768.

[66] For England, see *Carter v Wake* (1877) 4 Ch D 605. For South Africa, see Lubbe, 'Mortgage and Pledge' para 539 and Pienaar and Steven, 'Rights in Security' in *Mixed Legal Systems* 758 at 766. See too § 1229 *BGB*, art 2748 *Quebec Civil Code* and J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec* (1994) para 3.3.9.

[67] Art 2348 *Code civil*. See D Legeais, 'Le gage de meubles corporeals' *La Semaine Juridique* No 20, 17 May 2006, Supplement 12 at 15.

[68] Consumer Credit Act 1974 s 120(1)(a) and the Consumer Credit (Further Increase of Monetary Amounts) Order 1998, SI 1998/997, Schedule 1 para 1. See also *Lundie v Buchanan* (1862) 24 D 620.

[69] *M'Millan v Conrad* (1914) 30 Sh Ct Rep 275.

[70] Bell, *Principles* § 203; *Douglas v Menzeis* 1 March 1569, Balfour, *Practicks* 196. See too art 3164 *Louisiana Civil Code*; art 1871 *Codigo civil*; § 1252 *BGB* and American Law Institute, *Restatement of the Law of Security* (1941) s 37(1).

(2) Loss of possession

(a) General

8-20. The real right which the pledgee enjoys in the pledged property depends on possession being maintained.[71] The rationale is that third parties should be given notice that the property is burdened by a security: *mobilia non habent sequelam ex causa hypothecae*.[72] Thus if the pledgee gives the impignorated object away to a third party the real right is extinguished.[73] The same thing generally happens if the property is returned to the pledger.[74] However, the law has admitted some very limited exceptions, where a pledgee who has been in natural possession is permitted to maintain possession civilly through another.

(b) Release for necessary operations

8-21. The law allows the pledgee temporarily to release the subject of the pledge where it requires to be repaired.[75] Civil possession through the repairer is sufficient here to maintain the real right of pledge.

(c) Redelivery to pledger for purpose of sale

8-22. Where the pledgee is invested with a power of sale, he or she may return the pledged property to the pledger to act as an agent in carrying out that sale. The authority for this proposition is the decision of the House of Lords in *North-Western Bank Ltd v Poynter, Son and Macdonalds*.[76] There, an importer had been advanced money by the bank. In return he agreed to pledge bills of lading to it. These were duly delivered. Eight days later the bills were returned to the importer with the instruction that he was to sell the goods which they represented on the bank's behalf. The importer then sold the goods for which he received part-payment. A third party then arrested the balance in the buyer's hands. It was held, by the House of Lords, reversing the Second Division, that by giving up possession of the bills in this manner the bank had retained its right of pledge and was therefore preferred to the arrester.[77]

[71] Erskine III.i.33; Bell, *Commentaries* II, 22; Bell, *Principles* § 205 and 1364; Hume, *Lectures* IV, 3; *Hunter and Co v Slack* (1860) 22 D 1166; *Tod and Son v Merchant Banking Co of London Ltd* (1883) 10 R 1009. See also Denis, *Pledge* 109.

[72] Bankton I.xvii.3.

[73] *Wolifson v Harrison* 1977 SC 384.

[74] Erskine III.i.33; Bell, *Commentaries* II, 22; Bell, *Principles* § 205 and 1364; Hume, *Lectures* IV, 3; Gloag, 'Pledge' para 771.

[75] Bell, *Commentaries* II, 22. This was relied on in the South African case of *Stratford's Trs v The London and South African Bank* (1884) 3 EDC 439. See Pienaar and Steven, 'Rights in Security' in *Mixed Legal Systems* 758 at 764. See too Lubbe, 'Mortgage and Pledge' para 546; art 2704 *Quebec Civil Code* and the American Law Institute, *Restatement of the Law of Security* s 11.

[76] (1894) 22 R (HL) 1.

[77] The Inner House judgment is reported at (1894) 21 R 515. See generally A Rodger, 'Pledge of Bills of Lading in Scots Law' 1971 *JR* 193.

8-23. A number of points must be made. First, the court states that the laws of Scotland and England are the same upon the matter and certainly there is later English authority following it.[78] Secondly, the court is keen to help commerce. The Lord Chancellor, referring to the Inner House judges' opinion that a pledged object may not be returned for any purpose to the pledger without the right of pledge being extinguished states :

> 'If the rule exists, it is one which runs counter to every-day commercial practice, and I am satisfied, to every-day commercial understanding of business transactions.'[79]

8-24. Thirdly, on the basis of *Hamilton v Western Bank*,[80] the case is not one of pledge at all. This is certainly Gow's opinion.[81] However, for reasons advanced elsewhere as well as the express references to 'pledge' which pervaded the Court of Session and House of Lords judgments this argument may be dismissed.[82]

8-25. Fourthly, an important point is the exact manner in which the bills of lading were returned to the importer. They were redelivered under what has since become known as a trust receipt.[83] In it the bank stated: 'we transfer to you as trustees for us the bills of lading'.[84] The natural interpretation of this, as Gretton points out, is that the case is in reality one of commercial trust.[85] Upon redelivery the pledge is extinguished. However, the pledger holds the property and its proceeds upon sale in trust for the former pledgee. On the wording of the documentation in *Poynter* this approach has its attractions. However, it runs contrary to the language of the House of Lords, as well as a large mass of later English authority.[86] Given the fact that the law of England and Scotland is said to be the same on this matter English authority is very persuasive.[87] Here is Ellinger:

> 'The trust receipt enables the bank to retain an adequate security against the customer's insolvency. The release of the bill of lading to him … does not destroy the pledge. … Further, the bank is protected in respect of the proceeds. If the

[78] *Per* the Lord Chancellor (Herschell) at 6 and Lord Watson at 12. The later authority is *In re David Allester Ltd* [1922] 2 Ch 211 and *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147

[79] (1894) 22 R (HL) 1 at 7–8.

[80] See above, para 6-21.

[81] J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 278 n 68. The view is shared by Lord Maxwell in *Wolifson v Harrison* 1974 SLT (Notes) 55 at 56–57.

[82] See above, paras 6-22–6-24.

[83] See G L Gretton, 'Pledge, Bills of Lading, Trusts and Property Law' 1990 *JR* 23 at 31–32; *Chitty on Contracts* vol 2, paras 34.522–33.524.

[84] (1894) 22 R (HL) 1 at 5.

[85] Gretton, 'Pledge, Bills of Lading, Trusts and Property Law' at 32–33.

[86] *In re David Allester Ltd* [1922] 2 Ch 211; *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147; G W Paton, *Bailment in the Common Law* (1952) 357; *Chitty on Contracts* para 33.400; *Paget's Law of Banking* (13th edn, by M Hapgood 2007) paras 31.7–31.8; L Smith, 'Security' in A Burrows (ed), *English Private Law* (2nd edn, 2007) para 5-68.

[87] (1894) 22 R (HL) 1 at 6 *per* the Lord Chancellor (Herschell) and at 12 *per* Lord Watson.

customer becomes insolvent after the sale of the goods, the bank is likely to gain priority over the proceeds as it has an equitable proprietary interest in them.'[88]

8-26. The view that the pledge remains constituted over the goods and then a trust attaches over the proceeds must be accepted as an accurate statement of the law.[89] However, there is the difficulty here that the trust is a truster-trustee trust and the use of such trusts was not finally approved by the House of Lords till three-quarters of a century after *Poynter*.[90] Incidentally, this problem applies *a fortiori* to Professor Gretton's interpretation of the case, where both the goods and the proceeds would be held under such a trust. There is the further difficulty that the trust is a commercial one and that on other occasions the courts have frowned upon such quasi-securities.[91]

8-27. The problem with the commercial trust is that it allows security without publicity. It is *Poynter's* acquiescence with this state of affairs which concerns Lord Rodger the most.[92] The main practical difficulty is that the pledger might repledge the goods to a *bona fide* third party. When the matter came up in England, the Factors Acts were used by the courts to protect the third party, leaving the pledgee to bear the loss.[93] The advice to the pledgee in the light of this is to get the pledger to store the goods in a warehouse under the pledgee's name so that the pledgee's permission is required before any transaction is carried out.[94]

8-28. Despite its policy objections the trust receipt has become too entrenched into banking practice for *Poynter* to be overruled. In Louisiana a similar rule applies.[95] Perhaps the best way forward is that suggested by Professor Diamond. Pledges should require to be registered where the secured party ceases to have possession for whatever purpose, however temporary.[96]

[88] E P Ellinger, E Lomnicka and R J A Hooley, *Ellinger's Modern Banking Law* (4th edn, 2006) 800. Of course there is no such thing as an equitable proprietary interest in Scotland.

[89] But compare the view of R Cranston, *Principles of Banking Law* (2nd edn, 2002) 389: 'legally no trust is involved'.

[90] *Allan's Trs v Lord Advocate* 1971 SC (HL) 45. The Scottish Law Commission has suggested that registration should be required to constitute such trusts: see Discussion Paper on *Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006) paras 4-16–4-21.

[91] In particular in *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111. See G L Gretton, 'Using Trusts as Commercial Securities' 1988 *JLSS* 53; W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) ch 4 and *Nature and Constitution of Trusts* para 4.21.

[92] Rodger, 'Pledge of Bills of Lading in Scots Law' at 207ff. In the words of Smith J in the South African case of *Stratford's Trs v The London and South African Bank* (1884) 3 EDC 439 at 453 redelivery may 'hold out false colours to creditors'.

[93] *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147.

[94] *Ellinger's Modern Banking Law* 800.

[95] See R Slovenko, 'Of Pledge' (1958) 33 *Tul LR* 59 at 75–87 and V S Meiners, 'Formal Requirements of Pledge under Louisiana Civil Code Article 3158 and Related Articles' (1987) 48 *La LR* 129 at 138.

[96] *Review of Security Interests in Property* (DTI, 1989) para 11.5.7. See also Palmer and Hudson, 'Pledge' in *Interests in Goods* 621 at 628.

(3) Extinction of pledge: other causes

8-29. The following is a list of circumstances in which the right of pledge will be extinguished. It should not be treated as exhaustive.

(a) *Destruction of the subject matter of the pledge.* It is obviously not possible to have a right in something which no longer exists. If the property is destroyed, the loss is borne by the pledger unless it is shown that the pledgee has not exercised ordinary care of the subject.[97]

(b) *Confusion.* If the pledgee becomes owner of the subject matter, the pledge is extinguished in this manner.[98]

(c) *Renunciation or novation.* The pledgee may renounce the right or the pledge agreement may be novated by another agreement between the parties.[99]

(d) *Court order.* The pledge may be set aside by a court, for example if a party was fraudulently induced into giving the security or if the pledge amounts to an unfair preference.[100]

[97] On the pledgee's duty of care, see above paras 7-13–7-15.

[98] Eg, if the pledgee buys the property. See § 1256 *BGB.*

[99] Compare Lubbe, 'Mortgage and Pledge' para 546; § 1255 *BGB* and art 2071 *Code civil.*

[100] See above, para 6-66. On unfair preferences, see the Bankruptcy (Scotland) Act 1985 s 36 and the Insolvency Act 1986 s 243.

9 Lien: Introduction

A. DEFINITION

9-01. A lien[1] is a real right to retain property until the discharge of an obligation or certain obligations, the property not having been delivered to the retaining party for the purpose of security.[2] Where the property may be lawfully retained until the performance of a single obligation the right is known as one of 'special lien'.[3] Where the law sanctions retention in respect of more than one obligation the right is known as 'general lien'.[4] The normal

[1] Some equivalents in other systems are: *ius retentionis* (Roman law); *droit de rétention* (French law); *gesetzliches Pfandrecht* (German law); *retentionsret* (Danish law); *retentierecht* (Dutch law); *privilegio* (Italian law); *direito de retencão* (Portugese law) and *derecho de retención* (Spanish law). Source: M G Dickson, W Rosener and P M Storm, *Security on Movable Property and Receivables in Europe* (1988) 218.

[2] For alternative definitions, see Bell, *Principles* § 1410; *Gladstone v M'Callum* (1896) 23 R 783 at 785 *per* Lord M'Laren; W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 9 (1930) para 461; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 292; D M Walker, *Principles of Scottish Private Law* (4th edn, 1989) vol III, 399; W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) para 7.7; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 66; Scottish Executive Central Research Unit, *Business Finance and Security over Moveable Property* (2002) 111; Carey Miller with Irvine, *Corporeal Moveables* para 11.20; T Guthrie, *Scottish Property Law* (2nd edn, 2005) para 8.17. For a standard English law definition, see *Hammonds v Barclay* (1802) 2 East 227 at 235, 102 ER 356 at 359 *per* Grose J: a lien is 'a right in one man to detain that, which is in his possession, belonging to another till certain demands of him, the person in possession are satisfied'. See also Montagu, *Lien* 1–2; *Stroud's Judicial Dictionary* (6th edn, by D Greenberg and A Millbrook) vol 2 (2000) sv 'lien' and L A Jones, *A Treatise on the Law of Liens* (1888) § 3.

[3] See Bell, *Commentaries* II, 87 and 92–100; Bell, *Principles* §§ 1411 and 1419–1430; Sim, 'Rights in Security' para 75 and paras 78–100 and below, ch 16.

[4] See Bell, *Commentaries* II, 87 and 101–118; Bell, *Principles* §§ 1411 and 1431–1454; Sim, 'Rights in Security' paras 75 and 78–100 and below, ch 17.

obligation is a debt. The party with the lien may be referred to as the 'lien-holder'.[5] There appears to be no specific term for the party against whom the lien is being enforced. The Anglo-American terminology of 'lienee' and 'lienor' used to refer respectively to these parties does not seem to have come into Scots law.[6]

B. USES OF THE WORD 'LIEN'

9-02. In the field of juridical consistency the word 'lien' has had rather a chequered history.[7] It is therefore not surprising to see it used in a number of different ways. The following is a list of some examples which demonstrate usage different from the above definition.

(1) Any right of retention

9-03. 'Lien' has been used to denote a right to retain of any nature, such as one based on ownership or a right to retain debts.[8] This is a wide use of the word and is best avoided, failing as it does to distinguish between retention based on ownership and retention on some other basis, such as custody or possession. The failure to make this distinction has caused great problems in the past.[9] It follows that in general it is misguided to use 'lien' to refer to retention of incorporeal property[10] because retention of incorporeal property would seem to be based on ownership and not upon a subordinate real right.[11]

(2) Security

9-04. At its widest, 'lien' has been used to mean security.[12] Such use is also made abroad.[13]

[5] See, eg, 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 144; Sim, 'Rights in Security' paras 67 and 73.

[6] See, eg, Bell, *Personal Property* 136; M G Bridge, *Personal Property Law* (3rd edn, 2002) 171; I Davies, *Textbook on Commercial Law* (1992) 319.

[7] In particular as regards its relationship with the term 'retention'. See *Hamilton v Western Bank* (1856) 19 D 152 at 160 *per* Lord Ivory; Gloag and Irvine, *Rights in Security* 303–304; Sim, 'Rights in Security' para 66.

[8] Eg, Gloag, 'Lien' para 461; *Henderson v Norrie* (1866) 4 M 691 at 699 *per* Lord Curriehill.

[9] See the discussion by Lord Justice-Clerk Hope in *Brown v Sommerville* (1844) 6 D 1267 at 1273–1277and in *Melrose v Hastie* (1851) 13 D 880 at 887–891. See also *Laurie & Co v Denny's Tr* (1853) 15 D 404.

[10] See, eg, Bell, *Commentaries* II, 111 (factor's lien over price of goods) and the treatment of the case of *Dickson v Nicholson* (1855) 17 D 1011 (retention by commercial traveller of money in security of salary arrears) by Gloag and Irvine, *Rights in Security* 344.

[11] On the assumption that incorporeal property can be owned. Compare Reid, *Property* para 16 with G L Gretton, 'Owning Rights and Things' 1997 *Stell LR* 176 and 'Ownership and its Objects' (2007) 71 *RabelsZ* 802.

[12] See, eg, *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 464 *per* Lord Dreghorn. See also the Payment of Creditors (Scotland) Act 1793 ss 33 and 39 and the Payment of Creditors (Scotland) Act 1814 ss 42 and 50.

[13] See, eg, Jones, *A Treatise on the Law of Liens* § 2; the American Law Institute, *Restatement of the Law of Security* (1941) 157; J J White and R S Summers, *Uniform Commercial Code* (5th edn, 2000) para

(3) Maritime hypothec

9-05. In the realm of maritime law, 'lien' can be used to mean 'hypothec', that is security without possession or custody.[14]

(4) Real burden

9-06. 'Lien' or more accurately 'real lien' has been used in the context of heritage as a synonym for the pecuniary real burden.[15] Indeed, the term has been used generally to mean real burden, in other words a condition placed in the title to heritable property regulating the owner's use thereof.[16]

C. ETYMOLOGY

9-07. The term 'lien' is used in a number of legal systems, in particular those of Scotland, South Africa, England, Ireland, Quebec and the United States of America.[17] These jurisdictions have in common the use of the English language.[18] The word 'lien', however, had its origins furth of England. It comes from the Latin 'ligamen', meaning bond, and its connected verb, 'ligare', to bind or tie.[19] This Latin was taken into French as 'lien' and the word still means tie or bond in that language today.[20] On the other hand, if 'lien' is looked up in an English–French dictionary it is found that the French use the term 'droit de rétention' to mean 'lien' in the way Scots law utilises the term.[21]

23-3; S H Haimo, 'A Practical Guide to Secured Transactions in France' (1983) 58 *Tul LR* 1163; C P Sherman, *Roman Law in the Modern World* vol II (1922) 194–195; P Gane in his 1939 translation of U Huber, *Heedensdaegse Rechtsgeleertheyt* III.10.11. In England, 'lien' has also been given the slightly narrower meaning of any charge upon a piece of property, 'charge' being a class of security in English law. See Whitaker, *Lien* 1 and Hall, *Possessory Liens* 20–21.

[14] See *The Bold Buccleugh* (1851) 7 Moo PCC 267, 13 ER 884; *Currie v McKnight* (1896) 24 R (HL) 1; J Mansfield, 'Maritime Lien' (1888) 4 *LQR* 379 and D R Thomas, *British Shipping Laws* vol 14 (1980) ch 1. See also Hall, *Possessory Liens* 20–21.

[15] See *Martin v Paterson* 22 June 1808 FC; *Brown v Miller* (1820) 3 Ross LC 29; J P Wood, *Lectures in Conveyancing* (1903) 487 and the Glasgow Streets, Sewers and Buildings Consolidation Order Confirmation Act 1937 s 236(1), discussed in *Pickard v Glasgow Corporation* 1970 SLT (Sh Ct) 63 and *Sowman v City of Glasgow District Council* 1985 SLT 65. Pecuniary real burdens were abolished by the Title Conditions (Scotland) Act 2003 s 117.

[16] See K G C Reid, 'What is a Real Burden?' 1984 JLSS 9; Reid, *Property* para 375 and the deed of conditions in J M Halliday *Conveyancing Law and Practice* vol II (2nd edn, by I J S Talman, 1997) 229.

[17] For South Africa, see T J Scott, 'Lien' in *LAWSA* vol 15 (1999) paras 49–86. For Quebec, see J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec* (1994) para 7.2.3. For England and Ireland, see Bell, *Personal Property* ch 6.

[18] South Africa, of course, uses Afrikaans to a considerable extent. Similarly, Quebec also uses French.

[19] See *The Oxford English Dictionary* (2nd edn) vol viii, sv 'lien'; *Jowitt's Dictionary of English Law* (2nd edn, by J Burke, 1977) sv 'lien'. See also the American Law Institute, *Restatement of the Law of Security* (1941) 157 and Hall, *Possessory Liens* 16.

[20] *Collins-Robert French–English, English–French Dictionary* (2nd edn, 1987) sv 'lien'.

[21] For a discussion of the *droit de rétention*, see G Brière de l'Isle, 'France' in J G Sauveplanne (ed), *Security over Corporeal Movables* (1974) 115 at 120–121.

9-08. The Romans used the term '*retentio*' to mean 'lien'.[22] This comes straight into Scots law as 'retention'. The Anglo-Norman words for the concept – 'reteign' and 'deteign' – surely come from the same Latin root.[23] In Rome 'ius retentionis' meant the right which *retentio* gave.[24] This terminology can be found in the occasional early Scots case.[25] The term 'hypothec', meaning real right of security without possession by the creditor, has often been used to denote something which would now more correctly be seen as lien.[26] This is particularly true in the case of the right of a solicitor to retain clients' papers until his or her account is paid, which even recently has been referred to as a right of 'hypothec'.[27] The reasons for this use are examined elsewhere.[28]

D. LIEN IN PRACTICE

9-09. Lien acts as an effective security because of its frustrating effect on the party whose goods are subject to this right.[29] As Bell states: 'The effect of lien is to deprive the owner, or those in his right, of the use and benefit of the subject till the debt be paid for which it is retained.'[30] For example, Blake puts his car into the garage to be repaired. The work is carried out. If the garage simply let Blake take the car away he may take weeks to pay. If on the other hand they refuse to release the vehicle until they are paid, Blake will most likely promptly discharge his debt. Otherwise, he is left with the nuisance of not having the facility of his car.

9-10. The value of a lien to its holder is enhanced by the fact that it is a right which is good in insolvency.[31] To continue the example from above, if Blake should be sequestrated the garage will have a far greater chance of recovering the entire debt he owes, provided they have retained the car. If they have released the car they have no security and consequently will rank as an

[22] Eg D 47.2.60; R Sohm, *Institutes of Roman Law* (3rd edn, trans R Ledlie, 1907) 281.

[23] See the cases reported at *Year-book* 5 Ed IV Pasch pl 20 (1466) and 22 Ed IV Hil pl 15 *per* Brian CJ (1483), discussed by Sir William Holdsworth, *History of English Law* (2nd edn) vol 7 (1937) 512.

[24] See Thomas, *Roman Law* 276–277; Buckland, *Roman Law* 213–214, 473 and 490; R W Leage, *Roman Private Law* (3rd edn, by A M Prichard, 1962) 182–184 and 328–330.

[25] See *Binning v Brotherstones* (1676) Mor 13401; *Cuthberts v Ross* (1697) 4 Br Sup 374; *Creditors of Stuart v Stuart* (1709) Mor 2629 at 2630. In *Mitchel v M'Adam* (1712) Mor 11096 the term '*jus detinendi*' was used.

[26] Bankton I.xvii.2 and I.xvii 15; Bell, *Commentaries* (7th edn, 1870) II, 90.

[27] See *Boyd v Drummond, Robbie & Gibson* 1994 SCLR 777. See also Begg, *Law Agents* 205; *Robertson v Ross* (1887) 15 R 67; *Ure & Macrae v Davies* (1917) 33 Sh Ct Rep 109.

[28] See below, paras 10-92 and 10-138.

[29] For example, of the law agent's lien Sheriff Johnston in *Duffy's Trs v A B & Co* (1907) 23 Sh Ct Rep 94 at 99 states: 'It is often said that the value of that lien consists in the inconvenience which want of the papers may cause.' This is particularly true of this lien as the papers never may be sold to realise the security: *Ferguson & Stuart v Grant* (1856) 18 D 536 at 538 *per* Lord Curriehill and below, para 17-90.

[30] Bell, *Commentaries* II, 91. See also B Ziff, *Principles of Property Law* (4th edn, 2006) 428: '[the lien] allows the debtor [sic] to hold the goods hostage until the amount owing is paid'.

[31] Bankruptcy (Scotland) Act 1985 s 73(1).

unsecured creditor. But if they are detaining it, Blake's trustee in sequestration will have to make good the debt before the vehicle can be recovered. The general approach of the courts to liens in insolvency has at times proved rather benevolent. In one important case, a bleacher who had an express general lien over each parcel of goods sent to him, was held entitled to retain goods delivered within 60 days of the sequestration of his customer.[32] The rationale of the court was that the goods were sent in the ordinary course of business and therefore the lien did not amount to an unfair preference.

9-11. A lien will also prevail over diligence.[33] Thus if another of Blake's creditors was to arrest the car in the garage's hands, his right would be subject to that of the garage. Liens which are implied by the law have the further advantage that they prevail over any floating charge attaching to the property.[34]

9-12. Lien is a security which is alive in terms of modern commerce.[35] Businesses and private individuals are still using carriers, bankers, brokers, solicitors and accountants as they did in earlier times. While questions regarding the efficacy of these and other individuals' liens require fairly regular resolution by the courts both north and south of the Scottish border,[36] in some areas lien is less important than it once was. It is no longer possible for a solicitor to have an effective lien over title deeds.[37] Moreover, the onset of the electronic revolution and the resultant move to dematerialisation means that the exercise of a lien over a physical document will be a rarer phenomenon.

[32] *Anderson's Tr v Fleming* (1871) 9 M 718. The 60-day rule was set down by the Bankruptcy Act 1696. It was extended to six months by the Companies Act 1947 s 115(3). This remains the period under the present legislation: Bankruptcy (Scotland) Act 1985 s 36.

[33] See Bell, *Commentaries* (2nd edn, 1810) 474; (7th edn, 1870) II, 60. See below, paras 14-10–14-11.

[34] Companies Act 1985 s 464(2), to be replaced by Bankruptcy and Diligence etc (Scotland) Act 2007 s 40(4).

[35] But as D J T Logan, *Practical Debt Recovery* (2002) 250 has commented, it is surprising that there is not greater interest: 'The lien clearly gives a better security than an arrestment and is usually cost-free.'

[36] Some recent cases include *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785; *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50; *DTC (CNC) Ltd v Gary Sargeant & Co* [1996] 1 WLR 797; *Ismail v Richards Butler (a Firm)* [1996] QB 71; *Goudie v Mulholland* 2000 SC 61; *Re Carter Commercial Developments Ltd* [2002] BCC 803; *Cobbe v Yeoman's Row Management Ltd* [2006] 1 WLR 2964; *Jessup v Wetherell* [2006] EHWC 2582; *Air and General Finance Ltd v RYB Marine Ltd* 2007 GWD 35–589, [2007] CSOH 177 and *Onyvax Ltd v Endpoint Research (UK) Ltd* 2008 GWD 1–3, [2007] CSOH 211.

[37] See below, paras 17-78–17-82.

10 History of Lien

A. ROMAN LAW

(1) General

10-01. Unlike pledge, where there is ample evidence of a very early existence such as from the Bible,[1] it is difficult to find any information on either retention or lien from before the time of the Romans. Further, whereas pledge was considered in a reasonably coherent manner by the Roman texts and all the more so by later writers on Roman law,[2] such a treatment is not to be found when it comes to retention. There is, however, no lack of primary material dispersed in the *Institutes* of Gaius and the *Corpus Iuris Civilis* of Justinian. This material may be divided broadly into two categories. Retention is seen to arise first within property law, in the context of accession and, secondly, within the law of contract. These categories are examined in turn.

(2) Retention in the context of accession

(a) General

10-02. The Roman lien given by far the most juristic discussion was the right of the *bona fide* possessor to retain property lost due to *accessio*.[3] This doctrine, which has been taken into Scots law as accession,[4] holds that in certain circumstances where two pieces of corporeal property become joined together

[1] See above, para 3-01.

[2] See above, paras 3-03–3-16 and see, eg, Buckland, *Roman Law* 470–478; Thomas, *Roman Law* 329–334; F Schulz, *Classical Roman Law* (1951) 400–427.

[3] This term is not used in a technical sense in the Roman law texts: see Thomas, *Roman Law* 169.

[4] Reid, *Property* paras 570–596; Carey Miller with Irvine, *Corporeal Moveables* ch 3; W M Gordon, *Scottish Land Law* (2nd edn, 1999) ch 5. For a recent case, see *Boskabelle Ltd v Laird* 2006 SLT 1079, discussed in D L Carey Miller, 'Right to Annual Crops' (2007) 11 *Edin LR* 274.

one (the accessory) is deemed to have become subsumed in the other (the principal).[5] The factors dictating whether *accessio* has occurred include the degree of physical attachment between the things.[6] The effect of the doctrine is that the owner of the principal becomes owner of the accessory by what is in modern law considered as original acquisition.[7] There does not require to be any contract between the owner of the principal and the owner of the accessory to facilitate this.

(b) Accessio: *moveables to moveables*

10-03. Four situations are referred to in the texts involving *accessio* of moveable things to other moveable things.

(1) *Textura*. This was the situation where the thread of one individual was woven into that of another.[8] Justinian gives the example of the purple thread of one person being woven into a garment belonging to somebody else.[9] The garment is regarded as the principal and its owner becomes owner of the thread too.

(2) *Feruminatio*. This was where the property of one person was welded to that of another and the owner of the principal thing also became owner of the accessory.[10]

(3) *Scriptura*. Where one individual wrote upon the parchment or paper of another, the writing became the property of the owner of that which it had been written upon.[11] This was the case even where the lettering was of gold.[12]

(4) *Pictura*. Where one individual painted upon the cloth or tablet of another, the law regarded the painting as the principal and the cloth or tablet as the accessory.[13] Thus the owner of the painting became the owner of the cloth or tablet.

10-04. In all these situations the former owner of the accessory has suffered a loss. Whether that individual may obtain compensation depends on the circumstances. If it was he who knowingly brought about the *accessio* then he is regarded as having donated the thread to the owner of the principal.[14]

[5] See Buckland, *Roman Law* 208–215; Thomas, *Roman Law* 169–174.

[6] Thomas, *Roman Law* 169.

[7] In other words a new rather than a derivative title to the thing is obtained. See Reid, *Property* para 539.

[8] J 2.1.26; D H van Zyl, *History and Principles of Roman Private Law* (1983) 160.

[9] J 2.1.26.

[10] D 6.1.23.5; D 41.1.27.2; Van Zyl, *History and Principles* 160–161; Buckland, *Roman Law* 209; M Kaser, *Roman Private Law* (2nd edn, trans R Dannenbring, 1968) 112.

[11] Gaius II, 77; J 2.1.33; D 6.1.23.3; Van Zyl, *History and Principles* 161; Buckland, *Roman Law* 209–210; Kaser, *Roman Private Law* 111.

[12] Gaius II, 77; J 2.1.33.

[13] J 2.1.34; Gaius II, 78. Paul viewed the cloth or tablet as the principal: D 6.1.23.3. See Van Zyl, *History and Principles* 162; Buckland, *Roman Law* 210; *Kaser*, *Roman Private Law* 111.

[14] Van Zyl, *History and Principles* 162; Buckland, *Roman Law* 210.

If, however, this was not the case then it seems likely that the former owner of the accessory, when he was not in possession of the whole property, was able to obtain compensation from the owner of the principal by virtue of an *actio in factum* or *actio utilis*.[15]

10-05. Where the former owner of the accessory was still in possession of the whole property having brought about the *accessio* in the *bona fide* belief that the principal was his own, he had the right to retain the item (*ius retentionis*) until he was compensated.[16] In practice this worked by him meeting the *rei vindicatio* of the owner of the principal for recovery of his property with the defence of *exceptio doli*.[17] The object of this defence in general was to ameliorate the severity of a pursuer's claim.[18] In this case it was viewed as harsh to let the owner of the principal simply get the property without first compensating the *bona fide* former owner of the accessory. The availability of the *exceptio doli* in this situation pre-dated the existence of the remedies of the *actio in factum* and *actio utilis*.[19]

(c) Accessio*: moveables to land*

10-06. Two cases are notable here. The first is *inaedificatio*. This was where a building was constructed on the land of one person with the moveable property of another.[20] *Accessio* operated with the land as the principal and the moveables as the accessories. The remedies available here are similar to those discussed with regard to *accessio* of moveables to moveables. Thus if the builder used his own materials to build knowingly upon the land of another he was regarded as having donated the materials to the landowner.[21] If, however, he had carried out the work *bona fide*, and was not in possession of the land, then he would have an *actio in factum* or *actio utilis*.[22] If still in possession he had a right of retention (*ius retentionis*) by virtue of which he could refuse to remove himself from the land until compensated for his materials and labours. As was the case with *accessio* of moveables to

[15] D 6.1.23.5; D 10.4.3.14; Van Zyl, *History and Principles* 160–162. If the accessory had been stolen by the owner of the principal, its former owner had the *actio furti* or *condictio furtiva*: J 2.1.26.

[16] Kaser, *Roman Private Law* 112; Van Zyl, *History and Principles* 160–162.

[17] Gaius II, 76; J 2.1.33; Buckland, *Roman Law* 210.

[18] See R Zimmermann, *The Law of Obligations* (1990) 667–668 and the judgment of Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) at 592–601. See also R Zimmermann, 'Roman Law in a Mixed Legal System – The South African Experience' in R Evans-Jones, *The Civilian Tradition in Scotland* (1995) 41 at 69–74.

[19] Buckland, *Roman Law* 210.

[20] Gaius II, 73; J 2.1.29; Van Zyl, *History and Principles* 162–164. For a full account of the law in this area, see Buckland, *Roman Law* 212–215; and *Kaser*, *Roman Private Law* 111.

[21] J 2.1.30; Buckland, *Roman Law* 214. However, some texts do confer a right of action upon a *mala fide* builder: see D 6.1.37; C 3.32.5.1; D 5.3.38 and Van Zyl, *History and Principles* 164. In Roman-Dutch law the *mala fide* builder may recover necessary expenses: Voet 6.1.36. See also Bankton I.ix 42.

[22] Van Zyl, *History and Principles* 164. There also existed in certain circumstances a *ius tollendi* or right to remove the materials, but the texts on it are notoriously unclear: see Buckland, *Roman Law* 213.

moveables, the right of retention was exercised by raising the defence of the *exceptio doli* against the *rei vindicatio* of the landowner.[23]

10-07. There existed also with regard to *inaedificatio* the possibility of a situation where one party had attached some of a second party's property to a third party's land. The rules which would apply here, in particular for our purposes where rights of retention would operate, have been subject to academic discussion.[24] There is, however, no primary authority on the matter.

10-08. The second case involving *accessio* of moveables to land concerns plants and trees. Where an individual planted one of these organisms into the land of another (*implantatio*) or sowed seed into the same (*satio*) the planted or sown property was regarded as having acceded to the land upon it taking root and growing.[25] A person who *bona fide* had carried out the planting or sowing was, according to Ulpian, entitled to an *utilis actio in rem* by which he could claim compensation against the landowner.[26] Once again, however, retention could be pled by virtue of the *exceptio doli* if the *bona fide* planter or sower retained possession of the land.[27]

(d) Conclusions

10-09. In the first place, a *ius retentionis* only arose where the person who brought about the *accessio* was in good faith and in possession. In the second place the right was not predicated upon any pre-existing relationship between the possessor of the property and its owner. Thirdly, the right was always founded in the defence of the *exceptio doli*. Fourthly, the right could be exercised not only in respect of moveables, but in respect of land too. Fifthly, the right was available against the owner of the property whoever that might be at the time. This suggests that the right was a real one.[28]

10-10. Finally, whilst the *ius retentionis* arose here in the context of the property law doctrine of *accessio* it may also be analysed as arising in terms of unjustified enrichment. In other words, the fact that a party has *bona fide* brought about the *accessio* has led to the owner of the principal having become unjustly enriched.[29] He must therefore give that *bona fide* party recompense.

[23] D 41.1.7.12; D 44.4.14; Gaius II, 76; J 2.1.30; R W Leage, *Roman Private Law* (3rd edn, by A M Prichard, 1961) 182–183; Schulz, *Classical Roman Law* 365.

[24] Buckland, *Roman Law* 214–215; Leage, *Roman Private Law* 184.

[25] Gaius II, 74–75; J 2.1.31–32; Van Zyl, *History and Principles* 165.

[26] D 6.1.5.3.

[27] Gaius II, 76; J 2.1.32.

[28] The analogous right in modern South African law is real: see T J Scott, 'Lien' in *LAWSA* vol 15 (1999) paras 54–67; P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) 412–414; T J Scott and S Scott, *Wille's Law of Mortgage and Pledge in South Africa* (3rd edn, 1987) 87–92 and G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 783–784.

[29] See, eg, Van Zyl, *History and Principles* 164.

Such an interpretation is consistent with the views of Buckland, who submits that in any situation where a party made ameliorations to property under the mistaken belief it was his own, the law then gave him the *ius retentionis*.[30]

(3) Retention in the context of contract

(a) Right of depositary to retain for expenses

10-11. *Depositum* was the contract whereby a piece of moveable property was entrusted by one person, usually its owner, to another, the depositary, for safekeeping.[31] The contract was a gratuitous one. The depositee was given mere detention (*detentio*) of the subject not possession. *Depositum* is one of the contracts in Roman law described as being 'imperfectly bilateral'; others included loan for use and pledge.[32] Such contracts involved a principal claim which was for the return of the property and a counterclaim, for example for the restorer's expenses. The counterclaim was a contingent one, for example contingent on expenses having been incurred; thus the terminology 'imperfectly bilateral'. The action to enforce the principal claim was called the *actio directa*; the one for the counterclaim called the *actio contraria*.[33]

10-12. *Depositum* often involved the depositary being put to expense, for example if Julius went off to Britannia on holiday leaving his slave in the custody of Brutus, the latter would have to feed the slave and so forth. In this situation Brutus would have the *actio depositi contraria* for his expenses (*impensae*).[34] But, if Brutus was still detaining the slave, the pre-Justinianic law gave him a separate quite distinct remedy of *retentio*, which could be pled by means of the *exceptio doli* when Julius raised his *actio depositi directa* to get his slave back.[35] Indeed it is the case that this *ius retentionis* existed before the law recognised the *actio contraria*.[36] Justinian, however, appears to have abolished this right, leaving the *actio depositi contraria* as the sole remedy in this situation.[37]

10-13. Two points should be made on the *ius retentionis* which existed until Justinian. First, it was based on mere detention rather than possession. Secondly, it was limited solely to expenses. Extrinsic debts were not secured.

[30] Buckland, *Roman Law* 538. The measure of recovery was the loss to the former owner of the accessory rather than the gain by the owner of the principal: see Gaius II, 77–78 and J 2.1.33–34. But compare Leage, *Roman Private Law* 182–183 and 185.

[31] D 16.3; C 4.34; Buckland, *Roman Law* 467–470; Thomas, *Roman Law* 276; Leage, *Roman Private Law* 329; A Borkowski and P du Plessis, *Textbook on Roman Law* (3rd edn, 2005) 301–303.

[32] Kaser, *Roman Private Law* 166; Leage, *Roman Private Law* 323.

[33] D 16.3.5.pr; Thomas, *Roman Law* 277.

[34] D 16.3.5.pr; Thomas, *Roman Law* 277; Leage, *Roman Private Law* 329.

[35] D 47.2.60; Buckland, *Roman Law* 468; Kaser, *Roman Private Law* 166; Van Zyl, *History and Principles* 281.

[36] Buckland, *Roman Law* 411.

[37] C 4.34.11; Buckland, *Roman Law* 468; Leage, *Roman Private Law* 330; Borkowski and du Plessis, *Roman Law* 302. However, the right is recognised in modern civilian systems. See, eg, art 1948 *Louisiana Civil Code*; art 2293 *Civil Code of Quebec* and art 1780 *Codigo civil* (Spain).

(b) Right under contract of commodatum to retain for expenses

10-14. *Commodatum* was the contract in Roman law where a piece of property was lent by one party to another, for the latter's use.[38] Like *depositum*, *commodatum* was an imperfectly bilateral contract, in which mere detention not possession was given. The *actio directa (actio commodati directa)* and the *actio contraria (actio commodati contraria)* were similarly available.[39] Further, the party to whom the loan had been made also had the *ius retentionis* for expenses, a right which once again pre-dated the *actio contraria*.[40] However, like retention in the case of *depositum*, the right was not available in the later law, having been removed by the Emperors Diocletian and Maximian.[41]

(c) Retention under contract of pignus

10-15. *Pignus* was the Roman contract of pledge, in which property was delivered by one party to another in order to secure a debt.[42] Originally the property could only be retained until that debt was paid. However, the Emperor Gordian extended this right into a right to retain for all sums owed by debtor to creditor.[43]

(d) Right of husband to retain part of dowry on divorce

10-16. In the event of divorce the Roman wife had the *actio rei uxoriae* to reclaim her *dos* (dowry) from her husband.[44] However, the husband had certain rights of retention (*retentio*), for example one-sixth of the dowry if the divorce was caused by the wife's adultery.[45] However, these rights were permanent ones not simply being to secure the payment of debt. Thus they are better classified as rights of deduction and need not be considered further here.[46]

[38] D 13.6; C 4.23; Buckland, *Roman Law* 471–473; Thomas, *Roman Law* 274–276; Leage, *Roman Private Law* 326–329 and Borkowski and du Plessis, *Roman Law* 299–301.

[39] See above, n 38.

[40] D 13.6.18.4; Buckland, *Roman Law* 411, 473; Thomas, *Roman Law* 276; Leage, *Roman Private Law* 328; Kaser, *Roman Private Law* 166; Zimmermann, *Obligations* 201 and Borkowski and du Plessis, *Roman Law* 301.

[41] Voet 13.6.10. Once again, the right exists nonetheless in modern civilian systems. See arts 1890 and 1891 *Louisiana Civil Code* and art 2324 *Civil Code of Quebec.* However, it does not exist in Spain: art 1747 *Codigo civil.*

[42] See above, para 3-06 and D 13.7; D 13.20; C 4.24; Buckland, *Roman Law* 473–481; Thomas, *Roman Law* 330–332.

[43] C 8.26(27).1.2 (Gordian, AD 239); Thomas, *Roman Law* 333–334; Zimmermann, *Obligations* 227–229; Van Zyl, *History and Principles* 283.

[44] Kaser, *Roman Private Law* 253–255; Borkowski and du Plessis, *Roman Law* 131–134.

[45] Ulp Reg 6.8; Kaser, *Roman Private Law* 253. See also Van Zyl, *History and Principles* 108.

[46] Thomas, *Roman Law* 430–431. Justinian eventually abolished them: C 5.13.1.5.

(e) Retention in Roman contracts – a universal right?

10-17. While the textual evidence seems limited to *depositum* and *commodatum*, there is academic opinion in favour of construing retention as a general contractual doctrine. Thus Kaser states that under any imperfectly bilateral contract:

> 'Instead of bringing a counter-action, the debtor who had a due counterclaim arising from the same obligation, could exercise a right of retention (*retentio*), that is, he could refuse to make his performance until the counter-performance was tendered to him. This he did by means of the *exceptio doli*.'[47]

10-18. Further, Kaser applies his thesis to perfectly bilateral contracts, that is those contracts in which each party was simultaneously creditor and debtor in respect of a principal claim.[48] The main examples are *emptio et venditio* (sale) and *locatio et conductio* (hire).[49] To give an example of retention operating here, a party hiring out his slave could refuse to deliver the slave until paid the amount due under the contract of hire. Zimmermann makes express mention of retention of cargo by a ship's master for an average contribution under the *lex Rhodia de iactu*, in his discussion of *locatio et conductio*.[50]

10-19. Kaser's thesis seems compatible with that of Sohm, whose discussion focuses on the *exceptio doli*, the practical means by which retention was pled as a defence to an action for delivery or performance.[51] According to Sohm, the *exceptio doli* could be pled in any situation where the pursuer in an action was *ipsa res in se dolum habet*, that is wherever the raising of the action objectively constituted a breach of good faith.[52] Thus it was clearly such a breach to raise an action against someone to perform his obligations under a contract he had made with you, if you were not prepared to meet your obligations to him under that same contract. As Sohm writes, the *exceptio doli* was:

> 'employed for giving effect to counter-claims either by means of a lien ("retentio") – where claim and counter-claim are not ejusdem generis (as eg where a defendant is called upon to deliver up some object, but claims compensation for moneys expended on such object) – or by means of a set-off ("compensatio"), where claim and counter-claim are ejusdem generis. Thus the exceptio doli came to be the exceptio of all exceptiones, which in the hands of the Roman jurists became a weapon that enabled the jus aequum to defeat the old jus strictum at every point.'[53]

10-20. However, in the specific case of a contract of sale, Sohm writes that the right of the seller to defend an action for delivery by the buyer, on the ground that the price has not been paid, is technically termed the *exceptio*

[47] Kaser, *Roman Private Law* 166.
[48] Kaser, *Roman Private Law* 167.
[49] Kaser, *Roman Private Law* 167.
[50] Zimmermann, *Obligations* 408 n 148.
[51] R Sohm, *Institutes of Roman Law* (3rd edn, trans J C Ledlie, 1907) 279–281.
[52] At 280.
[53] At 281.

non adimpleti contractus.[54] Moreover, Van Zyl believes that in the later law in any action upon a contract the defence that the other side has not yet made performance may be referred to in those terms.[55] Hence it may have been that as Roman contract law evolved the *exceptio doli* became refined into the *exceptio non adimpleti contractus*.[56] This terminology is certainly familiar in modern civilian systems.[57]

10-21. Kaser, Sohm and Van Zyl may slightly differ in their use of terminology. Nevertheless, the substance is similar, leading to the conclusion that retention was a part of general contractual doctrine in the later Roman law. However, what was being admitted was, to use the modern terminology, *special* retention; that is retention until reciprocal obligations under the *same* contract were performed. Other than in the particular case of pledge there is little evidence for general retention.[58]

(f) Effect of retention

10-22. The preceding paragraphs show that retention existed widely in Roman law. Two broad categories were recognised. First, there was retention arising in the context of *accessio*. This may be re-analysed as retention based upon enrichment, although it must be stressed that the primary texts simply deal with *accessio*. Secondly, there was retention based on contract. Whether the *ius retentionis* in either or both of these cases could be viewed as amounting to more than a personal right is a matter upon which it is difficult to draw any definite conclusions. The passages in the Digest stating that in a contract of sale the seller may retain the goods until he is paid refer to this right as a sort of pledge.[59] Thus the right to retain is being analysed as a security.

10-23. A matter of further interest is the way in which the law protects a party exercising a right of retention against theft. Any right of retention was dependent upon possession, or at least detention, of the subject in question. Where such possession or detention ceased, so did the right of retention. Hence, theft of the property, even by the owner himself, would bring an end

[54] At 397.

[55] Van Zyl, *History and Principles* 254. He cites D 19.1.13.8 and D 21.1.31.8, both of which involve contracts of sale. In many ways this supports Sohm's apparent view that the *exceptio non adimpleti contractus* only concerned sale, rather than his own wider one.

[56] That is, in respect of perfectly bilateral contracts. With imperfectly bilateral contracts, it would always be the *exceptio doli* which was the relevant defence.

[57] G H Treitel, *Remedies for Breach of Contract: A Comparative Account* (1988) 299ff; O Lando and H Beale, *Principles of European Contract Law Parts I and II* (2000) 404–408.

[58] That is, retention for claims other than those due under the specific contract in terms of which the property in question is being retained. See below, ch 17.

[59] Thus at D 19.1.13.8 it is stated that until the buyer pays the price 'the seller can keep the object of sale as a sort of pledge', that is '*venditor enim quasi pignus retinere potest eam rem quam venditit*'. See also D 21.1.31.8. Of course in a Roman contract of sale *dominium* remained with the seller until delivery, so the right of retention here is based on ownership, although validly analysed in terms of the *exceptio non adimpleti contractus*. Note also that D 47.2.15.2 which refers to the *ius retentionis* of a borrower under *commodatum* refers to it as '*quasi pignoris*'.

to the right. However, in this situation the law provided a remedy. To be able to sue for theft, that is *furtum*, the party instituting the action had to show that he had an interest, that is *interesse*, in the stolen item.[60]

10-24. There are a number of situations where the texts tell us that the *interesse* was conferred. In the first place, it was given to a *bona fide* possessor. Hence, the holder of a right of retention based on enrichment was protected.[61] Pledgees likewise had such an *interesse*.[62] A borrower under the contract of *commodatum* who was retaining for expenses was treated in the same way.[63] So too was a depositary under *depositum*, until of course Justinian removed his right of retention.[64] Buckland is of the view that anyone with a right of retention for expenses had the *interesse*, at least when it came to *furtum* by the owner.[65]

10-25. It is tempting to go one step further in the light of the Kaser/Sohm thesis and argue that anyone with a right of retention had the *interesse*.[66] In many situations of mutual contract an *interesse* based specifically on the *ius retentionis* did not need to be utilised. For example, if Claudius had contracted to sell his horse to Cicero and the animal was subsequently stolen, Claudius could sue the thief for *furtum* because he was the owner of the horse. The lack of textual evidence makes it impossible to draw any definite conclusion on whether anybody with a right of retention was deemed to have an *interesse*. The essential point is that it is certain that many did. Thus Roman law clearly regarded the *ius retentionis* as a valuable interest and that action could be taken against thieves who interfered with it.

B. THE MEDIEVAL PERIOD

(1) Scots law

10-26. As far as can be seen there is no evidence of retention in either *Regiam Majestatem*, Balfour's *Practicks*, or any of the other Scots legal works prior to

[60] See generally, B Nicholas, *An Introduction to Roman Law* (1962) 214–215; Buckland, *Roman Law* 576–581.

[61] D 47.2.12.1; Buckland, *Roman Law* 580.

[62] There exist a number of conflicting texts on the basis of this *interesse*, such as D 47.2.14.16 and D 13.7.22.pr. See Buckland, *Roman Law* 580.

[63] D 47.2.15; D.47.2.60; Buckland, *Roman Law* 580.

[64] D 47.8.23.

[65] Buckland, *Roman Law* 580. He bases his statement on D 47.2.15.2, D 47.2.60, D 47.8.2.23 and C 4.34.11. However, his assertion that there is only evidence for an action against the owner does not seem borne out by a reading of D 47.2.15.2 and D 47.8.2.23.

[66] On that thesis, see above paras 10-17–10-21. Zimmermann writes in *Obligations* at 935–936 that an interest was conferred to 'a bona fidei possessor or a person entitled to a ius retentionis'. See also Gaius III, 203: '*Furti autem actio ei competit, cuius interest rem salvam esse, licet dominus non sit*' ('the *actio furti* is available to the person in whose interest it is that the thing is maintained, even if he is not the owner thereof').

Stair.[67] Even in the very Romanist sections of these works dealing with deposit and loan for use (*commodatum*) there is no reference to such a thing as a right of retention for expenses.[68]

(2) English law

10-27. It is possible to find retention in medieval English law. The earliest apparent case is one of 1371.[69] There existed at that time in the context of animals, a concept known as the franchise of waif and stray.[70] A person with such a franchise was obliged to keep the stray animal and to return it to its owner if it was claimed within a year and a day. However, in this situation the law allowed retention against the owner, until the franchisee had been given a sufficient sum for the animal's keep.[71] *Prima facie* this right seems very similar to the *ius retentionis* for expenses conferred by Roman law on a borrower or depositary.[72] Nevertheless, there is no pre-existing contract between the parties here. Likewise, it is difficult to equate the franchisee's right with that of the Roman *bona fide* improver, for the franchisee here is under no delusion that he owns the animal.

10-28. It would seem that one must look elsewhere for the rationale behind this right of retention. The view of Sir William Holdsworth is that it arises in the context of the specific duties which the common law imposed upon a person with the franchise of waif and stray.[73] For discharging these duties properly the franchisee was entitled to compensation for his expenses. Holdsworth's explanation may be tested by examining the manner in which retention of possession (later to become known as lien) developed thereafter in the common law.

10-29. By 1466 at the latest an innkeeper could retain a guest's property in security of his account.[74] Like the franchisee, the law imposed certain duties upon the innkeeper: in particular, he was obliged if he had the room to receive any traveller who wished to stay at his inn.[75] A common carrier, who was bound to carry goods if asked, was later given a similar right of retention for the debt owed to him.[76]

[67] See *Regiam Majestatem* (Stair Society vol 11, 1947, ed Lord Cooper); Balfour, *Practicks*; Hope, *Major Practicks* (Stair Society vols 3 and 4, 1937–38, ed Lord Clyde).

[68] See *Regiam Majestatem* III.9; Balfour, *Practicks* 197–199 and Hope, *Major Practicks* II, 5 and II, 10.

[69] *Year-Book* 45 Ed III Pasch pl 30.

[70] The concept is discussed in *Constable's Case* (1601) 5 Co Rep at f 107b, 77 ER 218 at 221–222.

[71] See Sir William Holdsworth, *History of English Law* (2nd edn) vol 7 (1937) 511.

[72] See above, paras 10-11–10-14.

[73] Holdsworth, *History of English Law* vol 7, 511.

[74] YBB 5 Ed IV Pasch pl 20; 22 Ed IV Hil pl 5 *per* Brian CJ. The property involved in these cases was the guest's horse.

[75] Holdsworth, *History of English Law* vol 7, 511-512. This remains the rule today: see N Palmer and A Mason, 'Lien' in *Halsbury's Laws of England* vol 28 (4th edn, 1997 reissue) para 739.

[76] Holdsworth, *History of English Law* vol 7, 511–512; *Skinner v Upshaw* (1702) 2 Ld Raym 752, 92 ER 3; *Yorke v Grenaugh* (1703) 2 Ld Raym 867, 92 ER 79 *per* Holt CJ with Powell J dissenting. See also L A Jones, *A Treatise on the Law of Liens* (1888) § 263; Whitaker, *Lien* 90–99; Montagu, *Lien* 24–25 and Hall, *Possessory Liens* 28–29.

10-30. The idea of retention having arisen out of legal duty seems therefore to be a reasonable one.[77] However, as Holdsworth points out, the principle of retention was quickly extended beyond its original parameters.[78] At the same time, in 1466, when the courts were upholding the innkeeper's right of retention, they were giving a similar right to individuals such as tailors who had carried out work on a piece of property. Such individuals were held entitled to retain the chattel – to use the English terminology – until paid.[79] The courts asserted this principle again in 1483[80] and its breadth became accepted by the sixteenth-century judge, Chief Justice Brooke:

> 'Vide libro Rastel, que stuffe, mise al taylor, fuller, shereman, weever, miller et hujusmodi, ne seront distreine, car ceux artificers sont pur le commun weale. Et eadem lex alibi de equo in communi hospitio, mes tiels artificers poent reteigner le stuffe pur lour wages pur lour labour'.[81]

From this the term for retention in the old Anglo-Norman law can be seen to be 'reteign(er)'. 'Deteign(er)' is also used.[82] There is no sign of the term 'lien'.

10-31. There is one more area in which the early English law sanctioned retention and this was in the context of sale. By 1466 it seems to have been accepted that in absence of a special agreement providing for credit, the unpaid seller of goods could retain possession of the chattels until the price was paid.[83] This may be seen as the medieval forerunner of section 41 of the Sale of Goods Act 1979.

10-32. In summary, therefore, early English law conferred retention upon three classes of person:

(1) persons under certain public duties, in particular carriers and innkeepers;
(2) persons who have performed work on a particular chattel; and
(3) unpaid sellers.

To gain the benefit of a right of retention all of these individuals naturally had to be in possession of the subject which they were seeking to retain. Beyond that, there is no particular linkage between the three categories, other

[77] The thesis is accepted by Bell, *Personal Property* 138-139.

[78] Holdsworth, *History of English Law* vol 7, 512.

[79] YB 5 Ed IV Pasch pl 20; Holdsworth, vol 7, 512. The case is cited by Gloag and Irvine, *Rights in Security* 351.

[80] YB 22 Ed IV Hil pl 15 *per* Brian CJ.

[81] Brooke, *Abridgment of the Year-Books* (1568) sv 'Distresse' pl 70, quoted by Holdsworth, *History of English Law* vol 7, 512 n 6.

[82] See YB 5 Ed IV Pasch pl 20.

[83] 'Et meme le ley est si jeo achate de vous un cheval pur XXs vous reteignerez le cheval tanque vous estes pay de les XXs, mes que jeo paiera a vous a Michaelmas prochein ensuant, icy vous ne deteignerez le cheval tanque vous estes pay etc,' *per* Haydon *arg.* YB 5 Ed IV Pasch pl 20. This is translated by Lord Ellenborough CJ in *Chase v Westmore* (1816) 5 M & S 180 at 187, 105 ER 1016 at 1019: 'Note, also, by Haydon … . And the same law is, if I buy of you a horse for 20s you may keep the horse until I pay you the 20s, but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid.'

than perhaps that contract is usually involved. However, in class (1) the retention seems to arise out of the public duty involved, for example the duty on the carrier to carry, rather than the contract, for example of carriage, formed thereafter. Indeed, as has been seen, in the case of waif and stray there was no contract at all.

10-33. Finding any similarities between these rights and the rights of retention in Roman law is also a difficult task, if simply looking at the primary Roman sources. Accepting the view of Kaser, on the other hand, that retention became a general contractual doctrine in the later Roman law would provide some common ground between it and classes (2) and (3).[84] However, the opinion of Holdsworth that class (2) grew out of class (1) would seem to negative the idea of Roman influence.[85] Further, with regard to class (3), the English law of sale from the middle of the fifteenth century onwards was fundamentally different from the Roman *emptio venditio*. In the latter *dominium*, that is ownership, could not pass until the subject was delivered from seller to buyer. Thus a right of retention based merely on possession was an impossibility.[86] In English law it has been the rule that ownership could pass without delivery since at least 1442.[87]

C. THE SEVENTEENTH-CENTURY *IUS COMMUNE* WRITERS OF EUROPE

(1) General

10-34. The seventeenth century was a particularly important period in the development of the *ius commune* in Europe and saw the publication of a number of important treatises.[88] Pre-dating most of our own institutional works, they are of considerable relevance, as it is beyond doubt that they had an influence on Scots law.[89] A study of the work of the continental jurists of that era is required.[90]

[84] See above, paras 10-17–10-21.

[85] See above, para 10-28.

[86] See Nicholas, *Introduction to Roman Law* 178–179. Cross, *Lien* 2–3 contends, however, that Roman law was influential on English law here.

[87] *Doige's Case* (1442) YB 21 Hen VI f 55 pl 12. Previously the rule was the same as Roman law: see Bracton, *De Legibus et Consuetudinibus Angliae* (c 1230) (trans Thorne) Vol II, 181, which cites C 2.3.20 (*traditionibus et usucapionibus dominia rerum non nudis pactis transferentur*). For an account of how the law developed and changed, see C H S Filfoot, *History and Sources of the Common Law* (1949) 226–229.

[88] See O F Robinson, T D Fergus and W M Gordon, *European Legal History* (3rd edn, 2000) ch 7; Borkowski and du Plessis, *Roman Law* 368–380.

[89] J W Cairns, 'Historical Introduction' in Reid and Zimmermann, *History* vol 1, 14 at 135–142; J W Cairns, 'The Civil Law Tradition in Scottish Legal Thought' in D L Carey Miller and R Zimmermann, *The Civilian Tradition and Scots Law* (1997) 191 at 200–223.

[90] This is more the case with lien than with pledge, where a systemised body of rules has existed since Roman times and been taken into Scotland and other civilian jurisdictions with little variance. See above, paras 3-66–3-86.

(2) Grotius and Huber

10-35. Grotius's *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (Introduction to the Jurisprudence of Holland) was first published in 1631. It is surprising to find in such a broadly based work that there is no mention of retention, particularly in the context of accession, *commodatum* and deposit, with which it deals in a very Romanist manner.[91] A similar finding is made on the examination of Ulric Huber's *Heedensdaegse Rechtsgeleertheyt* (1686).[92]

(3) Domat

10-36. In Jean Domat's *Les loix civiles dans leur ordre naturel* (The Civil Law in its Natural Order) (3 volumes, 1689–94) reference must be made to his discussion under the heading 'Of the Privileges of Creditors'.[93] This section clearly is a development from the tacit hypothecs which Roman law granted to an increasingly wide range of creditors as the Empire progressed.[94] Domat states that those with a privilege rank above any other creditor.[95] This ranking will be in respect of all the debtor's assets if the privilege is a general one, or in respect of a particular asset if the law so restricts it. The privileges which seem relevant here are all restricted to particular assets, such as that of the carrier:

> 'Carriers have a privilege on the goods which they have carried, for the carriage of them, and for the duties of toll, customs, or others, which they shall have paid on account of the said goods. And the same privilege have all those whose money has been laid out in expenses of the like necessity, such as for the keeping and feeding of cattle, and others of the like kind.'[96]

10-37. As regards the second sentence, there is another privilege specially given to those who have laid out money to preserve some property.[97] A privilege which is also of note is the one in favour of architects, workmen and artificers 'who bestow their labour on buildings or other works, and who furnish materials'.[98] The privilege is over the property which has work done on it. The final privilege which seems of relevance is, however, a general one over the debtor's estate. It secures law charges where a debtor has died:

[91] H Grotius, *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (trans R W Lee in 2 vols, 1936–53) III.9 and III.7.

[92] U Huber, *Heedendaegse Rechtsgeleertheyt* (trans P Gane, 1939) II.6.15–16, III.17 and III.18.

[93] J Domat, *Les loix civiles dans leur ordre naturel* (1689) translated by W Strahan as *The Civil Law in its Natural Order* (1850) part 1, III.5 (ss 1732–1769). See too M Stolleis (ed), *Juristen: Ein biographisches Lexikon* (1995) 173–175.

[94] See C P Sherman, *Roman Law in the Modern World* vol II (1922) 194–195. As can be seen by the inclusion of the equivalent of our landlord's hypothec: Domat, *Les loix civiles* s 1749.

[95] Domat, *Les loix civiles* s 1736.

[96] Domat, *Les loix civiles*, s 1746. In later French law the carrier's privilege became dependent upon possession: see M Planiol, *Treatise on the Civil Law* (3 vols, 1959) s 2521 and art 2102(6) *Code civil*.

[97] Domat, *Les loix civiles*, s 1741. See now art 2102(3) *Code civil.*

[98] Domat, *Les loix civiles*, s 1744.

> 'The expenses of proving the will, or taking administration, of making inventories, of sales, orders of court, and discussions of movables or immovables, and all other necessary law charges are preferable to all other debts.'[99]

10-38. It is not very difficult to find parallels elsewhere. The carrier's privilege is like the carrier's right of retention in the old English law and the modern carrier's lien.[100] The privilege of the artificer also has its parallels in earlier English law and modern law.[101] The salvor's lien of today's law is like the privilege of the preserver.[102] Lastly, the privilege for law charges is not far removed from the modern solicitor's hypothec and solicitor's lien.[103] Despite all these parallels, there is one great difference between the privileges of Domat and the rights of retention of English and Scots law. The privileges do not require either possession or custody on behalf of the privileged creditor. In contrast, one with a right of retention necessarily must retain the subject to keep that right in it.

(4) Pufendorf

10-39. Samuel Pufendorf's *De Jure Naturae et Gentium* (On the Law of Nature and Nations), first published in 1672, does not contain many references to retention. It does, however, seem to admit it impliedly in the case of accession brought about by a *bona fide* possessor, stating 'if the builder be in possession, the owner of the land shall pay for the wages and the value of the material'.[104]

10-40. The one express mention of retention comes very briefly in the context of compensation.[105] Known as *compensatio* in Roman law, this is the doctrine where obligations owed between two parties may be set off against each other and thus extinguished. The doctrine generally is limited to liquid debts. For example, if A owes B £5 and B owes A £10, compensation means that if B pays A £5 both obligations are thereby discharged. Pufendorf points out that compensation can take place with consumable commodities which are the same. On the other hand different kinds of things or simply different things do not admit of compensation, writes Pufendorf, giving respectively the examples of 'a jar of Rhine wine for a jar of Spanish' and that of 'Bucephalus for an ordinary nag'.[106] He then comes to write the following:

[99] Domat, *Les loix civiles*, s 1760. Note that in the modern French law the privilege seems confined to court costs alone: art 2101(1) *Code civil*.

[100] See above, para 10-29 and below, paras 16-24–16-55.

[101] See above, para 10-30 and below, paras 16-10–16-12.

[102] See Bell, *Principles* § 1427. For the sake of clarity, Scots law also recognises a hypothec for salvage: see Guthrie's addendum to Bell, *Principles* (10th edn) § 1397; *Hatton v A/S Durban Hansen* 1919 SC 154.

[103] See Gloag and Irvine, *Rights in Security* 407–416 and 384–395.

[104] S Pufendorf, *De Jure Naturae et Gentium* (1672) IV.7.6.

[105] Pufendorf, V.11.6.

[106] Pufendorf, V.11.6.

'Although it often happens, even in reciprocal debts, that an obligation is not so much removed, as suspended by retention, whereby I keep to myself what I should have given another, until he has paid what he first owed me.'[107]

10-41. This passage suggests a right of retention based on mutual obligations in a contract, much like the interpretation of the later Roman law by Kaser and Sohm, discussed above.[108] Such a right does not seem to be limited to certain categories of contract as in the old English law.

(5) Voet

10-42. Johannes Voet's *Commentarius ad Pandectas* (1698–1704) contains a significant amount on the subject of retention, with discussion in various places on the matter. In the first place, Voet considers the right of retention of a *bona fide* possessor who has made improvements.[109] The discussion is a detailed one and every aspect of it will not be examined here. Voet begins with the general Roman principle that a possessor has only a right of retention for expenses and no separate action to recover them. The general rule is that the possessor recovers his expenses to the extent the property is enhanced in value. However, there are exceptions: in particular voluptuous expenses are not recoverable.[110] By way of a contrast with Roman law, Voet states that possessors in bad faith may also retain under the modern law, unless they stole the property.[111] This has been accepted into South African law.[112]

10-43. Next, reference may be made to where Voet simply reiterates the later Roman law. Thus in his discussion of deposit, he states that the depositary has no right to retain for expenses, a rule introduced by Justinian.[113] In examining *commodatum*, he states that there is also no right of retention, following the enactments of Diocletian and Maximian.[114] Likewise, discussing pledge, he writes that when the debt which a pledge is securing has been extinguished, the creditor may retain the pledged property for another debt which is owed to him by the debtor.[115] This rule was first enacted by the Emperor Gordian.[116]

10-44. The most valuable part of Voet's work, for present purposes, is his general discussion of retention in the context of compensation.[117] It is

[107] Pufendorf, V.11.6.

[108] See above, paras 10-17–10.21.

[109] J Voet, *Commentarius ad Pandectas* 6.1.36.

[110] That is luxurious outlays, *impensae voluptuariae*, which are unnecessary and undertaken because of caprice.

[111] Voet, *Commentarius ad Pandectas* 6.1.36.

[112] To a certain extent at least: see T J Scott, 'Lien' in *LAWSA* vol 15 (1999) para 57.

[113] Voet, *Commentarius ad Pandectas* 16.3.9. See above, para 10-11.

[114] Voet, *Commentarius ad Pandectas* 13.6.10.

[115] Voet, *Commentarius ad Pandectas* 20.6.16.

[116] See above, para 10-15.

[117] Voet, *Commentarius ad Pandectas* 16.2.20.

described by Gane as having become a '*locus classicus*'.[118] Treating retention along with compensation as defences to actions is to adopt the same pattern as Pufendorf. However, Voet's work is more detailed. He begins by distinguishing the concepts:

> 'The right of retention is not to be confused with set-off, although it is in some things by no means unlike set-off, and on the analogy of set-off can be raised even in execution. … Retention applies even to individual things which do not allow of set-off, and is allowed even as to debts which are not liquid. And it does not destroy an obligation *ipso jure*, as happens indeed by set-off.'[119]

10-45. As a preliminary point, this is the translation of Gane who translates '*compensatio*' as 'set-off', the English law term for compensation. More importantly, retention is seen as a defence mechanism generally available in the context of reciprocal obligations. However, one cannot retain for any debt, regardless of origin. In the words of Voet's near contemporary, Vinnius: '*Non posse creditorem, cui sine pignore pecunia debitur, rem debitoris pro eo quod sibi debitur retinere*'.[120] There may only be retention for that '*quod contrario judicio consigni potest*',[121] in other words, '*quod occasione quodem contractus, eis abest et vel maxime impensas necessarias*'.[122]

10-46. Voet goes on to state that 'retention finds employment in a number of causes'.[123] One of the causes he mentions concerns dowry and may be passed over.[124] Another two involve maritime law: the right of a ship's master to retain merchandise for a contribution for jettison and, secondly, for freight.[125] Next, there is the right of a seller to retain the goods until the price is paid by the buyer. After that, comes the right of a factor to hold back merchandise entrusted to him by his principal until the principal pays the factor what he owes him. Finally, Voet writes:

> 'Especially is there room for retention on account of what is owed in connection with the thing retained, for instance, for expenses incurred upon it or for workmanship or craftmanship bestowed about it. On those lines fullers, tailors, and possessors in good and in bad faith correctly safeguard themselves by holding back

[118] Voet, *Commentarius ad Pandectas* (trans by P Gane, 1956) vol 3, 147.

[119] Voet, *Commentarius ad Pandectas* 16.2.20.

[120] A Vinnius, *Selectarum juris quaestionum* (1653) Lib 1 c 41, referred to in *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 455. A creditor may not retain the property of the debtor for money owed unless he has a right of pledge. I am grateful to Mr Grant McLeod for his help with translating the Latin.

[121] Vinnius, *Selectarum juris quaestionum* (he may retain for that which a court could award under a counterclaim).

[122] Vinnius, *Selectarum juris quaestionum* (he may retain for that due under the contract, or for necessary expenses).

[123] Voet, *Commentarius ad Pandectas* 16.2.20.

[124] The right of a wife to hold back the property of her husband until her dowry and the rest of her woman's belongings are restored.

[125] Gane translates the first right as applicable to any sailor. However, the right is usually stated to be that of the ship's master. This right goes back to Roman law as the *lex Rhodia de iactu* and is known in civilian systems now as general average. See Robinson, Fergus and Gordon, *European Legal History* 93; Zimmermann, *Obligations* 406–412 and Bell, *Principles* § 1426.

cloth, garments or to things possessed in order to procure wages or expenses incurred.'[126]

10-47. Various comments may be made about Voet's list. First, it is not intended to be exhaustive.[127] Secondly, it is not limited to retention in the context of contract, as can be seen from the shipmaster's right to retain for general average and the similar right of possessors in good or bad faith for expenses. Thirdly, given the inclusion of the seller's right of retention, Voet does not differentiate between retention based on ownership and retention based on possession or custody.[128] Fourthly, while his work has a Roman foundation, the rights of retention found in early English law are not far removed from some of those rights which he discusses.[129]

(6) Conclusions

10-48. In the writings which have been examined here it is possible to see a general reassertion of the Justinianic treatment of retention. What is also clear, from Pufendorf and Voet at least, is the perception of retention as a general legal doctrine functioning within the sphere of mutual obligations. The silence of Grotius and Huber upon retention is interesting and suggests that until Voet there was little discussion on the matter in Roman-Dutch law. Domat's allocation of non-possessory privileges to creditors in many of the situations in which comparative systems demanded custody or possession in order to secure a preference is fascinating. His fundamental principles are, however, clearly taken once again from the law of ancient Rome.

D. THE LATER ENGLISH LAW

(1) General

10-49. The English law of retention continued to develop after the medieval period, although the great writers Coke and Blackstone appear to be silent upon the matter.[130] In many ways the law remained consistent with its history in that, leaving the special case of the unpaid seller's lien aside, it recognised a sub-category of rights of retention based upon public duty as distinct from

[126] Voet, *Commentarius ad Pandectas* 16.2.20. He also goes on to state that retention passes to heirs and the matter of whether a tender of security will end the right of retention, both showing retention to be a fairly well-developed doctrine.

[127] This is clear from the context of the discussion of retention as a defence to an action.

[128] For, in the Roman law, the seller retained ownership until the property was delivered to the buyer: *traditionibus et usucapionibus dominia rerum non nudis pactis transferentur* (C 2.3.20 (Diocletian, 293)).

[129] For example the English carrier's right of retention has parallels with the ship master's right to retain for freight.

[130] Sir Edward Coke, *Institutes of the Laws of England* (1628–41); Sir William Blackstone, *Commentaries on the Laws of England* (1791).

a sub-category based upon work done on a particular chattel.[131] Indeed there was a clear difference between the two in that the carrier and the innkeeper could validly plead their right against the owner of the property, even where they had no contractual relationship with that individual.[132] Thus if Alice took Byron's horse to an inn without Byron's permission, the innkeeper could still plead a right of retention, even against Byron, until Alice's bill was paid. With the other type of retention, the owner of the property was only bound if he or she or someone had ordered the work to be done, or had given authority (express or implied) to another to have it carried out. The law remains the same today.[133]

(2) Terminology: the arrival of the word 'lien'

10-50. Up until the eighteenth century any cases involving retention used the term 'retention', or its old Anglo-Norman equivalents, to label the right involved.[134] One case also had the reporter viewing the innkeeper's right of retention in terms of a pledge of the relevant property.[135] However, by 1734 at the latest a new word had come into English law which was used as a synonym for retention. That word was 'lien'. The earliest case involves the right of retention of a solicitor, of which more will be said below.[136] The Lord Chancellor stated:

> 'The Attorney hath a Lien upon [his client's] Papers … and tho' this doth not arise by any express Contract or Agreement, yet it is as effectual being an implied Contract by Law.'[137]

10-51. 'Lien' soon became embedded as an alternative for retention, with Lord Mansfield amongst others making great use of it.[138] In passing it may be noted that the term did not make such an instant impression upon

[131] See above, para 10-30 and Holdsworth, *History of English Law* vol 7, 511; Bell, *Personal Property* 138–141.

[132] Holdsworth, *History of English Law* vol 7, 511; *Robinson v Walter* (1617) 3 Bulstr 269, 81 ER 227 (innkeeper); *Yorke v Grenaugh* (1703) 2 Ld Raym 866 at 867, 92 ER 79 at 80 *per* Holt CJ (carrier).

[133] *Robins & Co v Gray* [1895] 2 QB 501; Palmer and Mason, 'Lien' para 741; G W Paton, *Bailment in the Common Law* (1952) 219–221 and 273; M G Bridge, *Personal Property Law* (3rd edn, 2002) 173–175; N E Palmer, *Bailment* (2nd edn, 1991) 1013 and 1499–1501.

[134] Eg, YBB 5 Ed IV Pasch pl 20, 22 Ed IV Hil pl 15 *per* Brian CJ; *Robinson v Walter* (1617) 3 Bulstr 269, 81 ER 227; *Chapman v Allen* (1632) Cro Car 271, 79 ER 836; *Jones v Pearle* (1723) 1 Stra 556, 93 ER 698.

[135] *Robinson v Walter* (1617) 3 Bulstr 269, 81 ER 227.

[136] See below, paras 10-58 and 10-83. See also Jones, *A Treatise on the Law of Liens* § 113.

[137] *Ex parte Bush* (1734) 2 Eq Cas Ab 109 pl 4, 22 ER 93.

[138] See Lord Mansfield in *Green v Farmer* (1768) 4 Burr 2214 at 2218; 98 ER 154 and *Drinkwater v Goodwin* (1775) 1 Cowp 251 at 255, 98 ER 1070 at 1072. The word 'lien' was also used in *Ex parte Shank* (1745) 1 Atk 234, 26 ER 151; *Ex parte Deeze* (1748) 1 Atk 228, 26 ER 146; *Turwin v Gibson* (1749) 3 Atk 720, 26 ER 1212; *Re Matthews ex parte Ockenden* (1754) 1 Atk 235, 26 ER 151; *Kruger v Wilcox* (1755) Amb 252, 27 ER 168 and *Kirkman v Shawcross* (1794) 6 TR 17, 101 ER 410. See also Hall, *Possessory Liens* 16.

everyday English language. Dr Johnson in his famous dictionary of 1755 only lists it as the past participle of the verb 'to lie'.[139]

10-52. The etymology of 'lien' has been considered elsewhere and it seems that the word came from France.[140] What is curious is that in French law then, 'lien' was not looked upon as a right in respect of some property, but simply to mean obligation or warranty. For example, Pothier has a section in his *Traité des Obligations* of 1761 entitled 'Du défaut de lien dans la personne qui promet.'[141] This translates as 'Of want of obligation in the person promising' and deals with the situation where an obligation by someone to do something is regarded as void where its terms are such that the person has an absolute liberty whether or not to perform the obligation.

10-53. What is particularly intriguing is that the word 'lien' was also being used by the English lawyers of the seventeenth century, and indeed perhaps before, to mean obligation or warranty.[142] Why 'lien' was to take an altogether different meaning in the following century is unclear.

10-54. The truth perhaps lies in the natural meaning of 'lien' in French as a bond or tie.[143] 'Lien' came into English law not simply to mean the right of someone to detain a chattel, but as a term for a nexus upon a particular piece of property. A completely separate species of rights, where a person had a right over some property without either possession or custody, existed in English law. These rights in the eighteenth century also became labelled as 'liens' and today they are known as 'equitable liens'.[144] Liens which are synonymous with rights of retention are referred to strictly as 'possessory liens'.[145] Other than the possession/lack of possession distinction another important difference is that it is possible to have an equitable lien upon land, or real property to use the English law term.[146] The possessory lien is confined to chattels.

[139] S Johnson, *Dictionary of the English Language* (1755) sv 'lien'. He cites Genesis 26:10 (King James Version). As a matter of interest, Psalms 68:13 and Jeremiah 3:2 also use 'lien' this way in the King James Version.

[140] See above, para 9-07.

[141] R Pothier, *Traité des Obligations* (1761) I.1.1.3.7 (s 47) translated by W D Evans as *Treatise on Obligations* (1806) vol 1, 28.

[142] See W Rastell, *La Termes de la Ley* (1624), which is used by *Jowitt's Dictionary of English Law* (2nd edn, by J Burke, 1977) sv 'lien' as authority for the proposition that lien 'formerly denoted *obligatio*, generally, a warranty.'

[143] See above, para 9-07.

[144] For an early equitable lien case in which the term 'lien' is used, see *Burgess v Wheate* (1759) 1 Eden 177, 28 ER 652 (purchaser's lien). For equitable liens in general, see Palmer and Mason, 'Lien' paras 754–800; R M Goode, *Commercial Law* (3rd edn, 2002) 620; A H Silvertown, *Law of Lien* (1988) 8–11.

[145] See Hall, *Possessory Liens* 18; *Jowitt's Dictionary of English Law* sv 'lien'; I Davies, *Textbook on Commercial Law* (1992) 320. They are alternatively known as legal or common law liens: see Palmer and Mason, 'Lien' para 702; Goode, *Commercial Law* 619; Silvertown, *Law of Lien* 5–7; L Smith, 'Security' in A Burrows (ed), *English Private Law* vol 1 (2nd edn, 2007) para 5.69.

[146] Palmer and Mason, 'Lien', para 754.

10-55. By way of further proof that lien means 'nexus', reference may also be made to maritime law. In this legal area there exists a species of rights known as 'maritime liens'.[147] These arise by operation of law in favour of certain individuals in respect of a ship. For example there is a maritime lien for salvage. A person whose property has been damaged by the ship, say in a collision, has the same right for the cost of the repairs.[148] Maritime liens are not dependent on possession of the vessel.[149] In civilian terms they may correctly be defined as hypothecs.[150] The idea of 'lien' being used to mean nexus comes out in one of the standard definitions of maritime lien:

> 'A Maritime lien must be something which adheres to the ship from the time that the fact happens which gave the Maritime lien, and then continues binding the ship until it is discharged'.[151]

10-56. The lien created is good against the world, with English judges having used civilian terminology such as *jus in re aliena* to make clear this fact.[152]

(3) Particular liens and general liens

10-57. The possessory liens which the common law had originally recognised were always particular ones.[153] In other words the person had the right to retain a particular item for a service performed in connection with it, such as repairing it or carrying it. A new development in the eighteenth century was the recognition of the general lien, where the relevant item could be retained for a general balance of accounts between the two parties in respect of like dealings between them.[154] General liens proved advantageous to the parties involved. For, in a series of contracts the knowledge that a general

[147] See D R Thomas in *British Shipping Laws* vol 14 (1980) ch 1; American Law Institute, *Restatement of the Law of Security* (1941) 161–162; J A G Lowe, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) paras 274–286; Silvertown, *Law of Lien* ch 5. It appears that the term 'maritime lien' was probably first coined in English law by Sir John Jervis in *The Bold Buccleugh* (1851) Moo PCC 267, 13 ER 884: see Thomas, *British Shipping Laws* 2.

[148] Thomas *British Shipping Laws* 13.

[149] This is why these rights are discussed by Gloag and Irvine, *Rights in Security* 437–439 as 'maritime hypothecs'. See too Thomas *British Shipping Laws* 3; *The Bold Buccleugh*; *The Tervaete* [1922] P 259; *The St Merriel* [1963] P 247.

[150] As discussed under this heading in Bell, *Principles* §§ 1397–1401; Gloag and Irvine, *Rights in Security* and J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 298. See too D M Walker, *Principles of Scottish Private Law* (4th edn, 1989) vol III, 412.

[151] *The Two Ellens* (1872) LR 4 PC 161 at 169 *per* Mellish LJ. This was approved by Lord Macnaghten in *The Sara* (1889) 14 App Cas 209 at 225. See Thomas *British Shipping Laws* 10.

[152] See, eg, *The Ripon City* [1897] P 226 at 242 *per* Gorell Barnes J; *The Tervaete* [1922] P 259. See also Hall, *Possessory Liens* 20.

[153] See Whitaker, *Lien* 13–27; Bell, *Personal Property* 142. There is, however, some dispute about whether the innkeeper's lien is in fact a general lien. *Jowitt's Dictionary of English Law* sv 'lien', for example, classifies it as such. Whether this lien is special or general is a matter which has been discussed in Scotland: see A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 90. See below, paras 16-72–16-77.

[154] Bell, *Personal Property* 142. See generally, N E Palmer, *Bailment* (2nd edn, 1991) 955–958.

lien was held would make the lien-holder feel safe to hand back property held under earlier contracts, knowing that the property which was held under later contracts could serve as security for the total debt outstanding under them all.[155]

10-58. It became established that certain professions were entitled to general liens as a matter of usage. Bankers, factors, insurance brokers, solicitors and stockbrokers appear on this list.[156] In the latter part of the eighteenth century the English courts were keen to add to it at every available opportunity. 'The convenience of commerce and natural justice are on the side of liens' trumpeted Lord Mansfield.[157] 'It has been the universal wish of the Courts at all times to extend the lien as far as possible',[158] declared Lord Kenyon CJ.

10-59. This great enthusiasm, however, was to come to an abrupt halt less than ten years after Lord Kenyon made that statement. Whilst the value of the general lien between the contracting parties was readily accepted, it also came to the attention of the courts the damage it could do to the interests of other creditors of the customer if he became insolvent.[159] As Le Blanc J put it in 1805:

> 'All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionally amongst all the creditors and they ought not to be encouraged.'[160]

Rooke J was more blunt:

> 'I shall never unless bound by authority assent to the doctrine that these general liens are to affect the rights of third persons.'[161]

10-60. The effect of this is that the movement to recognise general liens based on usage as widely as possible came to an end at the start of the nineteenth century. Further, when it came to accepting that a general lien had been created the courts resolved to place a heavy burden of proof on a person seeking to establish the existence of such a right.[162] The development of the law of lien in England thus could never be said to follow any pre-ordained pattern.

[155] Davies, *Textbook on Commercial Law* 321; Bell, *Personal Property* 142; *US Steel Products Co v Great Western Railway Co* [1916] 1 AC 189 at 211 *per* Lord Parmoor.

[156] Whitaker, *Lien* 34–35; Hall, *Possessory Liens* 37–48; Palmer and Mason, 'Lien' para 727; Bridge, *Personal Property Law* 171; Goode, *Commercial Law* 619.

[157] *Green v Farmer* (1768) 4 Burr 2214 at 2221, 98 ER 154 at 158.

[158] *Kirkman v Shawcross* (1794) 6 TR 14 at 17, 101 ER 410 at 412.

[159] Whitaker, *Lien* 32; Cross, *Lien* 16; Hall, *Possessory Liens* 35–36; Bell, *Personal Property* 142–143; Palmer and Mason, 'Lien' para 716; Davies, *Textbook on Commercial Law* 321; L A Jones, *A Treatise on Lien* (1888) § 19.

[160] *Rushforth v Hadfield* (1805) 6 East 519 at 528, 102 ER 1386 at 1390.

[161] *Richardson v Goss* (1802) 3 Bos & Pul 119 at 126, 127 ER 65 at 69.

[162] *Rushforth v Hadfield* (1805) 6 East 519, 102 ER 1386; (1806) 7 East 224, 103 ER 86; Palmer, *Bailment* 956.

(4) Summary of the scope of the possessory lien

10-61. The events at the turn of the nineteenth century set the scene for the crystallisation of the law of lien in England into the state in which it has existed ever since. There is still the accepted division between particular liens and general liens.

10-62. The law will imply a particular lien in favour of certain individuals who have a public duty, for example the innkeeper (hotelier) and the carrier.[163] It will also imply one in favour of an individual in respect of a particular chattel where that individual has done work on that chattel.[164] That much has remained the same for hundreds of years, the law having 'ossified' as one commentator puts it.[165] It must be stressed that English law does not imply a particular lien in every contract where one party has possession of the property of another, based upon the idea of mutuality of contract.[166] It is, however, open to the parties to a contract to convince a court that the creation of such a lien has been intended. This may be done by pointing to an express term in the contract or by proving that such a term is implied, for example by usage.[167]

10-63. The law will imply a general lien in the situations where usage has been accepted to confer such a right. Prominent examples are the general liens of the banker, factor (commercial agent) and solicitor.[168] A general lien may also be created expressly or impliedly by a particular contract[169] or by public advertisement.[170] Given, however, the unfair effect that a general lien is seen to give in the event of the customer's insolvency, the courts require a lot of persuasion to accept that such a right has been validly established.[171]

10-64. In certain situations, statute may confer a lien.[172] The most prominent example is the lien of the unpaid seller under the Sale of Goods Act 1979, which in actual fact is merely declaratory of the English common law, which was discussed above.[173]

[163] See above, para 10-49.

[164] See above, para 10-49.

[165] Bell, *Personal Property* 139.

[166] See, eg, Palmer and Mason, 'Lien' para 737. Compare Scots law: see Sim, 'Rights in Security' paras 75–77.

[167] Whitaker, *Lien* 27–30; Hall, *Possessory Liens* 32–33; Bell, *Personal Property* 142.

[168] See above, paras 10-57-10-60 and *Brandao v Barnett* (1846) 12 Cl & F 787, 8 ER 1622 (banker); *Kruger v Wilcox* (1755) Amb 252, 27 ER 168 (factor) and *Wilkins v Carmichael* (1779) 1 Dougl 101, 99 ER 70 (solicitor). Usage may also be local: see Palmer and Mason, 'Lien' para 730.

[169] Whitaker, *Lien* 36–38; Hall, *Possessory Liens* 32–33; Palmer and Mason, 'Lien' para 731; Palmer, *Bailment* 955.

[170] Palmer and Mason, 'Lien' para 732; *Kirkman v Shawcross* (1794) 6 TR 14, 101 ER 410.

[171] See above, para 10-60.

[172] Palmer and Mason, 'Lien' para 706; Bell, *Personal Property* 141; Silvertown, *Law of Lien* ch 12.

[173] Sale of Goods Act 1979 s 41. On the common law unpaid seller's lien, see above, para 10-31and *Lickbarrow v Mason* (1794) 5 TR 683, 101 ER 380; *Bloxam v Sanders* (1825) 4 B & C 941, 107 ER 1309; *Miles v Gorton* (1834) 2 C & M 504, 149 ER 860.

E. SCOTS LAW FROM 1650 TO 1800

(1) Pre-Stair case law

10-65. Prior to 1681 it is possible to isolate only a very small number of cases dealing with retention. One clear example, however, is *Binning v Brotherstones*.[174] It was held that there a *bona fide* possessor had a right to retain land which he had improved until reimbursed by the true owner. The law set down in this case can be seen to be pure Roman law: thus, the right of retention is referred to as a *jus retentionis*. Another early case, *Earl of Bedford v Lord Balmerino*,[175] also involves land. There the court allowed a trustee to retain the property against an adjudger of the beneficiary's right, until his expenses were met.[176]

10-66. Two further early cases deal with the right of retention of what the reports refer to as 'factors'. One concerns a gentleman who was a chamberlain. It was held that he was a servant and not truly a factor, thus had no right of retention.[177] In the other the factory concerned was set up by a person going abroad.[178] The factor he appointed was left to look after his property, *inter alia* being responsible for uplifting the rents. It was held that this factory could be revoked. Nevertheless, the court said that in this situation the factor had to be 'refunded of what he profitably expended' before he had to give up possession. The rationale here seems Romanist too, with echoes of depositaries having the right to be refunded for such expenses.[179]

(2) Stair

10-67. The treatment of retention by Stair in his *Institutions* of 1681 is very civilian. There are three passages, all in Book 1, which are of particular interest. The first one comes in the context of *commodatum*, in other words loan for use.[180] He writes that where the borrower has laid out necessary or profitable expenses upon the subject, he may either recover these by action or by retaining it until the lender satisfies his claim. The action the borrower has is described as 'contrary' to the 'direct' action of the lender to reclaim his property. The law enunciated by Stair is identical to the later Roman law of *commodatum* and indeed Stair cites the Digest of Justinian.[181] The only

[174] (1676) Mor 13401.

[175] (1662) Mor 9135.

[176] The right of retention is based on the trustee's ownership here. It was not until the nineteenth century that the difference between retention based on ownership and retention based on possession was finally settled. See below, para 14-16.

[177] *Pearson v Crichton* (1672) Mor 2625.

[178] *Chalmers v Bassily* (1666) Mor 9137.

[179] See above, paras 10-11-10-13.

[180] Stair I.xi.12.

[181] Stair I.xi.12.

change is that he has anglicised the Latin terminology of *actio directa*, *actio contraria*, and *retentio/ius retentionis*.[182]

10-68. The next passage is found as part of Stair's treatment of *depositum* (deposit).[183] He addresses the question of whether a depositary has a right of retention for expenses knowing that Justinian had abolished this right, a position accepted elsewhere in the *ius commune*:

> 'Though law and most interpreters favour the negative, upon the same ground that compensation is excluded; yet the affirmative is to be preferred, because as the contrary action is competent for the melioration, so much more the exception, it being part of the same contract.'[184]

10-69. This passage is set against the background of Stair's discussion in the preceding paragraph of whether compensation was competent in the case of deposit.[185] Justinian was credited with disallowing such an exception. Thus if Arthur owed Beatrix 30 sheaves of corn and he had already deposited 50 with her under a separate contract, Beatrix could not appropriate 30 of those and thereby extinguish Arthur's obligation. Stair writes that the rationale for the rule was that the very nature of the contract of deposit was that the property deposited must be capable of being restored on demand. Allowing compensation would prevent this. However, in Stair's considered opinion the 'convincing reason' why compensation is barred is because it concerns 'things of the same nature and liquid', whereas:

> '[I]n depositation, the dominion and possession of the thing remaineth in the depositor, though it be numerate money consigned, and to meddle with it is unwarrantable, and accounted in law theft'.[186]

10-70. Applying this reasoning, there is no reason why retention should be barred. Retention does not amount to meddling, for the depositor will get his particular piece of property back, immediately upon defraying the depositary's expenses. Stair therefore admitted the right of retention for a depositary. Indeed he cites the 1662 case of *Earl of Bedford v Lord Balmerino*,[187] as discussed above, to support his account of the law. Since this concerns the right of a trustee to retain heritage until his expenses are met, the case can only be considered to be of persuasive authority, for deposit as in Roman law is confined to moveables.[188] Moreover, the retention there was based on ownership rather than possession.

10-71. Before finishing his discussion of retention in the context of deposit, Stair writes in further justification of his position:

[182] See above, para 10-14.

[183] Stair I.xiii.9.

[184] Stair I.xiii.9. On the *ius commune*, see Voet 16.3.9, discussed above at para 10-43.

[185] Stair I.xiii.8.

[186] Stair I.xiii.8.

[187] (1662) Mor 9135, discussed above at para 10-65.

[188] On the Roman law, see Thomas, *Roman Law* 276. On the Scots law, see J A K Huntley, 'Deposit' in *Stair Memorial Encyclopaedia* vol 8 (1992) para 4.

> 'And in all cases in the law where action is competent, exception is also competent, and so with us, if instantly verified.'[189]

Thus for Stair, in Scots law exception is a remedy available in any situation in which it is clear that there is a right of action. Retention is a form of exception so is subject to that rule. It is not limited to particular forms of contract as under English law.[190] Indeed it is not limited to contract at all. It is a part of the general law of obligations.

10-72. It may be argued that the conclusions made at the end of the last paragraph are based on conjecture, given that they rest upon one sentence. It is therefore appropriate to turn now to the third and most general passage in the *Institutions* on the subject of retention, which may be quoted in full:

> 'Retention is not an absolute extinction of the obligation of repayment or restitution, but rather a suspension thereof, till satisfaction be made to the retainer; and therefore it is rather a dilatory than a peremptory exception, though sometimes, when that which is due to the retainer, is equivalent to the value of what is demanded, if either become liquid, it may turn into a compensation. Such is the right of mandatars, impledgers, and the like, who have interest to retain the things possessed by them, until the necessary and profitable expenses wared out by them thereupon be satisfied.'[191]

10-73. This appears within the title 'Liberation from Obligations' and like the passage on retention in deposit, immediately follows a discussion on compensation.[192] Stair's treatment is remarkably similar to that of Voet.[193] It seems accepted that Voet being a slightly later writer could not have influenced Stair.[194] However, Stair may possibly have influenced Voet.

10-74. It is clear from the passage above and its context that Stair sees retention as a defence which is generally available within the law of obligations. The only matter in doubt is whether it is limited to obligations involving 'necessary' or 'profitable' expenses upon a piece of property. If there is such a limitation, then many situations where retention could potentially operate are excluded. So, for example, leaving express contract aside, an innkeeper under such a rule could not retain his guest's luggage for his bill, unless for some peculiar reason he had laid out expenses upon that luggage.

10-75. Various reasons may be offered against such an interpretation. In the first place, if Stair recognised such a limitation he would have said so much more clearly. The use of the phrase 'Such is the right' suggests that he is merely giving an example rather than stating that retention is so limited.

[189] Stair I.xiii.9. It is not clear what 'instantly verified' means.

[190] See above, para 10-62.

[191] Stair I.xviii.7.

[192] Stair I.xviii.6.

[193] Voet 16.2.20.

[194] See G M Hutton, 'Purpose and Pattern of the Institutions' in *Stair Tercentenary Studies* (Stair Society, vol 33, 1981) 79 at 80. Voet's work was first published between 1698 and 1704. Stair had died in 1695.

Further, there is the fact that he says that retention may turn into compensation. Here he is obviously thinking of the retention of liquid debts and of course necessary or profitable expenses cannot be made in respect of a debt, as it is incorporeal. Viewing retention in a wide sense is also supported by the sentence from his title on deposit quoted above where he says that exception is available wherever action is competent.[195] Finally, although retention had its origins in Roman law in claims for expenses laid out upon property, it seems that both there later on and in the *ius commune* it was viewed as a defence available in all sorts of obligations.[196]

10-76. Whilst the Roman basis of Stair's work is clear, he is silent upon one of the main rights of retention of the civil law, that of the *bona fide* possessor for improvements.[197] This contrasts sharply with the detailed treatment by Voet[198] and is indeed somewhat surprising given the case of *Binning v Brotherstones*[199] of 1676 which deals with the matter.

10-77. As has been seen Stair views retention as a right available as a defence within the law of obligations as a whole. When he states that retention is pled by way of exception, he does not enter into the question of whether the exception is the *exceptio doli* or the *exceptio non adimpleti contractus*.[200] He seems to be unconcerned about differentiating between types of exception.

10-78. Stair can be shown always to treat retention as a matter concerned with the particular obligation in question and not other obligations between the two parties. In other words, there is nothing in the *Institutions* to suggest that Scots law in 1681 recognised anything akin to the general lien of today. As a matter of note, Stair does not say that a pledgee has a right of retention for all sums, a right which the Emperor Gordian gave to the Roman pledgee.[201]

10-79. A final point about Stair's work is that it does not make any distinction between retention based upon ownership and retention based upon merely custody or possession. This matter will be returned to later.[202]

(3) Case law: 1681–1750

10-80. There is a period of over sixty years between Stair and Bankton, the next institutional writer to deal with retention.[203] This sees some notable developments in the case law. Just one year after Stair's *Institutions* were

[195] Stair I.xiii.9.

[196] See above, paras 10-17–10-21, 10-40–10-41 and 10-44–10-47.

[197] See above, paras 10-02–10-10.

[198] See above, para 10-42.

[199] (1676) Mor 13401. See above, para 10-65.

[200] See above, paras 10-17–10-21.

[201] See above, para 10-15.

[202] See below, para 14-16.

[203] For Bankton, see below, paras 10-86–10-98. Sir George Mackenzie of Rosehaugh appears to say nothing on retention in his *Institutions of the Law of Scotland* (1684).

published, came what is probably the first case on retention in the context of maritime law. The report reads as follows:

> 'Found that though mariners and seamen had not a hypothecation upon the ship for their wages of their last voyage, yet they had *jus insistendi* and *retinendi*, while in possession of the ship, even against a person who had bought her after the voyage.'[204]

Two points may be made about the right of seamen to retain a ship against its owner for their wages. First, it is dependent on possession.[205] Secondly, it is a real right enforceable against the owner's singular successor.

10-81. Another important case is *Stephens v Creditors of the York Buildings Company*[206] decided in 1735. There the court held that a factor may retain the subjects of his constituent until he gets his salary and has his disbursements refunded. However, it is stated that his right is neither based upon compensation nor retention, but is 'upon a stronger footing'. It is said to be 'implied in the mutual contract betwixt them, and in all cases the *actio contraria* must meet the *actio directa*'.[207] Further, it is stated that the right also attaches to money received by the factor when selling the constituent's goods.

10-82. While the decision – that a factor has such a right – is beyond challenge, the reasoning is somewhat difficult to follow. The right is clearly one of retention. When it is stated that the right is 'stronger' than retention what can only be meant is that the right is stronger than a normal right of retention because unlike such a right it also attaches to the proceeds of the subject matter if it is sold. But then this is simply a consequence of a factor's right to sell the principal's property.[208] The other peculiarity here is the use of the terms *actio contraria* and *actio directa*. In Roman law these terms only appeared to have been used with regard to imperfectly bilateral contracts such as *depositum* and *commodatum*.[209] These contracts were gratuitous: a contract of factory is not.[210] Scots law appears therefore to be taking a more relaxed approach to the use of such terminology.

10-83. Most of the cases from this period concern the right of a solicitor to retain his client's papers until his account is settled. The earliest case dates from 1697. It refers to the right in question as a '*jus retentionis et hypothecae*'.[211] Intriguingly, all the subsequent cases call the right a 'tacit hypothec'[212] or

[204] *Seamen of 'The Golden Star' v Miln* (1682) Mor 6259. The case of *Sands v Scott* (1708) Mor 6261 has a similar ratio.

[205] The law was to change at a later date. See Bell, *Commentaries* I, 562 and Gloag and Irvine, *Rights in Security* 438.

[206] (1735) Mor 9140. This case is also discussed below at para 17-61.

[207] (1735) Mor 9140.

[208] See *Broughton v Stewart, Primerose and Co* 17 Dec 1814 FC.

[209] See above, paras 10-12 and 10-14.

[210] Factors are due a salary. A gratuitous factor is known as a mandatory, or formerly a 'mandatar' as in Stair I.xviii.7.

[211] *Cuthberts v Ross* (1697) 4 Br Sup 374.

[212] *Cochran v Houston* (1708) 4 Br Sup 721.

simply a 'hypothec'.[213] What is strange about this terminology is that the hypothec, as defined by Stair upon the basis of Roman law, is a non-possessory right of security.[214] The right of the law agent as set out in these cases depends on physically holding the client's papers. At that time in France, Domat had based his privilege for law charges upon the tacit hypothecs of Roman law.[215] Indeed at least one of the cases also refers to the right as a 'privilege'.[216] However, there is no evidence of French law requiring physical detention to enforce the right. The Scottish adoption of this terminology also caused some puzzlement among the judiciary, for in one case:

> 'Some thought that the right competent to agents was improperly called a hypothec, as it is no pledge or real right, but only a personal right of retention of the writs while they are in his hands.'[217]

The rest of the judges disagreed and said it was not a mere personal right. While they stated that the agent's right 'was a creature of the Court introduced for the agent's security, who otherways would not undertake the affairs of a person of doubted circumstances',[218] no comment was offered on the use of the term 'hypothec'. Further analysis of the issue is required.

10-84. The law agent's right of retention will be discussed in detail elsewhere,[219] but for the moment two further points arising out of the early case law will be made. Firstly, in one of the oldest cases it was suggested that the right was available only where the agent had no written proof of his client's indebtedness.[220] The court rejected the suggestion, holding that it was not so limited. Secondly, the cases indicate that a client's papers may be detained until the entire account is settled.[221] Thus this right of retention, to use the English terminology, is a general one.[222]

10-85. The right of retention of a solicitor seems to have come into English law at about the same time as it was recognised in Scots law.[223] It is the view of Lord Cuninghame that 'our hypothec, if not originally borrowed from English practice, is in many respects the same'[224] as the English attorney's

[213] Eg, *Ayton v Colville* (1705) Mor 6247; *Earl of Sutherland v Coupar* (1738) Mor 6247 and *Stewart* (1742) Mor 6248.

[214] Stair I.xiii.14.

[215] See above, para 10-36.

[216] *Cochran v Houston* (1708) 4 Br Sup 721.

[217] *Lidderdale's Creditors v Nasmyth* (1749) Mor 6248 at 6249.

[218] At 6249.

[219] See below, paras 17-73–17-92.

[220] *Ayton v Colville* (1705) Mor 6247. Similar arguments have been made about the foundation of the lien in English law: see J B Ames, *Lectures in Legal History* (1913) 157–158 and G W Paton, *Bailment in the Common Law* (1952) 187.

[221] Eg, *Lidderdale's Creditors v Nasmyth* at 6250, where it was held that the Writer to the Signet there had a 'right to retain the writs, till paid of his account due to him as a writer'.

[222] Or the post-Bell Scots terminology. See, eg, Bell, *Commentaries* II, 107.

[223] According to Holdsworth, *History of English Law* vol 12, 60, the solicitor's lien was first recognised in English law in 1688. In 1779 in *Wilkins v Carmichael* (1779) 1 Dougl 104, 99 ER 70 at 72 Lord Mansfield stated that the right 'was not very ancient'.

[224] *Kemp v Youngs* (1838) 16 S 500 at 503.

right of retention. There is no direct evidence of the Scots right having such an origin. However, it is beyond doubt that English law was to prove of great influence in this area as time went on.[225]

(4) Bankton

(a) Retention in general

10-86. Bankton's *An Institute of the Laws of Scotland* (1751–53) is of particular interest for its 'Observations on the Law of England'. The discussion of Scots law, like Stair's, has clear roots in Roman law. This can be seen first in the case of the right of a *bona fide* possessor to retain property until the expenses laid out are met by the true owner.[226] An area which Stair is silent upon, Bankton deals with it in no less than three different places in his *Institute*.[227] In his most detailed discussion, within his title on recompense, he sets out the Roman law before turning to the law of Scotland.[228] The basic rule is that the *bona fide* possessor may retain for necessary and profitable expenses, but not voluptuary ones 'laid out only for decorement'.[229] This rule is the same as the one in Roman-Dutch law.[230]

10-87. The rationale behind this right of retention is given by Bankton when he is discussing it as a defence to an action of removing:

> 'This is founded on the rule of law and justice, *Nemo debet locupletior fieri cum alterius jactura*, None ought to enrich himself by the spoils of another.'[231]

Thus Scots law recognises a right of retention founded upon unjustified enrichment, as developed out of Roman law.

10-88. When discussing deposit, Bankton states merely that a depositary has a contrary action for expenses when the depositor reclaims his property.[232] There is no mention of a right of retention. However, the matter does feature in his discussion of 'Commodate'. He states that in the earlier Roman law a borrower had the right.[233] However, he goes on to note that the later

[225] See Bell, *Commentaries* II, 107–109; Begg, *Law Agents* ch 15; Gloag and Irvine, *Rights in Security* 384–395.

[226] On the Roman law, see above paras 10-02–10-10.

[227] Bankton I.viii.15; I.ix.42 and II.ix.68.

[228] Bankton I.ix.42. Perhaps, more correctly, he discusses the civil law in the light of the *ius commune*, for he mentions the right of the *mala fide* possessor to detain for expenses, a matter found in Voet rather than the work of Justinian. See Voet 6.1.36.

[229] Bankton I.ix.42.

[230] Voet 6.1.36.

[231] Bankton II.ix.68. The rule was first expressed in this form by Pomponius: 'Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem' (D 12.6.14). Bankton cites *Binning v Brotherstones* (1676) Mor 13401. See above, para 10-65.

[232] Bankton I.xv.3.

[233] Bankton I.xiv.6.

constitutions removed it.[234] Bankton opines that Scots law allows a right of retention here, which of course was the view of Stair:

> 'By our law (and the modern law of other countries) the possessor, in all such cases, has an hypothec or right of retention of the thing, till his damages and expences are refunded.'[235]

10-89. The vocabulary here is interesting. 'Hypothec' is being used synonymously with right of retention. Certainly there is precedent for this in the case law, as has been seen, with the law agent's right of retention.[236] His authority for the foreign law is Voet.[237] The width of the statement made suggests in hindsight that Bankton would allow a depositary retention. Indeed it is suggestive of him allowing any possessor the right.

10-90. Whether this was actually what Bankton meant may be more accurately ascertained by examining his general discussion of retention. Just like Pufendorf, Stair and Voet, this comes immediately in the wake of a discussion of compensation.[238] Bankton begins by saying that although retention resembles compensation the two are quite different. Then comes a very important statement giving his understanding of retention:

> 'It is granted for one's security till he is paid or relieved, in respect to counter claims he has against the party whose effects are retained.'[239]

10-91. Therefore it seems that Bankton like Stair views retention as a remedy generally available within the law of obligations. Further, Bankton expressly sees retention as a form of security, something which Stair did not. He gives specific examples of the right operating: a subject may be retained for expenses laid out upon it, a cautioner in a liquid bond may retain any debt due by him to the principal debtor and a factor may retain his constituent's property until relieved of all debts due to him, a right which prevails over diligence.[240] It will be immediately noticed from this list that Bankton does not confine retention to corporeal moveables. Nor does he make any distinction between special retention, as in the case of expenses upon property, and general retention, as in the case of the cautioner and factor. The conclusion is that matters are not as juridically clear as they could be.

(b) Retention in the particular context of security

10-92. As was seen above, in his discussion on 'Commodate' Bankton equated right of retention with hypothec. Why he does this becomes apparent if his general treatment of hypothec within his title on 'Pledge' is examined.

[234] See above, para 10-14.
[235] Bankton I.xiv.6.
[236] See above, para 10-83.
[237] Bankton I.xiv.6, note e.
[238] Bankton I.xxiv.23–33.
[239] Bankton I.xxiv.34.
[240] Bankton I.xxiv.34.

Stating that 'hypothec' in Roman law meant non-possessory security, he adds:

> 'But, with us, in the proper sense, Hypothec is applied to the creditor's security, introduced by the provision of law.'[241]

As 'hypothec' was viewed as meaning tacit security in 1749, by Bankton at least, it is apparent why retention in turn is viewed as a hypothec. Further, this knowledge goes a long way to explaining why the case law refers to the law agent's right to retain his client's papers as one of hypothec.[242]

10-93. Bankton further expounds 'hypothec' later in the title by saying that it only applies to corporeal moveables.[243] Thus the right of retention of a cautioner cannot be referred to as a cautioner's hypothec. In a small way, then, Bankton does eventually distinguish retention in terms of different types of property. Also within his title on 'Pledge', he expressly mentions the 'tacit hypothec or right of retention'[244] of the lawful possessor. He gives two examples of this: the right of the law agent over a client's papers and the right of a tradesman to detain the subject worked upon.[245] It is interesting that he did not give these examples in his general discussion of retention. Perhaps Bankton more readily associates these rights with the law of security rather than the law of obligations, although of course they are part of both.

10-94. In his 'Observations on the Law of England' on the subject of pledge, Bankton mentions three rights of retention: that of the innkeeper in respect of his guest's horse, that of the tailor over clothes made and that of the agent or attorney over his client's papers.[246] This is correct in so far as it goes, but is certainly not a comprehensive account of the English law of the time.[247] Bankton also argues that it is more accurate to view these rights as ones of retention and not hypothec.[248] However, this seems to amount to a deferral to the English terminology, for these rights clearly fall under 'hypothec' in the sense he uses the word.

(c) Use of 'lien'

10-95. Bankton's work appears to have the earliest example of the word 'lien' being used in Scotland. Intriguingly, the word is not to be found in the context of retention, nor indeed that of corporeal moveables. It is to be found in his treatment of heritable security, within his discussion of the pecuniary real burden. Bankton writes:

[241] Bankton I.xvii.2.

[242] Eg, *Ayton v Colville* (1705) Mor 6247; *Earl of Sutherland v Coupar* (1738) Mor 6247 and *Stewart and others, Petitioners* (1742) Mor 6248. See, above, para 10-83.

[243] Bankton I.xvii.17.

[244] Bankton I.xvii.15.

[245] Bankton I.xvii.15.

[246] Bankton I.xvii.10, citing Coke's *Institute*.

[247] Eg, the right of retention of the carrier is missing. The English law of the time is discussed above, paras 10-49–10-60.

[248] Bankton I.xvii.10.

> 'To explain a little farther real debts or burthens, termed *Debita fundi*, the ground is properly debtor in those, it being therewith affected, and such debts a real Lien thereon, to use the term in English law.'[249]

10-96. He goes on in his subsequent 'Observations on the Law of England', to use the expression 'real Lien' in the context of security over land south of the border.[250] Therefore the word 'lien' surely came to Scots law from English law.

10-97. The way in which the term is being used is curious. As has been shown, 'lien' first appeared in English law round about twenty years before Bankton wrote.[251] It was used in the sense of nexus, in accordance with its literal French meaning of tie or bond. Whilst the term was used in English land law at the time when Bankton wrote, there is far more evidence of it being used in the context of moveable property, in particular with regard to rights of retention.[252] The mystery, then, is why Bankton imported the term when discussing security over land and not when discussing security over moveables.

10-98. Two further points must be made about the term 'real Lien'. First, 'lien' is spelt with a capital 'L'. This can be traced to the early English cases which use the term.[253] Secondly, there is the issue of the word 'real'. It may be thought that this means real as in *jus in re*, as in 'real burden'. But it does not. It means real as in 'real property', the English term for heritage.[254] This is quite clear from the context.[255] In other words 'real lien' means 'heritable lien', a fact which is easily overlooked.[256]

(5) Kames

10-99. In his *Principles of Equity*, Lord Kames discusses retention in the same way as earlier writers, by comparing it to compensation.[257] He describes the right as 'an equitable exception' available to a 'defendant' allowing him 'to with-hold performance from the pursuer, till the pursuer *simul et semel* perform to him'.[258] Thus once again retention is seen as a generally available remedy.

[249] Bankton II.v.18.

[250] Bankton II.v.3 ('Observations on the Law of England').

[251] See above, paras 10-50–10-56.

[252] See above, paras 10-50–10-56.

[253] Eg, *Ex parte Bush* (1734) 2 Eq Cas Ab 109 pl 4, 22 ER 93.

[254] See, eg, Bell, *Personal Property* 1; K E Digby, *History of the Law of Real Property* (5th edn, 1897); R Megarry and H W R Wade, *The Law of Real Property* (6th edn, by C Harpum with M Grant and S Bridge, 2000); G C Cheshire and E H Burn, *Modern Law of Real Property* (17th edn, 2006).

[255] That is, the direct lifting of an English law term into Scots law.

[256] For example in *Wilmot v Wilson* (1841) 3 D 815 at 818 *per* Lord Cuninghame.

[257] Lord Kames, *Principles of Equity* (3rd edn, 1778) vol 2, 100.

[258] At 100–101.

10-100. Kames goes on to say that 'retention is founded solely on utility',[259] being admitted purely to reduce the number of law-suits. There is certainly a truth here, in that a plea of retention allows a party to assert his or her rights without having to raise a separate action against the party he or she wishes to assert these rights against. According to Kames: 'The utility of retention has gained it admittance in all civilised nations.'[260] This bald statement takes no account of, for example, the great differences between the relevant English and Scots law at the time. Further his statement that retention is solely based upon utility whereas compensation is based upon both equity and utility, is difficult to reconcile with his earlier utterance that retention is an equitable exception. Kames finishes his discussion of retention in his *Principles of Equity* by considering retention under an English mortgage and a Scottish wadset.[261]

10-101. Another of Kames' works, his *Historical Law Tracts*, first published in 1758, merits attention in that he uses the word 'lien' in it.[262] Like Bankton, he refers to the term 'real lien' in his chapter on heritable securities.[263] However, unlike the earlier writer, he uses 'lien' in the context of moveables. He writes:

> 'The *nexus*, or lien, of property was greatly strengthened, when it was now become law, that no man could be deprived of his property without his own consent; except singly in the case of a purchase *bona fide* in open market.'[264]

Leaving aside the fact that this seems to be an account of English rather than Scots law,[265] it is seen that Kames expressly views 'lien' as a nexus. Nevertheless, the use is peculiar in that the English authorities of the time as well as Bankton use it to mean the nexus of a security holder, not that of the owner of property.[266] What is important for present purposes is that 'lien' has yet to be used in Scotland to mean right of retention. The conclusion upon the work of Kames is that it is somewhat esoteric.

[259] At 101. He repeats the statement that retention depends entirely on the utility of abridging law-suits at 130, but adds in respect of his discussion of justice there: 'But if it have no support from justice, it meets on the other hand with no opposition from it.'

[260] At 101.

[261] At 101–105.

[262] The work went to four editions, the last being published in 1792.

[263] Lord Kames, *Historical Law Tracts* (1758) 233; (4th edn, 1792) 165.

[264] At 141 (4th edn at 101). He also writes at 142 (4th edn at 101): 'The *nexus*, or lien, of property being originally slight, it was not thought unjust to deprive a man of his property by means of a *bona fide* purchase, even where the subject was sold by a robber.'

[265] The rule in Scotland always having been a direct application of *nemo plus juris ad alienum transferre potest quam ipse haberet*.

[266] In Bankton's case, the nexus of the creditor who can enforce a pecuniary real burden: see, above, para 10-95. On the English law, see above, para 10-50.

(6) Erskine

10-102. John Erskine's *An Institute of the Law of Scotland* is firmly founded on Roman law.[267] Nevertheless, like Stair he makes no reference to the *bona fide* possessor's right of retention.[268] Also missing is any discussion of retention in commodate, although Erskine makes express reference to the *actio directa commodati* and the *actio contraria*.[269] As regards deposit, he states the later Roman rule that retention is not permissible.[270] However, Erskine opines that this rule was only introduced to prevent retention for debts unrelated to the contract of deposit and that, given this, Scots law will allow the depositary to retain for expenses.[271] This was of course Stair's view of the law too.[272]

10-103. Erskine's main discussion of retention, like previous writers, follows upon his discourse on compensation.[273] He does not seek to differentiate between retention in respect of different types of property and begins with the right of a cautioner to retain debts owed to him by the principal debtor.[274] Then he focuses on retention as a whole, writing:

> 'This right is most frequently pleaded by those who have bestowed either their money or their labour upon the subject sought to be retained; and it commonly arises in that case, from the mutual obligations which naturally lie upon the contractor.'[275]

Once more, then, there is the idea of retention as a general doctrine of the law of obligations. Erskine sets out some practical examples.[276] First, there is the right of a law agent to retain his client's papers 'till his bill of accounts be paid'. Secondly, a tradesman may retain the item he has made until paid. Thirdly, a factor may retain the balance of his intromissions, until refunded of all his expenses.

10-104. The examples are similar to those of Bankton.[277] Unlike that writer though, Erskine does not discuss retention in the context of security. He does not view retention of corporeal moveables as a hypothec, because for him a hypothec is where 'the debtor himself retains the possession of the subject impignorated'.[278] For writers who lived in the same era, it is striking that their definitions of hypothec are so different. It is of course Erskine's definition

[267] See, eg, G McLeod, 'The Romanization of Property Law' in Reid and Zimmermann, *History* vol 1, 220 at 235–239.

[268] Although he discusses the right to recompense here: Erskine III.i.11.

[269] Erskine III.i.24.

[270] Erskine III.i.27.

[271] No authority has been found to support Erskine's conclusion, but see Voet 13.6.10 on the subject of retention in *commodatum*, where interesting parallels may be drawn.

[272] See above, para 10-68.

[273] Erskine III.iv.11–19.

[274] Erskine III.iv.20.

[275] Erskine III.iv.21.

[276] Erskine III.iv.21.

[277] See above, para 10-93.

[278] Erskine III.1.34.

which is to prevail, being in line with that of Stair.[279] On the other hand the view of retention as a form of security, very much Bankton's standpoint, was in the future to become widely accepted.[280]

10-105. Lastly, Erskine like Bankton refers to 'lien' only in the context of a particular form of heritable security, the pecuniary real burden:

> 'The conditions and qualities with which a proprietor intends to burden his grant, ought to be expressed in the deed itself in such words as are proper to constitute a real charge or burden upon the lands; or, as it is called of late, a *lien*, a vocable borrowed from the French, signifying a tie or bond.'[281]

Thus, it is clear that 'lien' comes from the French language. Likewise the use of the word in this sense comes from English law. However, English law was also using it at the time to mean retention.[282] Why there is no reference to this made by Erskine, as with Bankton remains a mystery.

(7) Case law: 1750–1800

10-106. With the exception of the seminal *Harper v Faulds*,[283] it is not proposed to discuss the twenty or so relevant cases in any detail here. Most concern the law agent's so-called hypothec, which will be considered elsewhere.[284] The main issue which will be examined is the penetration of the term 'lien' into Scots law. It will be recalled that along with Bankton and Erskine, Kames used the term 'lien' or indeed 'real lien' to mean pecuniary real burden.[285] However, Kames used 'lien' also as a general term for nexus, in much the same way as the English lawyer of the time.[286] Unlike south of the border, nobody in Scotland had yet used 'lien' in the sense of the nexus conferred by a right of retention.[287]

10-107. As far as can be seen the first Scots case in which 'lien' may be found is in the House of Lords' decision in *M'Dowal and Gray v Annand and Colhoun's Assignees*[288] in 1776. The word does not appear in the judgments but in the plea of the respondents who argue that a pledge without possession amounts to a 'secret lien'.[289] Thus the word here is being used to mean a security.

10-108. 'Lien' apparently makes its Court of Session debut in 1779 in *Dunlop v Spiers*[290] in the context of a trust deed for creditors. The defenders here

[279] Stair I.xiii.14. And that of Ulpian: D 13.7.9.2.
[280] See, eg, Gloag and Irvine, *Rights in Security* chs 10 and 11.
[281] Erskine II.iii.49.
[282] See above, para 10-51.
[283] (1791) Bell's Octavo Cases 440. See below, paras 10-111-10-122.
[284] See the discussion of the solicitor's lien, below at paras 17-73-17-92.
[285] See above, paras 10-95, 10-101 and 10-105.
[286] See above, para 10-101.
[287] See above, para 10-51.
[288] (1776) 2 Pat 387.
[289] (1776) 2 Pat 387 at 392.
[290] (1779) Mor 14107.

argued that as the bankrupt's effects were vested in the trustees 'no *lien* was created over the subjects'[291] in favour of the creditors equivalent to that created by real diligence. The pursuers in contrast argued that a 'trust right creates a real lien over the subjects of the debtor in favour of his creditors, equivalent to attachment by legal diligence'.[292] They lost the case. Leaving the merits of the decision aside, it can be seen that 'lien' is being used here to mean 'nexus', in the context of both heritable and moveable property.

10-109. In the 1780 case of *Tait v Cockburn*,[293] the pleadings refer to an adjudication creating a '*lien*' or 'real *lien*'[294] upon the heritage it is granted over. The next case of *Bank of Scotland v Bank of England*,[295] a year later, sees pleadings which use 'real lien' in the sense of pecuniary real burden. In that same year comes *Ranking of Hamilton of Provenhall's Creditors*.[296] It concerns a competition between the 'lien' of a solicitor by 'virtue of his right of hypothec' and the 'real lien' of a heritable creditor in respect of the title deeds to some land. The final case for present consideration is *Hamilton v Wood*,[297] decided in 1788. It concerned a ship and the pleadings refer to 'the *lien* created by bonds of bottomry'.[298]

10-110. Apart from the right of the solicitor in *Provenhall's Creditors* the cases do not concern rights of retention. The second notable point is that most of them use 'lien' in italics, which in cases from Morison's Dictionary is a signal that a word is either Latin or some other foreign language. Thirdly, the cases concern both heritable and moveable property, although there is a definite bias towards corporeals rather than incorporeals.[299] Fourthly, leaving *McDowal* aside, 'lien' is being used as a synonym for 'nexus'. Fifthly, it appears from the cases that the nexus which a 'lien' confers is a real right upon the property in question, either a real right in security or a real right by diligence.[300] Given that, *McDowal* does not really contradict the other cases. Further, if one takes the view that diligence can amount to judicial security, there is the option to bracket all the cases under a 'security' heading.[301] Whether this is coherent or not, it is still some distance away from 'lien' as right of retention.

[291] At 14108.

[292] At 14109.

[293] (1780) Mor 14110.

[294] (1780) Mor 14110.

[295] (1781) Mor 14121.

[296] (1781) Mor 6253.

[297] (1788) Mor 6269.

[298] At 6271.

[299] In fact none of the cases refer directly to incorporeal property, although *Dunlop* deals with a debtor's entire estate.

[300] For example a bond of bottomry, as referred to in *Hamilton*, creates a real right: see Gloag and Irvine, *Rights in Security* 297. This is also why the term 'real lien' is used, when 'real' in connection with property in English law actually is equivalent to 'heritable'.

[301] 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.

(8) *Harper v Faulds* (1791)

(a) The facts

10-111. The decision of the Whole Court in the 1791 case of *Harper v Faulds* is undoubtedly one of the most important in this entire area of law.[302] Faulds was a bleacher. Harper regularly sent him linen to be bleached. The account between the two was settled annually at Candlemas. However, Harper became bankrupt. Faulds sought to retain the linen which he had presently in his hands for the entire balance of the account. Harper's trustee in sequestration argued that he could only retain it for the amount due for bleaching that particular linen itself.

(b) The arguments

10-112. The basic argument for the bleacher is that Scots law following Roman law recognise a general right of retention in favour of one person possessing the property of another, that is a right of retention good for all sums owed by the other to him.[303] Retention operates in the same way as compensation, the argument continues, in that it may be pled competently against all debts due, although compensation itself is naturally restricted to all liquid debts.

10-113. Counsel for the bleacher makes extensive use of Voet as an account of the civil law, using him as authority for the proposition that only in special cases, such as in deposit and commodate was the right of retention denied.[304] Heavy reliance is placed on the fact that a Roman pledgee could retain for all sums.[305] Kames, Stair, Bankton, and Erskine are cited, the basic proposition being that they say nothing which is contrary to Scots law admitting a general right of retention.[306] Reference is also made to the cases of cautioners, law agents and factors.[307] Finally, it is stated that the general right of retention is good against a trustee in sequestration.[308]

10-114. The trustee in sequestration considers the bleacher's arguments for general retention and retorts:

> 'On examining our law, no doctrine of such evil tendency is to be found. Faulds pretends to resort to the first principles of our law; but disquisitions on the state of law, in rude and barbarous times, must depend greatly on fancy and conjecture.'[309]

[302] *Harper v Faulds* (1791) Bell's Octavo Cases 440. It is reported less fully as *Harper's Creditors v Faulds* (1791) Mor 2666 and also at (1791) 2 Ross LC 708.

[303] (1791) Bell's Octavo Cases at 433–434.

[304] At 434–436.

[305] At 437–438.

[306] At 439–440.

[307] At 440–444.

[308] At 449–450.

[309] At 451.

He begins by citing Stair's point that Scots law is against latent securities.[310] He goes on to show that Roman law did not admit general retention and goes through our institutional writers, concluding that 'nothing [there] countenances the general right contended for'.[311] Going through the Scottish cases, he argues that they show that the right of retention is restricted unless there is implied consent by the parties to the contrary, such as in the case of the factor.[312]

(c) The judgments

10-115. Three of the judges agree with the bleacher on the basis that retention operates in as wide a fashion as compensation. In the words of Lord Swinton:

> 'Compensation and retention are the same; with this variation, that compensation can be proponed only in liquid claims, retention takes place whether the claims be illiquid or not.'[313]

10-116. The Lord Justice-Clerk also finds for the bleacher, but only on the basis that Harper, the owner of the linen, had become bankrupt:

> 'Retention, and a general count and reckoning, would be a bar to the proper conducting of business; but it is a rule of natural justice, that where bankruptcy happens, this plea must be received: the expediency that denied it in the former case has then no existence.'[314]

10-117. The majority of the court, however, disagree and find for the trustee in sequestration.[315] A highly erudite judgment is delivered by the Lord President, Sir Ilay Campbell. He states that retention comes from the civil law and defines it as:

> 'A right of refusing delivery of a subject, till the counter-obligation under which the subject was lodged, be performed.'[316]

He finds no authority in the civil law for general retention and states that the principles which regulate the retention of the factor and the cautioner do not apply to other contracts.[317] He disagrees with the view of the Lord Justice-Clerk.[318] Further, he shows that there are clear policy reasons for not allowing general retention:

[310] At 451.

[311] At 456.

[312] At 456–457.

[313] At 467.

[314] At 471.

[315] The judges are Lords Stonefield, Hailes, Gardenston, Ankerville, Dunsinnan and Dreghorn, and the Lord President.

[316] (1791) Bell's Octavo Cases 440 at 471.

[317] At 474.

[318] At 473 he states 'Bankruptcy can make no difference, the case is the same after bankruptcy as before it, the property is in the creditors, so far as not excluded by a lien.'

> 'Retention is a more extensive and dangerous right than compensation, where bankruptcy occurs. Compensation operates *retro*, and a balance is struck, for which alone the creditor can rank. Retention is different, it does not extinguish *pro tanto*, leaving the creditor to rank merely for the balance, but he retains the subjects, and, instead of ranking for the balance, ranks for the whole debt until he is paid up, either by his dividend, or by that joined with the produce of his collateral security.'[319]

10-118. The reason here seems convincing. As regards the decision in *Harper v Faulds*, on a wider level, it is one which coheres with the examination in this chapter of the civil law and institutional sources. What was found there was that the right of retention was a defence generally available within the law of obligations and not limited to a fixed list of contracts as in English law.[320]

10-119. However, the retention allowed was retention until the performance of a reciprocal obligation. For example, under a contract of commodate the subject could be retained until the borrower's expenses in respect of that subject were met. There was no general retention for all sums due by lender to borrower. Certain exceptions existed, of course, such as the Roman pledgee under the *pignus Gordianum*.[321] Scots law also has certain exceptions, such as the retention of the factor.[322] However, these are very much exceptions and consequently the decision of the majority in *Harper* must be viewed as correct.

(d) Use of 'lien'

10-120. Where the word 'lien' is found in the pleadings and the judgments it is used to mean the nexus created by a real security on a piece of property.[323] Thus the use is consonant with the use made in earlier Scots case law.[324] In fact the form often used here is 'real lien'. This suggests a real right, but is probably in fact a mistake for 'real lien', a contemporaneous term of English law for security over land.[325]

10-121. The way in which 'lien' relates to right of retention sees a difference of opinion between the two judges who use the word: the Lord President and Lord Dreghorn, both of whom found for the trustee in sequestration. Lord Dreghorn opines:

> 'Retention is not a pledge, nor a lien, but the mere result of possession: since, if an artificer loses possession, he loses his right of retention, even for expenses; nor can he recover possession as in a lien, where he has an *actio in rem*.'[326]

[319] (1791) Bell's Octavo Cases 440 at 474.
[320] See above, paras 10-39–10-47; 10-71–10-78; 10-86–10-91; 10-99 and 10-103–10-104.
[321] See above, para 10-15.
[322] See above, paras 10-91 and 10-103.
[323] (1791) Bell's Octavo Cases 440 at 437, 438, 447, 463, 464, 464, 465, 472 and 473.
[324] See above, paras 10-108–10-110.
[325] See above, paras 10-95–10-98.
[326] (1791) Bell's Octavo Cases 440 at 464–465.

10-122. In sharp contrast, Sir Ilay Campbell states:

> 'For the expense of bleaching he [the bleacher] has a real right, a lien, which entitles him to refuse delivery to the owner, or to any one in his name, till paid his expence.'[327]

For the reasons discussed fully elsewhere it is felt that the Lord President is correct.[328] Moreover, this appears to be only the second time in Scotland that a right of retention is referred to as being a lien.[329] It is nonetheless clear that it is not being said that 'lien' and 'right of retention' are interchangeable terms. Rather, and this is clear also in another part of the Lord President's judgment, a right of retention is an example of a lien.[330] Thus he and Lord Dreghorn are at one on the meaning of 'lien', but they disagree on whether a right of retention counts as such. In 1791 therefore, as in 1749 with Bankton, 'lien' in Scotland meant something different from what it means today.

F. SCOTS LAW FROM 1800 TO PRESENT

(1) Bell

(a) References to lien in A Treatise on the Law of Bankruptcy in Scotland

10-123. Bell is credited with, and sometimes criticised for, the introduction of lien into Scots law.[331] The earliest of his relevant works is his *A Treatise on the Law of Bankruptcy in Scotland*. The first volume was published in 1800 and the second in 1804. The work was to appear in six subsequent editions, but under the new name of *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*.[332]

10-124. It is fair to say that his treatment of retention/lien follows the same plan in all these editions, but it is of course the earliest one which is of primary interest. In the second volume Bell discusses the various types of security effective in bankruptcy. One of his headings is: 'Of securities of the nature of real right resulting from possession.'[333] Under that heading he writes:

[327] At 472.

[328] See below, ch 14.

[329] The only previous time being in the pleadings of *Ranking of Hamilton of Provenhall's Creditors* (1781) Mor 6253, in respect of the right conferred by the law agent's hypothec, as then called. See above para 10-109.

[330] He states ((1791) Bell's Octavo Cases 440 at 473): 'It would be singular, that what was not in any view a lien before bankruptcy, should, at the moment of bankruptcy, be converted into one.'

[331] Gretton, 'The Concept of Security' at 144.

[332] See D M Walker, *The Scottish Jurists* (1985) 338–345.

[333] G J Bell, *A Treatise on the Law of Bankruptcy in Scotland* vol 2 (1804) 362.

> 'The securities includable under this class correspond with the set-off and equitable liens of the English law; the terms used in this country are compensation and retention.'[334]

Like earlier institutional writers, he deals with compensation and retention in the same part of his work. But there are differences here. Bell discusses retention before compensation. More importantly, he deals with these doctrines in terms of securities rather than in terms of liberation from obligations. Only Bankton came anywhere near to such an approach.[335] Also important is Bell's direct equation of our doctrines with those of English law. In some ways this is open to question. For, even at the time when he wrote there existed a category of rights in English law, now universally referred to as 'equitable liens', which cannot be equated with retention for they are non-possessory.[336]

10-125. Under the sub-heading 'Of the doctrine of retention or lien',[337] Bell states that liens or rights of retention are either special or general. A special lien secures only the debt under a particular contract whereas a general lien secures the whole balance of debts due by the proprietor to the possessor of the goods. He goes on to say that in both the case of special and general retention 'the security and real right depends entirely on the fact of possession'. Once again the point that retention or synonymously lien is a security is emphasised, here in very much civilian terminology. There follows further discussion on the type of possession needed to found a lien.

10-126. Under a further sub-heading 'Of Specific Liens', Bell states that in any contract a special lien can arise through the doctrine of mutuality of obligations.[338] Thus, for example, a bleacher may detain cloth he has whitened and a carrier a commodity he has delivered until paid. Under the sub-heading 'Of General Liens', Bell enters into a discourse upon the relevant English law on the matter, including the matter of how general liens can be created expressly.[339] In terms of Scots law, he discusses the 'Writer's retention', the 'Factor's lien', the 'Broker's lien', the 'Lien to trustees' and the 'Cautioner's lien'. He then goes on to look at compensation.[340]

(b) Use of 'lien'

10-127. Bell uses 'lien' as a direct synonym for possessory retention. This indeed was the principal use of the word in English law at the time, within the general context of nexus.[341] However, with only a couple of exceptions,[342]

[334] Bell, *Treatise on the Law of Bankruptcy* vol 2, 362.
[335] See above, paras 10-92–10-94.
[336] See above, para 10-54.
[337] Bell, *Treatise on the Law of Bankruptcy* vol 2, 362.
[338] At 363.
[339] At 364.
[340] At 365.
[341] See above, para 10-50.
[342] *Ranking of Hamilton of Provenhall's Creditors* (1781) Mor 6253; *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 472 *per* Lord President Campbell.

Bell is the first Scottish authority to use the word in terms of retention. It is very much a novel approach, for it goes against the grain of contemporary Scots usage. The Scots lawyer of the time was using 'lien' as a general term for nexus.[343] So too were statutes applying to Scotland.[344] If there was a more specialised use of the word, it came in the shape of 'real lien', a term used by David Hume, Walter Ross and conveyancers at large for the heritable pecuniary real burden.[345]

10-128. In fact Bell pointedly moves away from the Scottish usage of the time. He does not refer to 'real liens' when discussing real burdens, unlike Bankton, Kames, Erskine, Hume and Ross.[346] Only on one occasion in his works does he use 'lien' simply to mean nexus, when he writes in his section on diligence that 'Arrestment in execution was a lien created by attachment.'[347] Rather when Bell uses 'lien' he means pure and simple retention based on possession. In this light, it is right to say that Bell anglicised the Scots terminology of retention. To be fair, he uses 'retention' as many times as he does 'lien', but over the coming decades the latter term gained ascendancy.[348]

(c) Special liens and general liens

10-129. The distinction between special and general liens had never previously been made by a Scottish writer. The way in which Bell sets the matter out leaves little doubt that he has been studying the contemporary English law. Nevertheless, it would seem that there is a certain validity in applying the distinction in Scots law. For whilst special retention is the normal rule, it seems that our common law recognises general retention in the cases of the cautioner, factor and law agent.[349]

10-130. Bell's discussion of the possession requisite to found a lien is clearly based on English law.[350] However, his account of special liens is in contrast very much Scottish. Special retention is seen as a right which is not confined to specific contracts, but as something founded on the doctrine of mutuality of obligations.

10-131. As regards general retention, there is much reference to English law here. But with the exception of the broker's lien, Bell cannot be accused of having no relevant Scottish authority to show that the examples of the

[343] See above, para 10-109.

[344] See the Payment of Creditors (Scotland) Act 1793 ss 33 and 39 and the Payment of Creditors (Scotland) Act 1814 ss 42 and 50.

[345] See Hume, *Lectures* vol IV, ch 9; W Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence* vol 2 (1792) and (2nd edn, 1822) at 414ff; *Martin v Paterson* 22 June 1808 FC; *Brown v Miller* (1820) 3 Ross LC 23.

[346] Bell, *Commentaries* I, 726–732.

[347] Bell, *Commentaries* I, 726–732.

[348] See Gloag and Irvine, *Rights in Security* ch 10.

[349] See Erskine III.iv.20–21. However, the cautioner's right is in respect of debts and rests on *dominium*.

[350] He relies on English authority, eg *Kinloch v Craig* (1789) 3 TR 119, 100 ER 487.

general liens which he gives are in fact recognised by Scots law. There are, however, clear conceptual difficulties with his last two examples, the lien to trustees and the cautioner's lien. Trustees own trust property and thus their right of retention is based upon ownership and not possession, which Bell has stated to be the foundation of lien.[351] As regards cautioners, all the case law involves the retention of debts and debts, being incorporeal, cannot be possessed. The cautioner's lien therefore is a different species of retention from the right of a law agent to detain a client's papers.

(d) General comments

10-132. In writing his treatise of 1804 Bell is not guilty of the wholesale introduction of an alien concept (lien) into Scots law. Rather, what he can be accused of is taking the comparable English law and using it to embellish the Scots law of retention already existing. Unsurprisingly this methodology works better in some places than it does in others. For example his realisation that Scots law recognises general retention in certain places, like English law, is perceptive and accurate. The way in which he uses 'lien', on the other hand, conflicts with contemporary Scots case law.[352]

10-133. Bell's emphasis on retention or lien as a form of security is important as this view is now generally accepted, although the importance of the doctrine within the law of obligations as recognised by Stair and others is still appreciated.[353] In reality Bell's treatment of lien is no less than the foundation of the modern law in this area.[354] By way of criticism, the principal things lacking from it are a conception of the particular types of property over which retention may be exercised and more crucially a differentiation between retention based upon ownership and that based on a lesser title.

(e) Bell's later works

10-134. As previously stated, Bell's *Treatise on Bankruptcy*, in the revised form of his *Commentaries* went to seven editions. The later editions mainly contain new developments in the law. There are, however, some areas of retention/lien where Scots law is showing no sign of development so Bell does in fact carry out a wholesale importation of some English law. Two cases are particularly important. In the second edition of his *Commentaries* he introduces the banker's lien to Scotland.[355] He states it to be a general lien. There is no Scots authority cited, but simply a sheepish statement that 'bankers are in the nature of money-factors'.[356] Thus the reader is asked to

[351] Although there is confusion liable to arise here as trust was formerly seen as mere deposit: see Stair I.xiii.8.

[352] See above, para 10-109.

[353] See, eg, W M Gloag, *Contract* (2nd edn, 1929) ch 35.

[354] Being relied upon by later writers, eg A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 36ff.

[355] Bell, *Commentaries* (2nd edn, 1810) 488.

[356] Bell, *Commentaries* (2nd edn, 1810) 488.

perform a deductive syllogism. Factors have a general lien in Scotland. Bankers are money-factors. Thus bankers have a general lien in Scotland. And indeed nobody has dissented from the conclusion.[357]

10-135. The other instance comes in the third edition of his *Commentaries*, where the innkeeper's lien is introduced into Scots law. It is found in his section 'Of special liens'. Bell's strategy here is to set out the relevant English law and then end with:

> 'In Scotland, I think lien would be given on the broad principle, that it is the resulting security for the *actio contraria* in all cases.'[358]

This approach is liable to engender problems for it throws together the generalist civilian doctrine of retention arising out of mutual obligations with the idiosyncrasies of the English innkeeper's lien. The matter is addressed fully elsewhere.[359]

10-136. Bell's other great work was his *Principles of the Law of Scotland*, first published in 1829, which went to ten editions.[360] It contains a chapter entitled 'Of retention or lien', following upon a chapter on pledge and hypothec.[361] Compensation is treated in a completely different part of the work,[362] lien being seen squarely as a form of security. His detailed treatment of the matter follows the same pattern as in his *Commentaries*.[363]

(2) Other nineteenth-century developments

10-137. The law of lien after the work of George Joseph Bell falls into the same category as the law of pledge post-1681.[364] It is effectively the modern law. Thus only a brief overview of the development of the area is needed.

10-138. The word 'lien' as used by Bell slowly but surely becomes orthodox Scots law.[365] This may be seen in the particular context of bankruptcy legislation, where 'lien' had formerly been used as a synonym for security in

[357] The proposition that Scots law recognises a general lien in favour of bankers was endorsed in *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12. See below, para 17-32.

[358] Bell, *Commentaries* (3rd edn, 1819) vol 2, 147.

[359] See below, paras 16-68–16-71.

[360] The last edition in Bell's personal hands was the 4th edition of 1839. Bell died in 1843. The 10th and final edition edited by Sheriff W Guthrie appeared in 1899.

[361] The chapter is found at §§ 1410–1454 in the 10th edition.

[362] Bell, *Principles* (4th and later editions) §§ 572–575. At § 1410 he does, however, distinguish retention from it.

[363] In essence he deals with the requisite possession followed by special then general retention.

[364] See above, para 3-66.

[365] See, eg, *Skinner v Paterson* (1823) 2 S 354 (NE 312); *Laurie v Black* (1831) 10 S 1 and *Paton v Wyllie* (1833) 11 S 703. Not everybody was happy about this: eg, Lord Ivory in *Hamilton v Western Bank* (1856) 19 D 152 at 156 said: 'In this [area] there has been a good deal of confusion introduced into our practice from a loose and not correctly discriminating use of the phraseology and doctrines of English law.'

general.[366] In the specific area of the law agent's right of retention the word 'hypothec' does continue to be much used.[367] Further, 'real lien' remains widely used in the context of the pecuniary real burden upon land.[368]

10-139. In terms of legal writings, the earliest of significance is David Hume's *Lectures*. His discussion of retention is heavily reliant on Bell, but in some ways retrograde in that it falls within his treatment of obligations in a chapter entitled 'Extinction By Compensation and Retention'.[369] In the middle of the century there comes Professor More's famous note on retention in his edition of Stair's *Institutions*,[370] as well as a useful chapter on the solicitor's right of retention in Begg on *Law Agents*.[371] There is, unsurprisingly, a very full treatment in Gloag and Irvine's magisterial *Law of Rights in Security* (1897) in two chapters, entitled 'Retention or Lien' and 'Particular Liens'.[372] Written by Gloag, they show the clear way in which retention operates as a security. Scotland, however, compares less favourably with England, where a number of books on lien were published in the nineteenth century.[373]

10-140. As regards the development of the law, the middle part of the century sees the courts setting out firmly the distinction between retention based on ownership and retention based on mere possession or custody, otherwise known as lien.[374] This is an area on which Bell himself could have been much clearer.[375] Further, the distinction is one which David Hume and Professor More both miss.[376]

[366] Compare the Payment of Creditors (Scotland) Act 1793 ss 33 and 39 and the Payment of Creditors (Scotland) Act 1814 ss 42 and 50 with the Bankruptcy (Scotland) Act 1839 s 3 and the Bankruptcy (Scotland) Act 1856 s 4.

[367] Even late in the century: see *Morrison v Watson* (1883) 2 Guth Sh Cas 502.

[368] Eg *Brown v Miller* (1820) 3 Ross LC 29; *Wilson v Fraser* (1824) 2 Sh App 162 and *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296.

[369] Hume, *Lectures* III, 46–59.

[370] Notes to Stair, *Institutions* cxxxi.

[371] Begg, *Law Agents* ch 15.

[372] Gloag and Irvine, *Rights in Security* chs 10 and 11.

[373] They were all authored by barristers. See Whitaker, *Lien;* Montagu, *Lien* and Cross, *Lien*. The early twentieth century saw the publication of Hall, *Possessory Liens*.

[374] See below, para 14-16; *Brown v Sommerville* (1844) 6 D 1267; *Melrose v Hastie* (1851) 13 D 880; *Laurie & Co v Denny's Tr* (1853) 15 D 404 and *Wyper v Harveys* (1861) 23 D 606.

[375] The treatment of the trustee's and cautioner's lien in the same context as the other lien makes matters confusing. However, in his discussion of the trustee's lien over the heritable estate he states that it is good for all sums, but that this 'is only part of the more comprehensive doctrine [of retention based on ownership] already alluded to in treating of securities by absolute disposition': Bell, *Commentaries* II, 117–118. More generally, see Bell, *Principles* § 1431: 'It has sometimes been contended that in Scotland the [general] right of retention goes further than the English lien, so as to comprehend all cases where there is legitimate possession and a debt due to the possessor. … But there is no ground for this distinction.'

[376] See Hume, *Lectures* III, 56–57. On More, see Gloag and Irvine, *Rights in Security* 329 and 354.

10-141. The century also sees the appearance of cases in areas where Bell said that Scots law recognised a lien, but in fact there previously had been no judicial authority. Examples include cases on the banker's and broker's lien.[377] Also seen is judicial approval of express general liens, an area which Bell discussed upon the basis of English law, but on which the law of Scotland had previously been silent.[378]

(3) The twentieth and twenty-first centuries

10-142. There has been a consolidation of the developments of the nineteenth century. Little fundamental academic work has been done, with most of those who have written on the subject setting out broadly similar statements of the law.[379] Bell remains very influential.[380] However, the term 'real lien' made a consistent struggle for survival. It remained used as an alternative expression for the pecuniary real burden, even in an Act of Parliament,[381] until the eventual abolition of that security.[382] This was despite the fact that being an importation from England the 'real' refers to land and not a *jus in re*.[383]

10-143. The case law has come slowly but steadily, unlike pledge where it has somewhat dried up. This is a result probably of lien being of greater

[377] *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 (banker's lien); *Wilmot v Wilson* (1841) 3 D 815 (broker's lien).

[378] *Anderson's Trs v Fleming* (1871) 9 M 718.

[379] See W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 9 (1930) paras 461–498; T B Smith, *A Short Commentary on the Law of Scotland* (1962) 477; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 292–298; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) paras 66–100; D M Walker, *Principles of Scottish Private Law* (4th edn, 1989) vol 3, 399–405; W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) 94–97; Carey Miller with Irvine, *Corporeal Moveables* paras 11.19–11-25; E A Marshall, *Scots Mercantile Law* (3rd edn, 1997) paras 7-122–7-175; S C Styles, 'Rights in Security' in A D M Forte (ed), *Scots Commercial Law* (1997) 179 at 185–188; D J T Logan, *Practical Debt Recovery* (2001) 242–250: Gloag and Henderson, *The Law of Scotland* paras 37.15–37.26; J H Greene and I M Fletcher, *The Law and Practice of Receivership in Scotland* (3rd edn by I M Fletcher and R Roxburgh, 2005) paras 4.48–4.54; N Busby, B Clark, R Paisley and P Spink, *Scots Law: A Student Guide* (3rd edn, 2006) paras 8-35–8-39; McBryde, *Contract*, paras 20-74–20-87; C Ashton et al, *Understanding Scots Law* (2007) para 12-27 and H L MacQueen and J Thomson, *Contract Law in Scotland* (2nd edn, 2007) paras 5-16–5-19. See also Steven, 'Rights in Security over Moveables' in Reid and Zimmermann, *History* vol 1, 333 at 350–361 and Pienaar and Steven, 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 776–785.

[380] Being cited by many of the works in the preceding note.

[381] See the Glasgow Streets, Sewers and Buildings Consolidation Order Confirmation Act 1937 s 236(1), discussed in *Pickard v Glasgow Corporation* 1970 SLT (Sh Ct) 63 and *Sowman v City of Glasgow District Council* 1985 SLT 65. Indeed 'real lien' has also been used to mean an ordinary real burden. See *Anderson v Dickie* 1915 SC (HL) 79; K G C Reid, 'What is a Real Burden?' 1984 *JLSS* 9 and the deed of conditions in J M Halliday, *Conveyancing Law and Practice* vol II (2nd edn, by I J S Talman, 1997) 229.

[382] Title Conditions (Scotland) Act 2003 s 117.

[383] See above, para 10-97.

commercial importance.[384] Despite having more decisions to be able to consider and throw light on apparent lacunae and inconsistencies, it remains fair to say in Professor Gretton's words of 1987 that the law of lien is in a 'chaotic state'.[385]

[384] See above, paras 2-18 and 9-12. Many of the lien cases involve insolvency: eg, *Liquidator of Grand Empire Theatres v Snodgrass* 1932 SC (HL) 73; *Garden Haig Scott & Wallace v White* 1962 SC 51 and *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50.

[385] Gretton, 'The Concept of Security' at 144.

11 Lien: The Obligation Secured

A. A VALID OBLIGATION

11-01. A lien, like any other security, will only exist so long as the obligation which it secures is valid and outstanding.[1] If there is no obligation owed to the party detaining the property, there can be no lien.[2] The position is the same if the detaining party considers that an obligation is owed but in fact that obligation is invalid or unlawful. In this situation, he or she will be liable in damages.[3] The criminal law may also intervene, because in certain exceptional circumstances an intention to deprive a person temporarily of his or her property will constitute the *mens rea* for theft.[4] A charge of extortion is also a possibility if the detainer is demanding payment.[5]

11-02. In the well-known case of *Carmichael v Black, Black v Carmichael*[6] cars parked on a piece of private land were clamped. The owners were made to

[1] See Gloag and Irvine, *Rights in Security* 340; *Ogilvie and Son v Taylor* (1844) 12 D 266. For pledge, see above, para 4-01. For the same principle as regards a standard security, see *Albatown Ltd v Credential Group Ltd* 2001 GWD 27-1102.

[2] *Walker v Phin* (1831) 9 S 691; *Ridley v Sloan* (1837) 15 S 469; *Stephen & Sons v Swayne and Bovill* (1861) 24 D 158; *Garscadden v Ardrossan Dry Dock Co Ltd* 1910 SC 178; *Lamonby v Arthur G Foulds Ltd* 1928 SC 89; *McNair & Co v Don* (1932) 48 Sh Ct Rep 99; *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6. English law is to the same effect: see Montagu, *Lien* 19.

[3] *McNair & Co v Don* (1932) 48 Sh Ct Rep 99.

[4] *Milne v Tudhope* 1981 JC 53; *Kidston v Annan* 1984 SLT 279. Cf *Herron v Best* 1976 SLT (Sh Ct) 80. This is not the law in England where a permanent intention to deprive is required: *Arthur v Anker* [1997] QB 564.

[5] *Carmichael v Black; Black v Carmichael* 1992 SLT 897; reported also as *Carmichael v Black; Carmichael v Penrice* 1992 SCCR 709.

[6] 1992 SLT 897. See further G H Gordon, *The Criminal Law of Scotland* (3rd edn by M G A Christie) vol 2 (2001) paras 14-01–14-02; 14-10–14-11 and 14-28–14-29, and R M White, 'Parking's Fine: The Enforceability of "Private" Parking Schemes' 2007 *JR* 1 at 3–5.

pay a fee before their vehicles were released. The matter attracted the attention of the local procurator fiscal and the individuals doing the clamping were prosecuted for theft and extortion. They were found guilty. The Court of Criminal Appeal subsequently upheld the convictions. Lord Justice-General Hope stated:

> 'The only means which the law regards as legitimate to force a debtor to make payment of his debt are those provided by due legal process. To use due legal process, such as ... a right of lien or retention available under contract ... is no doubt legitimate. ... But it is illegitimate to use other means, such as ... the unauthorised detention of the debtor's person or his property, and it is extortion if the purpose in doing so is to obtain payment of the debt.'[7]

11-03. As there was no pre-existing contract between the clampers and the car owners, in the view of the court there was no valid lien. An earlier case illustrates the same point.[8] The owner of a television set gave it to another party for a free estimate in respect of repairs. Without any instructions, that party repaired the set and sought to retain it until his bill was met. He was charged with and convicted of theft in the Sheriff Court. The Court of Criminal Appeal upheld the conviction, agreeing with the sheriff that the accused was 'indeed holding the television set to ransom'.[9]

B. MONETARY AND NON-MONETARY OBLIGATIONS

11-04. Liens invariably secure the payment of a monetary debt, for example a hotel bill, the account of a solicitor or carriage charges. There seems no reason why in specific circumstances the performance of an obligation *ad factum praestandum* should not be secured. Erskine seems to admit this when he says that there may be retention until 'he who pleads it obtains payment or satisfaction for his counter claim'.[10] Bell's widely accepted definition of retention based on possession, i.e. lien, is also supportive:

> 'Retention may be described as a right to retain a subject legitimately in one's possession until a debt shall be paid, or an engagement performed, the *jus exigendi* of which is in the possessor.'[11]

11-05. The case of *Kerr v Dundee Gas Light Company*[12] may be further authority, although the judges do not make express reference to lien. There, a builder entered into a contract to erect a gas-holder tank on the ground of his employers. He commenced the work, bringing materials and tools on to the site, but subsequently became bankrupt. The contract was abandoned. It was held that the employers could retain the materials in order to complete the work, subject to a claim for the value of them. Further, by a majority, it

[7] 1992 SLT 897 at 900.
[8] *Kidston v Annan* 1984 SLT 279.
[9] At 280.
[10] Erskine III.iv.20.
[11] Bell, *Principles* § 1410. Adopted by J Graham Stewart, *Law of Diligence* (1898) 173.
[12] (1861) 23 D 343. I am grateful to Mr W James Wolffe QC for his thoughts upon this case.

was held that the tools could be retained for use in the execution of the contract. This was subject to a claim for their return on the completion of the work, and reasonable remuneration for their use.

11-06. The right to retain and use the materials cannot be a lien, for the essence of a lien is that the property is returned on performance of the obligation secured. The materials were being permanently attached to the employers' ground.[13] However, it is arguable that the right over the tools is a lien securing the performance of the contract. In the words of Lord Justice-Clerk Inglis, the tools were to be 'returned ... as soon as the works were executed, and the contract obligation fulfilled by their means'.[14]

11-07. The peculiarity here is that a lien does not normally confer a right of use in respect of the property being retained.[15] If the judgment had been that the property could be retained until the builder's trustee in sequestration performed the contract, then there would be no conceptual difficulty. But rather the fact that it was the retaining party who could go ahead and complete the work makes the right of retention a *sui generis* one. It is perhaps better analysed in terms of an equitable right arising on bankruptcy. Further, the dissenting view of Lord Cowan that the possession of the tools was with the bankrupt, and not his employers, has force.[16]

C. BASIS OF THE SECURED OBLIGATION

(1) The orthodoxy

11-08. The established view is that a lien secures only contractual obligations. Gloag and Irvine state:

> 'A right to retain any subject which is the property of another must be founded on possession, and *must rest on contract*, express or implied'[17] (emphasis added).

According to Lord Young, lien is 'just a contract of pledge collateral to another contract of which it is an incident'.[18] In the view of Professor McBryde, special lien is 'an instance of the mutuality principle' of the Scots law of contract.[19] General lien too is widely acknowledged to exist only in the context of contract. Professor Walker writes:

[13] See particularly at 350 *per* Lord Benholme.

[14] At 349. It appears to be the view of Graham Stewart, *Diligence* 173 that the case concerns lien.

[15] It confers merely a right to detain.

[16] At 349–350. However, his Lordship somewhat changes his mind in the subsequent case of *Moore v Gledden* (1869) 7 M 1016 at 1025–1026 as to what constitutes possession.

[17] Gloag and Irvine, *Rights in Security* 341.

[18] *Miller v Hutcheson & Dixon* (1881) 8 R 489 at 492.

[19] W W McBryde, *The Law of Contract in Scotland* (1987) para 14-45. The same statement appears in the 3rd edn (2007) at para 20-74. However, it is followed shortly after by 'Lien has specialities because it may apply to obligations which are not contractual and it is a right in security.' Reference is then made to the thesis on which this book is based.

> 'In exceptional cases, however, a general right of lien is recognised, that is, a right to withhold a thing *possessed under a contract* in security ... of the whole balance due under all transactions between the parties'[20] (emphasis added).

11-09. Support for all these statements can be found in the works of Bell.[21] However, only the last of them is entirely accurate. For whilst a general lien is only recognised as arising exceptionally in certain cases of contract,[22] special lien is not confined to situations where there has been a pre-existing agreement between the parties in question. This much is apparent by Bell's list of examples of special lien, which is found in both his *Commentaries* and *Principles*. On it appears a lien for salvage,[23] which he describes as 'a most natural and equitable right to those who, having saved the ship, cannot be compelled to deliver it up till salvage be paid'.[24] The right applies to the vessel's cargo too.[25]

11-10. Whilst it is possible to have a salvage contract[26] – for example, the owner of a sunken ship contracts with a salvor to recover it – a salvage claim arises in the absence of agreement by operation of law, as does the salvor's real right of lien.[27] No pre-existing agreement between the parties is required.[28] According to Gloag, the right of the salvor is an 'exceptional' case of lien, which rests on custom of trade rather than contract.[29] This seems flawed, as Bell does not restrict the right to professional salvors. McBryde states that the lien is *sui generis* and therefore not an exception to the mutuality principle of contract.[30] Nevertheless, the salvor's right of retention fits squarely within the accepted definition of lien as a right to retain possession of another's property until that party discharges an obligation.

[20] D M Walker, *Contract* (3rd edn, 1995) 535.

[21] Support for Gloag and Irvine's statement may be found in his *Principles* (10th edn) §§ 1411 and 1412. Support for Lord Young's statement may be found in his *Commentaries* (7th edn) at II, 87, when he states that retention 'operates as a pledge constituted by tacit or implied consent'. Support for McBryde's and Walker's statements may be found in the *Principles* at §§ 1411, 1419 and 1431.

[22] See below, ch 17.

[23] Bell, *Commentaries* II, 99; Bell, *Principles* § 1427.

[24] Bell, *Principles* § 1427.

[25] Bell, *Commentaries* II, 99.

[26] See, eg, *Otis v Kidston* (1862) 24 D 419 and *Mackenzie v Steam Herring Fleet Ltd* (1903) 10 SLT 734.

[27] See Bell, *Commentaries* II, 99: 'There is in such a case a personal action also; but the first and most proper remedy is *in rem*.' It is now accepted that the salvor also has a maritime lien or hypothec which does not require possession: see Sheriff Guthrie's addendum to Bell, *Principles* § 1397; *Hatton v A/S Durban Hansen* 1919 SC 154; A R G McMillan, *Scottish Maritime Practice* (1926) 218, but compare Gloag and Irvine, *Rights in Security* 438.

[28] According to J A G Lowe, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 278 the maritime salvage lien is based on contract even where there is no agreement between the shipowner and the salvor. This cannot be accepted. As D R Thomas writes in 'Maritime Liens' in *British Shipping Laws* vol 14 (1980) para 571: 'The right to salvage may arise under the general maritime law or under a salvage agreement.'

[29] W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 9 (1930) para 481.

[30] McBryde, *Contract* para 20-86 n 282.

11-11. The law recognises another right to retain possession independent of contract, which none of our writers, including Bell, seem to have noticed. This is the lien of a *bona fide* possessor for improvements made to a piece of property in the mistaken belief that ownership of it is held.[31] This right comes from Roman law. Hence the absence of a contract cannot be said to rest on custom, nor should the right be simply viewed as *sui generis*. Rather, the identification of this right of retention, along with that of the salvor, disproves the theory that lien is merely part and parcel of the *exceptio non adimpleti contractus*.

(2) Special lien: a doctrine of the law of obligations

11-12. The thesis submitted here is that special lien is part of the law of obligations as a whole and not just the law of contract. Its pedigree is a good one. Stair treats retention within his title 'Liberation from Obligations', as does Bankton.[32] Erskine's treatment is similar.[33] They all define retention in similar terms: a right to suspend performance of an obligation until a counterclaim is satisfied. Whilst counterclaims are most readily associated with rights under a contract, nowhere is it said within these institutional writings that retention is confined to contractual obligations.

11-13. It is submitted tentatively that a special lien arises if the following three criteria are met:

(1) A holds possession or custody of the property of B;
(2) A has an obligation to return that property to B; and
(3) A has a counterclaim against B which is connected to the property.

11-14. The first of these criteria is discussed in detail elsewhere.[34] The basis of the second lies in the ownership of the property held. As it belongs to B, A has a duty to return it. If, however, the third criterion is satisfied and A has a valid claim against B connected to the property, then A may exercise a lien. The claim is capable of arising from any class of obligation which B owes to A. In other words it may rest in contract, unjustified enrichment or delict.

(3) Lien in the context of contract

11-15. As stated before, general liens only arise in a contractual situation.[35] Contract is also the most familiar area where special lien is encountered. The basis of the lien here is the *exceptio non adimpleti contractus*.[36] For example, Alice sends her car to the garage for repair. The garage carries out the work

[31] See below, paras 11-19–11-22.

[32] Stair I.xviii.7; Bankton I.xxiv.34.

[33] Erskine III.iv.20–21, within the title 'Of the Dissolution of Obligations'.

[34] See below, paras 13-04–13-13.

[35] See above, para 11-09.

[36] See above, para 10-20; G H Treitel, *Remedies for Breach of Contract* (1988) 313–314 and O Lando and H Beale (eds), *Principles of European Contract Law: Parts I and II* (2000) 404–408.

and becomes entitled to detain the car until Alice pays her bill. A special lien will only arise in a contractual situation where there are synallgamatic obligations between the parties.[37] To be more precise, the obligation of the lien-holder to return the property must be reciprocal to the obligation which he or she is demanding that the other party perform. Thus in this example, the duty of the garage to give Alice her car and the duty of Alice to pay her bill are mutual obligations. It must be said, however, that the courts have simply been willing to accept the right to retain as being mutual to the other party's duty to pay the sum owed under the contract without a detailed explanation of why this is the case.[38]

11-16. A lien will not be validly constituted where detention of the property amounts to a breach of the contract under which it is claimed to arise.[39] Thus, where a bill was sent to a banker for discount and he refused to discount it, the court held that he could not exercise a lien over the bill.[40] Likewise, a solicitor to whom a client has given papers specifically so they will be produced in court, may not claim a lien over them.[41]

11-17. A lien will not arise under a contract if the contract excludes it.[42] Where title deeds are handed to a solicitor with an obligation to return them on demand, the right to immediate redelivery has been upheld, but whether this would exclude a lien has not had to be decided.[43] The safe approach is to have an express exclusion.[44]

(4) Special lien in the context of unjustified enrichment

11-18. There are two clear examples of enrichment liens: those of the *bona fide* possessor for improvements and the salvor. Both may be viewed as special liens, for they secure respectively the claim for recompense and the claim for salvage, and nothing else.

[37] See McBryde, *Contract* para 20-74 and below, para 16-19. See also C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (2008) 162 (DCFR Model Rule III – 3:401).

[38] See, eg, *Meikle & Wilson v Pollard* (1880) 8 R 69 at 72 *per* Lord Young. See also below, para 16-13.

[39] Bell, *Principles* § 1414; Gloag and Irvine, *Rights in Security* 348; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 71. The same principle applies to retention of monetary sums: *Stewart v Bisset* (1770) Mor App, *Compensation* No 2; *Middlemas v Gibson* 1910 SC 577.

[40] *Borthwick v Bremner* (1833) 12 S 121.

[41] *Callman v Bell* (1793) Mor 6255; Begg, *Law Agents* 211; Gloag and Irvine, *Rights in Security* 348.

[42] Bell, *Commentaries* II, 91; Bell, *Principles* § 1418; Gloag and Irvine, *Rights in Security* 360; Bell, *Principles* § 1421 (ship repairer's lien); J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 293 (repairer's lien); W M Gloag, *The Law of Contract* (2nd edn, 1929) 636–637; *Gilfillan v Henderson* (1828) 6 S 880 (solicitor's lien); *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 at 20 *per* Lord McLaren (banker's lien).

[43] *Crawfurd v Hodge* (1831) 10 S 11; *Holmes v Stirling* (1892) 8 Sh Ct Rep 276.

[44] See *Onyvax Ltd v Endpoint Research (UK) Ltd* 2008 GWD 1–3, [2007] CSOH 211, discussed in A J M Steven, 'Lien as an Excludable and Equitable Right' (2008) 12 *Edin LR* 280.

11-19. Consider first the lien of the *bona fide* possessor for improvements which comes from Roman law.[45] It is clearly an enrichment lien, for, as Bankton says, it is based upon the rule *nemo debet locupletior fieri cum alterius jactura*.[46] It secures the claim in recompense of the *bona fide* possessor for necessary and profitable expenses laid out upon the property. However, voluptuary expenses are not covered.[47]

11-20. Unlike in Roman law, the Scottish courts have not upheld the right of retention at all times. In two cases where the lien was pled against an heir of entail and in a case where the claimant had no written title, the claimant was told to remove himself and seek recompense for his improvements thereafter in separate proceedings.[48] The first of these scenarios can no longer arise.[49] Nevertheless, where a purportedly *bona fide* possessor may more likely encounter difficulty now is with the doctrine of constructive notice of the register, which the courts have developed this century.[50] If this doctrine is strictly adhered to here, then it becomes rather difficult for a possessor to prove good faith.

11-21. Professor Whitty is sceptical about the *bona fide* possessor's lien and cites the case of *Beattie v Lord Napier*[51] in his support. There a schoolhouse was erected on a piece of land which was known by all not to be owned by the builders. The true owner sold on. Those who had done the building sought recompense and pled retention when the singular successor tried to evict them. The court found against them on both grounds. But in *Beattie* as Professor Reid points out the issue of right of retention was clouded by the fact that the possessors appear to have been in bad faith.[52] For it is settled that *mala fide* possessors have no claim in recompense for meliorations and consequently no right of retention.[53]

11-22. It is important to remember the distinction between the claim in recompense which is personal and the lien which is real. Of course, the policy

[45] See above, paras 10-05–10-10. On Scots law, see Bankton I.viii.15; I.ix.42 and II.ix.68; *Binning v Brotherstones* (1676) Mor 13401; *York Buildings Co v Mackenzie* (1797) 3 Pat 579; *Barbour v Halliday* (1840) 2 D 1279; J Rankine, *The Law of Land-ownership in Scotland* (4th edn, 1909) 89–90; W M Gordon, *Scottish Land Law* (2nd edn, 1999) para 14-56; Reid, *Property* para 173.

[46] Bankton II.ix.68.

[47] Bankton I.ix.42. They are not secured because there is no claim in recompense for improvements 'of a fanciful sort, or such as are suited only to the particular taste and humour of the late possessor': Hume, *Lectures* III, 171.

[48] *Duke of Gordon v Innes* (1824) 3 S 10; *Vans Agnew v Earl of Stair* (1824) 3 S 229; *Sinclair v Sinclair* (1829) 7 S 342. There appears to have been a lack of good faith on behalf of the builder in the last of these.

[49] New entails were prohibited by the Entail (Scotland) Act 1914. All remaining entails were abolished by the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 50.

[50] See *Aberdeen Trades Council v Shipconstructors & Shipwrights Association* 1949 SC (HL) 45; *Trade Development Bank v Warriner and Mason (Scotland) Ltd* 1980 SLT 49 aff'd 1980 SC 74, 1980 SLT 223.

[51] (1832) 9 S 639.

[52] Reid, *Property* para 173 n 11.

[53] Erskine III.i.11; *Barbour v Halliday* (1840) 2 D 1279; *Duke of Hamilton v Johnston* (1877) 14 SLR 298. All of these rejected Stair's opinion (I.viii.6) that *mala fide* possessors did have a claim.

grounds which restrict the claim in recompense will also restrict the operation of any lien, as the latter is dependent on the former.[54]

11-23. The salvor's lien must be viewed too as an enrichment lien, because but for the salvor's actions the owner of the property in question would have suffered the loss of his or her property to the sea.[55] That party is thus enriched by having goods saved.

11-24. Where else does the law recognise enrichment liens? In the absence of authority what must be looked for are situations within the context of unjustified enrichment where one party's property is in the possession of another who has an obligation to return that property but also has a counterclaim.[56] *Negotiorum gestio* fits this description. This is where someone steps in to look after the affairs of another who at the time of intervention is unable to manage them.[57] It is not difficult to imagine a situation where a lien would arise in favour of a *negotiorum gestor*.

11-25. For example,[58] Jill owns a refrigerated warehouse in which she stores foodstuffs. Jill is out of the country, when the power cables serving her warehouse are blown down by a storm. Karen, a friend of Jill who has a refrigerated warehouse elsewhere, acts as a *negotiorum gestor*, by removing the foodstuffs to her warehouse. In this situation, Karen will be allowed to retain the goods until her expenses are met by Jill. For here we have counter obligations: the obligation of Karen to return Jill's property and the obligation of Jill to meet Karen's expenses.

11-26. Roman law gave the *negotiorum gestor* a *ius retentionis*.[59] Further, in South Africa the law is very similar. A *negotiorum gestor*, being a person who has laid out necessary expenses upon a piece of property, is entitled to a salvage lien.[60] Being an enrichment lien, this gives a real right in the property in question.[61] The laws of France and Louisiana both give non-possessory privileges in respect of expenses laid out on conserving a thing.[62] Professor

[54] There are arguments on both sides. See Whitty, 'Indirect Enrichment in Scots Law' 1994 *JR* 200 at 210ff.

[55] Unless of course there is a salvage contract. See above, para 11-10 and *Otis v Kidston* (1862) 24 D 419 and *Mackenzie v Steam Herring Fleet Ltd* (1903) 10 SLT 734. The term 'benevolent intervention' is used by the Draft Common Frame of Reference: see von Bar, Clive and Schulte-Nölke, *Principles, Definitions and Model Rules* 297–300 and 328 (DCFR Book V).

[56] See above, para 11-12.

[57] N R Whitty, '*Negotiorum Gestio*' in *Stair Memorial Encyclopaedia* vol 15 (1996) paras 87–143; N R Whitty and D van Zyl, 'Unauthorised Management of Affairs (*Negotiorum Gestio*)' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 366–398.

[58] The example is very loosely based on *Kolbin (AS) & Sons v William Kinnear & Co* 1931 SC (HL) 128.

[59] D 12.6.33; Buckland, *Roman Law* 538.

[60] *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 1 SA 571 (SA); P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) 413–414; T J Scott, 'Lien' in *LAWSA* vol 15 (1999) para 61; T J Scott and S Scott, *Wille's Law of Mortgage and Pledge in South Africa* (3rd edn, 1987) 87; D H van Zyl, *Negotiorum Gestio in South African Law* (1985) 78–80.

[61] See references in n 60 above.

[62] Art 2103(3) *Code civil*; art 3217(6) *Louisiana Civil Code.*

Whitty, who considered the Roman and South African authority, originally was of the clear opinion that no such lien is recognised by Scots law.[63] More recently, he has commented that 'there is no authority and the question is still open'.[64]

11-27. As has been seen, there is authority recognising a lien in favour of a *bona fide* possessor of land for improvements.[65] It is submitted that the law must also recognise a similar right in respect of *bona fide* meliorations to corporeal moveables. Indeed this is Professor Reid's view.[66] The right is clearly recognised in Roman law, South African law and in the law of Quebec.[67]

11-28. No doubt other examples may be found in the law of unjustified enrichment where a special lien may arise. This is an area where our law is open to extension.

(5) Special lien in the context of delict

11-29. Delict is a less obvious place to find retention or lien operating. This is because it is an area which generally sees only one of the involved parties having obligations, not both of them. For example, Stevenson owed Mrs Donoghue a duty of care when producing his ginger beer.[68] She, on the other hand, had no obligation to him. Thus the key ingredients of counter obligations and one party in possession of the property of another, do not regularly present themselves in the context of delict.

11-30. It is nonetheless possible to produce a couple of statutory examples of delictual liens. Under the Winter Herding Act 1686 the owner of 'horses, nolt, sheep, swine or goats' straying on another's land is made liable, in addition to his liability for any damage done, in a penalty of half a merk for each beast, and the beasts could be retained until this and the expenses of keeping them are met.[69] This Act may or may have not been declaratory of

[63] Whitty, '*Negotiorum Gestio*' para 128. He points out that there exists no Scottish authority recognising a lien here. This is correct. He adds that 'probably a new species of subordinate real right can only be created by the legislature'. This is also correct, but the point here is that Scots law is capable of recognising an enrichment lien in favour of a *gestor* on general principles of the law of retention, thus it is not a question of creating a new subordinate real right.

[64] Whitty and Van Zyl, 'Unauthorised Management of Affairs (*Negotiorum Gestio*)' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 366 at 387, referring to the thesis on which this book is based.

[65] See above, paras 11-18–11-22.

[66] Reid, *Property* para 173.

[67] On the Roman law, see above para 10-05. On the South African law see *Savory v Baldochi* 1907 TS 523; *New Club Garage v Millborrow & Son* 1931 GWL 86; Scott, 'Lien' para 56; *Wille's Law of Mortgage and Pledge in South Africa* 88. For Quebec, see art 974 *Quebec Civil Code.*

[68] *Donoghue v Stevenson* 1932 SC (HL) 31.

[69] See *Fraser v Smith* (1899) 1 F 487; W M Gloag and R C Henderson, *Introduction to the Law of Scotland* (8th edn, by J A D Hope et al, 1980) 517; Rankine, *Landownership* 611. See also the American Law Institute, *Restatement of the Law of Security* (1941) s 61(i), which provides a similar right.

the common law. Certainly the situation is ripe for the creation of a lien. On the one hand the owner of the animals has a right to get his or her property back. On the other hand the neighbour has a claim for damages. That party may detain the animal until that claim is met.

11-31. The Winter Herding Act has been repealed in recent years and the replacement legislation only confers a right of retention in order to prevent damage.[70] It is a nice question whether a right of retention exists at common law until damages are paid for damage already caused, although obviously there is no right in respect of the fixed penalty now abolished. The new legislation of course may be seen as a complete statutory code, thus excluding such a claim.

11-32. The other statutory example is still in force and concerns ports. The provisions of most private Acts of Parliament relating to harbour authorities incorporate the terms of the Harbours, Docks and Piers Clauses Act 1847. They allow the detention by a harbour authority of any vessel causing damage to harbour works in any circumstances and the retention of vessel until security for repairs is given.[71]

11-33. In terms of hypothetical examples of where lien may arise in terms of delict, one may be where a car crashes through a fence and lands in someone's garden. The owner of the garden arguably has a lien until reimbursed for the damage. No doubt there may be other examples.[72] In German law, an individual has a lien *in personam* (*Zurückbehaltungsrecht*) where he or she has a claim in respect of any damage caused by an object which he or she is holding.[73]

11-34. One matter which may be considered is the fact that a delictual lien will secure a claim for damages, rather than a fixed amount of money already set down in a contract. However, the courts are willing for a lien to be exercised in order to secure the payment of damages due for breach of contract.[74] Hence there cannot be a problem in allowing a similar exercise in respect of damages due for a liability in delict.

[70] Animals (Scotland) Act 1987 s 3.

[71] Harbours, Docks and Piers Clauses Act 1847 s 74. See Lowe, 'Rights in Security' para 298.

[72] It is arguable that the cars in *Carmichael v Black, Black v Carmichael* 1992 SLT 897 could lawfully be detained until damages for trespass were received. However, such damages would be minimal if due at all given that all which was involved was a few hours' parking, with no damage caused to the property. The levelling of a hefty fee (£45) for the wheel clamps to be removed, as was done there, would consequently still amount to extortion.

[73] § 273(2) *BGB.*

[74] See below, paras 16-20–16-23; *Moore's Carving Machine Co v Austin* (1890) 33 SLR 613; *Marshall v Bogle* (1890) 2 Guth Sh Cas 401; Gloag and Irvine, *Rights in Security* 353; Gloag, *Contract* (2nd edn, 1929) 632.

12 Subject Matter of Lien

A. CORPOREAL MOVEABLES

12-01. It is universally accepted that it is competent to have a lien over corporeal moveable property.[1] The case law contains many examples, including: title deeds;[2] papers in general;[3] ships;[4] horses;[5] engines;[6] bleached goods;[7] grain;[8] potatoes;[9] electrical appliances;[10] household goods;[11] a refreshment trailer;[12] cars;[13] paintings;[14] and luggage.[15] A lien, however, may not be exercised where this would frustrate the provisions of a statute.[16] Hence a register of shareholders of a company which must be kept open for

[1] See, eg, W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 9 (1930) para 475; D M Walker, *Civil Remedies* (1974) 64 and D J T Logan, *Practical Debt Recovery* (2001) 242. Bell treats lien in his *Commentaries* in a chapter entitled 'Of Securities over Moveables in the Nature of Real Right resulting from Possession': Bell, *Commentaries* II, 86.

[2] *Orme v Barclay* (1778) Mor 6251; *Creditors of Newlands v Mackenzie* (1793) Mor 6254; *Menzies v Murdoch* (1841) 4 D 257; *Garden Haig Scott & Wallace v Stevenson's Tr* 1962 SC 51.

[3] *Ayton v Colville* (1705) Mor 6247; *Meikle & Wilson v Pollard* (1880) 8 R 69; *Reid v Galbraith* (1893) 1 SLT 273.

[4] *Barr & Shearer v Cooper* (1873) 11 M 651 rev'd (1875) 2 R (HL) 14; *Ross & Duncan v David Baxter & Co* (1885) 13 R 185; *Garscadden v Ardrossan Dry Dock Co Ltd* 1910 SC 178.

[5] *Miller v Hutcheson & Dixon* (1881) 8 R 489.

[6] *Democratic Republic of the Sudan v Sagax Aviation Ltd* 1990 GWD 29-1681.

[7] *Lesly v Hunter* (1752) Mor 2660; *Harper v Faulds* (1791) Bell's Octavo Cases 440; *Anderson's Tr v Fleming* (1871) 9 M 618.

[8] *Laurie & Co v Denny's Tr* (1853) 15 D 404.

[9] *Paton's Trs v Finlayson* 1923 SC 872.

[10] *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50.

[11] *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.

[12] *Hostess Mobile Catering v Archibald Scott Ltd* 1981 SC 185.

[13] *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6.

[14] *Goudie v Mulholland* 2000 SC 61.

[15] *Bermans and Nathans Ltd v Weibye* 1983 SC 67.

[16] A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 96; *DTC (CNC) Ltd v Gary Sargeant & Co* [1996] 2 All ER 369.

inspection at the company's registered office cannot be made the subject matter of a lien.[17] A company's seal and charter may not be retained either.[18] There is American authority that an undertaker cannot exercise a lien over a corpse.[19] The position must be the same in Scotland as a dead body cannot be owned[20] and therefore security rights over it must also be incompetent.

B. CORPOREAL HERITABLE PROPERTY

12-02. According to Professor Walker:

> '[T]he right of retention or lien can be exercised in respect of corporeal moveables only, not of heritage.'[21]

Certainly it is the orthodox view that lien is a moveable security, no more, no less.[22] However, this ignores the existence of the lien of the *bona fide* possessor for improvements made to land. An enrichment lien, rather than a lien resting on contract, its nature has been discussed elsewhere.[23] Lien is therefore not restricted to corporeal moveables.

12-03. There remains the question of whether there can be a lien upon land arising by agreement. On this issue Gloag writes:

> 'The doctrine of lien founded on possession under a contract of employment has no application to heritable property.'[24]

He cites two cases to support this proposition. One concerns a tenant retaining possession after the reduction of his lease till refunded for improvements.[25] The court held he had no right to retain. However the basis of the decision has nothing to do with the fact that land is involved, but rather that a tenant has no claim in these circumstances and consequently no right of retention either.[26] In the other case railway contractors tried to retain possession of a railway until certain claims were met by their

[17] *Liquidator of Garpel Haematite Co Ltd v Andrew* (1866) 4 M 617; *In re Capital Fire Insurance Association* (1883) 24 Ch D 408.

[18] *York Buildings Co v Robertson* (1805) Mor App, *Hypothec* No 2.

[19] *Morgan v Richmond* 336 So 2d 342 (La Ct of App, 1976) cited in T Guthrie, *Scottish Property Law* (2nd edn, 2005) para 8.19.

[20] N R Whitty, 'Rights of Personality, Property Rights and the Human Body in Scots Law' (2005) 9 *Edin LR* 194 at 228–231.

[21] Walker, *Civil Remedies* 64.

[22] Thus Bell treats lien within a chapter entitled 'Of Securities over Moveables in the Nature of Real Right resulting from Possession' in his *Commentaries* II, 86. In his *Principles* the treatment falls within a section entitled 'Real Rights of Property and Possession in Moveables': *Principles* §§ 1410–1454.

[23] See above, paras 11-16–11-26.

[24] W M Gloag, *Contract* (2nd edn, 1929) 632. See also his 'Lien' in *Encyclopaedia of the Laws of Scotland*, para 475.

[25] *Turner v Turner* (1811) Hume 854.

[26] Bankton II.ix.68; Erskine III.i.33; J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) 260.

employer.[27] In the opinion of the court they could not do this as, in the words of Lord Justice-Clerk Inglis, their possession could only be retained 'so long and to such an extent as is necessary for the performance of the contract'.[28] This can be read as being a condition peculiar to the contract in question. However, the judgments contain some dicta which seem to deny the possibility of a lien upon land.[29]

12-04. Professor McBryde, on the other hand, sees no reason why there cannot be a heritable lien based on the mutuality principle of the law of contract.[30] His dismissal of the two cases above is perhaps not entirely convincing.[31] He states also that:

> 'The possible objection [to the recognition of such a lien] that it is inconvenient to have latent rights affecting heritage can be met by pointing out that retention is not effective against third parties.'[32]

This is not correct. Lien is a real right and will be effective against third parties.[33] However, the right is not a latent one as it depends on possession. An unregistered servitude is arguably more latent as it only requires occasional exercise to prevent it from negatively prescribing.[34] In the Land Register there exist a considerable number of rights known as 'overriding interests' which do not require to be registered. It would seem that a lien could be one of these rights.[35] Registration is not the be all and end all of land law. Given this, there seems no reason why a lien should not be exercised in respect

[27] *Castle-Douglas and Dumfries Railway Co v Lee* (1859) 22 D 18.

[28] (1859) 22 D 18 at 23.

[29] The Lord Ordinary (Jerviswoode) states at 21: 'The respondents maintain, in the first place, that they are in possession of the line, and have a right of *lien* or of retention over it, as in security of their claims. … No authority in the law of Scotland has been referred to in support of the proposition as applied to an heritable subject as that in question.' At 23, Lord Justice-Clerk Inglis states: 'Any notion of a lien or right of retention in heritable subjects of this kind is totally out of the question, and was not contended for.'

[30] McBryde, *Contract* paras 20-82–20-85.

[31] As regards *Turner v Turner* he states that there was no right of retention because the lease had been reduced. But the law still allows a claim for recompense when a title has been reduced in cases not involving a tenant: *Binning v Brotherstones* (1676) Mor 13401; Reid, *Property* para 173. As regards the *Castle-Douglas Railway Co* case, he states that the contractors never had possession. What Lord Justice-Clerk Inglis in fact says is that both the contractors and the landowners have possession, but the former's title is inferior to the latter's.

[32] McBryde, *Contract* para 20-82.

[33] See below, ch 14.

[34] After the servitude is constituted by 20 years' positive prescription under s 3 of the Prescription and Limitation (Scotland) Act 1973, it need only be exercised every 20 years to stop it from negatively prescribing under s 8 of the 1973 Act. Prior to 28 November 2004 a written servitude could be made real by possession alone. This is no longer competent, except for pipeline servitudes: see Title Conditions (Scotland) Act 2003 s 75(1), (3).

[35] Land Registration (Scotland) Act 1979 s 28(1). A lien fits within the definition of '(j): a right or interest of any person, being a right which has been made real, otherwise by the recording of a deed in the Register of Sasines or by registration'.

of heritable property.[36] This certainly is the position in France, the Netherlands and South Africa.[37] Logically, the *exceptio non adimpleti contractus* should apply as much to immoveables as to moveables. This has been accepted by Professors MacQueen and Thomson.[38] It is also recognised as a possibility by Professor Paisley.[39]

C. INCORPOREAL PROPERTY

12-05. It is not very difficult to find examples of a lien being said to arise upon incorporeal moveable property. Thus Bell notes: 'Strictly speaking, [retention or lien] is applicable to corporeal subjects only, but is extended to debts.'[40] At common law and usually also by its Articles of Association a company has a lien over shares in security of debts owed by the shareholder to the company.[41] In truth the lien here is the right to retain the money which the shares represent.[42] Another example is a factor being said to have a lien over the price of goods sold on behalf of the principal.[43] Many instances of the judiciary using 'lien' in the context of incorporeal moveable property may be found in our law reports.[44]

12-06. The background to such usage lies in the fact that 'lien' originally came into Scots law as a term for nexus. This was equally applicable to all types of property.[45] Conceptually, however, there is a clear difference between retention of possession of corporeal moveables and retention of incorporeals such as debts. The former rests on a subordinate real right, whereas the latter rests upon *dominium*.[46] When a person buys shares in a company he or she in effect transfers his or her money to it in return for the

[36] As stated, this is also Professor McBryde's view, but for different reasons: *Contract* paras 20-82–20-85.

[37] See M Planiol, *Civil Law Treatise* vol 2 (1959) s 2521 for France. See T J Scott, 'Lien' in *LAWSA* vol 15 (1999) para 79 for South Africa. See also G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 777–778. See J H M van Erp and L P W van Vliet, 'Real and Personal Security', vol 6.4 *Electronic Journal of Comparative Law* (Dec 2002) http://www.ejcl.org/64/art64-7.html.

[38] H L MacQueen and J Thomson, *Contract Law in Scotland* (2nd edn, 2007) para 5.16.

[39] R Paisley, *Land Law* (2000) para 11.2 n 4, under reference to the thesis upon which this book is based.

[40] Bell, *Principles* § 1410. This comes within the context of the heading 'Real Rights of Property and Possession in Moveables'.

[41] *Hotchkis v Royal Bank* (1797) 3 Pat 618; *Burns v Lawrie's Trs* (1840) 2 D 1348; *Stark v Fife and Kinross Coal Co Ltd* (1899) 1 F 1173.

[42] Walker, *Civil Remedies* 64.

[43] Bell, *Commentaries* II, 111; *Levitt v Cleasby* (1823) 2 S 184 (NE 163); *Miller and Paterson v M'Nair* (1852) 14 D 955 at 961 *per* Lord Medwyn.

[44] Eg *Dickson v Nicholson* (1855) 17 D 1011 at 1014 *per* Lord Ivory; *Brown v Smith* (1893) 1 SLT 158 ('lien' of auctioneer on price of goods sold).

[45] See above, para 10-110.

[46] On the assumption that ownership of incorporeals can be held. See above, para 9-03.

shares. When a factor is paid by a buyer of the goods of his or her principal, the price becomes the factor's. The factor must of course account to the principal and it is in this process of accounting that money may be retained until obligations owed by the principal to the factor are discharged.

12-07. The conceptual distinction should be recognised by referring to cases involving retention of incorporeal property in terms of 'retention' and not 'lien'. In many cases this usage has already been adopted. For example, the right of a tenant to retain rent until the landlord discharges obligations in terms of the lease has always been referred to as a right of retention and not as a lien.[47]

12-08. An exception to the general rule is admitted in the case of negotiable instruments, over which it is possible to have a lien.[48] If one takes the argument that a holder of a bill of exchange is its owner then in most cases any right of retention must be considered to be based on that ownership and therefore not to be a lien.[49] However, a person in possession of an order bill not indorsed to him cannot be a holder and in relevant circumstances may have a lien. It must be said that the case law on negotiable instruments tends to avoid these conceptual niceties and adopts a wide usage of lien.[50]

[47] See Gloag, *Contract* 628–630; McBryde, *Contract* paras 20-68–20-73.

[48] Bills of Exchange Act 1882 s 27(3); *Byles on Bills of Exchange and Cheques* (28th edn, by N Elliot, J Odgers and J M Phillips, 2007) paras 18-018–18-019. For the effect of a banker's lien in relation to negotiable instruments, see Bell, *Principles* § 1451; Gloag and Irvine, *Rights in Security* 372ff; *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 at 20 *per* Lord M'Laren.

[49] This is the view of Professor Gretton expressed in 'The Concept of Security' in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 at 144.

[50] Eg, *Brandao v Barnett* (1846) 12 Cl & Fin 787, 8 ER 1622; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413; *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527. See further Shaw, *Security over Moveables* 66.

13 The Pre-Requisites of Lien

A. GENERAL

13-01. Being a right in security a lien requires for its foundation a debt or obligation *ad factum praestandum*, the performance of which it secures.[1] The categories of obligation which may be secured by a lien are discussed elsewhere.[2] The second requirement for the constitution is that the creditor in the obligation holds the property over which the lien is being claimed, in order that he or she may withhold it from the debtor and thereby enforce the security. This pre-requisite is examined in detail below.[3]

13-02. An important question is that of when the right in security actually comes into existence. The answer here must be that the real right can only arise when both pre-requisites are present. With special lien, the property

[1] Gloag and Irvine, *Rights in Security* 341; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 66.

[2] See above, ch 12.

[3] See below, paras 13-04–13-13.

normally will have come into the creditor's hands before the debt becomes exigible. For example, goods are sent to be repaired. On the repairer carrying out the work the repair bill becomes chargeable. Only at this point can the lien arise. In general lien, the debt will often pre-date the delivery of the property. For example, a document sent to a solicitor in September may validly be held to secure conveyancing charges incurred in August.

13-03. The question of when a lien comes into existence is particularly important in the case of insolvency. It is settled that a lien will not be effectual unless the property came into the creditor's hands prior to the debtor being sequestrated, or in the case of a company, liquidated.[4] Provided that the property was delivered in the ordinary course of business a lien is unlikely to be struck down as an unfair preference.[5] It is difficult to find authority as regards the situation where the property came into the lien-holder's hands before the debtor was sequestrated but the debt only arose after the sequestration. Applying general principles, there can be no valid lien here, because the law does not permit the creation of real securities after a sequestration.[6]

B. CUSTODY AND POSSESSION

(1) The need for possession

13-04. It is a truth universally acknowledged that a man who is not in possession of a piece of property will be in want of a lien upon it.[7] Thus the very first thing which Bell says about retention in his *Principles* is: 'This right results from possession.'[8] In the view of Goudy, 'Lien is the child of possession.'[9] Similarly Sim writes that: '[A] lien demands possession of the security subjects by the person asserting the lien.'[10] Lord Penrose has stated that lien requires 'that goods belonging to one party came into the possession of [another] party in the course of the performance by the second party of its obligations under the contract'.[11]

[4] Bell, *Commentaries* II, 89; Gloag and Irvine, *Rights in Security* 344–346; H Goudy, *Bankruptcy* (4th edn, 1914) 543; W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 9 (1930) para 470; D M Walker, *Civil Remedies* (1974) 67; Sim, 'Rights in Security' para 69; *Jackson v Fenwick's Tr* (1899) 6 SLT 319. The same principle applies to retention of money: *Meldrum's Trs v Clark* (1826) 5 S 122 (NE 112); *Dickson v Nicholson* (1855) 17 D 1011; *Stevenson, Lauder & Gilchrist v Dawson* (1896) 23 R 496 and *Scottish Union and National Insurance Co v Fairley* (1900) 8 SLT 154.

[5] *Anderson's Tr v Fleming* (1871) 9 M 718. See also *Crockart's Tr v Hay & Co Ltd* 1913 SC 509.

[6] See, eg, Gloag and Irvine, *Rights in Security* 4 and 8–9.

[7] With apologies to Jane Austen and the first line of *Pride and Prejudice*.

[8] Bell, *Principles* § 1410.

[9] Goudy, *Bankruptcy* 543. Lien is similarly described in the pleadings in *Malcolm v Bannatyne* 15 Nov 1814 FC.

[10] Sim, 'Rights in Security' para 68.

[11] *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50 at 52; Whitaker, *Lien* 68 and Hall, *Possessory Liens* 23–27.

13-05. Statements such as these resound down the last two centuries.[12] They are usually followed by other statements making it clear that it is possession which is required and that mere custody will not suffice.[13] A whole train of cases is regularly cited to prove this point. For the Scottish courts have held that the following parties do not have a lien: a clerk or servant with regard to his employer's horses;[14] persons employed to cut wood under the supervision of the estate manager with regard to that wood;[15] a branch manager with regard to a liquor licence;[16] and a company secretary with regard to the books of the company.[17]

(2) The difference between custody and possession

13-06. The rule that possession will found a lien whereas custody will not, requires that the difference between the two is known. With custody, the property in question is held exclusively for another. A custodier has no *animus* to hold the property for his or her own use.[18] Conversely, a possessor has such an *animus*. He or she holds for his or her own rights and interests.[19] The distinction has often been blurred. Here is Lord Ivory from 1856:

> '[T]here have, in our own law, arisen sometimes considerable difficulties as to the distinction between custody and possession. Questions may arise as to goods, which, in a certain sense, are in custody, if in the hands of a workman who gets them for the special purpose of performing operations upon them, – which being performed, the article has been changed in shape, and is, in its changed state, restored to the owner. The workman has the custody, but the possession is still in the proprietor. Again, a carrier has a limited custody, but not possession. A manufacturer has, perhaps, a higher right, but still he has not possession. He is merely the hand which holds the goods for a certain purpose, and his custody is the possession of the proprietor.'[20]

[12] See Bell, *Commentaries* II, 87; Hume, *Lectures* III, 57; Gloag and Irvine, *Rights in Security* 341; Gloag, 'Lien' para 464; Walker, *Civil Remedies* 66; W A Wilson, *The Law of Scotland on Debt* (2nd edn, 1991) para 7.7; D J T Logan, *Practical Debt Recovery* (2001) 242; F Davidson and L J Macgregor, *Commercial Law in Scotland* (2003) para 6.9; N Busby, B Clark, R Paisley and P Spink, *Scots Law: A Student Guide* (3rd edn, 2006) para 8-35; *Levitt v Cleasby* (1823) 2 S 184 (NE 163) *per* the Lord Ordinary (Cringletie). The position is the same in English and American common law: see L A Jones, *A Treatise on the Law of Liens* (1888) § 20.

[13] Eg, Gloag and Irvine, *Rights in Security* 342–343; Walker, *Civil Remedies* 66; D J Cusine and A D M Forte, *Scottish Cases and Materials in Commercial Law* (1987) 159; Sim, 'Rights in Security' para 70; Logan, *Practical Debt Recovery* 242.

[14] *Burns v Bruce & Baxter* (1799) Hume 29.

[15] *Callum v Ferrier* (1822) 2 S 102 (NE 96) aff'd (1825) 1 W & S 399.

[16] *Clift v Portobello Pier Co* (1877) 4 R 462.

[17] *Gladstone v M'Callum* (1896) 23 R 783; *Barnton Hotel Co Ltd v Cook* (1899) 1 F 1190. See also the comparative authority of *Dickson v Nicholson* (1855) 17 D 1011 where it was held that a commercial traveller could not retain money in security of his salary being paid.

[18] Stair II.i.17; Reid, *Property* para 125; Walker, *Civil Remedies* 66; W M Gordon, *Scottish Land Law* (2nd edn, 1999) paras 14.02–14.06; Carey Miller with Irvine, *Corporeal Moveables* para 1.18.

[19] See n 18 above.

[20] *Hamilton v Western Bank* (1856) 19 D 152 at 161.

13-07. As Professor Reid writes, this is a useful passage.[21] It makes it clear that workmen, carriers and manufacturers only have custody. However, the absorption of this information leads to the recognition of a major problem. Those who have done work upon goods, those who have carried goods and those who have manufactured goods may only have custody of those goods. Nevertheless, the law is settled that these individuals are entitled to a lien.[22] Further, it is not very difficult to think of another clear example of a lien based on mere custody. That is the lien of the warehouseman or storekeeper, which Gloag and Irvine accept to be founded on mere custody and not possession.[23] Indeed there have been other times when the judiciary have referred to lien being based on custody rather than possession.[24]

(3) Lien based upon custody

13-08. It is submitted that a lien may arise where there is merely custody rather than possession.[25] Of course there are cases where possession proper is required, for example the lien of the *bona fide* possessor for improvements.[26] It goes without saying that this right depends on possession because a person cannot be a *bona fide* possessor unless that person believes ownership of the property in question is held and therefore has the *animus* to possess. As regards the other cases of lien, it has already been seen that those who perform operations to a subject – manufacturers, carriers and storekeepers – all have mere custody.[27] They do not have an *animus* to hold the property in their own interest as they carry out their jobs. They merely hold property for its owner while they carry out some function with respect to it.

13-09. The same logic may be applied to other traditional instances of lien. Solicitors do not hold title deeds for their own benefit. They hold them because they are acting for their clients.[28] Commercial agents do not hold their principals' property for their own use. They hold it because their

[21] Reid, *Property* para 125 n 7.

[22] Bell, *Commentaries* II, 94–97; II, 100; and II, 104; Gloag and Irvine, *Rights in Security* 349–352 and 400–403; *Harper v Faulds* (1791) Bell's Octavo Cases 440; *Stevenson v Likly* (1824) 3 S 291 (NE 204); *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

[23] *Reid v Watson* (1836) 14 S 223; *Laurie & Co v Denny's Tr* (1853) 15 D 404; Gloag and Irvine, *Rights in Security* 342. See also Sim, 'Rights in Security' para 70.

[24] Eg, *York Buildings Co v Robertson* (1805) Mor App, *Hypothec* No 2 (lien of governor of a company based on custody of papers).

[25] It is not the first time that it has been recognised that a lien may be founded upon custody. Most previous accounts, however, are very confusing. For example, J J Gow, *The Mercantile and Industrial Law of Scotland* writes at 292 that lien 'is the right of the custodier of the property of another to retain it.' But at 293 he writes that lien 'arises from and continues with possession'. See also Gloag and Irvine, *Rights in Security* 342–343 and Sim, 'Rights in Security' para 70.

[26] See above, paras 11-16–11-20.

[27] See above, para 13-07.

[28] Thus in the early case of *Mitchel v M'Adam* (1712) Mor 11096, reference was made to papers subject to a law agent's lien being in his 'custody'. See further, *Steven v Robertson-Durham* (1904) 20 Sh Ct Rep 319 at 322 *per* Sheriff Maconochie.

principals have given them a job to do in respect of that property. A banker no more possesses negotiable instruments deposited by a customer than a storekeeper possesses goods deposited with him or her.[29] Accordingly, the majority of liens arise where there is custody and not possession. If exceptions to this are sought, then in addition to the lien of the *bona fide* possessor, there is the lien of the unpaid seller. According to statute it rests on possession.[30] However, it in many ways is no ordinary lien.[31]

(4) Criticism

13-10. The proposition that lien may rest on custody is not iconoclasm. Authority for it may be found in the judgment of Sir Ilay Campbell, the Lord President, in the important 1791 decision of *Harper v Faulds*.[32] Speaking in the context of the lien of a person who has performed work upon a subject he says:

> 'But the goods are delivered for a precise and special purpose, and for no other; there is no idea of transferring the property, nor of giving it in pledge, nor of transferring even the possession in a legal sense: the artificer has the mere naked custody of the goods; the civil possession is with the owner: the actual possession or custody may be with him too.'[33]

Therefore, to stress, the lien here rests not on possession but on mere naked custody. The workman could not have a barer title. Professor More criticises the Lord President's reasoning.[34] He sees retention as the equivalent of arrestment. In other words if another creditor can arrest the property in the hands of the holder, then the holder too has right: the property may be retained for what is owed. More argues that if the holder has only custody and not possession then the property cannot be arrested in that party's hands and that consequently no right of retention is competent either.

13-11. This argument, however, does not find support in the law of arrestment. Where property is in the hands of a person other than the owner in terms of a contract involving mutual obligations, possession is regarded as not being with the owner. An arrestment is competent.[35] Bell gives the examples of carriers, shipmasters, factors and depositaries.[36] On the other

[29] On the tricky issue of liens upon negotiable instruments, see above, para 12-08.

[30] Sale of Goods Act 1979 ss 39 and 41–43. In fact the lien can be asserted when the seller is acting as 'custodier' for the buyer: s 41(2).

[31] See Bell, *Personal Property* 137. For example, the lien-holder unlike most others has an automatic right of sale: 1979 Act s 39(1)(c).

[32] (1791) Bell's Octavo Cases 440. See above, paras 10-111–10-122.

[33] (1791) Bell's Octavo Cases 440 at 472. Note also *Bogle v Dunmore & Co* (1787) Mor 14216, where the court accepted that a shipowner as carrier was regarded as not having possession of the goods. See Gloag and Irvine, *Rights in Security* 283.

[34] J S More, *Notes to Stair's Institutions* (1832) cxxxi at cxxxv.

[35] Bell, *Commentaries* (2nd edn, 1810) 470; (7th edn, 1870) II, 70.

[36] Bell, *Commentaries* (2nd edn) 470; (7th edn) II, 70; *Appine's Creditors* (1760) Mor 749; *Matthew v Fawns* (1842) 4 D 1242; *Kellas v Brown* (1856) 18 D 1089.

hand where property is held by persons with no right to prevent the owner demanding his or her goods, for example servants, clerks or stewards, arrestment is incompetent.[37]

13-12. A more convincing argument is that while liens regularly arise in situations where the creditor has mere custody, the actual assertion of the real right transmutes the creditor's holding from custody into possession. For example, David, a carrier transports goods. While transporting them he has custody. When he has completed his job, he is entitled to a lien in respect of his charges. The assertion of such a lien means that he is holding the property for his own use, that is until he is paid. He therefore arguably has the necessary *animus* for possession.

13-13. It is difficult to draw a definite conclusion here. Civilian and mixed systems elsewhere accept that lien-holders have possession.[38] The problem is that the Scots law of possession is badly in need of research and analysis.[39] It is clear, however, that the traditional thesis stating that possession will found a lien and custody will not is of doubtful validity.

(5) Custody and servants

13-14. It has been seen that the law of arrestment makes a distinction between property being held by parties other than the owner in general and property being held by the owner's servants. However, this dichotomy is not restricted to arrestment. It is found in the law of lien too. For it appears that the traditional statement that possession will found a lien whereas custody will not, should be replaced with the statement that mere custody will not found a lien in the case of servants. This proposition is borne out by looking at the cases referred to above, which have traditionally been used to say that there can be no lien based only on custody.

13-15. In the 1799 case of *Burns v Bruce & Baxter*,[40] Mr Burns was employed by Messrs Marshall and Company of Berwick as a clerk at Edinburgh in charge of the company's horses. When the company discontinued trading, he sought to retain the animals until his wages and disbursements were met. At the same time other creditors of the company arrested the horses in his hands. In terms of a multiplepoinding:

> 'The Court were of opinion, that Burns had possession of the horses in the capacity of clerk or servant to Messrs Marshall and Co, and that arrestment for their debt

[37] Bell, *Commentaries* II, 70, citing *Cuningham v Home* (1760) Mor 747.

[38] For Germany, see F Baur, *Sachenrecht* (17th edn, by J F Baur and R Stürner, 1999) 540. For Quebec, see J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Quebec* (1994) para 7.2.3. For South Africa, see T J Scott, 'Lien' in *LAWSA* vol 15 (1999) paras 51–53.

[39] Two recent contributions are D Carr, *Possession in Scots Law: Selected Themes* (unpublished University of Edinburgh MSc Thesis, 2005) and C Donnelly, 'From Possession to Ownership: An Analytical Study of the Declining Role of Possession in Scottish Property Law' 2006 *JR* 267.

[40] (1799) Hume 29.

was therefore not competent in his hands, – as also, that, for the like reason, Burns had no right of retention of the horses for any debt due by the company to himself.'[41]

13-16. In *Callum v Ferrier* a person employed to cut wood was under the superintendence of the manager of the employer.[42] The employee was held to have no right of retention. In *Clift v Portobello Pier Co* a manager on a written contract of service who was summarily dismissed was decreed to return a liquor licence forthwith.[43] Finally, in the cases of *Gladstone v M'Callum*[44] and *Barnton Hotel Co Ltd v Cook*[45] it was held that a company secretary has no lien over the books of the company. In both of these the judges pointed out that the secretary was the employee or servant of the company.[46] However, they went on to say that this fact meant that he did not have the possession necessary to constitute a lien.[47] The matter is better analysed as because he was a servant the secretary had no lien.[48]

(6) English influence

13-17. There is some coherence between the cases to the effect that servants are not entitled to a lien. Professor McBryde, for one, does not see it as a good rule, being of the view that contracts of employment should be treated no differently from other contracts and that servants should be entitled to liens.[49] It would appear that there is English influence here.

13-18. In English law there exists a concept called bailment which refers to the owner of movable property placing it in the possession of another party.[50] That other party is referred to as a 'bailee'. The long established position is that an employee or servant cannot be a bailee.[51] Here is Palmer, the leading authority on bailment:

'It has been stated on innumerable occasions that a servant who, as a concomitant of his employment, acquires custody of his master's goods does not in ordinary

[41] At 30.

[42] (1822) 2 S 102 (NE 96) aff'd (1825) 1 W & S 399.

[43] (1877) 4 R 462.

[44] (1896) 23 R 783.

[45] (1899) 1 F 1190.

[46] *Gladstone v M'Callum* at 784 *per* Lord President Robertson; *Barnton Hotel Co Ltd v Cook* at 1193 *per* Lords Kinnear and M'Laren.

[47] *Gladstone v M'Callum* at 784 *per* Lord President Robertson; *Barnton Hotel Co Ltd v Cook* at 1193 *per* Lords Kinnear and M'Laren. Lord M'Laren in *Gladstone* at 785 makes a comparison with a solicitor 'who is lawfully in possession of his client's papers under a contract of agency'.

[48] Note here also the case of *Dickson v Nicholson* (1855) 17 D 1011 where a travelling salesman was not allowed to retain money in security of his salary. Lord Ivory at 1014 referred to him as a 'mere traveller'.

[49] McBryde, *Contract* para 20-78.

[50] See Sir William Jones, *An Essay on the Law of Bailments* (1781); G W Paton, *Bailment in the Common Law* (1952); N Palmer, 'Bailment' in *Halsbury's Laws of England* (4th edn) vol 3(1) (2005 reissue) paras 1–100; Bell, *Personal Property* ch 5; N E Palmer, *Bailment* (2nd edn, 1991).

[51] Paton, *Bailment in the Common Law* 4, adopting the definition of bailment in Sir Frederick Pollock and R S Wright, *Possession* (1888) 163.

circumstances become a bailee. Possession is deemed to remain in the master in such circumstances'.[52]

13-19. Most bailees in English law have liens, for example carriers, repairers and storekeepers.[53] Servants, on the other hand, have no such rights. This is resonant of the opinions expressed in the *Gladstone* and *Barnton Hotel* cases referred to above that an employee does not have the possession to found a lien.[54]

13-20. The mix-up in the Scottish law of lien between custody and possession would appear to have its foundations in Bell paying too much heed to English authority. He seems to have overlooked the fact that the element of intention in possession is different north and south of the border. In England the requisite *animus* is an intention to exclude others.[55] In Scotland it is an intention to hold for one's own use.[56] A lien-holder does have an intention to exclude others, for example thieves. However, whether a lien-holder intends to hold for his or her own use is far more questionable, a matter which has been discussed above.[57] A study of Bell's section on possession in the context of lien in his *Commentaries* reveals that it is almost wholly based on English law.[58]

13-21. Accepting that there has been considerable English influence enables conclusions to be drawn. In the first place, the fact that an individual only has custody of property does not prevent a lien from arising.[59] This is a minimum requirement; hence holders with the additional *animus* necessary for possession may also have a lien. In the second place, employees or servants cannot have a lien simply because they only hold as employees or servants and therefore cannot detain their masters' goods.

(7) Types of holding which may found lien

13-22. Bell believed that only actual possession of the property in question was capable of establishing a lien upon it. He wrote:

[52] Palmer, *Bailment* 456.

[53] Paton, *Bailment in the Common Law* 184–195 and 273–277; N Palmer and A Mason, 'Lien' in *Halsbury's Laws of England* (4th edn) vol 28 (1997) paras 737–744; I Davies, *Textbook on Commercial Law* (1992) 321–323.

[54] Hall, *Possessory Liens* 5–6. See above, para 13-16.

[55] Paton, *Bailment* 9.

[56] Stair II.i.17; Reid, *Property* para 125.

[57] See above, paras 13-12–13-13.

[58] Bell, *Commentaries* II, 87–91. Most of the cases he relies upon are English, eg, *Heywood v Waring* (1815) 4 Camp 291, 171 ER 93; *Kinloch v Craig* (1789) 3 TR 119, 100 ER 487 and *Kruger v Wilcox* (1755) Amb 252, 27 ER 168.

[59] As much seems to have been accepted by Gloag, 'Lien' para 464. Under the title 'Lien is dependent on possession', he writes 'Possession, in this particular, involves both physical custody and a right to possess.' He does not substantiate what he means by 'right to possess'.

> 'It is not sufficient that goods or money have been sent, with orders to be delivered to the person claiming the lien, if they have not actually come into his custody.'[60]

As has been seen, mere custody rather than actual possession may well be enough.[61] The question of whether the property is being held in a manner effective to create a lien is one of fact.[62] Thus in one case,[63] shipbuilders contracted with a firm of engineers to place engines in a ship. The vessel was towed to the public harbour of Leith for the engines to be fitted. This work was duly carried out. At all times one of the shipbuilders' men remained aboard the ship and, further, the contract provided that the vessel was 'throughout in charge of the shipbuilders'. It was held that these facts meant that the engineers never obtained possession of the ship and therefore could not assert a lien over it.[64]

13-23. The courts have been of the opinion that, contrary to Bell, civil possession too may form the basis of a lien. Thus in *Gairdner v Milne & Co*[65] a factor was held entitled to retain an insurance policy belonging to his principal when in fact the policy was held for the factor by a policy broker and had never been in the factor's custody.[66]

(8) Custody must have been legitimately obtained

13-24. A lien must be founded upon custody which is legitimate.[67] Custody acquired by fraud or by a void contract will not do.[68] Similarly where the custody has been obtained by mistake a lien cannot be established.[69]

13-25. More specific examples of illegitimate custody have also been recognised. Thus a law agent was not allowed to plead a lien in regard to the rental book of an estate against a judicial factor where the latter was considered to be the natural custodier of the property.[70] In another case a

[60] Bell, *Commentaries* II, 87. He cites *Kinloch v Craig* (1789) 3 TR 119, 100 ER 487 and *Young v Stein's Tr* (1789) Mor 14218 in support of his proposition. Both cases involve bills of lading.

[61] See above, paras 13-04–13-13.

[62] Gloag and Irvine, *Rights in Security* 341–342; Wilson, *Debt* para 7.7; *Barr & Shearer v Cooper* (1875) 2 R (HL) 14; *Paton's Trs v Finlayson* 1923 SC 872.

[63] *Ross & Duncan v David Baxter & Co* (1885) 13 R 185.

[64] It is submitted that for the same reasons that they did not obtain custody either.

[65] (1858) 20 D 565.

[66] See also *Wilmot v Wilson* (1841) 3 D 815. Compare *Levitt v Cleasby* (1823) 2 S 184 (NE 163). Further, see *Renny v Rutherford* (1840) 2 D 676; *Renny v Kemp* (1841) 3 D 1134, discussed, below, para 13-30.

[67] Bell, *Commentaries* II, 88–89; Bell, *Principles* § 1413; Hume, *Lectures* III, 58; Gloag and Irvine, *Rights in Security* 343–344; Sim, 'Rights in Security' para 69; *Shepherd's Trs v MacDonald, Fraser & Co* (1898) 5 SLT 296 *per* Lord Stormonth Darling; *Barclay v Guthrie* (1887) 3 Sh Ct Rep 103 *per* Sheriff Hall.

[68] Bell, *Principles* § 1413; Hume, *Lectures* III, 58.

[69] Bell, *Principles* § 1413; *Louson v Craik* (1842) 4 D 1452. A similar rule applies in England: *Lucas v Dorrien* (1817) 7 Taunt 278, 129 ER 112. Hume's statement that possession obtained in 'an accidental way may be sufficient' (*Lectures* III, 58) must be regarded as wrong. See the comments of G C H Paton, the editor of Hume's *Lectures* at III, 58, n 172.

[70] *Mackay, Petitioner* (1867) 3 SLR 329.

horse had been sold and was delivered to the buyer.[71] He thereupon rejected the animal and tried to return it to the seller, who refused to take it. When he eventually changed his mind, the buyer pled a right of retention in respect of his expenses in caring for the horse. The court held that upon rejecting the animal the buyer no longer had legitimate possession of it and therefore had no lien. His proper course should have been to deliver the horse into neutral custody upon rejecting it.[72]

13-26. In one old case where a creditor had obtained possession of some of his debtor's property by way of an irregular poinding it was held that despite the irregularity he had a right to retain the goods until paid.[73] This decision is universally accepted as being wrong.[74] Lord Justice-Clerk Braxfield commented on the Lord President who gave the leading opinion in that case, in the following terms: 'Arniston, though a great man, was wrong: *aliquando bonus dormitat Homerus*'.[75]

C. LOSS OF POSSESSION

(1) General

13-27. The general rule is that if the lien-holder loses possession of the property then this will extinguish the lien upon it.[76] Thus Bell writes:

> 'A person possessed of property, and entitled to a lien, loses it the moment he quits his possession.'[77]

Thus where tyres were sold by a dealer to a buyer it was held that the lien of the dealer was lost upon delivery of the goods.[78] Likewise a factor loses his or her lien upon delivery to the principal.[79] Where, however, a number of items are subject to a lien and custody is lost of some of them, the rest remain burdened by the lien to the extent of the whole debt due.[80] Thus where goods had been carried by sea and some had been delivered on arrival in port, the

[71] *Barclay v Guthrie* (1887) 3 Sh Ct Rep 103.

[72] See *M'Bey v Gardiner* (1858) 20 D 1151.

[73] *Glendinning's Creditors v Montgomery* (1745) Mor 2573.

[74] Bell, *Commentaries* II, 89; Bell, *Principles* § 1413; Hume, *Lectures* III, 58; Gloag and Irvine, *Rights in Security* 343; *Arthur v Hastie & Jamieson* (1770) Mor 14209 *per* Lord Pitfour (see Bell, *Commentaries* II, 89); *Harper v Faulds* (1791) Bell's Octavo Cases 440; *Patten v Royal Bank* (1853) 15 D 617; *Laurie & Co v Denny's Tr* (1853) 15 D 404 at 409 *per* Lord Ivory.

[75] *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 471.

[76] Bell, *Principles* § 1415; Hume, *Lectures* III, 58; Gloag and Irvine, *Rights in Security* 360; D M Walker, *Civil Remedies* (1974) 72; Sim, 'Rights in Security para 74; *Petrie v Geddes* (1823) 2 S 562 (NE 485); *Morrison v Fulwell's Tr* (1901) 9 SLT 34.

[77] Bell, *Commentaries* II, 89.

[78] *London Scottish Transport Ltd v Tyres (Scotland) Ltd* 1957 SLT (Sh Ct) 48.

[79] *Kruger v Wilcox* (1755) Amb 252, 27 ER 168. Although an English case, the same would hold in Scotland: see Bell, *Principles* II, 89–90; Montagu, *Lien* 8 and Hall, *Possessory Liens* 78–79.

[80] Gloag and Irvine, *Rights in Security* 360–361; Sim, 'Rights in Security' para 74. See too the American Law Institute, *Restatement of the Law of Security* (1941) s 80(2).

lien of the shipowner for carriage remained over the rest.[81] Similarly, where a law agent abandoned his lien over the titles of a portion of his client's property his right of retention over the titles of the remainder of the property for the whole balance was not affected.[82]

13-28. Bell writes that a lien will not be lost if the property is 'taken 'away' by undue means.'[83] This coheres with the Roman law which allowed a party with a *ius retentionis* to sue for theft.[84] It also finds support in the Sale of Goods Act 1979, which provides that the unpaid seller loses his lien where 'the buyer or his agent *lawfully* obtains possession of the goods' (emphasis added).[85] The Inner House recently agreed with Bell's approach, holding that a lien is not extinguished where the holder is induced to give up possession by improper means.[86] In the Outer House, Lord Malcolm has expressed the view that a lien may not be lost where possession is given up because of a court order.[87] Under the Quebec Civil Code a person with a lien does not lose it if he or she is involuntarily dispossessed and has the right to have the property returned to him.[88] By way of contrast, under South African law the lien is lost even although the dispossession is involuntary.[89] However, the erstwhile lien-holder has the *mandament van spolie* in order to get the thing back and re-acquire the lien. In Scotland the counterpart to this remedy, spuilzie, would arguably be similarly available.[90]

13-29. Bell is also of the view that the lien will subsist if the property is released in error.[91] More controversial is his statement that a lien 'may be reserved by agreement' between debtor and creditor.[92] This creates the possibility of liens which are *de facto* hypothecs and which violate the principle of no security without publicity.[93]

13-30. In fact this position seems already to have been reached, for in some eighteenth-century cases it was held that a solicitor retained his lien over title deeds which he had lent to another solicitor employed by his client.[94] The reasoning of Lord Gillies of why this is the case is as follows:

[81] *Malcolm v Bannatyne* 15 Nov 1814 FC.

[82] *Gray v Wardrop's Trs* (1851) 13 D 963 rev'd *sub nom Gray v Graham* (1855) 18 D (HL) 52.

[83] Bell, *Principles* § 1415. 'Away' is Sheriff Guthrie's addition.

[84] See above, para 10-24.

[85] Sale of Goods Act 1979 s 43(1)(b).

[86] *Goudie v Mulholland* 2000 SC 61.

[87] *Air and General Finance Ltd v RYB Marine Ltd* 2007 GWD 35-589, [2007] CSOH 177 at para 10.

[88] Art 1593 *Quebec Civil Code.*

[89] Scott, 'Lien' para 53.

[90] Reid, *Property* paras 161–166.The problem here is that a lien-holder arguably may only have custody. See above, paras 13-04–13-14.

[91] Bell, *Principles* § 1415.

[92] Bell, *Principles* § 1415.

[93] See above, para 2-19.

[94] *Campbell v Montgomerie* (1839) 1 D 1147; *Renny v Rutherford* (1840) 2 D 676; *Renny v Kemp* (1841) 3 D 1134. See also *Ure & Macrae v Davies* (1917) 33 Sh Ct Rep 109.

> 'In my opinion [the lien] remained as secure as ever. He parted with the actual custody of the titles, but not with their legal custody. Legally and civilly speaking, he remained custodier through the medium of [the second solicitor] holding them from him on loan.'[95]

This is somewhat perplexing. Whilst it is well known that there are different sorts of possession, it is generally thought that custody denotes physical holding only.[96] Thus the opinion of Lord Gillies does not seem convincing. Even the fact which he highlights,[97] that the second solicitor had to return the deeds on demand, does not remove the basic truth that by parting with them he lost the custody thereof.

13-31. Similar logic to that of Lord Gillies was applied in the 1953 case of *John Penman Ltd v Macdonald*.[98] There a gentleman who was not a professional accountant was employed by a firm to write up their business books. He had given up custody of the books for a time to the firm's auditor, but had later recovered it and then sought to retain the items until he was paid. The firm argued that the lien was confined to the value of the services performed after the date he recovered the books. The Sheriff-Substitute disagreed. He held that giving the books to the auditor was not 'a relinquishing of possession'[99] and continued:

> 'The defender's contract of employment was still running and he remained in constructive possession. In any event the handing of the books to the auditor … was not a restoration of these articles to the pursuers.'[100]

The matter of to whom the property is relinquished is irrelevant.[101] Moreover, a lien by constructive possession amounts to no less than a secret lien and has little to commend it.

(2) English authority

13-32. Most commentators on English law accept that a lien will continue if the property in question is delivered to the owner or another party merely for a limited purpose with the intention that the lien will subsist.[102] However, there is effectively only one case to support this point. There, a repairer's lien over a taxi was held not to be extinguished by the owner temporarily removing the vehicle in order to ply for hire.[103] Nevertheless, the general rule

[95] *Renny v Rutherford* (1840) 2 D 676 at 683.

[96] Reid, *Property* para 125.

[97] *Renny v Rutherford* (1840) 2 D 676 at 683.

[98] 1953 SLT (Sh Ct) 81.

[99] At 82.

[100] At 82.

[101] See Bell, *Principles* § 1415. All that matters is that the erstwhile lien-holder parts with the property.

[102] See Paton, *Bailment in the Common Law* 184–185; N Palmer and A Mason, 'Lien' para 725; Bell, *Personal Property* 145 and Hall, *Possessory Liens* 77–78.

[103] *Abermarle Supply Co Ltd v Hind & Co Ltd* [1928] 1 KB 307.

is clear that where a lien-holder parts with the property the lien is normally forfeited.[104]

(3) Effect of recovery of possession

13-33. Bell wrote that, with the exception of the liens of a factor and a policy broker, where a lien had been lost by the property being parted with, it did not revive on possession being recovered.[105] Factors (commercial agents) and policy brokers both have general liens[106] and it is submitted that in fact the same rule applies to all holders of such liens.[107] As a general lien is good for all sums owed in a course of trading or employment, obtaining custody of the property once more will create a lien which secures the same debts that were secured prior to relinquishing the custody. What actually happens is that the old general lien is replaced by a new general lien.[108] In practice this is of course the same as the original lien reviving.

13-34. As regards special liens, Bell's rule means that once the property is parted with 'the lien seems to be extinct beyond revival'.[109] The case of *London Scottish Transport Ltd v Tyres (Scotland) Ltd*[110] illustrates this principle. There, some goods were delivered under a contract of sale. The sellers subsequently suspected that the buyer was nearing insolvency and instructed an agent to uplift most of the goods. This he was able to do. The buyer duly went into liquidation and the seller claimed a lien over the goods under the Sale of Goods Act. It was held that the seller had no such right, his lien having being lost on the goods being delivered. The recovery of the goods did not revive the lien. In a subsequent case it was held that an unpaid seller's lien may revive if the buyer returns the goods to the unpaid seller with the intention that the lien should be revived.[111] It may be doubted whether this situation will be encountered very often.

[104] *Forth v Simpson* (1849) 13 QB 680, 116 ER 1423; *Jackson v Cummins* (1839) 5 M & W 342, 151 ER 145 and *Scarfe v Morgan* (1838) 4 M & W 270, 150 ER 1430.

[105] See Bell, *Commentaries* II, 90; Bell, *Principles* § 1449 and Gloag and Irvine, *Rights in Security* 360.

[106] See, eg, Bell, *Commentaries* II, 109–112 and 115–117.

[107] On this matter, see Gloag and Irvine, *Rights in Security* 360.

[108] Compare *Goudie v Mulholland* 2000 SC 61 at 67 where the parties agreed that recovery of possession would not restore the lien. But if the averments that the lien was general are accepted the lien in these circumstances would effectively be restored.

[109] Bell, *Commentaries* II, 91.

[110] 1957 SLT (Sh Ct) 48.

[111] *Hostess Mobile Catering v Archibald Scott Ltd* 1981 SC 185. This view had also been expressed by the sheriff in *London Scottish Transport Ltd* at 49. See too Carey Miller with Irvine, *Corporeal Moveables* para 11.25.

D. OWNERSHIP OF THE PROPERTY

(1) General

13-35. The general rule is that a contractual lien may only be exercised over a piece of property where the party who entered into the contract with the lien-holder was the owner of the property or an agent.[112] In the words of Lord Young: 'The right must proceed from the owner of the property or someone in his right'.[113] Thus Alison's property cannot be detained for an obligation owed by Bruce without Alison's authorisation. Thus in one case the burgh of Auchtermuchty had become insolvent and some of the councillors employed a solicitor to act for them.[114] He claimed a lien over the title deeds of the burgh for his account. It was held that he had no such right, for he had not been employed by the Magistrates and Council of Auchtermuchty as a whole. In another case a bank was held not entitled to retain a bill of exchange deposited by someone, in security of his debts, where it was found that that person did not own the bill.[115]

13-36. The rule as regards enrichment and delictual liens is less certain, because of the nascent state of the law. Clearly the *bona fide* possessor's lien is enforceable against the true owner of the property.[116] Thus the rule which applies to contractual liens would seem to apply to enrichment liens. With respect to delictual liens, a case could arise where Ann takes Ben's car and drives it into Craig's wall. Can Craig detain the car from Ben in respect of the damage caused by Ann? There is no ready answer.

(2) Authorised persons

13-37. A person who has either the express, implied or ostensible authority of the owner to subject his or her property to a lien may effectually allow a

[112] Gloag and Irvine, *Rights in Security* 349; Gloag, 'Lien' para 474; Walker, *Civil Remedies* 65–66; Sim, 'Rights in Security' para 72. The same general rule applies in England: see Cross, *Lien* 27–28 and Hall, *Possessory Liens* 27–31. See *Air and General Finance Ltd v RYB Marine Ltd* 2007 GWD 35-589, [2007] CSOH 177, discussed in A J M Steven, 'Missing the Boat: Lien for Damages' (2008) 12 *Edin LR* 270 at 273. The exception to the rule is the innkeeper's lien which will attach to any goods brought into the inn, no matter who owns them: *Bermans and Nathans Ltd v Weibye* 1983 SC 67. The reasons for this are discussed elsewhere, but may not be ECHR compatible. See below, paras 16-82–16-84.

The brief report of the case of *Lesly v Hunter* (1752) Mor 2660 suggests that a bleacher may retain cloth he has bleached even although the true owner did not authorise the bleaching. However, the Session Papers disclose that the owner agreed to pay for the cost of the bleaching in that case. The dispute was over the entire balance due from the third party who had sent the cloth for bleaching and the bleacher. The court held rightly that the true owner did not have to pay that balance before he could get his cloth back. I wish to record my thanks to the Keeper of the Advocates Library and Catherine A Smith, formerly the Senior Librarian, for permitting me access to the Session Papers.

[113] *Robertson v Ross* (1887) 15 R 67 at 71.

[114] *Walker v Phin* (1831) 9 S 691.

[115] *Farrar and Rooth v North British Banking Co* (1850) 12 D 1190.

[116] See above, paras 11-18–11-22.

lien to be created over that property.[117] A mercantile (commercial) agent within the meaning of the Factors Acts is given that right in terms of that set of statutes.[118]

13-38. The question of authorisation was the subject of the recent case of *Democratic Republic of the Sudan v Sagax Aviation Ltd*.[119] There A contracted with B for the overhaul of five helicopter engines, knowing that the work would be sub-contracted to C. C, in fact sub-contracted to a subsidiary, D, who stopped work on the insolvency of B and demanded payment, in the meantime claiming a lien on the engines. A argued that D had no lien, being an unauthorised sub-contractor. D, in reply, argued that B had implied authority to sub-contract the work to any company in C's group and, further, that A had become aware of what was going on and not objected. The court held that there was nothing in the contract which allowed a further sub-contract. However, the case was sent to proof before answer on the issue of whether A had knowledge of the matter and did nothing about it.[120]

(3) Where the owner has voluntarily allowed another to hold the property

13-39. Situations may arise where the owner of property has placed it in the hands of another, for example in terms of a contract of hire or hire purchase. The question arises whether the person who has received possession may allow a lien to be created over the property which will be valid against the owner. It appears that the law here is settled. The first Lord President Clyde set it out in the following terms in *Lamonby v Arthur G Foulds Ltd*:

> '[I]n both pledge and lien the principle that the possessor of a moveable can give no better right therein or thereto to a third party than he has himself acquired from the owner applies, unless the owner has personally barred himself, by some actings of his own, from founding on the limited character of the title he actually gave to the possessor.'[121]

13-40. The facts of the case in which Lord Clyde gave his judgment were as follows. A motor lorry was the subject of a hire-purchase agreement, which expressly provided that the hirer was not 'to create any lien thereon for repairs'. The hirer handed the vehicle to a firm of engineers for repairs. When he subsequently failed to meet his hire-purchase payments, the owner sought to recover the lorry from the engineers who pled a lien for their repairs. It was held that no lien was created in respect that the hirer had no title to allow

[117] Gloag, 'Lien' para 472; Sim, 'Rights in Security' para 72.

[118] Factors Act 1889 applied to Scotland by the Factors (Scotland) Act 1890 s 1. See in particular the 1889 Act ss 1(1), 1(5) and 2.

[119] 1990 GWD 29-1681.

[120] If A's knowledge was proven, then he would arguably be personally barred from denying the lien. See below, para 13-50.

[121] 1928 SC 89 at 95. *Democratic Republic of the Sudan v Sagax Aviation Ltd* 1990 GWD 29-1681, discussed above, is a case where personal bar is arguably relevant.

such a creation. The fact that the repairers did not know that the title was so limited was held to be irrelevant.

13-41. In a similar case a hirer of a sewing machine under a hire-purchase contract was obliged to keep it in her own custody.[122] In breach of this contract, she stored the machine with a broker. The broker claimed a lien for storage dues when the owner tried to recover his property. It was held that no lien had been validly constituted. In the words of the Sheriff-Substitute, the hirer could not 'give any title of lien to a storekeeper, because, she had, by the terms of her contract, no title to store'.[123]

13-42. Universal commercial practice in contracts of hire following cases such as those described is to have an express clause barring the creation of a lien over the property. For example, the standard form contract of hire for a photocopier, which featured in a recent case, contained the following provision:

> '8(a) The user agrees not without the written consent of the supplier ... (b) to remove the copier from the installation address or (c) create or permit to be created any lien or encumbrance in respect of the copier.'[124]

13-43. The traditional approach outlined in these cases has been subject to criticism.[125] Lien, or at least special lien, is a security which usually arises by operation of law.[126] Given this, the question of whether the person who placed the property in a position whereby it became the subject of a lien had the requisite title to do so may be viewed as irrelevant. This must particularly be the case where the would-be lien-holder has no knowledge of the title possessed, as in *Lamonby v Arthur G Foulds Ltd*.[127]

13-44. However, because the rule *nemo plus juris ad alienum transferre potest, quam ipse haberet* effectively applies to lien, the irresistible conclusion is that lien to some extent is a consensual security. Such a proposition coheres with the rule explored previously that lien must be founded on a legitimate holding of the property and not one obtained by fraud or mistake.[128] However, lien cannot be regarded as a consensual security in the same way as pledge, where debtor and creditor require the *animus* to create the real right.[129] For a special lien will arise by operation of law without any need for *animus* on the part of the debtor.[130] The answer to the conundrum probably has more to do with policy than anything else.

[122] *Glasgow Corporation v Singer Sewing Machine Co Ltd* (1918) 34 Sh Ct Rep 177.

[123] At 178.

[124] *Eurocopy (Scotland) plc v Lothian Health Board* 1995 SC 564. See also the hire-purchase contract in *Lions Ltd v Gosford Furnishing Co Ltd* 1962 SC 78.

[125] Eg, Professor Wilson considers *Lamonby v Arthur G Foulds Ltd* to be wrong: *The Law of Scotland on Debt* (2nd edn, 1991) para 7.8. See also J J Gow, *Law of Hire Purchase* (2nd edn, 1964) 164 and D J T Logan, *Practical Debt Recovery* (2001) 243–244.

[126] See below, para 16-01.

[127] 1928 SC 89. See above, paras 13-39–13-40.

[128] See above, para 13-24.

[129] See above, para 6-01.

[130] See below, para 16-01.

13-45. Lien is a species of real right in security. It seems manifestly unjust that simply because it arises by operation of law it should be capable of overruling the rule *nemo plus*. Dire results would follow if this was the case. Thus Angela could take Barney's car, which he is hiring, and contract with Charlotte to have it painted pink with yellow spots. Barney would be unable to recover his car from Charlotte until he has paid for work which he would never have authorised in his right mind. To stop this from happening, the law has in essence applied the rule *nemo plus* to an involuntary security.

13-46. It is valuable to look at other systems here. In German law, there is a significant academic dispute over whether a lien can arise in such circumstances.[131] The law of Quebec is the same as our own in that an effective lien will only arise under a contract where the debtor has the property with the consent of its owner.[132] In English law a workman or bailee claiming a lien may infer the owner's authority from a hirer's use of a piece of property and is not bound by any contractual limitation unless he has knowledge of it.[133] In South African law a contractual lien cannot be enforced against the true owner unless that party authorised it.[134] However, where work has been done on a piece of property the workman has an enrichment lien which is good against the world.[135] This is the law no matter whether or not the owner authorised the work.[136]

13-47. It may be argued that the South African model should be followed in Scotland so that there would be an enrichment lien, which would secure necessary and useful expenses but not voluptuary ones. However, the idea that the repairer could have a lien enforceable against the true owner in addition to his contractual claim against the person who had instructed the work has been frowned upon in Scotland.[137]

[131] Compare, eg, K H Schwab and H Prütting, *Sachenrecht: Ein Studienbuch* (24th edn, 1993) 337–338 with F Baur, *Sachenrecht* (17th edn, by J F Baur and R Stürner, 1999) 690–691.

[132] Art 1592 *Quebec Civil Code.*

[133] Palmer and Mason, 'Lien' para 538; M G Bridge, *Personal Property Law* (3rd edn, 2002) 173–174; *Green v All Motors Ltd* [1917] 1 KB 625; *Tappenden v Artus* [1964] 2 QB 185.

[134] T J Scott and S Scott, *Wille's Law of Mortgage and Pledge in South Africa* (3rd edn, 1987) 92–93; P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) 412–413; Scott, 'Lien' paras 50 and 68–72.

[135] *Wille's Law of Mortgage and Pledge in South Africa* 86–92; *Silberberg and Schoeman's The Law of Property* 418–420; Scott, 'Lien' paras 54-67.

[136] Unless the property was stolen. See *Silberberg and Schoeman's The Law of Property* 418–420; Scott, 'Lien' para 62; *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A); *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 (4) SA 19 (A); *ABSA Bank t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 1 (SA) 939 (C) and *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA). See also D Visser and S Miller, 'Between Principle and Policy: Indirect Enrichment in Subcontractor and "Garage-Repair" Cases' (2000) 117 *SALJ* 594 and G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems* 759 at 781–782.

[137] At a University of Edinburgh Department of Private Law Seminar held on 17 June 1996 and addressed by Professor Sieg Eiselen, consternation was expressed at the idea of Scots law ever adopting the South African position.

13-48. The root of the problem is that if the hirer or other party in possession absconds or becomes insolvent the cost of the work must be met either by the repairer or by the true owner. The current Scottish position is that it falls to the repairer, unless of course the work was authorised by the owner.[138] This seems correct in terms of the fact that the hirer had no title to subject the property to a contractual lien. However, this leaves the question of whether the repairer could have a claim against the owner in unjustified enrichment. There is some case law suggesting that there is not a valid claim here.[139] But as the matter is primarily for the law of unjustified enrichment, this is not the appropriate place to have a substantive discussion of it.[140]

13-49. If, however, an enrichment claim was felt to be merited here, then a lien should be admitted. On the other hand, the fact of the repairer having two concurrent claims – that is, against the hirer in contract and against the owner in unjustified enrichment – severely complicates the issue and prevents the easy resolution of the matter.[141]

(4) Personal bar

13-50. In certain limited circumstances the true owner will be personally barred from denying that a third party has permitted a lien to be validly created upon his property.[142] For this to happen the true owner must have acted in a manner calculated to mislead the would-be lien-holder and the latter must have been misled by reliance on the owner's actings.[143] Merely placing one's property in the hands of another without taking precautions to inform third parties that one is in fact the true owner does not amount to conduct calculated to mislead.[144] The rules regarding personal bar are said to be the same for pledge and lien.[145]

[138] See above, paras 13-37–13-38.

[139] *Kirklands Garage (Kinross) Ltd v Clark* 1967 SLT (Sh Ct) 60. See N R Whitty, 'Indirect Enrichment in Scots Law' 1994 *JR* 200 at 215.

[140] See, however, W D H Sellar, 'Obligations' in *Stair Memorial Encyclopaedia* vol 15 (1996) para 49.

[141] South African writers have appreciated the problems. See, eg, Visser and Miller (n 136). See also N R Whitty and D van Zyl, 'Unauthorized Management of Affairs (*Negotiorum Gestio*)' in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems* 366 at 394–395.

[142] Gloag and Irvine, *Rights in Security* 203–209 and 349; Walker, *Civil Remedies* 65–66; Sim, 'Rights in Security' para 72.

[143] See Gloag and Irvine at 203–209 and 349 and the judgment of Lord Kinnear in *Mitchell v Heys & Sons* (1894) 21 R 600.

[144] See above, paras 13-39–13-41; *Mitchell v Heys & Sons*; *Glasgow Corporation v Singer Sewing Machine Co Ltd* (1918) 34 Sh Ct Rep 177; *Lamonby v Arthur G Foulds Ltd* 1928 SC 89.

[145] Gloag and Irvine at 203–209; *Mitchell v Heys & Sons*. See also E C Reid and J W G Blackie, *Personal Bar* (2006) para 16-06 and above, paras 6-48–6-49.

14 Lien as a Real Right

A. GENERAL

14-01. As Professor Gretton commented twenty years ago, the 'most serious difficulty arising from the lack of conceptual foundations in the law of lien is the question of whether a lien-holder has a real right.'[1] It is submitted here that lien is a *jus in re aliena*, for four reasons. First, many authorities not brought together until now state that this is the case. Secondly, lien is normally treated along with pledge and hypothec as a right in security. Thirdly, a lien will prevail over subsequent diligence. Fourthly, a lien-holder, because that party has a real security, is generally not required to give it up in return for being given some personal security, in other words caution.

B. REASONS FOR LIEN BEING A REAL RIGHT

(1) The authorities

14-02. A considerable number of authorities consider lien to be a real right. The foremost writer on the whole subject of lien, Bell, is chief amongst them. He deals with lien in a section of his *Commentaries* entitled 'Of Securities over Moveables in the Nature of Real Right resulting from Possession.'[2] Within that section he writes of the various ways in which a lien may be created, for example expressly or by usage of trade and notes:

[1] 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 144.

[2] Bell, *Commentaries* II, 86ff.

'In all these cases the real right depends entirely on the fact of possession: it begins with possession, and with the loss of it expires.'[3]

The following writers have also referred to lien expressly as a real right: Carey Miller;[4] Gloag and Irvine;[5] Graham Stewart;[6] Goudy;[7] Gretton;[8] Sim;[9] Styles[10] and Whitty.[11] T B Smith may be added to the list, for he treats it under the heading of 'Jura In Re Aliena' in his *Short Commentary on the Law of Scotland*.[12]

14-03. Lien has also been described as a real right from the bench. In the landmark 1791 decision of *Harper v Faulds*, the Lord President, Sir Ilay Campbell, did just that.[13] One of his distinguished successors, Lord President McNeill, expressed a similar opinion seventy years later.[14] Likewise at the start of the twentieth century, Lord Trayner put the matter in layman's terms when he said that the solicitor's lien was, subject to a certain equitable exception, 'good against the world.'[15]

14-04. Case law generally has treated lien as a real right. Thus where goods were put on a train by a person who failed to pay the carriage, it was held that the railway company could enforce its carrier's lien against the person to whom the goods were sent.[16] Where a solicitor had lien over his client's title deeds in respect of a piece of land, it was held that the lien was good against the client's singular successor.[17] In fact the issue of whether the solicitor's lien is a real right was settled as early as 1749 in the case of *Lidderdale's Creditors v Nasmyth*.[18] In that case some of the judges thought

[3] At II, 87.

[4] Carey Miller with Irvine, *Corporeal Moveables* para 11.19.

[5] Gloag and Irvine, *Rights in Security* 8 and 359.

[6] J Graham Stewart, *Law of Diligence* (1897) 165.

[7] H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th edn, by T A Fyfe 1914) 543.

[8] Gretton, 'The Concept of Security' at 145.

[9] A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 74.

[10] S C Styles, 'Rights in Security' in A D M Forte (ed), *Scots Commercial Law* (1997) 179 at 185.

[11] N R Whitty, 'Obligations' in *Stair Memorial Encyclopaedia* vol 15 (1996) para 128. In addition, this is the view taken by Gerrit Pienaar and the author in 'Rights in Security' in Zimmermann, Visser and Reid, *Mixed Legal Systems* 758 at 783.

[12] T B Smith, *A Short Commentary on the Law of Scotland* (1962) 477.

[13] *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 472. See above, paras 10-111–10-122.

[14] *Wyper v Harveys* (1861) 23 D 606 at 620.

[15] *Drummond v Muirhead & Guthrie Smith* (1900) 2 F 585 at 589. The exception is where the solicitor as well as acting for the owner of the heritable property, is acting for a heritable creditor of the owner. In that case he cannot plead his lien against that creditor: see Begg, *Law Agents* 229; *Wilson v Lumsdaine* (1837) 15 S 1211; *Gray v Wardrop's Trs* (1851) 13 D 963 rev'd *sub nom Gray v Graham* (1855) 18 D (HL) 52.

[16] *Scottish Central Railway Co v Ferguson, Rennie and Co* (1864) 2 M 781. It was held also that no general lien could be exercised here as the requirements set down by the Railway and Canal Traffic Act 1854 s 7 had not been met. See also *Marris v Whyte & Mackay* (1889) 5 Sh Ct Rep 163 (lien of storekeeper valid against purchasers of his customer) and *Tyne Dock Engineering Co Ltd v Royal Bank of Scotland Ltd* 1974 SLT 57 (lien of ship repairer valid against mortgagee).

[17] *Palmer v Lee* (1880) 7 R 651.

[18] (1749) Mor 6248. See above, para 10-83.

that the right was 'no pledge or real right, but only a personal right of retention of the writs'.[19] However, the majority held that if the lien 'was only good against the employer, it would in most cases be good for nothing',[20] for the law agent's right would be otiose against creditors and singular successors.

14-05. It is also possible to point to a statute recognising that lien is a real right. The Sale of Goods Act 1979 expressly provides that the unpaid seller's lien 'is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it'.[21]

14-06. The authorities in favour of lien being a personal right are not numerous. Professor McBryde writes that:

> '[R]etention is not effective against third parties. It is no more than a remedy for A if B is in breach of his contract with A.'[22]

He does not justify the statement. Begg, who wrote a treatise on law agents, refers to the fact that the solicitor's lien is often inaccurately called a hypothec.[23] He states that the right is 'merely a general lien or right of retention, not amounting to a real right either of hypothec or of pledge'.[24] The statement is ambiguous. It may be best read as saying that the law agent's lien is not a real right of pledge or hypothec, but a real right of lien. Logan states that:

> 'A lien arises out of mutuality of contract between the parties. It is therefore not a real right in the strict sense but it is not only a personal right either'.[25]

This cannot be accepted. As Lord Hodge has recently noted, 'Scots law does not recognise a right that lies between a real right and a personal right.'[26]

There are also some stray judicial dicta inferring that lien is a personal right,[27] but as far as can be seen no definitive statements to that effect. Undoubtedly, the vast majority of authorities consider lien to be real.

[19] (1749) Mor 6248 at 6249.

[20] At 6249. The solicitor's lien is arguably not real, for papers must be handed over to the trustee in sequestration or liquidator. See the Bankruptcy (Scotland) Act 1985 s 38(4); the Insolvency (Scotland) Rules 1986 r 4.22(4) and Sim, 'Rights in Security' paras 98 and 100. But as the preference which the solicitor has over the estate is preserved the practical result is no different.

[21] Sale of Goods Act 1979 s 47(1). See Carey Miller with Irvine, *Corporeal Moveables* para 11.29.

[22] McBryde, *Contract* para 20-82.

[23] Begg, *Law Agents* 205.

[24] Begg, *Law Agents* 205.

[25] D J T Logan, *Practical Debt Recovery* (2001) 243.

[26] *3052775 Nova Scotia Ltd v Henderson* 2007 GWD 35-589, [2006] CSOH 147 at para 11.

[27] See, eg, *Laurie v Black* (1831) 10 S 1. See also *Air and General Finance Ltd v RYB Marine Ltd* [2007] CSOH 177 at para 7 *per* Lord Malcolm, discussed in A J M Steven, 'Missing the Boat: Lien for Damages' (2008) 12 *Edin LR* 270 at 274.

(2) Lien treated along with other securities

14-07. The writers who do not expressly state lien to be a real right in security nevertheless treat the matter in the context of real rights in security. This invariably means considering lien at the same time as pledge and hypothec. The following writers fall into this category: Bankton,[28] Cusine and Forte,[29] Davidson and Macgregor,[30] Gloag and Henderson,[31] Gow,[32] Guthrie,[33] Lillie,[34] Marshall,[35] Walker,[36] and Wilson.[37]

14-08. A similar treatment can be found in our statutes. Thus lien is recognised to be a 'security' which prevails in a sequestration by the Bankruptcy (Scotland) Act 1985 and its predecessors.[38] Likewise, when Neville Chamberlain rushed legislation through Parliament at the start of World War II,[39] the fact that a lien amounts to a real right in security was not forgotten. The Compensation (Defence) Act 1939 enacted:

> 'Where any sum by way of compensation is paid in accordance with any provisions of this Act requiring compensation to be paid to the owner of any property, then, if at the time when the compensation accrues due, the property is subject to any mortgage, pledge, lien or other similar obligation, the sum paid shall be deemed to be comprised in that mortgage, pledge, lien or other obligation.'[40]

14-09. As well as being treated along with other securities, lien at times has been assimilated into other securities. This is due to the lack of conceptual foundations in the law of retention and lien. Thus Bankton saw retention as a type of hypothec.[41] The solicitor's lien originally was universally called the solicitor's hypothec.[42] Lord Young described lien as 'just a contract of pledge

[28] Bankton I.xvii.15–16.

[29] D J Cusine and A D M Forte, *Scottish Cases and Materials in Commercial Law* (1987) 122–172.

[30] F Davidson and L J Macgregor, *Commercial Law in Scotland* (2003) ch 6.

[31] Gloag and Henderson, *The Law of Scotland* ch 37.

[32] J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) ch 4.

[33] T Guthrie, *Scottish Property Law* (2nd edn, 2005) ch 8.

[34] J Lillie, *The Mercantile Law of Scotland* (6th edn, 1970) ch 3.

[35] E A Marshall, *Scots Mercantile Law* (3rd edn, 1997) ch 7.

[36] D M Walker, *Principles of Scottish Private Law* (4th edn, 1989) vol III, ch 5.30.

[37] W A Wilson, *The Scottish Law of Debt* (2nd edn, 1991) ch 7.

[38] Bankruptcy (Scotland) Act 1985 s 73(1); Bankruptcy (Scotland) Act 1856 s 4; Bankruptcy (Scotland) Act 1839 s 3. Further, a lien is also good against the trustees under a trust deed for creditors: *Meikle & Wilson v Pollard* (1880) 8 R 69; *Robertson v Ross* (1887) 15 R 67.

[39] With the aim of showing Hitler that he had no lien over Poland.

[40] Compensation (Defence) Act 1939 s 14. The case of *Liquidator of Callander Hydro Hotel Ltd v Thomson* 1955 SLT 354 discusses the section in relation to heritable security.

[41] Bankton I.xvii.15–16.

[42] See Bell, *Commentaries* II, 90; Begg, *Law Agents* 205; *Cuthberts v Ross* (1697) 4 Br Sup 374; *Ayton v Colville* (1705) Mor 6247. Even late in the nineteenth century this terminology was still being used: *Morrison v Watson* (1883) 2 Guth Sh Cas 502.

collateral to another contract of which it is an incident'.[43] Similarly Gow writes that lien is a 'legal pledge'.[44] There are innumerable other examples.[45]

(3) Lien prevails over subsequent diligence

14-10. The fact that a lien will prevail over the later diligence of unsecured creditors also demonstrates that it is a real right. Bell writes:

> 'Where the possessor of goods has a hypothec or lien over them, he is not to be deprived of it by poinding. … So, wherever a factor has lien for his general balance, an artificer for the value of the labour bestowed, a carrier or shipmaster for the carriage and freight, they will be safe from invasion by a poinding creditor.'[46]

In a similar vein when dealing with the ranking of creditors in a bankruptcy, Bell states that creditors who have 'real securities over moveables'[47] by *inter alia* retention prevail over creditors who have done diligence.

14-11. Graham Stewart and Professor Gretton also recognise that a lien will prevail over creditors subsequently carrying out diligence and indeed both expressly state that lien is a real right.[48]

(4) Lien-holder not bound to give up lien in return for caution

14-12. As a person with a lien is considered to have a real security he or she will not normally have to release the lien on caution being given for the debt which the lien is securing.[49] In a case involving the right of an agent to retain an insurance policy from his principal, Lord Ordinary (Cuninghame) pronounced:

> '[A]ssuming that the agent has a *real lien* on the policy founded on … the Lord Ordinary apprehends that it would be contrary to every principle and analogy in the law to compel him to give up that real security on *personal* caution for his ultimate claims.'[50]

As a lien is subject to the equitable control of the courts, the replacement of it by caution is not an impossibility.[51] However, the general rule is very much

[43] *Miller v Hutcheson & Dixon* (1881) 8 R 489 at 492.

[44] Gow, *The Mercantile and Industrial Law of Scotland* 292.

[45] Eg, the Factors Act 1889 s 1(5).

[46] Bell, *Commentaries* II, 60.

[47] Bell, *Commentaries* II, 406.

[48] Graham Stewart, *Diligence* 165; Gretton, 'The Concept of Security' at 145.

[49] Gloag and Irvine, *Rights in Security* 359; Sim, 'Rights in Security' para 74; *M'Culloch v Pattison & Co*, 4 March 1794, unreported, see Bell, *Commentaries* II, 105.

[50] *Wilmot v Wilson* (1841) 3 D 815 at 818.

[51] *Ferguson & Stuart v Grant* (1856) 18 D 536; *Boyd v Drummond, Robbie & Gibson* 1994 SCLR 777. See below, para 15-05. However, J Story, *Commentaries on Equity Jurisprudence as Administered in England and America* vol 1 (1836) 483 states: 'A Lien is not in strictness either a *jus ad rem*; but simply a right to possess and retain property, until some charge attaching to it is paid or discharged.' This statement has influenced Cross, *Lien* 2; Cobbett, *Pawns or Pledges* 34–35 and Denis, *Pledge* 480–481.

as stated, reinforcing the point once more that lien is accepted to be a real right.

(5) Comparative authority

14-13. Other jurisdictions take varying approaches to the question of whether lien is a real right. In English law it is said to be a personal right.[52] Unlike an English pledgee, a lienee has no assignable interest in the property and no right of sale.[53] Further, unlike pledge, execution cannot be levied against the property held.[54] Nevertheless, it has always been the case that lien has been good in the debtor's insolvency.[55] The question of effectiveness against singular successors does not seem to have attracted discussion, but one modern writer begins his treatment of possessory security in England, by writing that 'the pledge and the lien both … give the creditor a legal interest which runs with the goods'.[56] Further, older authority stating that a pledgee has a special property in the security subjects but a lienee does not, has been questioned in the House of Lords.[57] From the Scottish perspective, the English lien appears to be real rather than personal.

14-14. In Quebec lien seems to be real, because the Civil Code provides that the right 'may be set up against anyone'.[58] Of French law, Planiol states that lien 'is not an exception purely personal',[59] being valid against creditors and successors. However, he refuses to accept that it is a real right. He compares it to the exception *rei venditae et traditae* in Roman law, where a buyer could stop the seller getting the thing back from him after the sale.[60] The exception was good against the seller and all those who had acquired rights from him in the property since the sale. However, the right of the buyer here surely stems from the fact that *dominium* is held.

14-15. South African law makes a distinction between enrichment liens which are real and debtor and creditor liens which are personal.[61] Both types

[52] N Palmer and A Mason, 'Lien' in *Halsbury's Laws of England* (4th edn) vol 28 (1997 reissue) para 719; Bell, *Personal Property* 136. Of course the personal right/real right dichotomy is civilian rather than English law.

[53] Palmer and Mason, 'Lien', para 719; Bell, *Personal Property* 136; *Donald v Suckling* (1866) LR 1 QB 585; *Halliday v Holgate* (1868) LR 3 Ex 299.

[54] *Legg v Evans* (1840) 6 M & W 36, 151 ER 311.

[55] See, eg, *Rushforth v Hadfield* (1805) 6 East 519, 102 ER 1386.

[56] Bell, *Personal Property* 136.

[57] *The Odessa* [1916] 1 AC 145 at 158–159 *per* Lord Mersey.

[58] Art 1593 *Quebec Civil Code.*

[59] M Planiol, *Civil Law Treatise* vol 2 (1959) s 2536.

[60] Planiol, s 2536; D 21.3.3.1.

[61] T J Scott, 'Lien' in *LAWSA* vol 15 (1999) paras 50 and 54–72; P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) 412–413. But compare the view of J Sonnekus, 'Retensieregte – nuwe rigting of misverstand *par excellence*' 1991 *TSAR* 462 that liens are not rights in the strict sense of the word, but rather defence mechanisms. This view received some support from van Zyl J in *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 (1) SA 939 (C) at 944. See further Pienaar and Steven, 'Rights in Security' in Zimmermann, Reid and Visser, *Mixed Legal Systems* 758 at 783–784.

are effective in the debtor's insolvency.[62] A debtor and creditor lien, however, is only good against a singular successor who is aware of its existence.[63] German law has a fixed list of real liens (*gesetzliche Pfandrechten*) including those of the carrier, factor and storekeeper.[64] Additionally, a personal lien (*Zurückbehaltungsrecht*) exists in any situation where a debtor has a claim against the creditor which is due and arises out of the same legal relationship from which the creditor's claim comes.[65] In the Netherlands a lien (*retentierecht*) has real effect because it is enforceable against the debtor, other creditors and subsequent acquirers of the property.[66]

C. LIEN AND RETENTION

14-16. The distinction between retention and lien was not finally settled until the middle of the nineteenth century.[67] Both are forms of security. The difference is that a creditor with a right of retention has ownership of the security subjects.[68] In lien, ownership lies with the debtor. In the words of Lord President M'Neill:

> 'A lien is a security held by a person over effects, the real right of property or *jus dominij* of which belongs to another property … a right of retention is a security held by a person over effects, the real right of property or *jus dominij* of which is vested in himself.'[69]

Thus only lien is a subordinate real right.[70] As a creditor with a right of retention has *dominium* he or she is entitled to withhold the property from the debtor until all sums owed by the debtor are paid.[71] A creditor with a lien only has security to the extent of a special or general lien.[72]

[62] Scott, 'Lien' para 83.

[63] Scott, 'Lien' para 72.

[64] K H Schwab and H Prütting, *Sachenrecht: Ein Studienbuch* (24th edn, 1993) 334; F Baur, *Sachenrecht* (17th edn, by J F Baur and R Stürner, 1999) 689–692.

[65] § 273 *BGB*; E J Cohn, *Manual of German Law* vol 1 (1968) para 210; G H Treitel, *Remedies for Breach of Contract* (1988) 313–317.

[66] Arts 6:53 and 3:291(1) *BW*; Art 60 Faillissementswet (Insolvency Act). See J H M van Erp and L P W van Vliet, 'Real and Personal Security', vol 6.4 *Electronic Journal of Comparative Law* (Dec 2002) http://www.ejcl.org/64/art64-7.html.

[67] See *Brown v Sommerville* (1844) 6 D 1267; *Melrose v Hastie* (1851) 13 D 880 and *Laurie & Co v Denny's Tr* (1853) 15 D 404.

[68] Gloag and Irvine, *Rights in Security* ch 10, especially at 340; Carey Miller with Irvine, *Corporeal Moveables* para 11.20; *Gladstone v M'Callum* (1896) 23 R 783 at 785 *per* Lord M'Laren.

[69] *Wyper v Harveys* (1861) 23 D 606 at 620.

[70] See generally, Gretton, 'The Concept of Security' at 126.

[71] Carey Miller with Irvine, *Corporeal Moveables* para 11.21.

[72] See generally below, chs 16 and 17.

D. TRANSFER OF THE REAL RIGHT

14-17. The real right of lien does not appear to be generally assignable. English law is clear that this is the case.[73] In Scotland, although there is no definitive authority, that which does exist points to a similar conclusion. In one case, it was held that an individual who paid the expenses of a judicial remit to an accountant did not have transferred to him the accountant's lien over the report.[74] In another decision, it was held that the hotelier's lien was not transferred to an individual who had paid a guest's bill and collected property which the guest had left at the hotel.[75] As regards the banker's lien, Shaw writes:

> 'The right of lien competent to a banker being a contract arising from the contract of agency in which there is *delectus personae* cannot be transferred by the lien-holder. He may assign the debt, but is not entitled to deliver the subject of the lien to the assignee. He holds such subject as agent for the customer, and the contract of agency cannot be transferred without the consent of the customer.'[76]

Thus the only person that the lien may be assigned to is another banker, if the customer agrees that the contract of agency be transferred. A similar rule is accepted by Begg and Gloag and Irvine as applying to the lien of the solicitor.[77] Thus the circumstances in which an individual may assign a lien are very limited, being only where the assignee is to act in the same capacity for the debtor as the assigner did prior to the assignation.[78] In contrast, it would seem settled that the lien may be transferred by judicial assignation, upon the death or sequestration of the lien-holder.[79]

[73] Bell, *Personal Property* 136–137; *Legg v Evans* (1840) 6 M & W 36, 151 ER 311.

[74] *M'Queen v Dickie* (1851) 13 D 502.

[75] *Garden v Shaw* (1874) 1 Guth Sh Cas 505.

[76] Shaw, *Security over Moveables* 69.

[77] Begg, *Law Agents* 207; Gloag and Irvine, *Rights in Security* 393. See also *Renny v Kemp* (1841) 3 D 1134 at 1140 *per* Lord Cuninghame and *Inglis v Renny* (1825) 4 S 113 at 114 *per* Lord Balgray.

[78] For the position on pledge, see above, paras 4-18–4-25.

[79] *Wilson v Lumsdaine* (1837) 15 S 1211; *Paul v Meikle* (1868) 7 M 235 (death); *Paul v Dickson* (1839) 1 D 867; *Inglis v Moncreiff* (1851) 13 D 622 (sequestration).

15 Enforcement and Extinction of Lien

A. ENFORCEMENT IN GENERAL

15-01. As has been made clear elsewhere, the main way in which lien acts as a security is by preventing the debtor from recovering his or her property until the debt owed to the lien-holder is discharged.[1] However, there remains the matter of what can be done if the debtor seems unlikely ever to make payment. At common law a commercial agent (factor) has power to sell the principal's goods in order to satisfy the debt which his or her lien secures.[2] By statute an innkeeper has a right to sell any goods subject to his or her lien to meet the guest's bill.[3] An unpaid seller also has a right of resale.[4] In all other cases a lien-holder has no automatic right of sale, unless that party holds under a contract giving him such a right.[5]

15-02. With regard to marketable commodities it seems accepted that the lien-holder may apply to court for a warrant of sale.[6] If the subject of the lien will become valueless if it is not converted into money expeditiously then the court may order it to be sold on the application of the owner, even where the lien-holder objects.[7] In that case the lien-holder will have reserved a preference over the price.[8]

[1] See above, para 9-09.

[2] Bell, *Commentaries* II, 91; Bell, *Principles* § 1417; *Broughton v Stewart, Primerose & Co*, 17 Dec 1814 FC.

[3] Innkeepers Act 1878 s 1. See Gloag and Irvine, *Rights in Security* 399 and below, para 16-98.

[4] Sale of Goods Act 1979 ss 39(1)(c) and 48.

[5] Bell, *Commentaries* II, 91; W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 9 (1930) para 487; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 73; D J T Logan, *Practical Debt Recovery* (2001) 247.

[6] Bell, *Commentaries* II, 91; Bell, *Principles* § 1417; *Gibson & Stewart v Brown & Co* (1876) 3 R 328.

[7] *Parker v Andrew Brown & Co* (1878) 5 R 979.

[8] *Parker v Andrew Brown & Co* (1878) 5 R 979.

15-03. With regard to documents such as title deeds and the accounts of a business, it is widely accepted that a court will not authorise a sale.[9] The reason for this is usually said to be that such things are of no commercial value.[10] This may be accepted as correct, but it is felt that a further ground is because many documents, for example wills (prior to the testator's death) are confidential and it would not be reasonable to place them on the public market. It is universally agreed that a solicitor may not sell a client's papers in order to discharge his or her account.[11]

B. EQUITABLE CONTROL OF LIEN BY THE COURTS

15-04. A lien is a right the exercise of which may be subject to the intervention of the courts.[12] Take this example. Carol puts her surfboard in for repair to a business carrying out such work. The charge is not discussed. Carol returns three days later to find that the outfit has charged her £10,000 for the job and will not release the board until she pays up. Carol is likely to feel aggrieved and will rightly explore the possibility of a judicial remedy.

15-05. The approach of the courts in such circumstances was set out in a case on a solicitor's lien over his client's papers.[13] Lord President M'Neill stated:

> '[The] question arises, whether the right to retain the papers is not subject to the equitable control of the Court – whether the Court can prevent the abuse of that right of hypothec. I think the court has the power to do that, and has frequently exercised that power.'[14]

In the words of Lord Deas, the right of retention must not be used 'unfairly and oppressively'.[15] Bell writes that 'the [solicitor] cannot use his right as an engine of oppression, but must give up the papers, if there be pressing occasion for them, on security being found for payment of the debt when ascertained'.[16] In a recent case a firm of solicitors detaining executry papers was ordered to return these to the executors so tax returns to the Inland Revenue could be made, upon caution being lodged with the Sheriff Court.[17] Another good example of the courts exercising their power is *Garscadden v Ardrossan Dry Dock Co Ltd*.[18] There a shipbuilding company was exercising

[9] Bell, *Principles* § 1417; Gloag and Irvine, *Rights in Security* 359; Sim, 'Rights in Security' para 73.

[10] Bell, *Principles* § 1417; Gloag and Irvine, 359; Sim, 'Rights in Security' para 73.

[11] See, eg, *Ferguson & Stuart v Grant* (1856) 18 D 536; *Duffy's Trs v A B & Co* (1907) 23 Sh Ct Rep 94. See below, para 17-90.

[12] In the words of Gloag, 'Lien' para 462: 'Lien is an equitable right, to which the Court, in special circumstances, may refuse to give effect.' See also *Shepherd's Trs v MacDonald, Fraser & Co* (1898) 5 SLT 296 and D J T Logan, *Practical Debt Recovery* (2001) 244.

[13] *Ferguson & Stuart v Grant* (1856) 18 D 536.

[14] At 538.

[15] At 539.

[16] Bell, *Commentaries* II, 108. The general rule, however, is that a lien-holder is not bound to give up the lien in return for alternative security. See above, para 14-12.

[17] *Boyd v Drummond, Robbie & Gibson* 1994 SCLR 777.

[18] 1910 SC 178.

its lien over a vessel for repairs. A dispute, however, arose with the owner over the amount due and in the meantime he raised an action for delivery of the ship. The court ordered the shipbuilders to release it on him consigning the balance of the account due in the Sheriff Court. Lord Ardwall stated that it was 'plainly undesirable that this ship should be detained longer in the dock than is necessary'.[19] In *Onyvax Ltd v Endpoint Research (UK) Ltd*[20] the court ordered the delivery of a document containing details of research on a new cancer vaccine upon consignation of the sum owed by the party asserting a lien over it. This was done in the interests of patient safety.

15-06. While the court may be willing in limited circumstances, such as those just outlined, to order the lifting of the lien if the debtor finds caution, the normal rule is that the lien-holder is not obliged to accept caution in return for releasing the property.[21] If, however, the lien-holder has no valid claim he or she will be ordered to return the property forthwith.[22]

15-07. In the example of the surfboard, the court would not allow the repairing outfit to act so oppressively. It would probably order the board's release on Carol making payment for the work done assessed at *quantum meruit*.

C. ENFORCEMENT IN INSOLVENCY

15-08. A lien-holder is regarded as a secured creditor in the event of the debtor's insolvency.[23] Such an occurrence will not essentially affect a person who has a lien over marketable commodities. He or she may apply for a warrant of sale as before, but instead of making over any surplus which the sale realises to the debtor, will give it to the trustee in sequestration or liquidator.

15-09. With respect to documents, the position is slightly different. The trustee in sequestration or liquidator may order the lien-holder to deliver up any document.[24] However, in that situation the preference over the debtor's estate is preserved.[25] The cases on this area of law invariably involve the solicitor's lien, but the provisions of the relevant statute are general.

[19] 1910 SC 178 at 180. See also *Mackenzie v Steam Herring Fleet Ltd* (1903) 10 SLT 734; Bell, *Commentaries* II, 93. On a lien being removed on consignation of the amount due in a non-maritime case, see *Fyfe v Weir & Robertson* (1902) 18 Sh Ct Rep 9 (law agent's lien).

[20] [2007] CSOH 211, 2008 GWD 1-3, discussed in A J M Steven, 'Lien as an Excludable and Equitable Right' (2008) 12 *Edin LR* 280.

[21] *M'Culloch v Pattison* 4 March 1794, unreported (see Bell, *Commentaries* II, 105); *Ferguson & Stuart v Grant* (1856) 18 D 536 at 538 *per* Lord President M'Neill and Lord Curriehill and at 539 *per* Lord Deas. Compare *Wilmot v Wilson* (1841) 3 D 815. See above, para 14-12.

[22] In *Garscadden*, above, the shipbuilders also claimed a right of lien in respect of possible future expenses. The court held that they had no such right.

[23] Bankruptcy (Scotland) Act 1985 s 73(1).

[24] Bankruptcy (Scotland) Act 1985 s 38(2); Insolvency (Scotland) Rules 1986, SI 1986/1915, r 4.22(4).

[25] Bankruptcy (Scotland) Act 1985 s 38(2); Insolvency (Scotland) Rules 1986, r 4.22(4).

15-10. The person releasing a document does not require expressly to reserve his or her preference.[26] On the other hand the preference does not arise merely by surrendering the documents: the erstwhile custodier must prove that the lien was a valid one.[27] The preference extends over the whole estate, making its inter-relation with other preferential debts a complicated matter.[28] If the trustee in sequestration or liquidator decides that he or she does not want the documents in question, then the lien-holder will not get a preference.[29] The fact that extracts of title deeds from Register House are now regarded as equivalent to the originals means that solicitors are no longer likely to secure a preference because the trustee or liquidator requires the title deeds to go about his or her task.[30]

D. EXTINCTION

15-11. The following is a list of circumstances in which a lien will be extinguished. It is not intended to be exhaustive.

(a) *Discharge of the obligation secured.* As a lien is parasitic upon the obligation which it secures, the discharge of that obligation will extinguish the lien.[31]

(b) *Destruction of the subject matter of the lien.*

(c) *Confusion.* If the lien-holder becomes owner of the subject matter, then the lien will no longer exist.

(d) *Renunciation.* The lien will be extinguished if the lien-holder renounces it.

(e) *Loss of possession of subject matter.* Lien generally depends on the continuous detention of the property or the right will be lost. This subject has been examined in depth elsewhere.[32]

(f) *Taking another security or a bill.* Depending on the circumstances the lien may be extinguished by the lien-holder being given another security.[33] In

[26] *Adam & Winchester v White's Tr* (1884) 11 R 863 at 865 *per* Lord President Inglis; *Garden Haig Scott and Wallace v Stevenson's Tr* 1962 SC 51.

[27] *Rorie v Stevenson* 1908 SC 559.

[28] *Paul v Mathie* (1826) 4 S 420 (NE 424); *Miln's Judicial Factor v Spence's Trs* 1927 SLT 425. See Sim, 'Rights in Security' paras 98–99.

[29] *Ure & Macrae v Davies* (1917) 33 Sh Ct Rep 109 and Hall, *Possessory Liens* 33–34.

[30] Conveyancing and Feudal Reform (Scotland) Act 1970 s 45. The matter is discussed below, at para 17-80.

[31] Gloag and Irvine, *Rights in Security* 360. For South Africa, see Scott, 'Lien' para 84. See also the American Law Institute, *Restatement of the Law of Security* (1941) s 78.

[32] See above, paras 13-27–13-34.

[33] Gloag and Irvine, *Rights in Security* 361–362; Gloag, 'Lien' para 489; *Ayton v Colville* (1705) Mor 6710. English law is to the same effect: see Hall, *Possessory Liens* 81–82 and G W Paton, *Bailment in the Common Law* (1952) 194. For South African law, see Scott, 'Lien' para 85.

exceptional circumstances the taking of a bill from the debtor will indicate that the lien-holder has waived the right.[34]

(g) *Court order.* Lien is subject to the equitable jurisdiction of the courts and can consequently be extinguished by court order.[35]

[34] Gloag and Irvine, *Rights in Security* 361. Normally the lien will remain: *Gairdner v Milne & Co* (1858) 20 D 565; *Palmer v Lee* (1880) 7 R 651.

[35] See above, paras 15-04–15-07.

16 Special Lien

A. INTRODUCTION

(1) General

16-01. The traditional approach since Bell has been to view special lien as arising out of the principle of the mutuality of contractual obligations.[1] To put it another way, a special lien may be seen in terms of the *exceptio non adimpleti contractus*.[2] This is true in the sense that a special lien may, if the circumstances are right, arise under any contract rather than being confined to certain categories of contract as in England.[3] However, for two very important reasons, it only gives a partial picture.

16-02. First, special lien is a doctrine of the law of obligations and not merely part of the law of contract.[4] The exact obligational circumstances in which a special lien will arise are examined elsewhere.[5] What is required is one party holding the property of another under an obligation to return it. Where the other party in turn owes an obligation to the holder which is connected to the property, the holder has a lien until that obligation is performed. For example, a storekeeper has a duty to return goods to their owner when requested. However, if the owner has not yet paid the storage charges in respect of the goods, the storekeeper may retain the property until payment is made.[6]

16-03. Secondly, special lien as a real right, is also part of the law of property.[7] It is a right which may be enforced not only against the debtor, but against his or her creditors and singular successors.

16-04. In this chapter, special lien will be examined. This will be followed by a consideration of two important types of special lien: those of the carrier and the hotelier.[8]

[1] Bell, *Commentaries* II, 92–93; Bell, *Principles* §§ 1363, 1411 and 1419; Gloag and Irvine, *Rights in Security* 349–351; Shaw, *Security over Moveables* 55–57; W M Gloag, *Contract* (2nd edn, 1929) 630; McBryde, *Contract* paras 20-74–20-76; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) paras 75–76.

[2] For an analysis of the *exceptio*, see G H Treitel, *Remedies for Breach of Contract* (1988) 299–317.

[3] On the English law, see Whitaker, *Lien* 13–22; Hall, *Possessory Liens* ch 4 and N Palmer and A Mason, 'Lien' in *Halsbury's Laws of England* (4th edn) vol 28 (1997) paras 737–744. The term for 'special lien' in English law is 'particular lien'.

[4] See above, paras 11-12–11-14.

[5] See above, paras 11-15–11-34. In the case of enrichment liens, the basis of the right is the *exceptio doli* of Roman law: see above, paras 10-02–10-10.

[6] *Laurie & Co v Denny's Tr* (1853) 15 D 504.

[7] See *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 472 *per* Lord President Campbell and, above, ch 14.

[8] See below, paras 16-24–16-103.

(2) The meaning of 'special'

16-05. A special lien is said to be 'special' because the security which it gives is special to the obligation that gives rise to the lien.[9] For example, the lien of a garage for repairs to a car may be invoked until the customer pays the repair bill. It may, however, not be used to secure the payment of any other debt owed by the customer, such as for petrol bought the previous week.[10] If the lien-holder does retain the property in respect of such an extrinsic debt, there will be liability in damages to the owner of the property.[11]

16-06. It was at one time suggested, most notably by Professor More, that in any situation where one party was legitimately in possession of the property of another there was a right of retention for all sums by that party.[12] To accept this is to regard special lien as not being part of Scots law and this was indeed Professor More's contention:

> '[T]he original principle of retention, as held in our law, has been thrown into a state of embarrassment and confusion, by an attempt to assimilate it to the English doctrine of *lien*.'[13]

This statement has a measure of truth in it.[14] However, as regards the substance of the matter, Professor More's account of the law is not correct because it fails to distinguish between retention based on ownership and retention based on custody/possession (lien).[15] The former permits retention for all sums.[16] The latter does not.[17] This point has been made on a number of occasions by the courts and the matter may be regarded as beyond doubt.[18]

16-07. A special lien is so closely viewed as merely securing the obligation in terms of which it arises, that it does not extend to the cost of storing the

[9] Bell was responsible for introducing the terminology to Scotland: see, above, paras 10-125 and 10-129–10-131.

[10] *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6.

[11] *M'Nair v Don* (1932) 48 Sh Ct Rep 99.

[12] J S More, *Notes to Stair's Institutions* cxxxi (1826). See too the unsuccessful arguments in *Harper v Faulds* (1791) Bell's Octavo Cases 440; *Stuarts and Fletcher v M'Gregor and Co* (1829) 7 S 622; *Reid v Watson* (1836) 14 S 223; *Brown v Sommerville* (1844) 6 D 1267 and *Laurie & Co v Denny's Tr* (1853) 15 D 404.

[13] More, *Notes*, at cxxxiv.

[14] Thus not all the law which Bell sets out in his *Commentaries* and *Principles* is in fact justified in terms of Scottish principle, eg, his account of the innkeeper's lien. See above, para 10-135.

[15] Gloag and Irvine, *Rights in Security* 353–354; Gloag, *Contract* 633; W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 9 (1930) para 462.

[16] Gloag and Irvine, *Rights in Security* 330; *Dougal v Gordon* (1795) Mor 851; *Balleny v Raeburn* (1808) Mor App, *Compensation* No 5; *Hamilton v Western Bank* (1856) 19 D 152; *Nelson v Gordon* (1874) 1 R 1093. But compare *Moor v Atwal* 1995 SCLR 1119.

[17] See above, para 14-16 and the cases cited above in n 12.

[18] See the authorities referred to in the previous two notes and *Gladstone v M'Callum* (1896) 23 R 785 at 785 *per* Lord M'Laren. In *Laurie & Co v Denny's Tr* (1853) 15 D 404 at 410, Lord Ivory said of the distinction: 'I hope this will be the last time we will have to travel over the authorities to affirm a principle which has now taken deep root in our system, whatever may have been the law formerly.'

property being detained.[19] This rule, of course, may be varied by express contract.[20] Similarly, the lien does not extend to the costs of recovering the debt which it secures.[21]

(3) Circumstances in which the lien arises: the orthodoxy

16-08. Historically, a distinction has often been made in respect of the property over which a special lien may extend.[22] That distinction is a two-fold one and is set out by Gloag and Irvine.[23] First, there is property which has been improved by the work of the lien-holder. Secondly, there is property which has not been worked upon but which is in the hands of the lien-holder in terms of the obligation which gave rise to the lien.

(a) Category one: improved property

16-09. There has never been any doubt that a lien will arise in the first category. This much was made clear by both Bankton[24] and Erskine,[25] not to mention Bell.[26] Such a right has been held to exist in respect of the following: bleached cloth;[27] repaired cars,[28] ships[29] and aircraft;[30] plans drawn up by an architect;[31] and land which has been improved.[32] Gow gives his own colourful example: 'The television set, with its beguiling sagas, must languish in [the] shop until the price of the new picture tube has been paid.'[33]

(b) Category two: the decision in Brown v Sommerville

16-10. This category has proved more problematic. It was held in the important case of *Brown v Sommerville*[34] that a special lien will only come

[19] *Stephen & Sons v Swayne & Bovill* (1861) 24 D 158; *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6. But compare W A Wilson, *The Law of Scotland on Debt* (2nd edn, 1991) para 7.8.

[20] *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.

[21] Gloag, 'Lien' para 480; *Garscadden v Ardrossan Dry Dock Co Ltd* 1910 SC 178.

[22] Gloag and Irvine, *Rights in Security* 350–352; Sim, 'Rights in Security' paras 76–77; *Brown v Sommerville* (1844) 6 D 1267, discussed below, at paras 16-10–16-12.

[23] Gloag and Irvine, *Rights in Security* 350–352.

[24] Bankton I.xvii.15.

[25] Erskine III.iv.21. See also Voet 16.2.20.

[26] Bell, *Commentaries* II, 100; Bell, *Principles* § 1430.

[27] *Harper v Faulds* (1791) Bell's Octavo Cases 440. It now seems accepted that bleachers have a general lien upon usage of trade for the year's account: *Anderson's Tr v Fleming* (1871) 9 M 718. See below para 17-14.

[28] *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6.

[29] *Barr & Cooper v Shearer* (1875) 2 R (HL) 14; *Ross & Duncan v David Baxter & Co* (1885) 13 R 185.

[30] *Sun-Air of Scandinavia A/S v Caledonian Airborne Engineering* 8 Aug 1995, Outer House, unreported.

[31] *Lindsay v Mackenzie* (1883) 2 Guth Sh Cas 498.

[32] *Binning v Brotherstones* (1676) Mor 13401.

[33] J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 293.

[34] (1844) 6 D 1267.

into existence where work has been done to the property in question, as in the first category above. There, a printer had been given stereotype plates in order that he could print a periodical work entitled *Wilson's Tales of the Borders*. He sought subsequently to retain the plates until his account was paid. The majority of the court, reversing the Lord Ordinary, denied him a lien on the ground that no work had been done on the plates themselves. In the words of Lord Justice-Clerk Hope:

> '[The printer's] workmanship – the product of his skill and labour as an artificer, is the printed work – producing on paper that which is to be sold. That, it is admitted, he is entitled to retain until paid for. But on the plates he has bestowed no labour. They are not improved in value by his work – quite the reverse.'[35]

16-11. This is a very succinct statement of the law. What is unfortunate is that it is of the law of England and not Scotland. The majority of the court was in fact influenced by English law when making their decision.[36] In that jurisdiction since the Middle Ages it has been accepted that special, or more correctly, particular lien, has been limited to three main categories.[37] First, the law confers a lien upon an unpaid seller.[38] This lien is of course now statutory.[39] Secondly, a lien may arise out of public duty, as in the case of the liens of the common carrier and hotelier.[40] Thirdly, a lien arising in respect of property upon which work has been done and which has been improved by that work.[41] Thus, leaving the common carrier, hotelier and unpaid seller aside, English law does not countenance a lien except in respect of property improved by the lien-holder. The application of the rule leads to results which are difficult to justify. For example, a trainer of horses but not a livery stable keeper is entitled to lien, because only the former is regarded as making the horse more valuable.[42]

16-12. Scots law does not and never did follow the English rule. In *Stewart v Stevenson*,[43] a case decided sixteen years before *Brown*, it was held that an accountant had a right to retain documents placed in his hands for the purpose of drawing up a report, until paid his fee. The fact that the accountant did not work on the papers themselves was irrelevant. As Lord Moncreiff, who dissented in *Brown*, pointed out, our law 'has been established on principles perfectly distinct'[44] from the law in England. The relevant

[35] At 1278.

[36] See Gloag and Irvine, *Rights in Security* 352, n 2. The English case in question was *Bleaden v Hancock* (1829) 4 Car & P 152, 172 ER 648, a decision of Chief Justice Tindal.

[37] See above, paras 10-27–10-33 and 10-49.

[38] See above, para 10-31.

[39] Sale of Goods Act 1979 ss 39(1)(a) and 41.

[40] Palmer and Mason, 'Lien' paras 738–739.

[41] Palmer and Mason, paras 740–744. The American Law Institute, *Restatement of the Law of Security* (1941) s 61(a) confers a lien where work has been done or materials added to the property. It is not necessary that the thing be actually improved.

[42] Compare *Bevan v Waters* (1828) 3 Car & P 520, 172 ER 529 and *Forth v Simpson* (1849) 13 QB 680, 116 ER 1423 with *Jackson v Cummins* (1839) 5 M & W 342, 151 ER 145.

[43] (1828) 6 S 591.

[44] (1844) 6 D 126 at 1281–1285.

principles are civilian and to make the point, Lord Moncreiff makes reference to the following passage from the judgment of the Lord President in *Harper v Faulds*:

> 'I conceive [retention] to mean a right of refusing delivery of a subject, till the counter obligation under which the subject was lodged be performed. It is acknowledged by all our authors and decisions, mutual obligations must be performed *hinc inde*.'[45]

On this sound basis, the printer had every right to retain the plates until paid in terms of the contract under which he received them.

(c) Category two: authority subsequent to Brown

16-13. The majority decision in *Brown* must be regarded as wrong in principle. It has been consigned to history by a consistent series of later cases.[46] The first of these was *Meikle & Wilson v Pollard*,[47] decided in 1880. There a merchant had placed certain documents in the hands of a firm of accountants to enable them to collect debts for him. It was held that the firm had a right to retain the documents until its bill was paid for this service. The fact that no work was done on the papers themselves was irrelevant. As Lord Young stated:

> 'There is a counterpart in every contract, and here it is that the man of business is not entitled to get his money until he gives up the books, and his employer is not entitled to get his books till he pays the money. These are obligations *hinc inde* prestable by both parties.'[48]

16-14. The decision in *Meikle & Wilson* was recognised as being valid in two Sheriff Court cases decided shortly afterwards.[49] Further, it was heavily relied upon in the case of *Robertson v Ross*,[50] decided in 1887. There an estates factor had handed to him by a landowner documents which the factor required to carry out his factorial duties. It was held that the factor had a lien over the papers until paid. Lord Young gave a similar judgment in this case.[51] Lord Rutherfurd Clark concurred, but not without expressing some doubt. He said he was 'bound'[52] to follow the previous case, adding:

[45] *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 471.

[46] See Gloag and Irvine, *Rights in Security* 351–352; Bell, *Principles* § 1430, note (d); Gloag, *Contract* 631; Gloag, 'Lien' para 461; McBryde, *Contract* para 20-76.

[47] (1880) 8 R 69.

[48] At 72. The other judges in the case, Lord Justice-Clerk Moncreiff and Lord Gifford, use the term 'lien' to mean only 'general lien'. Thus, Lord Gifford states at 71: 'this is not a case of lien. It is simply a case of the retention of a subject … under a contract.' See too Lord Justice-Clerk Moncreiff in *Robertson v Ross* (1887) 15 R 67 at 70. This approach has not been taken subsequently: see Gow, *The Mercantile and Industrial Law of Scotland* 294.

[49] *Lindsay v Mackenzie* (1883) 2 Guth Sh Cas 498; *Morrison v Watson* (1883) 2 Guth Sh Cas 502.

[50] (1887) 15 R 67.

[51] At 71–72.

[52] At 72.

> 'I think it right, however, to say that, so far as I can judge, the decision in *Meikle's* case was an entirely new departure. If the law laid down there is sound, we should never have heard of the law-agent's hypothec as an exceptional right.'[53]

This was, however, more of a return than a departure, with the law re-embracing its civilian roots after dallying with English principle. Further, the law agent's hypothec, or as it is now known the solicitor's lien, is an exceptional right when compared with the liens in *Meikle & Wilson* and *Robertson*. It is a general lien, whereas they are special liens.[54]

16-15. Later years have seen further contract cases enunciating the principle that special lien arises out of mutual obligations.[55] The latest is *National Homecare Ltd v Belling & Co Ltd*.[56] There the defender had entered into an agreement with the pursuer whereby the latter was to deliver and install the former's equipment. The defender went into receivership. The pursuer sought declarator as to its entitlement to exercise a special lien over the equipment it held, until paid under the contract. Lord Penrose in the Outer House engaged in a comprehensive review of the previous cases in this area, noting in particular that *Brown v Sommerville* was now considered as wrong.[57] He agreed with the submission of counsel for the pursuer that 'special lien depends upon and is part of the law of mutual contract'.[58] Thus the equipment could be retained by the pursuer in security of payment.

(d) Gloag and Irvine's categorisation reanalysed

16-16. The result of the line of authority beginning with *Meikle & Wilson* is that it cannot be doubted that a special lien will arise in Gloag and Irvine's second category, i.e. where work has not been actually done on the property being detained. The more fundamental point is whether there is any value in distinguishing between special liens in respect of, first, property worked upon and, secondly, property which the lien-holder required to fulfil his or her obligations, but did not actually improve. There may be some merit at a factual level.[59] Beyond that, however, the division has little to commend it, particularly if one returns and looks at Gloag and Irvine's categorisation more closely.

16-17. The first category is defined as 'where the subject retained is actually enhanced in value by the work bestowed upon it'.[60] Tailors, watchmakers and ship carpenters who have carried out repairs, millers and bleachers are

[53] At 72.

[54] On the solicitor's lien, see below, paras 17-73–17-92.

[55] Whitaker, *Lien* 146–147; Hall, *Possessory Liens* 38–39 and 46; *Moore's Carving Machine Co v Austin* (1896) 33 SLR 613; *Findlay v Waddell* 1910 SC 670; *Paton's Trs v Finlayson* 1923 SC 872.

[56] 1994 SLT 50.

[57] At 53.

[58] At 52.

[59] The division was recently approved by Lord Penrose in *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50 at 53.

[60] Gloag and Irvine, *Rights in Security* 350–351.

placed in this category.[61] Their inclusion cannot be questioned. However, Gloag and Irvine thereafter 'on the same principle'[62] proceed to add carriers, storekeepers, wharfingers and salvors. Their list is completed through 'perhaps a slight extension of [the] rule'[63] with innkeepers. None of these further individuals can be said to 'enhance' the value of the property by 'work bestowed upon it'. Carriers carry. Storekeepers store, as do wharfingers. Innkeepers provide accommodation. Salvors preserve value rather than enhance it.[64]

16-18. What Gloag and Irvine try to do is unfortunately not possible. They try to fit liens into an English classification which do not and cannot belong there. Under English law the common carrier and innkeeper/hotelier have a particular lien arising out of their public duties. It is in this category of particular lien where they belong.[65] Storekeepers and wharfingers have nothing akin to a special lien in English law, although they may possibly have a general lien based on usage of trade.[66] The English case which Gloag and Irvine cite to justify the proposition that wharfingers have a special lien makes precisely this point.[67] In Scotland it has never been doubted that storekeepers have a special lien.[68]

16-19. The conclusion from this is that carriers, hoteliers, storekeepers and wharfingers should have been placed in Gloag and Irvine's second category, that is where the property subject to the lien 'was delivered and received only as a means to the performance of the contract'.[69] A more radical approach would be to depart from the authors' categorisation completely. There is much to be said for such a departure. To recognise a distinct category of special lien where the subject has been improved is to give an account of English rather than Scots law. In our jurisdiction such special liens are treated in the same way as any special lien in contract as arising out of the mutuality of contractual obligations.[70] In other words the lien-holder's duty to return the property is the counterpart to the obligation which the lien secures. The

[61] Gloag and Irvine, 350–351. Authority is cited in support, although in the case of tailors, watchmakers and millers, it is English.

[62] Gloag and Irvine, 350–351.

[63] Gloag and Irvine, 350–351.

[64] See, eg, T J Scott, 'Lien' in *LAWSA* vol 15 (1999) para 54.

[65] See above, para 10-32.

[66] Palmer and Mason, 'Lien' para 727.

[67] *Moet v Pickering* (1878) 8 Ch D 372.

[68] The leading authority is *Laurie & Co v Denny's Tr* (1853) 15 D 504.

[69] Gloag and Irvine, *Rights in Security* 351.

[70] See, eg, Gloag and Henderson, *The Law of Scotland* para 32.17: '[It] is immaterial that no work has actually been done on the article over which the lien is claimed'. But compare Lord M'Laren in *Gladstone v M'Callum* (1896) 23 R 783 at 785. In South African law, a distinction is made. Where work has been done, an enrichment lien will arise. This is a real right. In other relevant cases, a debtor-creditor lien will arise. This is a mere personal right: see Scott, 'Lien' paras 54–72. For criticism, see G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Reid and Visser, *Mixed Legal Systems* 758 at 778–780.

matter of whether property has been improved under the contract is irrelevant.[71]

(e) Special lien for damages

16-20. An exceptional instance of special lien is a right to retain property in security of a claim for damages.[72] The principal authority for this is *Moore's Carving Machine Co v Austin*.[73] There a commission agent was appointed by a company to sell carving machines. He was given a show machine which was fitted up in his premises. The company ran into difficulties and was unable to supply the agent with the machines. It was held that the company was in breach of contract and that the agent could retain the show machine until he received damages. The *quantum* was the expense which the contract had cost the agent. This amount consisted of costs in relation to the machine and travelling expenses.

16-21. In a subsequent Sheriff Court case, involving another agent, it was held that samples belonging to his employer could be retained in security of a claim for damages for wrongful dismissal.[74] As Gloag and Irvine point out, allowing a special lien for damages coheres with the long established rule that a contracting party may withhold payment of a debt due under a contract until he or she receives damages for breach of that contract.[75] In relation to the mutuality issue – namely that special lien arises in the context of reciprocal obligations – the obligation to pay damages for non-performance can be viewed in the same way as the obligation to perform, that is reciprocal to the right to retain.

16-22. It has been held in two cases that where a buyer under a contract for the sale of goods rejects the goods because they are disconform to the contract, there is no right to retain them until damages are received.[76] *Padgett & Co v M'Nair & Brand*[77] was decided in 1852. *Lupton & Co v Schulze & Co*[78] was decided in 1900, after the Sale of Goods Act 1893 had come into force but similar principles were applied. It is felt that these decisions are open to question. *Padgett* was decided well before the line of cases beginning with

[71] This certainly is the position under art 1592 *Civil Code of Quebec*, where a party holding the property of another under a contract has a lien in respect of a claim which is 'exigible and is directly related to the property of which he has detention'. See too French law: M Planiol, *Civil Law Treatise* vol 2 (1959) ss 2520–2521. In Taiwan, similarly, the creditor's right to payment simply has to be connected to the property: see art 928(2) *Taiwan Civil Code* and C-f Lo, *The Legal Culture and System of Taiwan* (2006) 135.

[72] See Gloag and Irvine, *Rights in Security* 353; Gloag, *Contract* 632; Gloag, 'Lien' para 479; McBryde, *Contract* para 20-76; Sim, 'Rights in Security' para 77.

[73] (1896) 3 SLR 613.

[74] *Marshall v Bogle* (1890) 2 Guth Sh Cas 401.

[75] Gloag and Irvine, *Rights in Security* 353 and 306–307; *Kilmarnock Gas-Light Co v Smith* (1872) 11 M 58; *Turnbull v M'Lean & Co* (1874) 1 R 730.

[76] See Gloag, *Contract* 632.

[77] (1852) 15 D 76.

[78] (1900) 2 F 1118.

Meikle & Wilson v Pollard which established that special liens arise out of mutual obligations under contract.[79] It also pre-dated the case of *Moore's Carving Machine Co* which admitted a special lien in security of a claim for damages. Further, the judges in *Padgett* took cognisance of English authority.[80] The judicial concern intimated in *Padgett* that allowing retention would be 'unfair' to the seller does not seem justified, given that lien is an equitable right with which a court can interfere in extreme cases.[81] The seller after all is no innocent: he or she is in breach of contract. In *Lupton*, Lord Moncreiff says:

> 'There may perhaps be exceptional cases in which, after a purchaser has rejected goods as not being conform to contract, he may be entitled to retain and use them, claiming damages in respect of defects in quality. As to such cases, I reserve my opinion.'[82]

16-23. In the recent case of *Air and General Finance Ltd v RYB Marine Ltd*,[83] an attempt to assert a lien for damages by a purchaser where the seller did not confer a good title to the property failed. The facts were that the sellers sold a motor yacht twice. The first purchasers then granted a ship mortgage over the vessel which was duly registered. But the second purchasers took delivery of the property. When the creditors of the first purchasers sought to enforce the mortgage, the second purchasers claimed that they had a lien over the vessel for their claim in damages in respect of not receiving ownership. It was held that no such lien could be enforceable against the creditors without their agreement as the damages were not due by them. The case is consistent with other authorities that for a right of lien to arise under a contract the owner of the goods or an agent must be the person who has handed over the property.[84]

B. CARRIER'S LIEN

(1) General

16-24. It is possible to treat the carrier's lien as a unitary subject.[85] Nevertheless, there are some specialities depending on the manner of carriage, for example by sea, and these will be given due examination also.[86] The

[79] See above, paras 16-13–16-15.

[80] (1852) 15 D 76 at 80 *per* Lord Justice-Clerk Hope and at 83 *per* Lord Wood.

[81] See in particular Lord Justice-Clerk Hope at 81–82. On lien as an equitable right, see above, paras 15-04–15-07.

[82] (1900) 2 F 1118 at 1123.

[83] [2007] CSOH 177, 2007 GWD 35-589.

[84] See above, para 13-35. In addition, the mortgage as a prior real right would prevail in any event. See A J M Steven, 'Missing the Boat: Lien for Damages' (2008) 12 *Edin LR* 270 at 274.

[85] Bell, *Commentaries* II, 94; Bell, *Principles* § 1422; Gloag and Irvine, *Rights in Security* 400.

[86] See below, paras 16-44–16-55. The accounts cited in the previous note consider in detail the particular rules relating to carriage by sea and by land.

carrier's lien is a relatively undeveloped subject in Scotland, leading to reliance often being placed upon English authority.[87] It is fair to say, however, that the borrowing of authority here has not caused the trouble that was brought about when the same thing was done in relation to the hotelier's lien.[88]

(2) History

16-25. In England, the common carrier was one of the earliest individuals to be given a lien by the law.[89] Like the innkeeper, it was conferred because of the public duty to accept goods for carriage and the strict liability if any harm became of them. Scots law developed somewhat differently. In the late seventeenth century it was recognised that a shipowner had a hypothec over the cargo for freight.[90] Being a hypothec, the right was not dependent on possession.[91] Bankton, however, viewed the hypothec in limited terms conferred by the law in favour of the owners and masters of ships.[92] He stated that it could only be enforced up to 15 days after delivery of the goods and, at least in terms of the maritime law of France, was defeated by a third party acquiring for value. Further, he opined:

> 'I doubt if [the master][93] has any other privilege by our law, than that of retention, while the goods are in the ship, in lighters, or on the key'.[94]

16-26. Thus the right in question can be analysed as a lien, which is replaced by a hypothec on delivery, which lasts for 15 days. Erskine, on the other hand, baldly asserts that the right is one of hypothec.[95] Equally simply, but quite differently, Voet recognised the right in terms of retention.[96]

16-27. In the case of *Bogle v Dunmore & Co*,[97] decided in 1787, there was no reference to hypothec but only to the right of a maritime carrier to detain for freight. Similarly, in the 1814 case of *Malcolm v Bannatyne*,[98] the carrier

[87] See, eg, Gloag and Irvine, *Rights in Security* 400–403.

[88] See below, paras 16-62–16-71.

[89] See above, paras 10-29–10-30; Sir William Holdsworth, *History of English Law* (2nd edn) vol 7 (1937) 511–512; Bell, *Personal Property* 138. See too the American Law Institute, *Restatement of the Law of Security* (1941) 168–169.

[90] *Muire v Lord Lyon* (1683) Mor 6260.

[91] On hypothec, see Stair I.xiii.14; Erskine III.i.34; Bell, *Commentaries* II, 24–40; Gloag and Irvine, *Rights in Security* ch 12 and A J M Steven, 'Rights in Security over Moveables' in Reid and Zimmermann, *History* vol 1 (2000) 333 at 345–350.

[92] Bankton I.xvii.16. He cites the case of *Lawry* 14 Nov 1676.

[93] Presumably as agent for the shipowner.

[94] Bankton I.xvii.16.

[95] Erskine III.i.34, citing *Muire v Lord Lyon*, above. But see Nicolson's note (30) where he writes that the right is 'more properly a right of *lien* or *retention* over the cargo while yet undelivered'. He cites Bell, *Commentaries* and *Malcolm v Bannatyne* 15 Nov 1814 FC, as his authority.

[96] Voet 16.2.20.

[97] (1787) Mor 14216.

[98] 15 Nov 1814 FC.

was only found to have a security over that property which he had not delivered. Thus the case law moved away from sanctioning a hypothec in respect of freight, recognising instead a lien.

16-28. When Bell came to deal with the matter in his *Commentaries*, he began by noting that Roman law conferred a right to retain in respect of carriage in terms of the *actio contraria* of the contract *locatio operis mercium vehendarum*.[99] He then pointed out that English law gave common carriers a lien because of their public duty to accept goods for carriage without enquiring into who owns them, the lien being enforceable against the owner. Bell concludes: 'In the Scottish jurisprudence, both principles may be held to combine in favour of a lien for the price of carriage.'[100] The statement may be seen as fair. As might be expected, there is far more English authority to rely on than authority from anywhere else. It is beyond doubt that the right in question is lien. Referring to carriage by sea, Bell states: 'Delivery of the goods divests the shipmaster of his lien, for it subsists only by possession.'[101]

16-29. Bell's treatment is accepted by other writers, for example Hume.[102] Other than by Gloag and Irvine, the carrier's lien has not been subject to detailed treatment by Scottish writers.[103] The case law on the subject cannot be said to be large in amount either.[104] Nevertheless, the lien is an important one, with similar rights being recognised in other jurisdictions, such as France,[105] Germany,[106] Italy,[107] Louisiana,[108] Quebec,[109] and South Africa.[110]

(3) The lien in practice

16-30. The lien seems to be little used in modern times. The Customer Care Department of DHL International advise it 'is rarely, if ever, relied upon',[111] the normal practice being to recover outstanding debts 'through the usual legal channels'.[112] This presumably means raising an action for payment and

[99] Bell, *Commentaries* II, 94.

[100] Bell, *Commentaries* II, 94.

[101] Bell, *Commentaries* II, 97.

[102] Hume, *Lectures* III, 47; D M Walker, *Principles of Scottish Private Law* (4th edn) vol 3 (1989) 400-401.

[103] Gloag and Irvine, *Rights in Security* 400–403.

[104] There are in the region of twenty relevant cases, dating from the unreported decision of *Lawry* 14 Nov 1676 (Bankton I.xvii.16) to *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.

[105] There exists a priority in favour of a carrier under art 2102(6) *Code civil.* This is dependent on the carrier continuing to hold the goods: M Planiol, *Civil Law Treatise* vol 2 (1959) s 2521.

[106] The carrier has a lien under § 440 *HGB* (*das Pfandrecht des Frachtführers*).

[107] Art 2761 *Codice civil.*

[108] Art 3217(9) *Louisana Civil Code.*

[109] Art 2058 *Quebec Civil Code.*

[110] The South African carrier's lien is not a real right: see Scott, 'Lien' para 70; *Standard Bank v Wilman Spilhaus & Co* (1888) 6 SC 15.

[111] Letter from DHL International (UK) Ltd to the author, dated 14 November 1996. Enquiries with other carriers did not receive replies.

[112] Letter from DHL International (UK) Ltd.

executing diligence. The company's Pallet Network Standard Terms and Conditions provide for an express lien, but there is not a similar clause in the other carriage contracts on their website.[113] Another carrier, UPS, has an express lien as parts of its terms and conditions of carriage.[114] Both these express liens cover all sums due to the carrier.[115]

(4) Nature of right

16-31. The carrier's lien is a special lien.[116] If the matter was in doubt, then it was settled in 1824 by the case of *Stevenson v Likly*.[117] There, a shipping company was employed to convey goods. During the course of the employment a balance became owed by the shipper to the company. In order to secure the balance the company detained goods consigned to the shipper. It was held by the Court of Session that the company had no right to do this. A carrier could only retain a parcel for the carriage charge in respect of that parcel and not for a general balance. The rule applies equally to land carriage, as Lord President Inglis makes clear in a case which involved a lien under statute: 'At common law the railway company, as carriers, would have been entitled to retain the goods till the carriage or toll applicable to these goods was paid.'[118]

16-32. The common law may be clear, but the question remains whether a carrier may obtain a general lien expressly or through usage. Bell, at least in the case of land carriage, appears to accept as much.[119] On the other hand, Gloag and Irvine were highly sceptical in respect of both types of carriage known in 1897.[120]

16-33. The issue may be traced back to English case law of the early nineteenth century.[121] This was the time at which the English courts were repudiating previous decisions, from judges such as Lord Mansfield, which were in favour of introducing general liens in as many situations as possible.

[113] DHL Pallet Network Standard Terms and Conditions clause 17: http://www.dhl.co.uk/publish/gb/en/information/dhl_standard_conditions/dhl_pallet_network.high.html.

[114] UPS Terms and Conditions of Carriage clause 5.4: http://www.ups.com/media/en/gb/terms_carriage_eur.pdf.

[115] On the enforceability of an express general lien here, see below, paras 16-32–16-36.

[116] Bell, *Commentaries* II, 94–97; Bell, *Principles* §§ 1422–1425; Gloag and Irvine, *Rights in Security* 400; A Mackenzie Stuart, 'Carriage by Land' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 3 (1927) para 44 and W G Normand and J G McIntyre, 'Carriage by Sea' in the same work at para 84; Sim, 'Rights in Security' para 77; D M Walker, 'Carriage by Land' in *SME Reissue* (2002) para 31; C Mackenzie, 'Carriage By Sea' in *SME Reissue* (2002) para 289.

[117] (1824) 3 S 291 (NE 204).

[118] *North British Railway Co v Carter* (1870) 8 M 998 at 1000. See also *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346 at 348 *per* Lord Young and *North British Railway Co v Russell* (1895) 11 Sh Ct Rep 241 at 246 *per* Sheriff Berry.

[119] Bell, *Commentaries* II, 97.

[120] Gloag and Irvine, *Rights in Security* 400 and 402.

[121] On which, see Bell, *Personal Property* 142–143.

The watershed case, *Rushforth v Hadfield*,[122] in fact involved a common carrier who claimed a general lien. The Court stated that allowing carriers to have general liens undermined the rules of the common law whereby they were granted a particular[123] lien in return for their public duties. Accordingly, it was held that in order to establish a general lien, a heavy burden of proof had to be discharged. Nevertheless, the task is not an impossible one.[124]

16-34. In Scotland the weight of authority points to the possibility of creating a general lien by agreement with a customer. In the first place, there would have been no need for the nineteenth-century legislation restricting the rights of railway companies to create express general liens, if this was not the case.[125] In the second place, it has been held by the House of Lords that a shipping company can extend its lien to cover dead freight, by agreement with its customer.[126] In the third place, in a recent case it was held by Sheriff Principal Risk that a removal company could create a general lien through express contract.[127]

16-35. The problem with the general lien is its prejudicial effect on third parties. The issue was important to the court in *Rushforth v Hadfield*.[128] Indeed in the later cases in England where carriers were able to establish general liens, these were only admitted on a contractual basis between carrier and customer and were not allowed to affect third parties.[129] In Scotland, Lord Young has seriously doubted whether it is possible for a carrier to create a general lien through either usage or expressly, which can prejudice third parties.[130] If one examines more closely what Gloag and Irvine say in respect of a shipowner contracting for an express lien for freight, it can be seen that what they doubt is that such a lien 'would be upheld in a question with the creditors of the shipper'.[131] And further, in the recent case mentioned above, the Sheriff Principal distinguished a previous decision in which a general lien was not upheld against a third party, because there were no third parties involved in the case in hand.[132]

[122] (1805) 6 East 519, 102 ER 1386; (1806) 7 East 224, 103 ER 86. There were two hearings.

[123] 'Particular' is the equivalent term to 'special' when discussing liens in English law. See above, para 10-57.

[124] *Oppenheim v Russell* (1802) 3 B & P 42, 127 ER 24; *Rushforth v Hadfield* (1805) 6 East 519, 102 ER 1386; (1806) 7 East 224, 103 ER 86; *Wright v Snell* (1822) 5 B & Ald 350, 106 ER 1219; N Palmer and A Hudson, 'Carriers' in *Halsbury's Laws of England* (4th edn) vol 5(1) (2004) para 686.

[125] Railway and Canal Traffic Act 1854 s 7, on which see *Scottish Central Railway Co v Ferguson* (1864) 2 M 781 and *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

[126] *M'Lean & Hope v Fleming* (1871) 9 M (HL) 38; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482.

[127] *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.

[128] See (1805) 6 East 519 at 528; 102 ER 1386 at 1390 *per* Le Blanc J.

[129] *Oppenheim v Russell* (1802) 3 B & P 42, 127 ER 24; *Rushforth v Hadfield* (1805) 6 East 519, 102 ER 1386; (1806) 7 East 224; *Wright v Snell* (1822) 5 B & Ald 350, 106 ER 1219 and G W Paton, *Bailment in the Common Law* (1952) 274.

[130] *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346 at 348.

[131] Gloag and Irvine, *Rights in Security* 400.

[132] *Bon Accord Removals v Hainsworth*, n 127 above. The case distinguished was *Peebles & Son v Caledonian Railway Co*, where Lord Young had made his views plain on the matter of carriers contracting for general liens.

16-36. The conclusion is that a general lien created in favour of a carrier will *only* operate effectually at a contractual level. Given this, and given further that the term 'lien' is consonant with that of 'real right', it is felt that the terminology being used is somewhat misleading. Instead of making reference to 'general lien', some other label such as 'contractual retention for a general balance' should be used. For the sake of clarity, it may be underlined that the special lien which arises by operation of law in favour of a carrier is a real right.[133]

(5) Property covered by the lien

16-37. In general, the carrier's lien extends over all the property which is being carried upon the customer's behalf under the contract between them.[134] It was held in an English case that the lien does not permit the detention of the customer, nor the clothes the customer is wearing, if the customer is travelling as a passenger along with the property.[135] There would seem no doubt that the same rule applies in Scotland.[136]

16-38. There exists the interesting question as to whether the lien extends to property which the customer does not own. In England the lien does so extend in respect of common carriers.[137] The rationale is the same rationale which applies to the innkeeper down south. The lien is seen as a counterpart to the public duties imposed upon the common carrier.[138]

16-39. As regards the position in Scotland, it is possible to read certain statements of Bell and Lord Young to the effect that the law is the same here as in England.[139] In addition there is the Sheriff Court decision of *Mossgiel*

[133] *Malcolm v Bannatyne* 15 Nov 1814 FC (lien prevailed over general creditors in customer's bankruptcy); *Stevenson v Likly* (1824) 3 S 291 (NE 204); *Scottish Central Railway Co v Ferguson* (1864) 2 M 781 (in these cases lien good against consignee); *Mossgiel SS Co v Stewart* (1900) 16 Sh Ct Rep 289 (lien prevailed over hypothec of landlord). The rule may be different as regards indorsees of bills of lading: see below, para 16-52.

[134] Bell, *Principles* §1424; Gloag and Irvine, *Rights in Security* 400; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482.

[135] *Wolf v Summers* (1811) 2 Camp 631, 170 ER 1275.

[136] This is accepted by Bell, *Commentaries* II, 96; Gloag and Irvine, *Rights in Security* 400; Walker, 'Carriage by Land' para 74 and C Mackenzie, 'Carriage by Sea' in *SME Reissue* (2002) para 350.

[137] *Skinner v Upshaw* (1702) 2 Ld Raym 752, 93 ER 3; *Yorke v Grenaugh* (1703) 2 Ld Raym 866 at 867 *per* Holt CJ, 92 ER 79 at 80; Paton, *Bailment in the Common Law* 273; Crossley Vaines, *Personal Property* (5th edn, 1973) 142–143; Palmer, *Bailment* 1013; Palmer and Hudson, 'Carriers' para 686. However, it has been held in the common law system of Australia that the lien may not be effectual if the carrier knew that the true owner gave no authority for the goods to be sent for transport: *Kilner's Ltd v The John Dawson Investment Trust Ltd* (1935) 35 SR (NSW) 274 *per* Jordan CJ at 278.

[138] Holdsworth, *History of English Law* vol 7, 511–512; Paton, *Bailment in the Common Law* 273; Palmer and Mason, 'Lien' in *Halsbury's Laws of England* (4th edn) vol 28 (1997) para 739; Whitaker, *Lien* 16 and Hall, *Possessory Liens* 53.

[139] Bell in his *Commentaries* II, 94 refers to the English rule in his statement that the English law upon the carrier's lien and the Roman law are combined to create the 'Scottish Jurisprudence' on

SS Co v Stewart[140] in which the sheriff takes this view expressly. There, part of the cargo over which a shipping company was exercising their lien turned out to be furniture which had been obtained on hire purchase by the shipper. The company did not know this when they accepted it for transportation. The sheriff followed English authority to hold that the lien was nonetheless effectual.[141] He dismissed an American case in which the opposite conclusion was reached upon 'the settled and universal principle'[142] that any individual dealing with property without its owner's consent has no claim against the owner for his expenses. The rule was recognised by the sheriff to apply to pawnbrokers and purchasers. However, the difference, he pointed out with regard to common carriers, was their public duty to receive goods with 'no opportunity of making inquiry as to ownership'.[143]

16-40. The American decision is preferable. To say that a common carrier has an absolute duty to receive all goods is to exaggerate. The English texts contain a number of examples of situations where the carrier may refuse to do so.[144] It is surely arguable that in a case where the carrier is suspicious as to the ownership of the property and in doubt as to whether payment will be made, that he or she could also refrain from carrying. Further, there is not a significant body of case law relating to carriers being sued for not fulfilling their duty to carry.[145] The view consequently taken here is that the true owner should prevail. There seems to be no convincing reason why a carrier should be given a privilege which other lien-holders are not.[146] Further, following the English rule means allowing the carrier not only to prevail over the true owner, but also over any third parties with a subordinate real right in the

---

the matter. In *Peebles v Caledonian Railway Co* (1875) 2 R 346 at 348 Lord Young refers to the common carrier's public duty to receive goods and to him having 'a particular lien on every parcel of goods for the carriage thereof'. The passage, with phrases such as 'common carrier' and 'particular lien', has a decidedly English law tone.

[140] (1900) 16 Sh Ct Rep 289.

[141] In particular Lord Holt in *Yorke v Grenaugh* (1703) 2 Ld Raym 866 at 867, 92 ER 79 at 80.

[142] (1900) 16 Sh Ct Rep 289 at 298. The American decision is *Robinson v Baker* (1849) 51 American Decisions 54.

[143] At 298.

[144] Palmer and Hudson 'Carriers', para 542; Palmer, *Bailment* 973–975. In particular, the common carrier may refuse to carry until paid the full and proper price of carriage: *Wyld v Pickford* (1841) 8 M & W 443, 151 ER 1113.

[145] See Palmer and Hudson 'Carriers' para 541, where the most recent case cited is *Belfast Ropework Co Ltd v Bushell* [1918] 1 KB 210. Palmer, *Bailment* 973 notes that the common carrier used to be liable to indictment for refusal to carry, but that this is no longer the law.

[146] Other than perhaps their strict liability under the edict *nautae*, *caupones*, *stabularii*. For an interesting study of how the edict became applicable to carriage by land in Scotland, see A F Rodger, 'The Praetor's Edict and Carriage by Land in Scots Law' (1968) 3 Ir Jur (NS) 175. However, the Carriers Act 1830 (as amended) has reduced the extent of this liability. The carrier may contract out of it provided he takes reasonable care to inform his customer. Further his liability in respect of specified goods, eg jewellery and watches, is excluded unless the customer declares their nature and value, if over £10, on handing them over. On the operation of the Act, see Walker, 'Carriage by Land' paras 11–16.

property.[147] This is most likely to be a breach of Article 1 Protocol 1 of the European Convention on Human Rights.[148] More generally, the notion of a lien arising out of public duty resulting in only common carriers being given a lien and not private carriers is not part of Scots law.[149]

(6) Enforcement

16-41. As regards enforcement of the lien, the view has been expressed that the right is one of detention with no automatic right to go to court and ask for a power to sell. In a case involving a railway company's lien for carriage, Sheriff Berry stated this opinion.[150] He then proceeded to examine Bell's *Principles* which refers to various situations, regarded by the sheriff as 'exceptions', where a power of sale can be applied for, including where there are 'goods prepared for the market, and useful only as commodities in trade'.[151] It is submitted, however, that the sheriff has matters the wrong way round and that in general, a lien-holder may apply for a power to sell, apart from recognised exceptions, such as an author's unpublished compositions and items which are *per se* not marketable.[152]

16-42. The leading case of *Stevenson v Likly*,[153] to which Sheriff Berry refers, coheres with the conclusion reached. There the court opined that the carrier should notify the exercise of the lien to the consignee 'and in the event of not being paid, to bring [the property] to judicial sale without delay'.[154] Sheriff Berry also cites the opinion of Lord President Inglis in another railway case as authority for his view.[155] However, all Lord Inglis said was that the carrier's right to retain goods was a 'passive security' when compared with a pledge with an express power of sale.[156]

[147] As happened in the *Mossgiel SS Co v Stewart* (1900) 16 Sh Ct Rep 289 where the lien was held to prevail over the landlord's hypothec.

[148] For a similar argument as regards the landlord's hypothec, see A J M Steven, 'Goodbye to the Landlord's Hypothec?' 2002 *SLT (News)* 177 and 'Goodbye to Sequestration for Rent' 2006 *SLT (News)* 17. See now the Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4). See also the discussion in relation to the hotelier's lien, below at para 16-84.

[149] In England, the accepted view is that private carriers have no lien as they have no public duty to carry: see Paton, *Bailment in the Common Law* 227–233; Crossley Vaines, *Personal Property* 143; Palmer and Hudson, 'Carriers' para 686. This is definitively the case as against third parties: Palmer, *Bailment* 1013–1014; *Electric Supply Stores v Gaywood* (1909) 100 LT 855. In Scotland, any carrier has a special lien arising out of their contract with their customer: Gloag, 'Lien' para 478; Sim, 'Rights in Security' paras 76–77.

[150] *North British Railway Co v Russell* (1895) 11 Sh Ct Rep 241 at 245–246.

[151] Bell, *Principles* § 1417.

[152] See Bell, *Principles* § 1417. For example, title deeds subject to a solicitor's lien cannot be sold: *Ferguson & Stuart v Grant* (1856) 18 D 536. See above, para 15-03.

[153] (1824) 3 S 291.

[154] At 293.

[155] *North British Railway Co v Carter* (1870) 8 M 998.

[156] At 1000.

(7) Extinction

16-43. Like any other lien, the carrier's right is extinguished if the goods are released.[157] Handing over some of the goods, however, leaves the lien intact in respect of the remaining goods for the entire sum due under the same contract of carriage.[158] It has been held in English sea carriage cases that the lien is waived if the contract in question provides that the freight is payable at a particular date after the landing of the goods.[159] The logic seems clear enough.

(8) Carriage by air specialities

16-44. It is difficult to find any Scottish material on the specialities of carriage by air.[160] When Gloag and Irvine's *Law of Rights in Security* was published in 1897, the world's first powered flight by the Wright brothers was still six years ahead and Bleriot's journey across the Channel was not to come for a further six years beyond that. As carriage of air became more common it was felt that there was much to be gained from nations adhering to the same rules. To this end, in Warsaw in 1929, the Convention for the Unification of Certain Rules relating to International Carriage by Air was signed.[161] This was brought into United Kingdom law by the Carriage by Air Act 1932 and subsequent legislation.[162] The Warsaw Convention, however, is silent on the issue of the carrier's lien.[163]

16-45. In England, it appears that the air carrier has no lien unless there is express agreement with the customer.[164] Two reasons are given for this. First, the Warsaw Convention does not give a lien. Secondly, air carriers are private rather than common carriers and private carriers in English law have no lien.[165] As regards Scotland, it is submitted that where goods are being carried by air internally, for example from Aberdeen to Edinburgh, the air company

[157] Bell, *Commentaries* II, 97; Gloag and Irvine, *Rights in Security* 402; Walker, 'Carriage by Land' para 31.

[158] *Malcolm v Bannatyne* 15 Nov 1814 FC. Compare *Re McLaren, ex parte Cooper* (1879) 11 Ch D 68.

[159] *Foster v Colby* (1858) 3 H & N 705, 157 ER 651; *Kirchner v Venus* (1859) 12 Moo PCC 361, 14 ER 948. See Gloag and Irvine, *Rights in Security* 402. The lien will also not operate if the carrier has agreed to give credit: *Raitt v Mitchell* (1815) 4 Camp 146, 171 ER 47.

[160] On the subject of carriage by air in general, see J A K Huntley, 'Carriage By Air' in *SME Reissue* Carriage (2002) paras 370–396.

[161] J Ridley, *The Law of the Carriage of Goods by Land, Sea and Air* (5th edn, 1978, by G Whitehead) 223.

[162] Carriage by Air Act 1932, repealed and replaced by the Carriage by Air Act 1961. On the later legislation, see Huntley, 'Carriage by Air' paras 372–374.

[163] Ridley, *Carriage of Goods by Land, Sea and Air* 235.

[164] Ridley, *Carriage of Goods by Land, Sea and Air* 235. The right to provide for a lien seems implicit in the Warsaw Convention: see C N Shawcross and K M Beaumont, *Air Law* (3rd edn, 1966) 492–493.

[165] See above, para 16-40.

will have a special lien arising out of the contract of carriage.[166] Our law of course does not deny private carriers a lien.[167]

16-46. With regard to goods carried from Scotland to England or beyond the issue becomes more complicated and international private law becomes relevant.[168] In summary, it would seem that because a lien is a real right in security, it is the law of the *situs* which will be important.[169] The carriage debt will normally arise when the aeroplane lands as the goods will then have been duly carried.[170] Consequently, if the law of the country to which the goods are being transported automatically confers a lien on carriers, then a lien will duly arise.[171] If that country does not recognise such a right, then the carrier will have no lien. The validity of any express contractual right of retention as between carrier and customer will be subject to governance by the proper law of the contract.[172]

(9) Carriage by land specialities

16-47. The majority of decisions involving the land carrier's lien concern the operation of nineteenth-century railway legislation.[173] In the first place, under section 90 of the Railway Clauses Consolidation (Scotland) Act 1845, railway companies were given the right to detain and sell goods and carriages for arrears of 'tolls due by the owner of the same, in respect of any carriage of goods'.[174] Lord President Inglis described this as 'a very important privilege',[175] noting that a lien normally amounted to a mere right to detain.

[166] The duty of the air company to hand over the goods and the duty of the customer to pay are reciprocal and the carrier is thus entitled to a lien. See, generally, Bell, *Principles* § 1419.

[167] See above, para 16-40.

[168] International private law will be equally relevant to transportation beyond Scotland by land or sea. For an account of the remedies of a sea carrier in different jurisdictions, see H Tiberg, *The Law of Demurrage* (3rd edn, 1979) 617–635.

[169] *Mitchell v Burnet and Mouat* (1746) Mor 4468; R D Leslie, 'Private International Law' in *Stair Memorial Encyclopaedia* vol 17 (1989) paras 313–318; A E Anton with P R Beaumont, *Private International Law* (2nd edn, 1990) 617; E B Crawford and J M Carruthers, *International Private Law in Scotland* (2nd edn, 2006) paras 17-10–17-16. But compare J M Carruthers, *The Transfer of Property in the Conflict of Laws* (2005).

[170] Lien like other securities is parasitic upon a debt. See above, para 11-01.

[171] For example, Germany: § 440 *HGB*.

[172] Contracts (Applicable Law) Act 1990, implementing the Convention on the Law applicable to International Obligations (Rome, 19 June 1980) Cm 8489. See Leslie, 'Private International Law' paras 278–282; Anton with Beaumont, *Private International Law* ch 11; P North and J J Fawcett, *Cheshire and North's Private International Law* (13th edn, 1999) ch 18; Crawford and Carruthers, *International Private Law in Scotland* ch 15. Under art 5 of the Convention, consumers are entitled to the protection of the mandatory rules of their country of habitual residence when contracting. It is expressly provided, however, by art 5(4)(a) that a carriage contract is not a consumer contract for the purposes of art 5.

[173] The amount of case law on the lien of the land carrier in the last hundred years has been negligible, but see *Bon Accord Removals v Hainsworth* 1993 GWD 28-1785.

[174] Railway Clauses Consolidation Act 1845 s 90. Applied by the Transport Act 1962 s 32 and Sch 3 Part IV.

[175] *North British Railway Co v Carter* (1870) 8 M 998 at 1000.

16-48. The statutory provision was to be construed narrowly.[176] The right being valid for 'tolls' amounted to a general right to retain. However, as the 'tolls' had to be owed by the owner of the goods, the right did not amount to a general lien valid against third parties. Thus in one case A in Leith sold flour to B in Dundee, to be forwarded to Dundee at A's expense. The railway company sought to detain the flour in terms of section 90 of the 1845 Act for unpaid tolls for the carriage of other goods due by A. It was held that B became owner of the flour on delivery to the railway company as carriers and that consequently they could not retain it under section 90.[177] It was also held in a later case that the statutory right applied only in respect of charges for the use of lines where the goods were being transported by individuals using their own carriages and not in respect of charges for goods carried by the railway company as common carriers.[178]

16-49. The other notable statutory provision is section 7 of the Railway and Canal Traffic Act 1854. This statute has now been repealed.[179] Nevertheless, a brief analysis is merited on policy grounds. The provision makes conditions in contracts of carriage with railway companies unenforceable if they are not 'just or reasonable'.[180] In two cases clauses giving companies a general lien in respect of goods carried by them were held to be invalid in terms of section 7.[181] The policy here again is to avoid sanctioning general liens in favour of carriers which would prejudice third parties.

16-50. Leaving section 7 aside, serious doubts have been expressed as to whether railway companies as common carriers would be allowed to create general liens, because of their duty to receive all goods brought to them by the public.[182] The General Conditions of Carriage of Goods of the British Railways Board did provide for such a lien, fortified with a power of sale.[183] The lien was stated to be without prejudice to the right of stoppage in transit of an unpaid seller, which accorded with an important English House of Lords decision from the beginning of this century.[184] Given the prevailing policy on this issue, it may be doubted in Scotland whether the BRB condition was enforceable against third parties. Following privatisation the British Railways Board no longer exists but, according to Professor Walker, goods

[176] At 100.

[177] *Denholm v North British Railway Co* (1867) 1 Guth Sh Cas 120.

[178] *Highland Railway Co v Jackson* (1876) 3 R 850, overruling *Caledonian Railway Co v Guild* (1873) 1 R 198.

[179] By the Transport Act 1962 s 95(1) and Sch 2 part I.

[180] Railway and Canal Traffic Act 1854 s 7.

[181] *Scottish Central Railway Co v Ferguson* (1861) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

[182] *Peebles and Son v Caledonian Railway Co* at 348 *per* Lord Young; Gloag and Irvine, *Rights in Security* 402; A Mackenzie Stuart, 'Carriage by Land' in *Encyclopaedia of the Laws of Scotland* (3rd edn) vol 3 (1927) para 44.

[183] D M Walker, 'Carriage by Land' in *Stair Memorial Encyclopaedia* vol 3 (1994) para 700.

[184] *United States Steel Products Co v South Western Railway Co* [1916] 1 AC 189.

delivered to freight operating companies are subject to a lien for the carriage charge.[185]

(10) Carriage by sea specialities

16-51. The special lien of the shipowner for freight may by express contract be extended to cover dead freight, in other words damages for the situation where a charterer in breach of his or her contractual obligation, fails to load a full and complete cargo.[186] It has been accepted in England that the lien may also be extended in order to secure demurrage or port charges.[187] In Scotland, it is settled that a shipowner has a separate lien for general average.[188] As regards a general lien created expressly, the prevailing view is that such a provision would not be enforceable against third parties.[189]

16-52. It is common in the transportation of goods by sea for bills of lading to be used, so that ownership of the property may pass by symbolical delivery.[190] The rule here is that the shipowner's lien is only enforceable against an indorsee of the bill of lading for the rate of freight expressed in the bill.[191] Thus the shipowner is unable to detain the goods from an indorsee in respect of a general balance owed by the shipper.[192]

16-53. It is what is specified in the bill of lading which is crucial. In one English case,[193] the rate of freight was fixed in a charter party, but only a nominal rate was referred to in the bill. It was held that the shipowner could not retain against the indorsee for the amount in the charter party. Where, however, no rate of freight is given on the bill but reference is made to the charter party, the shipowner has a lien for the amount in the charter party.[194] In a modern case,[195] the bill of lading was in a 'short' form and stated that it incorporated conditions as to lien in a 'long' form of bill 'on file with the Federal Maritime Commission'. It transpired that the relevant document was

[185] Walker, 'Carriage by Land' para 102 and 'Carriage by Land' in *SME Reissue* Carriage (2002) para 102. Presumably this is simply the lien which exists at common law.

[186] *M'Lean & Hope v Fleming* (1871) 9 M (HL) 38; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482; Mackenzie, 'Carriage by Sea' para 284.

[187] Gloag and Irvine, *Rights in Security* 400. See also S C Boyd, A S Burrows and D Foxton, *Scrutton on Charterparties and Bills of Lading* (20th edn, 1996) 382–384; Tiberg, *The Law of Demurrage* 611.

[188] Bell, *Commentaries* II, 95 and 99; Bell, *Principles* § 1426; Gloag and Irvine, *Rights in Security* 400; Normand and McIntyre, 'Carriage By Sea' para 84; D M Walker, *Principles of Scottish Private Law* (4th edn, 1989) vol III, 401.

[189] Sheriff Guthrie in Bell, *Principles* § 1424; Gloag and Irvine, *Rights in Security* 400.

[190] On symbolical delivery, see Reid, *Property* para 621 (W M Gordon).

[191] Bell, *Commentaries*) II, 96; Sheriff Guthrie in Bell, *Principles* § 1424; Gloag and Irvine, *Rights in Security* 401; *Scrutton on Charterparties and Bills of Lading* 380–381; Tiberg, *The Law of Demurrage* 624–625.

[192] *Bogle & Co v Dunmore* (1787) Mor 14216.

[193] *Foster v Colby* (1858) 3 H & N 705, 157 ER 651.

[194] *Smith v Sieveking* (1855) 5 El & Bl 589, 119 ER 600, 24 LJ QB 257.

[195] *Georgia Pacific Corporation v Evalend Shipping Co SA* 1988 SLT 683.

not filed with the Commission and accordingly the shipowner did not have the lien which it purported to give him.

16-54. The shipowner may retain the property carried for the entire freight specified in the bill of lading, even where the shipper has already paid some of it to the charterer.[196]

16-55. Like other liens the shipowner's depends on having custody of the goods.[197] Where the ship has been hired out to another party on time – the formal name for this contract being *locatio navis* – the captain and the crew become the employees of the charterer.[198] In this situation, the shipowner has no custody and no lien.[199] Where shipowners release the cargo in return for a bond for the sum they are demanding from the shippers, the terms of the bond must be closely examined.[200] Hence where a bond provided that, first, the lien had been released but that, secondly, the right of the shipper to challenge its validity had been preserved, it was unsurprisingly held that the first provision rendered the second meaningless.[201]

C. HOTELIER'S LIEN

(1) General

16-56. This section considers the right of the owner of a hotel to retain property brought to it by guests until their bills are paid. A similar right is recognised in many jurisdictions.[202]

16-57. In Scotland the traditional terminology used has been that of the 'innkeeper's lien'.[203] However, 'innkeeper' is a term with a somewhat archaic flavour, conjuring up the image of Mary and Joseph being offered room in a stable,[204] the opening scene from *Treasure Island*[205] or the places where

[196] *Youle v Cochrane* (1868) 6 M 427.

[197] Bell, *Principles* § 1424; Gloag and Irvine, *Rights in Security* 400–401; Mackenzie, 'Carriage By Sea' para 289. See too *China Pacific SA v Food Corporation of India* [1982] AC 939.

[198] Gloag and Irvine, *Rights in Security* 400–401.

[199] Bell, *Commentaries* II, 94–95; Bell, *Principles* § 1424; Gloag and Irvine, *Rights in Security* 400–401. See the English case of *Hutton v Bragg* (1816) 7 Taunt 14, 129 ER 6.

[200] W A Wilson, *The Law of Scotland on Debt* (2nd edn, 1991) para 7.7.

[201] *Georgia Pacific Corporation v Evalend Shipping Co SA* 1988 SLT 683.

[202] See, eg, art 2102(5) *Code civil*; § 704 *BGB*; the Hotel Proprietors Act 1963 s 8(2) (Eire); art 2760 *Codice civil*; art 3217(8) *Louisiana Civil Code* and art 2302 *Quebec Civil Code.* Note too the American Law Institute, *Restatement of the Law of Security* (1941) ss 61(c) and 63.

[203] Bell, *Commentaries* II, 99–100; Bell, *Principles* § 1428; Gloag and Irvine, *Rights in Security* 397–400; Walker, *Principles of Scottish Private Law* vol III, 401; Sim, 'Rights in Security' paras 90–93; Gloag and Henderson, *The Law of Scotland* para 37.24; D J T Logan, *Practical Debt Recovery* (2001) 249; T Guthrie, *Scottish Property Law* (2nd edn, 2005) paras 8.22–8.23; N Busby, B Clark, R Paisley and P Spink, *Scots Law: A Student Guide* (3rd edn, 2006) para 8-39.

[204] Luke 2:7.

[205] R L Stevenson, *Treasure Island* (1882).

Sherlock Holmes stayed whilst investigating cases.[206] It seems time that the terminology was updated.[207] Consequently this text, other than in a historical context, will refer to the right in question as the 'hotelier's lien'.[208]

(2) History

(a) Origins

16-58. The first Scottish writer to refer to what then could accurately be referred to as the right of retention of an innkeeper was Bankton in his *Institute*. The reference does not come within his discussion of Scots law, but rather at two different points within his 'Observations on the Laws of England'. One of these is found, as might be expected, in his discourse on the rights of retention recognised by English law.[209] The other falls within his discussion of the strict liability of English innkeepers and shipmasters for goods damaged within their inns and ships.[210] This liability derives from the Roman edict, *nautae, caupones, stabularii*. Bankton writes here:

> 'For the security and protection of travellers, inns are allowed certain privileges: thus, the horse and goods of a guest … may be detained by the inn-keeper, as likewise the guest himself, until the reckoning is paid, and that even against the owner, where it was a stolen horse.'[211]

16-59. With a couple of caveats, this may be accepted as a correct statement of English law from the fifteenth century to the present.[212] The innkeeper or hotelier has the duty to receive guests and to ensure the safety of any goods which they bring into the property. As a counterpart to these duties he or she has the right to detain the goods (if there are any) until the guests' bills are paid. Further, as the duty to look after the guests' goods applies to everything which they bring across the threshold, irrespective of who owns them, the right to retain likewise applies to all these goods. Thus, as Bankton says, the innkeeper may retain a stolen horse from its owner until the account

[206] Sir Arthur Conan Doyle, *Sherlock Holmes: The Complete Illustrated Short Stories* (1985).

[207] J J Downes, 'Hotels and Tourism' in *Stair Memorial Encyclopaedia* vol 11 (1990) para 1757 attempts to update matters by referring to the right as the 'hotelkeeper's lien'. This terminology was also used by the Sheriff-Substitute in *Ferguson v Peterkin* 1953 SLT (Sh Ct) 91. In the most recent case on lien, the term 'innkeeper's lien' returns: see *Air and General Finance v RYB Marine Ltd* 2007 GWD 35-589, [2007] CSOH 177 at para 8 *per* Lord Malcolm.

[208] See also Scottish Executive Central Research Unit, *Business Finance and Security over Moveable Property* (2002) 111.

[209] Bankton I.xvii.10 ('Observations on the Law of England').

[210] Bankton I.xvi.10 ('Observations on the Law of England').

[211] Bankton I.xvi.10 ('Observations on the Law of England').

[212] The caveats are: (1) the right seems as much for the security and protection of the innkeeper as for travellers; and (2) it is now clear that an innkeeper may not detain his guest for any reason: *Sunbolf v Alford* (1838) 3 M & W 248, 150 ER 1135. See below, para 16-80. For modern accounts of the law, see Paton, *Bailment in the Common Law* 217–224; Palmer and Mason, 'Lien' para 739; Bell, *Personal Property* 140.

of the person who brought it to the hotel is discharged.[213] This feature marks the lien out from others recognised by English law. It arises from the fact that the lien is seen as a counterpart to the public duties of the innkeeper, rather than something arising out of the agreement between innkeeper and guest.[214] To put it another way, the right to retain is viewed as resting upon custom rather than, as is usual with liens, contract.

16-60. What becomes interesting now is Bankton's discussion of Scots law. He does not mention a right to retain in favour of an innkeeper when treating retention.[215] Moreover, he does not recognise any such right in his detailed discourse upon the reception of the edict *nautae, caupones, stabularii* into Scots law.[216] The conclusion would seem that Scots common law does not give a right of retention to an innkeeper as a counterpart to the obligation to look after the property of guests. The Roman edict was received differently into the laws of Scotland and England.[217]

16-61. As has been previously shown, English law as it developed conferred liens upon distinct professions.[218] The original individuals to be granted the right were those holding a position which entailed certain duties. Thus, the right was granted to innkeepers who were bound to receive guests and look after their property and to common carriers who were bound to carry goods.[219] In Scots law, lien developed differently, out of the all-embracing defence mechanism of retention recognised by the civil law. Therefore, the Scottish innkeeper never had a lien based upon public duties. Any lien held, it being admitted that there appears to be no pre-1800 authority, could only arise out of the contract made with the guest.

(b) The role of Bell

16-62. The first Scottish authority to make reference to the lien of an innkeeper is the third edition of Bell's *Commentaries*, published in 1819.[220] The previous editions are silent upon the matter. Bell treats the lien as an example of one of the special liens recognised by Scots law.[221] Bar the final sentence,

[213] Bankton cites Bacon's *Abridgement* as his authority. See now, Paton, *Bailment in the Common Law* 219–221 and *Robins & Co v Gray* [1885] 2 QB 501.

[214] See Holdsworth, *History of English Law* vol 7, 511–512; Bell, *Personal Property* 138–140.

[215] Bankton I.xvii.8.

[216] Bankton I.xvi.15–18. On the reception of the edict, see now R Zimmermann and P Simpson, 'Strict Liability' in Reid and Zimmermann, *History* vol 2, 548 at 570–572.

[217] The point being strongly illustrated by the fact that livery-stable keepers have strict liability derived from the edict in Scots law, but not English law: see *Mustard v Paterson* 1923 SC 142 and below, para 16-95. For a recent Scottish case discussing the edict, see *Drake v Dow* 2006 GWD 21-461 commented on in P du Plessis, 'Innkeeper's Liability for Loss Suffered by Guests: *Drake v Dow*' (2007) 11 *Edin LR* 89.

[218] See above, paras 10-27–10-33.

[219] See above, paras 10-27–10-33.

[220] The first case to deal with the matter was still thirty years in the future: *M'Kichen v Muir* (1849) J Shaw 223.

[221] Bell, *Commentaries* (3rd edn, 1819) II, 147.

his account is an undiluted statement of English law, backed up by English authority.[222] Indeed it begins with the words 'In England … '.[223] What follows in summary is a passage stating that an innkeeper has a lien upon his guest's luggage for his bill and upon his horse for its stabling and keep. Bell notes that if a horse which turns out to be stolen is brought to the inn, the innkeeper's lien operates nonetheless.[224] He states that in England the keeper of a livery stable has no lien, because he has no public duty to receive horses. Finally, he offers his opinion on how Scots law would operate here:

> 'In Scotland, it would seem that lien would be given on the broad principle that it is the resulting security for the *actio contraria* in all cases.'[225]

16-63. The whole passage is repeated very similarly in the fourth and subsequent editions of the *Commentaries*.[226] However, in these later works it is prefixed with a statement outlining the public duties of an innkeeper to receive travellers and be responsible for the safety of their luggage. This too is backed up by English authority.[227] The way in which Bell has positioned this additional passage makes it clear that he sees the lien arising as a counterpart to the innkeeper's public duties. This much has been recognised judicially.[228]

16-64. The relevant passage in Bell's *Principles* treats the lien purely and simply in terms of English rules, justified by English cases.[229] Further, the editor of the later editions, Sheriff Guthrie, remains true to Bell's treatment, by adding further English principles set out in later English cases.[230]

(c) Later authorities

16-65. The authorities subsequent to Bell generally view the hotelier's lien from the standpoint of English principle. Gloag and Irvine writing in 1897 state:

> '[The lien] is held to be allowed as a counterpart of the obligation of the innkeeper to receive the guest and his luggage, and of his liability should that luggage be stolen.'[231]

[222] The authorities cited are Whitaker, *Lien* 117; *Jones v Pearle* (1723) 1 Stra 556, 93 ER 689 and *Hunter v Barkley* (1792) 2 Espinasse NP 283

[223] Bell, *Commentaries* (3rd edn, 1819) II, 147.

[224] The rule is a general one, applying not just to horses: *Robins & Co v Gray* [1895] 2 QB 501.

[225] Bell, *Commentaries* (3rd edn, 1819) II, 147.

[226] Bell, *Commentaries* (4th edn, 1821) II, 109–110; (5th edn, 1826) II, 103–104 and in the 7th edn (1870) at II, 99–100. One point of difference is that in the 3rd and 4th editions it is stated that there is a right to detain the guest himself. This does not appear in later editions. See below, para 16-80.

[227] *Thompson v Lacy* (1820) 3 B & Ald 283, 106 ER 667.

[228] *Skirving v Skirving* (1869) 1 Guth Sh Cas 508 at 509 *per* Sheriff Shand (later Lord Shand).

[229] Bell, *Principles* § 1428.

[230] Bell, *Principles* § 1428. For example, Guthrie cites *Mulliner v Florence* (1878) 3 QBD 484 to justify the proposition that in one sense the lien is general because it extends 'over all the guest's property'.

[231] Gloag and Irvine, *Rights in Security* 397.

Their authority is the important English case of 1895, *Robins v Gray*,[232] in which the Court of Appeal extensively examined the basis of the lien in England. Writing some years later, Gloag makes the same point in another way, by stating that the lien is an 'exceptional' one, resting 'rather on custom of trade than on any implied contract'.[233] A more modern writer, Sim, reverts to the older formulation, by stating that the lien is the 'counter-balance' to the obligation of the hotelier to receive guests and their luggage.[234]

16-66. Similar expressions have been made in the case law.[235] Lord President Emslie, in the only Court of Session case which saw an examination of the basis of the lien, noted that the views expressed in Bell's *Principles*, as edited by Guthrie, and Gloag and Irvine had not been challenged since their publication 'upwards of 80 years' ago.[236] He stated:

> 'Now the lien which the law of Scotland allows to an innkeeper is intended to be the counterpart of the obligations and strict liability of his calling.'[237]

16-67. What is the 'strict liability' to which Lord Emslie is referring? As discussed in an earlier part of his judgment, it is the liability which originated in the Roman edict *nautae, caupones, stabularii*. Lord Emslie refers to Bankton, Erskine and the Scottish cases which discuss the reception of that edict into Scots law.[238] He then says this of the innkeeper/hotelier:

> 'His liability is of the strictest. It may only be avoided if loss or damage is attributable to an act of God, or the king's enemies, or the negligence of the guest himself. This is trite law. All that I have said so far finds echo in the law of England and I need do no more than to refer to the case of *Robins v Gray*.'[239]

(3) The basis of the lien explored

16-68. Given the authorities examined it can be seen that the accepted view of Scots law is that the hotelier's lien is the counterpart of the duty to receive guests and the strict liability in respect of their goods derived from Roman law. It follows that the lien cannot be regarded as based upon the contract between hotelier and guest. This conclusion, perhaps unsurprisingly, causes Professor McBryde some problems. He sees no reason why the hotelier should

[232] [1895] 2 QB 591.

[233] Gloag, 'Lien' para 481.

[234] Sim, 'Rights in Security' para 481.

[235] *Skirving v Skirving* (1869) 1 Guth Sh Cas 508; *Macbeth v Hutton* (1892) 8 Sh Ct Rep 25; *Lorrain v Fulton* (1903) 19 Sh Ct Rep 283; *Gilhooly v Gilrain* (1911) 27 Sh Ct Rep 164.

[236] *Bermans and Nathans Ltd v Weibye* 1983 SC 67 at 72. The statement is similar to that of Sheriff Henderson in *Lorrain v Fulton* at 285 who noted that 'Professor Bell's view … has never been called in question'. Lord Emslie cites the statement of Lord Ormidale in *Rothfield v North British Railway Co* 1920 2 SLT 269 at 282 in his support: 'There is little, if any difference, between the views taken in the Courts of [Scotland and England] as to the rights and obligations of the keeper of an inn.'

[237] *Bermans and Nathans Ltd v Weibye* 1983 SC 67 at 71.

[238] Bankton I.xvi.1–2; Erskine III.i.28; *Mustard v Paterson* 1923 SLT 21; *Rothfield v North British Railway Co* 1920 2 SLT 269.

[239] *Bermans and Nathans Ltd v Weibye* 1983 SLT 299 at 302.

not have a lien arising out of the mutuality principle of the law of contract.[240] In other words, because there is an agreement between hotelier and guest, the hotelier may have a lien over the guest's property if the guest's obligation under that agreement to pay his or her bill is not fulfilled. For reasons which will be set out, it is felt that Professor McBryde's view is justified.

16-69. The hotelier's lien recognised by modern Scots law is based upon English authority. Much of the responsibility for this state of affairs lies with Bell. At the time when he wrote there was no previous Scottish authority on the subject.[241] Instead of trying to develop the law in terms of the general principles of retention recognised by the civil law, he, as was seen above, dealt with the matter more or less entirely by adopting English rules.[242] All later Scottish authorities except Professor McBryde have accepted Bell's treatment, seeing Scots and English law as the same here.[243]

16-70. This approach is surely misguided, for as the examination of Bankton showed the laws in the two countries, before Scots law was influenced by Bell, were distinct.[244] The edict *nautae, caupones, stabularii*, contrary to Lord Emslie's expressed view, was received differently north and south of the border. The liability imposed was similar. In England, however, the innkeeper as early as the fifteenth century, in return for bearing that liability as well as the duty to receive guests, was given a lien over their luggage.[245] The same thing did not happen in Scotland. If it had, Bankton would have surely mentioned it. As for why this was the case, the answer seems as follows. In civilian Scotland, retention exists as a generally available defence.[246] It is as open to innkeepers as much as to any other party holding another's property where that other is in debt to him or her. In England, no such general doctrine was or is recognised.[247] The law merely conferred specific liens in specific situations. This was one such situation, where the law felt it had to compensate innkeepers for the onerous obligations it had imposed upon them. The law of Scotland here was clear, that is until Bell published the third edition of his *Commentaries* and the rest, as may be said, is history.

16-71. This all leads to a difficult situation. There is the choice of either leaving the law in its post-Bell anglicised state or reverting to its civilian roots. The latter choice means recognising the hotelier's lien as arising out of the contracts with guests, an option which coheres with the approach of Professor McBryde. It is proposed to examine the operation of the hotelier's lien in depth, before drawing any conclusion.

[240] McBryde, *Contract* paras 20-86–20-87.

[241] Which probably explains why he waited until the 3rd edition of his *Commentaries* before examining the subject.

[242] See above, paras 16-62–16-64.

[243] See above, paras 16-65–16-67.

[244] See above, paras 16-58–16-61.

[245] See above, paras 16-58–16-61

[246] Stair I.xviii.7; Bankton I.xxiv.34; Erskine III.iv.20.

[247] Holdsworth, *History of English Law* vol 7, 511–512; Bell, *Personal Property* 138–141; A H Silvertown, *Law of Lien* (1988).

(4) Special lien or general lien

16-72. There has existed some confusion over the years as regards the matter of how the hotelier's lien should be viewed. Gloag and Irvine opine that it 'presents special features which make it difficult to classify it as a special or as a general lien'.[248] This is not very helpful, as the special features are not described. Sim echoes the statement.[249] He adds that the hotelier's right is 'more akin'[250] to a special lien. However, the reader is left perplexed because he treats the hotelier's lien in his section on general liens.[251] Gloag and Henderson perform a somewhat similar feat, treating the lien in their section on general liens, but stating that it is a special lien.[252] Graham Stewart and Professor Walker, on the other hand, are quite clear that the lien is a special one.[253] Other writers are equally clear that it is a general one.[254]

16-73. The view taken here is that the lien is special. It secures the debt which arises out of the contract between hotelier and guest whereby the latter is given accommodation for a price. Certainly the debt may be composed of a large number of individual charges, for example the bill for the mini-bar; the cost of wireless internet facilities; the price of the daily newspaper delivered; and so forth. However, all these charges are leviable in terms of the original contract. If the lien was general a guest arriving at the hotel in 2007 could have his or her luggage detained for the debt outstanding from a visit in 2004. Nowhere is such a proposition suggested. Rather, it is universally rejected.[255]

16-74. The view that the hotelier's lien is nothing other than special is supported by the case of *Ferguson v Peterkin*.[256] There, a wardrobe door in the bedroom of two guests had fallen off, breaking the mirror on it. The hoteliers refused to accept payment of the guests' bill for board, without payment for the door. They detained the guests' luggage for 48 days in security of the bill. The matter came to court, where the Sheriff-Substitute held that the hotelier's lien is a special lien, merely securing payment for board and entertainment.[257] Consequently, it cannot secure a claim for damages in respect of a broken door.[258]

[248] Gloag and Irvine, *Rights in Security* 397.

[249] Sim, 'Rights in Security' para 90. As does Logan, *Practical Debt Recovery* 249.

[250] Sim, 'Rights in Security' para 90.

[251] Sim, 'Rights in Security' paras 78–100.

[252] Gloag and Henderson, *The Law of Scotland* para 37.24 n 285.

[253] J Graham Stewart, *Law of Diligence* (1897) 173; D M Walker, *Civil Remedies* (1974) 68 and Walker, *Principles of Scottish Private Law* vol III, 401.

[254] Eg, Guthrie, *Scottish Property Law* paras 8.22–8.23; S C Styles, 'Rights in Security' in A D M Forte (ed), *Scottish Commercial Law* (1987) 179 at 187 and F Davidson and L J Macgregor, *Commercial Law in Scotland* (2003) para 6.9. See also *Air and General Finance v RYB Marine Ltd* 2007 GWD 35-589, [2007] CSOH 177 at para 8 *per* Lord Malcolm.

[255] Sheriff Guthrie in Bell, *Principles* (8th and subsequent edns) § 1428; Gloag and Irvine, *Rights in Security* 399; Sim, 'Rights in Security' para 92; *Harp v Minto* (1870) 1 Guth Sh Cas 508; the English case of *Jones v Thurloe* (1723) 8 Mod Rep 172, 88 ER 126.

[256] 1953 SLT (Sh Ct) 91.

[257] He relied on Bell, *Principles* §§ 1411, 1419 and 1428 and Graham Stewart, *Law of Diligence* 173.

[258] The hoteliers were held liable in damages for wrongful detention. See below, para 16-97.

16-75. The writer who is probably responsible for today's confusion is Sheriff Guthrie, the editor of the later editions of Bell's *Principles*. In a passage which first appeared in the eighth edition in 1885, he accepts that the lien is not general because it does not revive on a guest returning to the hotel at a later date.[259] Nevertheless, he adds that 'in another sense' the lien is general because it extends to all the guest's property brought to the hotel, as well as to his horses and carriages, for the guest's own expenses. The idea seems to be that there are two contracts – one for accommodating the guest and one for accommodating his horse and carriage – and further that the latter property may be detained till the debt due under the former contract is satisfied.

16-76. Sheriff Guthrie's idea comes from the English case of *Mulliner v Florence*,[260] where an innkeeper claimed a lien on horses brought to his inn. The guest claimed that the lien did not cover the cost of his own board, but only that of the horses. The court had none of it, holding that the lien was general applying to all the guest's property for his entire debt owed to the innkeeper. However, to try and isolate two separate contracts between hotelier and guest is to defy economic reality. The hotelier receives the guest's luggage and means of transport in terms of a single agreement for the guest to be provided with accommodation. To describe the lien as general is to use the term 'general lien' in a distinct and not the usual sense. Indeed, it might be said that it is using the term in a special and not its general sense.

16-77. Today, it is not possible to entertain the notion that the lien is general even in the sense the court in *Mulliner v Florence* viewed it to be. For, in terms of the Hotel Proprietors Act 1956, the lien does not attach to 'any vehicle or any property left therein, or any horse or other live animal or its harness or other equipment'.[261] Thus the guest's means of transport cannot be detained. The lien applies only to the rest of the guest's inanimate property. It is undoubtedly a special lien, a view shared by none other than Bell himself.[262]

(5) Property covered

(a) General

16-78. The lien, subject to a statutory exception, attaches to all goods brought by the guest into the hotel.[263] That exception, which was set out in the previous paragraph, is in respect of any vehicle brought by the guest, any property left in it, or any horse or other live animal or its harness or other

[259] Bell, *Principles* § 1428.

[260] (1875) 3 QBD 484.

[261] Hotel Proprietors Act 1956 s 2(2).

[262] In both his *Commentaries* II, 99–100 and his *Principles* § 1428, he treats the right as a straightforward case of special lien.

[263] Bell, *Principles* § 1428; Gloag and Irvine, *Rights in Security* 397–398; Downes, 'Hotels and Leisure' para 1757; Gloag and Henderson, *The Law of Scotland* para 37.24.

equipment.[264] Thus bicycles are no longer subject to the lien.[265] In Quebec, the guest's personal documents and effects of no market value may not be detained.[266]

16-79. The vehicle exception aside, the lien extends over the guest's luggage no matter what sort of property it is. The cases contain a number of examples: a box of clothes and a pipe;[267] a piano;[268] the professional instruments and materials of a dentist;[269] a portmanteau;[270] and a gun.[271]

16-80. The hotelier may not detain the actual guest or the clothing he or she is wearing.[272] This would amount to private imprisonment. An attempt to widen the rule was made in the case of *M'Kichen v Muir*.[273] There the Muir family had booked into an inn in order to attend a local ball. On returning from the event Mr Muir disagreed with the innkeeper over the bill. The latter consequently detained the family's ordinary clothes. This meant that the family had to walk eight or nine miles home on a rainy night, with the ladies wearing only 'thin shoes and light muslin dresses, and without bonnets'.[274] In a subsequent petition, Mr Muir argued that as the journey was the family's only alternative to being 'detained' at the inn, the right claimed by the innkeeper was 'equivalent to a power of incarceration'.[275] The Circuit Court of Justiciary rejected the submission. Thus it would seem that the general rule will be construed narrowly.

16-81. Gloag and Irvine discuss the matter of whether the lien attaches to the property of an individual who comes into the hotel only for refreshment

[264] Hotel Proprietors Act 1956 s 2(2).

[265] Compare *Kingston and Co v Blair* (1896) 12 Sh Ct Rep 20.

[266] Art 2302 *Quebec Civil Code*.

[267] *Gilhooly v Gilrain* (1911) 27 Sh Ct Rep 164 (lodging house case).

[268] *Macbeth v Hutton* (1892) 8 Sh Ct Rep 25 (lodging house case).

[269] *Skirving v Skirving* (1869) 1 Guth Sh Cas 508 (lodging house case).

[270] *Gray v Hart* (1885) 1 Sh Ct Rep 269 (lodging house case).

[271] *Garden v Shaw* (1874) 1 Guth Sh Cas 505.

[272] Gloag and Irvine, *Rights in Security* 397; Sim, 'Rights in Security' para 91; Gloag and Henderson, *The Law of Scotland* para 37.24. These works cite the English case of *Sunbolf v Alford* (1838) 3 M & W 248, 150 ER 1135. There existed previous authority in England for the proposition that the guest could be detained: *Newton v Trigg* (1691) 1 Show KB 268, 89 ER 566 (see also Bankton I.xvi.10 'Observations on the Law of England'). However, this authority was dismissed in *Sunbolf* where it was also held that allowing the lien to attach to the clothes a guest was wearing would mean permitting the innkeeper to assault him in order to get them. Baron Parke was particularly concerned that this meant that an innkeeper could strip his female guests naked if they did not pay their bills. See generally, Paton, *Bailment in the Common Law* 221–222 and also the American Law Institute, *Restatement of the Law of Security* (1941) s 63(1).

In Scotland, Bell stated in the 3rd edition (1819) of his *Commentaries* at II, 147 that there existed the right to detain the guest. In the 4th edition (1821) at II, 109–110, he says the same thing but notes that this is 'an awkward remedy'. These statements do not appear in the 5th edition (1826) or either of the subsequent editions.

[273] (1849) J Shaw 223. See McBryde, *Contract* para 20-87.

[274] (1849) J Shaw 223 at 224.

[275] At 224.

and not to stay.[276] On the basis that the hotelier is equally responsible for the safety of their property as for that of a boarder, they conclude that it is 'probable' the lien will apply.

(b) Property belonging to a third party

16-82. The hotelier's lien is said to cover luggage which does not actually belong to the guest.[277] In this way it differs sharply from other liens which are only effective in terms of property owned by the debtor.[278] The reasoning behind this was set out by Lord Emslie:

> 'In the case of an innkeeper … a lien which cannot be exercised over any of a traveller's possessions which are not his own property can scarcely be described as a counterpart of the special obligations and liability which the law requires the innkeeper to accept. … In the very nature of things travellers have been arriving at inns for centuries with many articles in their baggage which are not their own …. and the absence of any reported case on the question we are considering now simply suggests to my mind that no one in Scotland until now has thought it worthwhile to contend that the scope of the innkeeeper's lien does not extend to all of the relevant possessions of the defaulting guest but only to those in which he has right of property.'[279]

16-83. Thus the reason why the lien attaches to the property of third parties is because it is viewed as the counterpart of the hotelier's obligation to receive guests and ensure the safety of their luggage. In other words, this unique feature of the lien comes directly from its conceptual foundation in English law, and in terms of Bell and the orthodoxy he engendered, Scots law also.[280] It is unlikely, however, that this rule is compatible with the property protection clause in the European Convention on Human Rights.[281]

16-84. As regards the hotelier's state of mind, in the Irish Republic the lien only extends to property which the guest does not own if the hotelier 'was unaware' of the true position when he or she received the property into the hotel.[282] The law is to the same effect in some civilian jurisdictions, including France[283] and Italy.[284] The explanation for this would seem to have more to

[276] Gloag and Irvine, *Rights in Security* 399.

[277] Bell, *Commentaries* II, 99; Bell, *Principles* § 1428; Gloag and Irvine, *Rights in Security* 398; Walker, *Civil Remedies* 68; Sim, 'Rights in Security' para 91; Downes, 'Hotels and Leisure' para 1757; Gloag and Henderson, *The Law of Scotland* para 37.24; *Bermans and Nathans Ltd v Weibye* 1983 SC 67.

[278] Gloag and Irvine, *Rights in Security* 349; *Mitchell v Heys & Sons* (1894) 21 R 600; *Lamonby v Arthur G Foulds Ltd* 1928 SC 89. See above, para 13-25.

[279] *Bermans and Nathans Ltd v Weibye* 1983 SC 67 at 72.

[280] See above, paras 16-62–16-67.

[281] European Convention on Human Rights, Article 1 Protocol 1. For a similar argument as regards the landlord's hypothec, see A J M Steven, 'Goodbye to the Landlord's Hypothec?' 2002 *SLT (News)* 177 and 'Goodbye to Sequestration for Rent' 2006 *SLT (News)* 17. See now the Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4).

[282] Hotel Proprietors Act 1963 s 8(2). See too the American Law Institute, *Restatement of the Law of Security* s 63(2).

[283] M F Planiol, *Civil Law Treatise*, vol 2 (1959) s 2521. Note too art 3234 *Louisiana Civil Code.*

[284] Art 2760 *Codice civile.*

do with these systems looking upon good faith more favourably than our own, rather than a piece of law unique to the hotelier's lien. In contrast, under the law of England and probably Scotland, such knowledge is irrelevant.[285]

16-85. The lien only attaches to the guest's personal luggage. It does not cover goods sent by a third party for use during a stay.[286] Thus where theatrical costumes were sent to a hotel for the use of a film crew who were staying there, these were found not to be subject to the hotelier's lien.[287] In an English case, the same was found in respect of a piano hired by the guest whilst he was at an inn.[288]

(6) Lien or hypothec

16-86. As is well known, liens are founded on possession, or at least on custody.[289] If, however, the authorities are examined closely as to whether this is true of the hotelier's lien, a rather surprising result is found. Bell's *Principles*, as edited by Guthrie, state that the lien 'extends over the goods, horses, and carriages of travellers brought to the inn'.[290] Gloag and Irvine similarly write that the lien 'extends over everything which is brought to the inn by the guest'.[291] These statements are echoed in other authorities.[292] Unsurprisingly, this is how the lien is stated to operate in England.[293] Similarly, the Irish Republic's hotelier's lien is provided by statute to extend to property 'brought to the hotel by or on behalf of any guest'.[294]

16-87. All seem agreed that the lien attaches to luggage which the guest brings to the hotel. However, bringing something to a hotel is not the same as putting it into the possession of the hotelier. This seems to have been recognised by Lord Justice-Clerk Alness, who said of the possession of a farmer of potatoes in his field:

[285] *Robins & Co v Gray* [1895] 2 QB 501; Gloag and Irvine, *Rights in Security* 398; Gloag and Henderson, *The Law of Scotland* para 37.24, citing *Bermans and Nathans Ltd v Weibye* 1983 SC 67. However, Sheriff Guthrie in Bell, *Principles* § 1428, which is approved by Walker, *Civil Remedies* 68, takes the view that knowledge does matter.

[286] Sheriff Guthrie in Bell, *Principles* § 1428; Gloag and Irvine, *Rights in Security* 398; Sim, 'Rights in Security, para 91.

[287] *Bermans and Nathans Ltd v Weibye* 1983 SC 67.

[288] *Broadwood v Granara* (1854) 10 Exch 417, 156 ER 499.

[289] Bell, *Commentaries* II, 86–91; Gloag and Irvine, *Rights in Security* 340–349. See above, paras 13-01–13-26.

[290] Bell, *Principles* § 1428.

[291] Gloag and Irvine, *Rights in Security* 397.

[292] Walker, *Civil Remedies* 68; Sim, 'Rights in Security' para 91; Downes, 'Hotels and Leisure' para 1757; Walker, *Principles of Scottish Private Law* vol III, 401; *Smith v Chisholm* (1893) 9 Sh Ct Rep 44 at 46 per Sheriff Birnie; *Bermans and Nathans Ltd v Weibye* 1983 SLT 299 at 302 *per* Lord President Emslie.

[293] Paton, *Bailment in the Common Law* 218; Bell, *Personal Property* 140; *Robins & Co v Gray* [1895] 2 QB 501.

[294] Hotel Proprietors Act 1963 s 8(1).

'It [is] certainly superior in quality to the right of possession which an hotelkeeper has over the luggage of a guest in order to secure payment of the guest's bill.'[295]

16-88. Certainly, if the guest arrives at the hotel with her expensive jewels and has them placed in its safe for security reasons, there seems no doubt that the hotel has custody. A subsequent lien over the jewels can be seen to be based on that custody. On the other hand, if as more usually happens, the guest takes her luggage to her room then she cannot be said to be relinquishing custody to the hotelier. The security the hotelier has here in respect of the luggage because it has been brought to his hotel must be one of hypothec.[296] There would seem clear parallels with the hypothec of the landlord.[297] With a lease the tenant has possession of a certain property for a certain period. If the tenant does not pay the rent the landlord can enforce this security. Similarly with a hotel stay, if the guest does not discharge his or her bill the hotelier may seize his or her luggage and detain it until payment is made.

16-89. Reference may be made also to both our case law and German law. Throughout the Scottish decisions, there are references to the 'lien' attaching to the 'possessions' of the traveller.[298] For example, in *Garden v Shaw*, Sheriff Comrie Thomson stated that the right 'extends over such effects as the [guest] may have in his possession'.[299]

16-90. As regards German law, there is a well understood division between two types of security implied by law (*gesetzliche Pfandrechten*) in respect of corporeal moveables.[300] In the first place, there are securities based on possession (*auf Grund von Besitz*). In this group are included securities in favour of carriers, storekeepers and workmen, which correspond to our liens.[301] In the second place, there are securities based on the property in question being brought into the immoveable property of the creditor (*auf Grund von Einbringung*). In this group come the securities of the landlord and,

[295] *Paton's Trs v Finlayson* 1923 SC 872 at 877.

[296] On hypothec in Scots law, see Bell, *Commentaries* II, 25–40; Bell, *Principles* §§ 1385–1409; Gloag and Irvine, *Rights in Security* ch 12; Sim, 'Rights in Security' paras 101–107; A McAllister, *Scottish Law of Leases* (3rd edn, 2002) paras 5.39–5.79.

[297] On which, see Bell, *Commentaries* II, 27–34; Bell, *Principles* § 1234ff; Gloag and Irvine, *Rights in Security* 416–436. See now the Bankruptcy and Diligence etc (Scotland) Act 2007 s 208.

[298] Eg, *Gray v Hart* (1885) 1 Sh Ct Rep 269 (Sheriff Dove Wilson in a case involving a lodging-house keeper's lien refers to the relevant property as that 'which a lodger usually possesses'); *Kingston and Co v Blair* (1896) 12 Sh Ct Rep 20 (headnote refers to 'bicycle in possession of one of several guests'); *Bermans and Nathans Ltd v Weibye* 1983 SC 67 (Lord President Emslie refers to 'a traveller's possessions' at 72). In contrast in *Skirving v Skirving* (1869) 1 Guth Sh Cas 508 at 509, Sheriff Shand viewed the lodging-house keeper as having possession of his lodger's property.

[299] *Garden v Shaw* (1874) 1 Guth Sh Cas 505 at 507.

[300] See K H Schwab and H Prütting, *Sachenrecht: Ein Studienbuch* (24th edn, 1993) 334; F Baur, *Sachenrecht* (17th edn, by J F Baur and R Stürmer, 1999) 689.

[301] Schwab and Prütting, *Sachenrecht* at 334; Baur, *Sachenrecht* at 689. See § 440 *HGB* (*das Pfandrecht des Frachtführers*); § 421 *HGB* (*das Pfandrecht des Lagerhalters*); and § 647 *BGB* (*das Pfandrecht des Unternehmers beim Werkvertrag*).

importantly for our purpose, the hotelier (*der Gastwirt*).[302] Consequently, the security in favour of the hotelier in German law (*das Pfandrecht des Gastwirts*) in respect of guests' property is viewed as non-possessory (*besitzlos*).

16-91. In terms of English law, Professor Bridge has accepted that the hotelier does not have possession, 'but rather the right to impede the party in possession [the guest] from exercising in full the rights that normally accompany possession.'[303] In other words he or she can detain the luggage when the guest does not pay the bill. As he says, the 'personal baggage of a guest in a hotel bedroom can hardly be said to be possessed by the hotel'.[304] English law of course does not recognise the hypothec.[305]

16-92. The conclusion may be drawn that the security the Scottish hotelier has over guests' luggage is not one which is dependent on custody or possession. It is in fact misleading to refer to it as a lien, unless and until the hotelier actually takes hold of the property. What has almost universally been called the 'innkeeper's lien' now should be called the 'hotelier's hypothec'.

(7) Lodging houses

16-93. The question of whether a lodging-house keeper has a lien over a lodger's property in respect of his board was one which the Sheriff Courts were asked to answer on a number of occasions around the turn of the twentieth century.[306] The general approach taken was to look at the duties of lodging-house keepers.[307] On the basis of two old cases and Erskine's *Institute* they recognised that those who take in lodgers are responsible for the safety of their luggage and that this liability stems from the Roman edict *nautae*, *caupones*, *stabularii*.[308] Therefore, because like hoteliers they have this liability, then like hoteliers they are entitled to a lien as a counterpart to that liability. Gloag and Irvine are in agreement with such a conclusion.[309] A

[302] § 704, *BGB*.

[303] M G Bridge, *Personal Property Law* (3rd edn, 2002) 171.

[304] Bridge, *Personal Property Law* at 171, citing Fletcher Moulton LJ in *Lord's Tr v Great Eastern Railway Co* [1908] 2 KB 54.

[305] W W Buckland and A D McNair, *Roman Law and Common Law* (1965) 242.

[306] *Skirving v Skirving* (1869) 1 Guth Sh Cas 508; *Harp v Minto* (1870) 1 Guth Sh Cas 508; *Gray v Hart* (1885) 1 Sh Ct Rep 269; *Macbeth v Hutton* (1892) 8 Sh Ct Rep 25; *Lorrain v Fulton* (1903) 19 Sh Ct Rep 283; *Gilhooly v Gilrain* (1911) 27 Sh Ct Rep 164.

[307] See, eg, Sheriff (later Lord) Shand in *Skirving v Skirving* at 509 and Sheriff Henderson in *Lorrain v Fulton* at 284–285.

[308] *May v Wingate* (1694) Mor 9236; Erskine III.i.29; *Scott v Yates* (1800) Hume 207. But see also *Watling v M'Dowall* (1825) 4 S 83 (NE 86) where the court reserved its judgment on the matter. See also Downes, 'Hotels and Leisure' para 1742, which must be considered to be wrong. Further, note that Sheriff Guthrie Smith in *Harp v Minto* (1870) 1 Guth Sh Cas 508 followed the English case of *Holder v Soulby* (1860) 8 CBNS 254, 141 ER 1163 and held that lodging-house keepers were not liable under the edict. On the liability of lodging-house keepers in England, generally, see Palmer, *Bailment* 1512–1514.

[309] Gloag and Irvine, *Rights in Security* 399–400. See also Sim, 'Rights in Security' para 90.

recent Sheriff Court case, however, has held that there is not liability under the edict.[310]

16-94. Be that as it may, most of the authorities seem to miss that a lodging-house keeper will have a lien (or rather, in some cases, a hypothec) on the basis of the contract with the lodger. This much was, however, recognised in Aberdeen Sheriff Court by Sheriff Dove Wilson.[311] He noted that a lodging-house keeper was different from an innkeeper in respect that he had no public duty to receive people and that his responsibility in respect of luggage was perhaps stronger. Then he said:

> 'But neither of these points affect the present position. Liens are allowed in many cases where there is no special responsibility for the customer's goods, and where the person who allowed it can select his customers at pleasure.'[312]

The point is a good one. While it must be recognised that the lien can be based on contract, the problem comes in relation to goods which the lodger does not own. There has been no reported case on this matter. If the question was to arise, it must be conceded that the weight of authority equates the lodging-house keeper's lien with that of the hotelier, and on that basis the third party owner of the goods should have a fear of losing out.[313] In Louisiana, for example, the innkeeper's lien applies to any individuals 'who let lodgings or receive or take boarders'.[314]

(8) Entitlement of other parties to the lien

16-95. Bell wrote that in England a livery-stable keeper, in other words a hotelier who receives equine rather than human guests, has no lien.[315] The reason is that such an individual has no public duty to receive the horses.[316] The rule remains the same down south today.[317] As regards Scotland, Bell was of the opinion that such an individual would have a lien arising from the *actio contraria* in terms of the contract with the person who brought the

[310] *Drake v Dow* 2006 GWD 21-461 commented on in P du Plessis, 'Innkeeper's Liability for Loss Suffered by Guests: *Drake v Dow*' (2007) 11 *Edin LR* 89.

[311] *Gray v Hart* (1885) 1 Sh Ct Rep 269.

[312] At 270.

[313] But the probable incompatibility of this rule with Article 1 Protocol 1 of the European Convention on Human Rights could be used in the third party's defence. See above, para 16-84.

[314] The lien is technically a privilege, but is dependent on the property being still in the hotel: art 3233 *Louisiana Civil Code*.

[315] Bell, *Commentaries* II, 100; Bell, *Principles* § 1428.

[316] Further, livery-stable keepers in England do not have strict liability, the edict *nautae, caupones, stabularii*, being interpreted differently there than in Scotland. See *Searle v Laverick* (1874) LR 9 QB 123 at 126 *per* Blackburn J; *Mustard v Paterson* 1923 SC 142 at 148 *per* Lord Justice-Clerk Alness; at 150–151 *per* Lord Hunter and at 154 *per* Lord Anderson.

[317] Gloag and Irvine, *Rights in Security* 398; Paton, *Bailment in the Common Law* 217–218; *Jackson v Cummins* (1839) 5 M & W 342, 151 ER 145; *Orchard v Rackstraw* (1850) 9 CB 698, 137 ER 1066; *Smith v Dearlove* (1848) 6 CB 132, 136 ER 1202. The livery-stable keeper has been held not to improve the value of the animals and thus cannot claim the lien of a bailee for work done: see Paton at 217–218.

animals.[318] Lord Young expressed a similar opinion and Gloag and Irvine see no reason why the English rule would apply here.[319] This seems correct.

16-96. The hotelier has a lien because he or she is a hotelier. Consequently the lien may not be assigned to a third party. In *Garden v Shaw*,[320] an innkeeper retained a gun which was in the possession of one Mr Benson who had not paid his bill. Sometime later Mr Benson's agent met his debt and obtained the gun from the innkeeper. At this point Mr Garden appeared and went to court claiming the gun was his and that he had only lent it to Mr Benson. Mr Benson's agent argued that he could keep the item until Mr Garden paid him the amount he had paid the innkeeper. This amounted to saying that the innkeeper's lien had been assigned to him. The Sheriff correctly disagreed, holding that:

> 'It would be altogether intolerable were [Mr Garden] obliged to follow his property up and down the country through the hands of a series of persons, each claiming the rights of an assignee.'[321]

(9) Enforcement

16-97. As with all other liens, the hotelier's lien encourages the debtor, i.e. guest, to discharge the debt by the withholding of his or her property until that is done. It is the guest alone who is liable for the bill. Thus where a person had assisted a guest to remove the guest's property from a hotel, that person was held not liable for the account due by the guest for board and lodging.[322] Where, however, a party of guests book into a hotel, the property of any of them may be detained in respect of the bill of the party as a whole.[323] The hotelier will be liable in damages if he or she detains luggage when there is no right to do so.[324]

16-98. With regard to selling the property to meet the debt, the lien is subject to its own statutory rules. As could be guessed, these rules come from England. It was held in *Mulliner v Florence*[325] in 1875 that an English innkeeper had no right to sell articles subject to his lien. The rule was felt to be inconvenient and consequently the Innkeepers Act 1878 was passed.[326] It is widely accepted that the Act was never intended to apply to Scotland, where

[318] Bell, *Commentaries* II, 100.

[319] *Miller v Hutcheson & Dixon* (1881) 8 R 489 at 492; Gloag and Irvine, *Rights in Security* 398.

[320] (1874) 1 Guth Sh Cas 505.

[321] At 507.

[322] *Smith v Chisholm* (1893) 9 Sh Ct Rep 44.

[323] *Kingston and Co v Blair* (1896) 12 Sh Ct Rep 20. The basis of the decision was that the contract was formed between the party and the hotelier.

[324] *Ferguson v Peterkin* 1953 SLT (Sh Ct) 91 (detention of luggage for damage to wardrobe door outside scope of special lien).

[325] (1878) 3 QBD 484.

[326] See Gloag and Irvine, *Rights in Security* 399; Paton, *Bailment in the Common Law* 218; Palmer, *Bailment* 1499 and 1504–1505.

generally any lien-holder can apply to the court for a power to sell.[327] Nevertheless, all seem now agreed that it does so apply.[328]

16-99. In terms of the 1878 Act a hotelier has the right to sell by public auction any goods, chattels, horses, carriages, wares, or merchandise deposited with him or left in the hotel premises.[329] It is more than arguable that the Act no longer applies to horses and carriages in the light of later legislation, but other writers do not discuss the matter.[330] The right applies where the property has been deposited or left by a person who is or who becomes indebted to the hotelier for board or lodging or the expenses of looking after any horse or other animal brought to the hotel.[331] The hotelier may only exercise the right to sell in order to satisfy the debt for which a lien is held over the property.[332] Further, the property must have been left at the hotel for at least six weeks without the debt having been paid.[333] A minimum of one month before the sale, the hotelier must advertise it in a London newspaper and in a locally circulating newspaper, with a description of the goods and the name of the person who left them, if known.[334] After the sale, the hotelier must pay that person on demand, after deducting the amount of the debt due along with the sale expenses, any surplus arising from the sale.[335]

(10) Extinction

16-100. The lien is lost if the luggage of the guest is removed from the hotel. It does not revive if the guest subsequently returns.[336] There is an exception, however, where during a lengthy stay a guest (along with his or her property) is occasionally absent *animo revertendi*.[337] If the guest departs without paying

[327] Gloag and Irvine, *Rights in Security* 399; Sim, 'Rights in Security' para 93. This was because of the requirement to advertise any sale under the Act in a London newspaper: 1878 Act s 1, third proviso. For the general ability of a Scots lien-holder to apply to the court for the right to sell, see Bell, *Principles* § 1417.

[328] Gloag and Irvine, *Rights in Security* 399; Sim, 'Rights in Security' para 93; Walker, *Principles of Scottish Private Law* vol III, 401; Downes, 'Hotels and Leisure' paras 1758–1759; Gloag and Henderson, *The Law of Scotland* para 37.24; *Smith v Chisholm* (1893) 9 Sh Ct Rep 44.

[329] 1878 Act s 1.

[330] Hotel Proprietors Act 1956 s 2(2), which removes *inter alia* these things from the scope of the hotelier's lien.

[331] 1878 Act s 1.

[332] 1878 Act s 1, second proviso.

[333] 1878 Act s 1, first proviso.

[334] 1878 Act s 1, third proviso.

[335] 1878 Act s 1, first proviso.

[336] Sheriff Guthrie in Bell, *Principles* § 1428; Gloag and Irvine, *Rights in Security* 399; Sim, 'Rights in Security' para 92, citing *Jones v Thurloe* (1723) 8 Mod Rep 172, 88 ER 126; *Harp v Minto* (1870) 1 Guth Sh Cas 508.

[337] That is, with the intention of returning. See Guthrie, Gloag and Irvine, and Sim, all citing *Allen v Smith* (1862) 12 CBNS 638, 142 ER 1293. See also Walker, *Principles of Scottish Private Law* vol III, 401.

the bill, but leaves luggage at the hotel, it remains subject to the lien.[338] It has been held in England that the lien is not lost by the hotelier accepting a security for the bill, so if that security proves to be insufficient the lien may still be enforced.[339]

(11) Conclusions

16-101. It has been shown that the principles upon which the hotelier's lien rests in Scotland today are English principles, brought into our law by Bell.[340] The question which remains is whether the law should return to its civilian roots and recognise the lien as arising out of the contract between hotelier and guest.[341] With regard to the matter of property brought to the hotel which does not belong to the guest, the foundation of the lien is of importance. For it is only because the lien has been viewed as arising from the hotelier's public duties that it has been allowed to prevail in respect of such property.[342]

16-102. The argument that the public duties of the hotelier are onerous enough to justify special treatment is not convincing. Scots law at the time of Bankton seemed to take that view.[343] Moreover, the strict liability of the hotelier derived from the edict *nautae, caupones, stabularii* has had its stringency reduced by the Hotel Proprietors Act 1956.[344] Finally, the effect of Article 1 Protocol 1 of the European Convention on Human Rights is surely to stop the security covering third party goods. It may be concluded that there is little to support the perpetuation of the post-Bell orthodoxy and that the hotelier's lien should be treated like any other.

16-103. The other important issue identified was the fact that the lien in many cases is truly a hypothec.[345] The lien does live on with regard to items that the hotelier has custody of, such as that which is in the safe at reception.

[338] Sheriff Guthrie in Bell, *Principles* § 1428; Sim, 'Rights in Security' citing *Snead v Watkins* (1856) 1 CBNS 267, 140 ER 111.

[339] *Angus v McLachlan* (1883) 23 Ch Div 330. On the extinction of the lien in England, generally, see Palmer, *Bailment* 1502–1504.

[340] See above, paras 16-62–16-64.

[341] This approach may find some support in the judgment of Sheriff Dove Wilson in *Gray v Hart* (1885) 1 Sh Ct Rep 269 (see above, para 16-94) and in the views of Professor McBryde: see *Contract* para 20-87. See also *Ferguson v Peterkin* 1953 SLT (Sh Ct) 91, where Sheriff-Substitute Garrett on being asked to decide what sort of lien a hotelier has said: 'Whether it be based on implied obligation in a particular mutual contract and operates as a security for performance of the counterpart or depends on custom, it is a special lien'.

[342] *Bermans and Nathans Ltd v Weibye* 1983 SC 67. See above, para 16-82.

[343] See above, paras 16-58–16-61.

[344] Hotel Proprietors Act 1956 s 2. A point not missed by McBryde, *Contract* para 20-87. On the operation of the Act, see Downes, 'Hotels and Leisure' paras 1748–1751 and W J Stewart, *Delict* (3rd edn, 2004) para 4.7. See also Zimmermann and Simpson, 'Strict Liability' 582.

[345] See above, paras 16-86–16-92.

17 General Lien

A. GENERAL MATTERS

(1) Introduction

17-01. A general lien is the right of a first party to retain property from a second party until that party discharges a balance of debt owed for all work performed by the first party in the same capacity in which that first party holds the property.[1] For example, a solicitor has the right to retain his or her client's papers until paid for all the work carried out as solicitor, whether the work related to those papers or not.[2] General liens arise only in exceptional circumstances.[3] They have also a more restricted sphere of existence in that they are confined to contractual obligations.[4] Nonetheless, they are regarded as much real rights as special liens.[5]

(2) The meaning of 'general'

17-02. Like the term 'special lien', the term 'general lien' was first used in Scots law by Bell.[6] A general lien is said to be 'general' because rather than merely securing an amount due under one contract, it instead secures a general balance owed to the lien-holder by the client or customer.[7] To say that a general lien secures a general balance is not to say that it covers all sums due by the one party to the other. A right of retention based on *dominium* is good generally for all sums.[8] A general lien *only* covers sums arising out

[1] For alternative definitions, see Bell, *Commentaries* II, 87; Bell, *Principles* §§ 1411 and 1431; Gloag and Irvine, *Rights in Security* 340–341 and 353; W M Gloag, 'Lien' in *Encyclopaedia of the Laws of Scotland* vol 9, paras 476 and 482; Gloag and Henderson, *The Law of Scotland* para 37.16; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) paras 75 and 78.

[2] See below, paras 17-73–17-92; Bell, *Commentaries* II, 107; Bell, *Principles* §§ 1437–1438; Gloag and Irvine, *Rights in Security* 384; *Macrae v Leith* 1913 SC 901.

[3] Gloag and Irvine, *Rights in Security* 353; Shaw, *Security over Moveables* 58; Gloag, *Contract* 634; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 293; D M Walker, *Civil Remedies* (1974) 69; Sim, 'Rights in Security' para 75.

[4] Unlike special liens, they are not part of the general law of obligations. See above, paras 11-12–11-34 and below, paras 17-07–17-10.

[5] Bell, *Commentaries* II, 87; Gloag and Irvine, *Rights in Security* 8; *Scottish Central Railway Co v Ferguson* (1864) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346; *Marris v Whyte & Mackay* (1889) 5 Sh Ct Rep 163.

[6] See above, para 10-125.

[7] Bell, *Commentaries* II, 87; Bell, *Principles* § 1411; Gloag and Irvine, *Rights in Security* 340–341. In *Laurie & Co v Denny's Tr* (1853) 15 D 404 at 408, Lord Fullerton describes a general lien as a right 'to retain goods for a general balance, though deposited at first for a special purpose'.

[8] See above, para 14-16; Gloag and Irvine, *Rights in Security* 330–337; *Melrose v Hastie* (1850) 12 D 655; *Hamilton v Western Bank* (1856) 19 D 152; *Nelson v Gordon* (1874) 1 R 1093. But compare *Moor v Atwal* 1995 SCLR 1119.

of services performed by the lien-holder in the same capacity in which the property subject to the lien is held.[9] Thus a solicitor's lien secures the bill for the work carried out for the client as a law agent.[10] It does not cover cash advances made to the client: solicitors are not moneylenders.[11] Similarly the lien of the commercial agent or factor will not cover debts arising out of transactions which are not factorial.[12]

17-03. The rule is seen to operate clearly in the situation where an individual carries out services in two capacities. In *M'Call & Co v James Black & Co*[13] an agent acted both as a factor and a broker for a company. It was held that he could not assert a factor's lien over goods which he held in the capacity of broker. Similarly, in *Largue v Urquhart*[14] a law agent also acted as a factor. It was held that his law agent's lien did not cover expenses incurred during an action which he had undertaken in the capacity of factor and not law agent.

(3) Policy of the law

17-04. As has been stated, a general lien is an exceptional right which will only arise in limited circumstances.[15] It is surprising to note the number of writers who make this point, without explaining the policy reasons behind it.[16] This is particularly the case when Bell set out the matter clearly, contrasting special and general liens:

> 'While the special or particular lien is admitted, as the natural result of the mutual contract on which possession proceeds, and as circumscribed by that contract, so as to produce little danger of false credit; there is an obvious objection to the indiscriminate admission of general liens, either for the whole balance that happens at that time to stand in account between the parties, or for the balance due on a particular train of employment of which there is no obvious limit. This objection is

[9] Gloag and Irvine, *Rights in Security* 358; Gloag, 'Lien' para 486; Sim, 'Rights in Security' para 80. In *Garden Haig Scott & Wallace v Stevenson's Tr* 1962 SLT 78 at 85, Lord Carmont said: 'A solicitor's lien or right of retention is quite a different right from what [the solicitor in that case] had in virtue of his holding an *ex facie* absolute title.' Professor Walker in his *Civil Remedies* states at 69 that a general lien will cover 'all debts' before going on to show that this is not the case in the next two pages of his work.

[10] Bell, *Commentaries* II, 107; Gloag and Irvine, *Rights in Security* 384–389; *Menzies v Murdoch* (1841) 4 D 257; *Paul v Meikle* (1868) 7 M 235; *Liquidator of Grand Empire Theatres v Snodgrass* 1932 SC (HL) 73.

[11] *Christie v Ruxton* (1862) 24 D 1182; *Wylie's Exrx v M'Jannet* (1901) 4 F 195.

[12] *Brown v Smith* (1893) 1 SLT 158. Given authority such as this, it is perhaps misleading to classify a general lien as an unrestricted security. 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 144.

[13] (1824) 2 Sh App 188. See also the English case of *Houghton v Matthews* (1803) 3 Bos & Pul 485, 127 ER 263.

[14] (1883) 10 R 1229.

[15] See above, para 17-01.

[16] Gloag and Irvine, *Rights in Security* 353; Shaw, *Security over Moveables* 58; Gloag, *Contract* 634; Walker, *Civil Remedies* 69; Sim, 'Rights in Security' para 75. Note also the argument of the appellant in *Strong v Philips* (1878) 5 R 770 at 771 that 'The law was very jealous of general liens.'

somewhat analogous to that which has operated so strongly on the doctrine of hypothecs.'[17]

17-05. Bell was all too aware of what had happened in England at the turn of the nineteenth century. There the views of Lord Hardwicke and Lord Mansfield, who were much in favour of recognising general liens in as many situations as possible, were cast aside by dicta outlining the prejudicial effect of such liens upon other creditors in the event of the debtor's insolvency.[18] These dicta remain authoritative today.[19]

17-06. Not only do general liens have the potential to create unfairness for creditors. They may also prejudice singular successors. For example, if A sends goods to B via his carrier, it is rather unfair upon B if the carrier is allowed to retain the goods until all the debts owed by A to him in respect of carriage over the last five years are met.[20] Given the ability of general liens to adversely affect third parties by securing 'hidden' debt, Scots law like English law will admit general liens only in closely defined circumstances. In particular, whilst it is in theory possible to create such liens expressly, certain criteria must be met before a court will enforce such rights.[21]

(4) Basis of general liens

17-07. It has been seen that special liens have developed out of the *exceptio doli* and *exceptio non adimpleti contractus* of Roman law.[22] It is straightforward to discover examples of special lien in other civilian and mixed systems.[23] In contrast, it is a considerably harder task to find cases of general lien in these jurisdictions.[24] The reason for this is that general liens have English rather than civilian roots. Various pieces of evidence seem to point to this conclusion.

17-08. In the first place, the term 'general lien' was not recognised in Scotland before Bell's study of the subject.[25] In the second place, this study is heavily anglicised.[26] In the third place, the general lien which has attracted by far the most litigation – the solicitor's lien – may well have been borrowed

[17] Bell, *Commentaries* II, 101.

[18] Bell, *Commentaries* II, 101–102. See above, paras 10-58–10-60.

[19] N Palmer and A Mason, 'Lien' in *Halsbury's Laws of England* vol 28 (1997) para 716; Bell, *Personal Property* 142–143; I Davies, *Textbook on Commercial Law* (1992) 321.

[20] Consequently such a lien would not be enforced: *Scottish Central Railway Co v Ferguson* (1864) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

[21] See below, paras 17-18–17-26.

[22] See above, paras 10-17–10-21, 10-72–10-77 and 16-01–16-19.

[23] For example, France, Germany, Italy, Louisiana, Quebec and South Africa all recognise the hotelier's lien or equivalents: see above, para 16-56.

[24] For example, South Africa only seems to recognise a general lien in favour of factors. See G Pienaar and A J M Steven, 'Rights in Security' in Zimmermann, Reid and Visser, *Mixed Legal Systems* 758 at 780.

[25] See above, paras 10-125–10-126.

[26] See above, paras 10-125–10-126.

from south of the border.[27] In the fourth place, English authority is particularly persuasive in the context of general lien, for example in proving whether such a right has been established by usage.[28] In general, the law north and south of the border is very similar, contrasting with the position as regards special lien.[29] As Lord Young stated in *Miller v Hutcheson & Dixon*,[30] 'the law of general lien … does not differ in England and Scotland to any material degree'.

17-09. In Scots law, like English law, a general lien must be founded upon contract. This may be regarded as stating the obvious. That, however, is because the received wisdom has been that all liens arise in contractual situations. One of the major arguments of this book is that special lien is a doctrine of the law of obligations as a whole, equally capable of arising in unjustified enrichment and delict as in contract.[31] In contrast, contract is the sole domain of the general lien.

17-10. It would seem to be the case that a general lien can either be created by implied or express contract. As Bell stated: 'The foundation of general lien is agreement, either express or implied.'[32]

(5) General lien arising by implication

(a) Agency liens

17-11. The original general liens in Scots law are those of the commercial agent (factor) and the solicitor, both of which can be traced back as far as the seventeenth century.[33] Since then, auctioneers,[34] bankers[35] and brokers[36] have also been accepted as entitled to general liens, on the ground that they are types of factor. These five liens are probably the best-known cases of general lien.[37] Bell sees them[38] as liens which had 'gradually been established by legal construction of particular contracts or connections.'[39] Gloag and

[27] See *Kemp v Youngs* (1838) 16 S 500 at 503 *per* Lord Cuninghame and, above, para 10-85.

[28] See, eg, *Strong v Philips & Co* (1878) 5 R 770; *Mitchell v Heys and Sons* (1894) 21 R 600 and *Glendinning v Hope & Co* 1911 SC (HL) 73. See below, paras 17-13–17-14.

[29] See above, paras 16-10–16-12.

[30] (1881) 8 R 489 at 493.

[31] See above, paras 11-12–11-34.

[32] Bell, *Commentaries* II, 102.

[33] *Chalmers v Bassily* (1666) Mor 9137 and *Pearson v Murray* (1672) Mor 2625 (factor); *Cuthberts v Ross* (1697) 4 Br Sup 374. See below, paras 17-49 and 17-74.

[34] *Miller v Hutcheson & Dixon* (1881) 8 R 489. See below, para 17-54.

[35] *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12. See below, paras 17-28–17-31.

[36] Bell, *Commentaries* II, 115 (policy broker); *Glendinning v Hope & Co* 1911 SC (HL) 73 (stockbrokers). See below, paras 17-39–17-47.

[37] Sim, 'Rights in Security' para 78. Note too that the American Law Institute, *Restatement of the Law of Security* (1941) s 62, confers general liens on factors, attorneys at law and bankers.

[38] Excluding the auctioneer's lien, which was not admitted until *Miller v Hutcheson & Dixon* (1881) 8 R 489.

[39] Bell, *Commentaries* II, 106.

Irvine regard them as based upon usage and Sim regards their foundation as common law or usage.[40]

17-12. An alternative rationalisation is possible. All these individuals are agents. It has been held in the House of Lords that an agent is entitled to a general lien in respect of the property of the principal.[41] Moreover, it is the case that all the liens referred to here, with the exception of the solicitor's lien, have their basis in the lien of the factor.[42] Consequently, it may be accepted that it is an implied term of a contract between principal and agent that the agent is entitled to a general lien. In the words of Lord M'Laren:

> 'It is a general principle of our law that every agent has a lien or right of retention against his principal for the balance due to him'.[43]

(b) By usage of trade

17-13. In his *Commentaries*, Bell discusses the general liens recognised in England by usage of trade.[44] This is followed by the statement: 'In Scotland there does not appear in our books any case in which a general lien by usage of trade has been claimed or established.'[45] In the latter part of the nineteenth century this was to change, with a number of cases coming before the courts and the work of Bell being much cited. The courts insisted that a party seeking to rely on a general lien created by usage of trade had to prove that usage.[46] Usage with respect to a particular locality could suffice.[47] In one case, an attempt to show that storekeepers have such a right failed because usage could not be proved.[48] In another, it was held that scourers have no general lien, because the usage adduced was only local and found not to be universal in that locality.[49] It has, however, been held that a general lien in favour of calenderers and packers has been established by usage in Scotland.[50] In that case, the court placed heavy reliance upon the fact that such usage had been proven in England. Lord Gifford stated:

> 'Comparatively slight proof of the practice of trade in Scotland will be sufficient to establish a rule of trade which is recognised and in full force in England. It is very undesirable in matters of mercantile law and in precisely the same circumstances

[40] Gloag and Irvine, *Rights in Security* 356; Sim, 'Rights in Security' para 78.

[41] *Glendinning v Hope & Co* 1911 SC (HL) 73 at 78 per Lord Kinnear. See below, para 17-56.

[42] See also L J Macgregor, *SME Reissue* Agency and Mandate (2002) para 124.

[43] *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 at 19.

[44] Bell, *Commentaries* II, 103–104.

[45] Bell, *Commentaries* II, 104. The distinction, however, between general liens arising by common law and through use of trade is often not made. See, eg, Gloag and Irvine, *Rights in Security* 356 and Sim, 'Rights in Security' para 78.

[46] Gloag and Irvine, *Rights in Security* 356–357.

[47] *Smith v Aikmans* (1859) 22 D 344 at 346–347 *per* Lord Curriehill; *Mitchell v Heys & Sons* (1894) 21 R 600. Gloag, 'Lien' para 485, is therefore wrong to say that local usage is not enough.

[48] *Laurie & Co v Denny's Tr* (1853) 15 D 404.

[49] *Smith v Aikmans* (1859) 22 D 344.

[50] *Strong v Philips & Co* (1878) 5 R 770.

> that different rules should prevail or be fixed for England and for Scotland when no reason whatever can be given for such variance.'[51]

17-14. Similar sentiments were expressed by Bell.[52] It is generally accepted now that evidence that a general lien exists in respect of a trade in England will help persuade a court that a similar lien should be recognised in Scotland.[53] Nevertheless, in the only two other cases of a general lien established by usage resort was not made to English practice. The first of these concerned calico printers, it being held that Glaswegian members of that trade have a general lien.[54] The second involved bleachers. It seems now accepted that these individuals in Scotland have the right to retain that which they have bleached in respect of their account for the year.[55] Once a lien has been established by usage, its continuing existence will apparently not be questioned.[56]

(c) Through a course of dealing

17-15. In many commercial circumstances parties deal with each other on an ongoing basis. Accounts are settled periodically rather than after each individual transaction. Here the law may well imply a general lien whereby any goods being held by the tradesman are subject to a lien securing payment of all the sums due under the contracts in the period of accounting.[57] Bell illustrates the point by referring to a contract of manufacture:

> 'Where the employment of a workman is not in one solitary act of manufacture, but in a course of work, the payments being made not on the delivery of each parcel of goods, but periodically, once a year or half-yearly, it may be fairly presumed that the renunciation of the undoubted lien which the workman has on each parcel has in contemplation the continuance of the custom, and the renewal of a lien upon other goods.'[58]

17-16. Thus it was held in an early case that where an account for bleaching was settled on an annual basis, any goods held by the bleacher at the end of the year could be withheld from the owner until the annual account was paid.[59] The general lien is of benefit to both parties here in that individual goods can be handed over to the customer without instantaneous payment

[51] At 774. Compare with *Laurie & Co v Denny's Tr* (1853) 15 D 404 at 408 *per* Lord Cuninghame.

[52] Bell, *Commentaries* II, 104.

[53] Gloag and Irvine, *Rights in Security* 357; Gloag, *Contract* 635; Gloag, 'Lien' para 485; Sim, 'Rights in Security' para 79; Gloag and Henderson, *The Law of Scotland* para 37.18. In England it has been held that packers, calico printers and wharfingers have a general lien by usage, but dyers, fullers and millers do not: Gloag and Irvine, *Rights in Security* 357.

[54] *Mitchell v Heys and Sons* (1894) 21 R 600.

[55] *Anderson's Tr v Fleming* (1871) 9 M 718.

[56] In other words, continued usage need not be proved. This is certainly the position in English law: Palmer and Mason, 'Lien' para 716.

[57] Bell, *Commentaries* II, 104–105; Bell, *Principles* § 1435.

[58] Bell, *Commentaries* II, 104. See also Hume, *Lectures* III, 48–50.

[59] *Hunter v Austin & Co*, 25 Feb 1794 and *M'Culloch v Pattison & Co*, 4 March 1794, both unreported but described in Bell, *Commentaries* II, 104–105; *Aberdeen & Smith v Paterson* (1812) Hume 127.

as the bleacher has security for the debt over the other goods over which custody is still held.[60]

17-17. The difference between a general lien established by usage and one established by a course of dealing, is that the latter need only arise out of the dealings between the tradesman and a particular customer. Nevertheless, the borderline between the two has always been rather blurred and with particular respect to bleachers, as was pointed out above, a general lien has been established by usage.[61]

(6) General lien created expressly

17-18. It seems widely accepted that a general lien may be created expressly in terms of an agreement between the parties.[62] Bell writes that an express general lien will be 'effectual' if 'stipulated in clear and unambiguous terms'.[63] Lord Young was very certain in his views upon general liens, remarking in one case:

> '[Counsel] spoke as if it were a dangerous thing to hold that such liens may be constituted by contract. But it is only the common law of freedom applying to all who are *sui juris*. … People can contract as to liens as they please.'[64]

17-19. Thus, in *Bon Accord Removals v Hainsworth*[65] a party entered into two contracts with a removal company for the removal and temporary storage of certain goods. The contracts provided that the company had a general lien for its charges. It was held that goods which formed the subject matter of one of the contracts could be detained until the sums due under both the contracts were met. Thus the rule that carriers and storekeepers only have a special lien was overridden by the express general lien.[66]

17-20. In one English case it was held that a general lien had been constituted in the light of public advertisement by the tradesman claiming it.[67] Bell notes the doubts in a later decision 'whether this power of creating liens by notice

[60] See *US Steel Products Co v Great Western Railway Co* [1916] 1 AC 189 at 211 *per* Lord Parmoor; Bell, *Personal Property* 142; Davies, *Textbook on Commercial Law* 321.

[61] See, in particular, the opinions in *Anderson's Tr v Fleming* (1871) 9 M 718, where the decisions cited in n 59 are regarded as establishing a general lien in favour of a bleacher by usage rather than through a course of dealing. See too Gloag and Irvine, *Rights in Security* 357.

[62] Bell, *Commentaries* II, 104; Bell, *Principles* § 1432; Gloag and Irvine, *Rights in Security* 355–356; Sim, 'Rights in Security' para 67; *Lamb v Kaselack, Alsen & Co* (1882) 9 R 482; *Marris v Whyte & Mackay* (1893) 9 Sh Ct Rep 111. English law is to the same effect: see Montagu, *Lien* 32–35 and Hall, *Possessory Liens* 32–33.

[63] Bell, *Commentaries* II, 104.

[64] *Miller v Hutcheson & Dixon* (1881) 8 R 489 at 492.

[65] 1993 GWD 28-1785.

[66] *Stevenson v Likly* (1824) 3 S 291 (NE 204) (carrier); *Laurie & Co v Denny's Tr* (1853) 15 D 404 (storekeeper).

[67] *Kirkman v Shawcross* (1796) 6 TR 14, 101 ER 410.

in handbills and newspapers be consistent with the true interests of trade'.[68] Nevertheless he includes a section in both his *Commentaries* and his *Principles* on general liens being raised by advertisement.[69]

17-21. There is of course a difficulty here. The policy of the law is to restrict general liens to exceptional cases, because of their prejudicial effect to creditors and singular successors of the debtor.[70] This policy is subverted if everyone has *carte blanche* to create general liens when and where they like as Lord Young suggests. However, it would appear to be the case that his view is misguided. For a start, it seems that in the case of hoteliers and carriers the special lien which the law confers upon these individuals may not be replaced by an express general lien.[71] The reason is that these persons have certain duties which they must exercise for the public benefit. As Lord Young stated himself:

> 'I should greatly doubt the validity at common law of an agreement between a carrier and the sender of goods which professed to create a general lien to the prejudice of the consignee, to whom the carrier was legally bound to carry them at the usual rate of carriage.'[72]

17-22. In the *Bon Accord Removals* case (above), the Sheriff Principal expressly recognised that there were no third parties involved, before upholding the express general lien for which the contract of carriage had provided. Thus while the terminology of lien was used, all that was being recognised was retention at a mere contractual level.

17-23. At a wider level, judicial attitudes towards the recognition of express general liens have usually been lukewarm. The most important case on the subject is *Anderson's Trs v Fleming*.[73] It has often been cited by writers in a manner which suggests that it is authority for the proposition that express general liens will invariably be upheld by the courts.[74] This reading of the case generates more unease when the same writers state that the lien in that case was not struck down as an unfair preference, although created shortly before the insolvency of the debtor.[75] There is, however, less cause for concern than there may seem at first. In the case bleachers who had been employed for some time by the debtor regularly returned each parcel of bleached goods

[68] Bell, *Commentaries* II, 105. The doubts he refers to were expressed in *Oppenheim v Russell* (1803) 3 B and P 42. McLaren notes (Bell, *Commentaries* II, 106) that following the case of *Bowman v Malcolm* (1843) 11 M & W 833, 152 ER 1042 the doctrine of lien by advertisement may have been negatived.

[69] Bell, *Commentaries* II, 105–106; Bell, *Principles* § 1433.

[70] See above, paras 17-04–17-06.

[71] See above, paras 16-31–16-36; Gloag and Irvine, *Rights in Security* 356; Shaw, *Security over Moveables* 59–60; Gloag, 'Lien' para 483; Sim, 'Rights in Security' para 78; *Scottish Central Railway Co v Ferguson* (1864) 2 M 781; *Peebles & Son v Caledonian Railway Co* (1875) 2 R 346.

[72] At 348.

[73] (1871) 9 M 718.

[74] Gloag and Irvine, *Rights in Security* 355–356; Shaw, *Security over Moveables* 58–59; Gloag, 'Lien' para 483; Sim, 'Rights in Security' para 78.

[75] Gloag and Irvine, *Rights in Security* 355–356; Shaw, *Security over Moveables* 58–59; Gloag, 'Lien' para 483; Sim, 'Rights in Security' para 67.

with a receipt stating that all goods which they held were subject to a general lien in respect of the balance of accounts (including acceptances and promissory notes) between the parties. Upon the insolvency of the debtor, the lien constituted by this notice was upheld and was not an unfair preference as it had been created in the ordinary course of business.[76]

17-24. What was important for the judges was not so much the written notice, but the lien implied by the common law in the given situation. Lord President Inglis pointed out that the bleachers had an implied right arising by usage of trade to retain any goods in their hands for the past year's account.[77] Turning to the notice he said:

> 'This contract, taking the words in the widest literal sense, would establish a lien for the general balance due on account, however long outstanding. … But such a contract would not only be a most unreasonable but also a most illegal contract, and I cannot suppose that either party meant anything of the kind. On the contrary, I think that the fair and rational meaning of the contract is, that the bleachers stipulate for a lien for the balance of their account, meaning thereby, according to the ordinary usage of trade, the balance of the year's account remaining unsettled.'[78]

17-25. The only additional right which the express provision gave was to ensure that the lien was not extinguished in respect of debts for which bills had been accepted, a matter on which the law was unclear.[79] As Lord Kinloch stated, this point did not alter the fact that the lien 'rest[ed] for its constitution on the act of law, not on contract merely'.[80] What must be taken out of the case is that the courts will not simply enforce a general lien because it appears in an express provision.[81] For the courts are aware of the adverse effect of general liens upon third parties.

17-26. The point is illustrated by the subsequent case of *Marris v Whyte and Mackay*[82] where storekeepers stored goods under the condition that they were 'held subject to a lien by the storekeeper for his general balance against the same account'. Sheriff Lees upheld the lien. He noted its 'clear and unambiguous terms'[83] and that it was not unreasonable. However, he warned:

[76] The unsuccessful argument was that the lien was unenforceable, being created within 60 days of the debtor's bankruptcy in terms of the now repealed Bankruptcy Act 1696. Unfair preferences are now dealt with under the Bankruptcy (Scotland) Act 1985 s 36.

[77] (1871) 9 M 718 at 720–721.

[78] At 721. See also Lord Deas at 722, Lord Ardmillan at 723 and Lord Kinloch at 724–725. The point is made in a footnote by Gloag and Irvine, *Rights in Security* 356 and Sim, 'Rights in Security' para 78.

[79] See the discussion by Lord Kinloch at 725 and also *Harper v Faulds* (1791) Bell's Octavo Cases 440.

[80] (1871) 9 M 718 at 725.

[81] This is despite Gloag's apparent assertion that this would be the case: 'Lien' para 483. Thus Professor Gretton's fears on this, expressed in 'The Concept of Security', in Cusine (ed), *A Scots Conveyancing Miscellany* (1987) 126 at 144 are perhaps not entirely justified.

[82] (1893) 9 Sh Ct Rep 111.

[83] At 114, following Bell, *Commentaries* II, 103.

'If it were sought to convert a lien for storage rents into a security for all debts due by the depositor to the storekeeper, a Court of law might not sustain such a contention as being fundamentally inconsistent with the commercial interests of the community at large.'[84]

B. BANKER'S LIEN

(1) Introduction

17-27. A banker has a general lien over all the securities of the customer in his or her hands, which secures the general balance due by the customer.[85] The right is an important weapon in the armoury of the banker against defaulting customers. It sits alongside the right to set off separate accounts kept by the customer, which allows a banker to combine an account in credit with one which is overdrawn.[86] These twin rights, which also exist in English law, have sometimes been subject to conflation.[87] Thus the right of set-off may be analysed as a right to retain the balance on one account to meet the balance on another.[88] However, such an analysis points to a right of retention based on ownership of the sum in question, the money having been transferred to the bank.[89] More fundamentally, the banker's right here may be seen to be one of compensation, rather than retention.[90]

(2) Basis of the lien

17-28. The banker's lien appears to have been first recognised in Scotland by Bell in the second edition of his *Commentaries*. The previous edition was silent on the matter. Bell introduces the subject as follows:

'Bankers are in the nature of money-factors; and, by law, they have a general lien upon all the proper securities in their hands, belonging to any particular person,

[84] At 113.

[85] Bell, *Commentaries* II, 113; Bell, *Principles* § 1451; Hume, *Lectures* III, 56; Gloag and Irvine, *Rights in Security* 370; J Graham Stewart, *Diligence* (1898) 174; Shaw, *Security over Moveables* 61; W Wallace and A McNeil, *Banking Law* (10th edn, by D B Caskie, 1991) 21; L D Crerar, *SME Reissue* Banking, Money and Commercial Paper (2000) para 104; Sim, 'Rights in Security' para 81; N J M Grier, *Banking Law in Scotland* (2001) para 9-38; L D Crerar, *The Law of Banking in Scotland* (2nd edn, 2007) 208–209.

[86] Gloag and Irvine, *Rights in Security* 370–371 and 381–383; Shaw, *Security over Moveables* 66–67; Wallace and McNeil, *Banking Law* 24–26.

[87] Gloag and Irvine, *Rights in Security* 381; *Halesowen Presswork and Assemblies Ltd v National Westminster Bank Ltd* [1971] 1 QB 1 at 34 *per* Lord Denning MR. On the distinction in England, see E P Ellinger, E Lomnicka and R Hooley, *Ellinger's Modern Banking Law* (4th edn, 2006) 230–234.

[88] Gloag and Irvine, *Rights in Security* 381.

[89] As Buckley LJ pointed out in *Halesowen Presswork and Assemblies Ltd v National Westminster Bank Ltd* at 46, no man can have a lien over his own property. This was approved in the House of Lords by Viscount Dilhorne and Lord Cross: *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785 at 802 and 810. See M Hapgood, *Paget's Law of Banking* (13th edn, 2007) para 29.6.

[90] Shaw, *Security over Moveables* 68.

> their customer, for his general balance; unless there be evidence to show that they received any particular security, under special circumstances, which would take it out of the common rule.'[91]

17-29. No Scottish authority is cited. Bell works on the basis that bankers are a type of factor and because factors are entitled to a general lien in Scots law so must bankers. He does, however, make reference to the English case of *Davis v Bowsher*,[92] decided in 1794. This case is accepted to be the first in English law to recognise the banker's lien.[93] It involved a Bristol banker. Lord Kenyon, however, made very clear that he was not setting out law merely applicable to that city:

> 'I am clearly of opinion, that, by the general law of the land, a banker has a general lien upon all the securities in his hands, belonging to any particular person, for his general balance, unless there be evidence to shew that he received any particular security, under special circumstances, which would take it out of the common law rule.'[94]

17-30. This passage is uncannily like Bell's description of the banker's lien set out above. As it appears *verbatim* in an extensive footnote in Bell's work, it is even more difficult to miss the similarity.[95] Bell perhaps noticed this himself as he substantially alters his wording in later editions.[96] This, however, does not stop Gloag and Irvine's statement 'that the lien of a banker, in the law of England, is founded on entirely different principles from the similar lien … recognised by the law of Scotland' from ringing distinctly hollow.[97] To be fair to them, the courts north and south of the border had, subsequent to Bell, taken divergent views on the basis of the lien. In England, Lord Campbell saw it as 'part of the law merchant'.[98] In Scotland, Lord McLaren regarded it as arising because bankers are agents;[99] a point going back to Bell's definition of bankers as money-factors.

17-31. The truth is that the Scottish banker's lien was born in England.[100] Many of the cases which appear in the standard treatments of it are English.[101] The lien was unknown in Scotland until Bell realised he could import it via the second edition of his *Commentaries*, because of the banker's agency. That said, the involvement of agency does mean that the lien is by

[91] Bell, *Commentaries* (2nd edn, 1810) 488.

[92] (1794) 5 TR 488, 101 ER 275.

[93] Hapgood, *Paget's Law of Banking* para 29.2.

[94] (1794) Term Rep 488 at 491, 101 ER 275 at 276.

[95] Bell, *Commentaries* (2nd edn, 1810) 489.

[96] Bell, *Commentaries* (7th edn, 1870) II, 113.

[97] Gloag and Irvine, *Rights in Security* 371.

[98] *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 805, 8 ER 1622 at 1629.

[99] *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 at 20.

[100] A point accepted by Crerar, *SME Reissue* Banking, Money and Commercial Paper para 104 and Crerar, *Banking Law* 208 under reference to the thesis on which this book is based. Similarly and obviously, the banker's lien recognised in American common law comes from English law. See L A Jones, *A Treatise on the Law of Liens* (1888) ch 6.

[101] For example, *Brandao v Barnett* (1846) 12 Cl & Fin 787, 8 ER 1622.

no means out of place amongst the general liens recognised at Scots common law and is without question accepted today as a key general lien.[102]

(3) Debts secured

17-32. The lien secures the general balance owed by the customer. It covers all charges paid and disbursements made, as well as all advances made by the banker in a banking capacity.[103] Where the customer is bankrupt or *vergens ad inopiam* the banker is additionally entitled to retain in security the money due on any bills which the banker has discounted although the term of payment is in the future.[104] This is of course correctly classifiable as a right of retention rather than a lien. The same may be said of the banker's right where the customer is *vergens ad inopiam* to retain a balance in favour of the customer and refuse to honour a cheque, in security of a bill which is yet to mature.[105]

(4) Property covered

17-33. The lien attaches to all negotiable securities belonging to the customer which are deposited with the banker in the ordinary course of business.[106] Consequently, it does not cover valuable items, for example plate deposited for safekeeping.[107] The negotiable securities to which the lien does attach include bills of exchange, promissory notes, cheques and bearer bonds.[108] In England, unlike Scotland, the lien has been held to attach to pieces of paper which are not negotiable, such as policies of insurance and share certificates.[109]

[102] Gloag and Irvine, *Rights in Security* 370–381; Shaw, *Security over Moveables* 61–70; Sim, 'Rights in Security' paras 81–84; Gloag and Henderson, *The Law of Scotland* para 37.20.

[103] Bell, *Commentaries* II, 113; Bell, *Principles* § 1451; Hume, *Lectures* III, 56; Gloag and Irvine, *Rights in Security* 372–373; Shaw, *Security over Moveables* 61 and 66; Wallace and McNeil, *Banking Law* 21; *Robertson's Tr v Royal Bank of Scotland* (1890) 23 R 12 at 16 *per* Lord President Inglis.

[104] Bell, *Commentaries* II, 115; Bell, *Principles* § 1451; Gloag and Irvine, *Rights in Security* 372–373; *British Linen Co v Ferrier*, 20 Nov 1807, unreported (see Bell, *Commentaries* II, 115).

[105] *Paul & Thain v Royal Bank of Scotland* (1869) 7 M 361; *Ireland v North of Scotland Banking Co* (1880) 8 R 215; *King v British Linen Co* (1899) 1 F 928.

[106] Bell, *Commentaries* II, 113; Bell, *Principles* § 1451; Hume, *Lectures* III, 56; Gloag and Irvine, *Rights in Security* 372; Shaw, *Security over Moveables* 65–66; Wallace and McNeil, *Banking Law* 21; Crerar *SME Reissue* Banking, Money and Commercial Paper para 104; Crerar, *The Law of Banking in Scotland* 208.

[107] Gloag and Irvine, *Rights in Security* 372, citing Lord Campbell in *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 809, 8 ER 1622 at 1631.

[108] Bell, *Commentaries* II, 113; Bell, *Principles* § 1451; Hume, *Lectures* III, 56; Gloag and Irvine, *Rights in Security* 372; Shaw, *Security over Moveables* 65–66; Wallace and McNeil, *Banking Law* 21; Crerar *SME Reissue* Banking, Money and Commercial Paper para 104; Crerar, *The Law of Banking in Scotland* 208.

[109] Gloag and Irvine, *Rights in Security* 372; *Ellinger's Modern Banking Law* 804; *Paget's Law of Banking* para 29.4; *Re United Service Co, Johnston's Claim* (1870) LR 6 Ch App 212; *Misa v Currie* (1876) 1 App Cas 554; *In re Bowes, Earl of Strathmore v Vane* (1886) 33 Ch D 586.

17-34. The lien does not attach to bills of exchange which the banker has discounted.[110] When a banker discounts a bill he or she buys it from the customer and the bill becomes the banker's property. Being the banker's own property, the banker cannot have a lien over it.[111] Professor Gretton takes matters further by arguing that all holders of negotiable instruments are the owners thereof and thus cannot have a lien upon them.[112] This approach seems to lack support in the relevant authorities.[113]

17-35. The fact that negotiable instruments are negotiable means that the banker may have a valid lien over them even where the customer had no right to deposit them, for example if they were stolen.[114] In such circumstances the validity of the lien depends on the banker being in good faith and giving value.[115] Thus where a stockbroker had pledged securities belonging to his clients to bankers who admitted that they did not believe that the securities were the stockbroker's, it was held that the bankers could not assert a lien over the securities in respect of the general balance owed by the stockbroker.[116] Nevertheless, it was also held that the bankers were entitled to assume that the stockbroker's clients had authorised the pledge. Therefore, the securities could be retained until the specific advances for which they were pledged were repaid.

(5) Exclusion

17-36. In certain circumstances the banker's lien will not arise. Where securities have been accepted for safekeeping by the banker as a depositary, no general lien arises over them.[117] The same holds if the securities come into the banker's hands by mistake.[118] The terms of a receipt issued by a banker will be important, although not conclusive evidence as to the capacity in

[110] Gloag and Irvine, *Rights in Security* 373; Shaw, *Security over Moveables* 64–65.

[111] Gloag and Irvine, *Rights in Security* 373; Shaw, *Security over Moveables* 64–65.

[112] Gretton, 'The Concept of Security' 144.

[113] For example, in *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 20, the court had no difficulty with a lien in respect of bearer bonds. See too *Clydesdale Bank v Liquidators of James Allan Senior and Son* 1926 SC 235, where it was held that bills indorsed and delivered to a bank for the purpose of collection remained the property of the company. And see Shaw, *Security over Moveables* 69, where it is said that the customer may transfer the subjects over which the lien exists. See also Crerar *SME Reissue* 'Banking, Money and Commercial Paper' para 104 and Crerar, *The Law of Banking in Scotland* 209.

[114] Gloag and Irvine, *Rights in Security* 379; Shaw, *Security over Moveables* 61–62.

[115] Gloag and Irvine at 379; Shaw at 61–62; *Farrer & Rooth v North British Banking Co* (1850) 12 D 1190; *London Joint Stock Bank v Simmons* [1892] AC 201. The normal rule, that the lien-holder must have custody given to him or her by the owner of the property or someone authorised by him or her does not apply here. For that rule, see above, paras 13-35–13-40.

[116] *National Bank of Scotland v Dickie's Tr* (1895) 22 R 740.

[117] Gloag and Irvine, *Rights in Security* 375; Shaw, *Security over Moveables* 62; Wallace and McNeil, *Banking Law* 22; Crerar, *SME Reissue* 'Banking, Money and Commercial Paper' para 104; Crerar, *The Law of Banking in Scotland* 208; *Brandao v Barnett* (1846) 12 Cl & Fin 787, 8 ER 1622; *Leese v Martin* (1873) LR 17 Eq 224.

[118] *Lucas v Dorrien* (1817) 7 Taunt 278, 129 ER 112.

which he or she holds the securities.[119] In the case of *Robertson's Tr v Royal Bank of Scotland*,[120] bearer bonds had been deposited with the bank which issued a receipt stating 'We hold for safe keeping on your account, and subject to your order.' This receipt pointed to the bank acting as a depositary. However, it was established that the bank had regularly made advances on the security of the bonds. Given this, the court took the view that the securities had been received in the ordinary course of business and that the bank consequently had a general lien over them.

17-37. The lien will also not attach to securities which have been specifically appropriated, in other words sent to the banker for a particular purpose.[121] The onus of proof that there has been such an appropriation rests with the customer.[122] There are certain clear cases of appropriation. For example, where a bill is handed over to meet a specific debt, the banker must follow the customer's instructions and so apply it.[123] Similarly, where bills have been sent for discount, the banker cannot refuse to do this while at the same time purporting to exercise a lien over them.[124]

(6) Enforcement

17-38. The banker's lien is a real right, enforceable against creditors and singular successors.[125] It is generally accepted that in Scotland, a banker has no right to sell the subjects of the lien in order to meet the debt owed.[126] Where, however, the date of payment for the bills has become due, the banker if he or she is the holder of the instrument, will be entitled to obtain payment. The proceeds are then put towards the discharge of the customer's debt.[127] In the case of an unindorsed order bill this will of course not be possible.[128] In England, the banker's general lien differs from most liens recognised there, in that there is an implied right of sale.[129]

[119] Gloag and Irvine, *Rights in Security* 376.

[120] (1890) 18 R 12.

[121] Bell, *Commentaries* II, 114; Bell, *Principles* § 1451; Gloag and Irvine, *Rights in Security* 377; Shaw, *Security over Moveables* 63; Wallace and McNeil, *Banking Law* 22.

[122] Shaw, *Security over Moveables* 63; *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12.

[123] *Allan v Allan & Co* (1831) 9 S 519.

[124] *Matheson v Anderson* (1822) 1 S 486 (NE 453); *Haig v Buchanan* (1823) 2 S 412; *Borthwick v Bremner* (1833) 11 S 716. Compare *Glen v National Bank of Scotland* (1849) 12 D 353.

[125] *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12 (sequestration); *Clydesdale Bank v Liquidator of James Allan Senior & Son Ltd* 1926 SC 235 (liquidation); Shaw, *Security over Moveables* 69 (singular successor).

[126] Gloag and Irvine, *Rights in Security* 380; Wallace and McNeil, *Banking Law* 23; Crerar, *The Law of Banking in Scotland* 209; Crerar *SME Reissue* 'Banking, Money and Commercial Paper' para 104; *Robertson's Tr v Royal Bank of Scotland* (1890) 18 R 12. Shaw, *Security over Moveables* at 70, however, regards it as an 'open question', pointing out that in transactions between stockbrokers and bankers a right to realise may be implied.

[127] Gloag and Irvine, *Rights in Security* 380–381; Shaw, *Security over Moveables* 70.

[128] Not being the holder. See Bell, *Commentaries* II, 23.

[129] *Paget's Law of Banking* para 29.3; *Ellinger's Modern Banking Law* 803; *Rosenberg v International Banking Corporation* (1923) 14 Ll LR 344 at 347.

C. BROKER'S LIEN

(1) Introduction

17-39. A broker is entitled at common law to a general lien over the property of his or her principal.[130] Brokers are essentially agents employed to transact a certain piece of business. They may therefore be contrasted with factors who are given a more general authority by their principals in order to manage their business affairs.[131] In some cases the distinction between factor and broker may be rather blurred.[132] As both are entitled to general liens this is not perhaps a matter of great significance for present purposes.[133]

(2) Basis of the lien

17-40. The earliest case is *Leslie and Thomson v Linn*,[134] decided in 1783. There, it was argued by the pursuers that an insurance broker was considered in law to be a factor and thus had the right to retain the insurance policy until paid. The defender countered, arguing that such an individual 'acting in his proper sphere, is not a factor'.[135] The Lord Ordinary found in his favour, but on appeal this decision was reversed. It is not clear whether the court on appeal accepted that the broker was a factor, or whether its decision was based on the particular facts of the case.[136] It may be noted that English law had recognised a general lien in favour of a policy broker by the late eighteenth century and English authority was cited by the pursuers.[137]

17-41. Bell recognised a distinct general lien in favour of brokers merely in the context of policy brokers.[138] For a statement of the law in relation to brokers in general, reference must be made to part of his treatment of the factor's lien:

> 'A broker is considered as a factor, and has a general lien on any property that is in his hands in the course of that employment, for the advances, engagements, and

[130] Bell, *Commentaries* II, 112 and 115; Bell, *Principles* § 1452; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th edn, by T A Fyfe, 1914) 548.

[131] Gloag and Irvine, *Rights in Security* 395.

[132] Particularly in the case of stockbrokers who are considered to be factors: *Glendinning v Hope & Co* 1911 SC (HL) 73.

[133] Macgregor, 'Agency and Mandate' para 57 distinguishes factors and brokers, stating that brokers do not have possession of goods and therefore no lien. But as is shown below, brokers do have a general lien over documents in their possession.

[134] *Leslie and Thomson v Linn* (1783) Mor 2627.

[135] At 2628.

[136] In particular, the insurance had been effected in the name of the broker.

[137] The authority cited was *Godin v London Assurance Company* (1758) 1 Burr 489, 97 ER 419. See also *Harding v Carter* (1781) 1 Park's Marine Insurances (8th edn) 4 and the cases noted in Bell, *Commentaries* II, 116.

[138] Bell, *Commentaries* II, 115; Bell, *Principles* § 1452. The same approach is taken by Hume: *Lectures* III, 56.

charges on account of his principal. See afterwards, Of Insurance Brokers, separately.'[139]

17-42. Bell therefore appears to view brokers as a sub-category of factors. This approach finds support in *Leslie and Linn*, and also in an important twentieth-century case, where stockbrokers were considered to be factors and therefore held entitled to the factor's general lien.[140] On the other hand, the law is clear that a broker receiving property in that capacity has no right to retain the property in respect of debts due to him when he or she acted as a factor.[141] Given this, it is felt that it is inappropriate to view a broker as simply being a factor. A better approach is to regard both factors and brokers as agents. Both may be regarded as having general liens because of their agency.[142]

(3) Stockbrokers

17-43. It is now settled law that stockbrokers have a general lien in respect of any documents belonging to their customer which they hold.[143] The point was decided in English law at an earlier stage and Gloag and Irvine correctly anticipated that the same rule would be held to apply north of the border.[144] As has been stated in the previous paragraph, the lien arises out of the contract of agency between stockbroker and client.

(4) Insurance brokers

17-44. Most of the authority in relation to the broker's lien relates to insurance brokers and marine insurance brokers at that.[145] Goudy seems to limit the lien to cases involving marine insurance,[146] but as Gloag and Irvine point out there seems no ground why there should be such a limitation.[147] Certainly there is nothing written by Bell to support it.[148] Indeed, Hume writes

[139] Bell, *Commentaries* II, 112.

[140] *Glendinning v Hope & Co* 1911 SC (HL) 73.

[141] *M'Call & Co v James Black & Co* (1824) 2 Sh App 189; Gloag and Irvine, *Rights in Security* 395.

[142] See above, paras 17-11–17-12.

[143] *Glendinning v Hope & Co*. See Gloag, 'Lien' para 491; Sim, 'Rights in Security' para 87.

[144] *Jones v Peppercorne* (1858) Johns 430, 70 ER 490; Gloag and Irvine, *Rights in Security* 396. See also *In re London and Globe Finance Corporation* [1902] 2 Ch 416.

[145] Eg, *Leslie and Thomson v Linn* (1783) Mor 2627; *Ross's Assignee v Galloway* (1806) Mor App, *Periculum* No 1 and *Scott and Gifford v The Sea Insurance Co* 22 Jan 1825 FC.

[146] Goudy, *Treatise on Bankruptcy* 548.

[147] Gloag and Irvine, *Rights in Security* 396. As regards the position in English law, E R Hardy Ivamy, *General Principles of Insurance Law* (5th edn, 1986) 513, observes: 'It does not appear to have been decided whether a general lien exists in other branches of insurance; presumably, such a lien may be implied from the course of business or from usage.'

[148] Bell, *Commentaries* II, 115–117; Bell, *Principles* § 1452.

that policies may be detained 'against the ship owners or other persons assured'.[149]

17-45. An insurance broker has a lien over any policy which he has effected, that enables him to retain it until the balance due to him by the insured is paid.[150] With specific regard to marine insurance policies, the lien has been placed on a statutory footing.[151] If the policy is paid out by the underwriter, the lien becomes transferred into a right of retention in respect of that sum.[152] The underwriter has a right of retention in respect of the policy until the premium is paid.[153] If the underwriter becomes insolvent neither the insured nor the broker may retain the premiums nor use them in a second insurance to secure against the effect of the insolvency.[154]

17-46. The lien naturally depends on the broker having the policy in his or her hands.[155] If of course the broker has effected the insurance in his own name, the issue of the policy's location becomes irrelevant, as it is the broker who is entitled to be paid.[156] In the situation where the policy is effected by a sub-broker and thereafter its proceeds are paid out to him or her, the principal broker has a preference in respect of them as against the principal and the principal's creditors.[157]

17-47. Where the person dealing with the broker is merely an agent the broker's lien will nonetheless secure the general balance owed by that party to him or her, provided the agency has not been disclosed.[158] If, however, the broker is aware of the agency or ought in the circumstances to have been so aware his lien, in a question with the principal, will not secure the general balance owed by the agent. In that case it will only cover the premiums due under the particular policy.[159] It has been held in England that where the broker lost possession of the policy and then later regains it, but before that becomes aware that the person dealing with him is in fact only an agent, he

[149] Hume, *Lectures* III, 56.

[150] Bell, *Commentaries* II, 115–117; Bell, *Principles* § 1452; Hume, *Lectures* III, 56; Gloag and Irvine, *Rights in Security* 396. For an account of the relevant (and very similar) English law in relation to marine insurance, see R Merkin, 'Insurance' in *Halsbury's Laws of England,* vol 25 (2003 reissue) paras 274–275 and N Legh-Jones, J Birds and D Owen, *MacGillivray on Insurance Law* (10th edn, 2003) para 7-27.

[151] Marine Insurance Act 1906 s 53(2). See *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] QB 199.

[152] Gloag and Irvine, *Rights in Security* 396. The broker may, however, require a special power to recover from the underwriter: see Bell, *Commentaries* II, 115 and Goudy, *Treatise on Bankruptcy* 548.

[153] *Scott and Gifford v The Sea Insurance Co* 22 Jan 1825 FC.

[154] Bell, *Commentaries* II, 116; Bell, *Principles* § 1452; *Selkrig v Pitcairn & Scott* (1805) Mor App, *Insurance* No 10.

[155] Gloag and Irvine, *Rights in Security* 396; Goudy, *Treatise on Bankruptcy* 548.

[156] *Leslie and Thomson v Linn* (1783) Mor 2627.

[157] *Ross's Assignee v Galloway* (1806) Mor App, *Periculum* No 1.

[158] Bell, *Commentaries* II, 116–117; Bell, *Principles* § 1452; Gloag and Irvine, *Rights in Security* 397; Goudy, *Treatise on Bankruptcy* 548.

[159] Bell, *Commentaries* II, 116–117; Bell, *Principles* § 1452; Gloag and Irvine at 397; Goudy, *Treatise on Bankruptcy* 548; *Losh, Wilson & Bell v Douglas & Co* (1857) 20 D 58. See also the English decision of *Fisher v Smith* (1878) 4 App Cas 1.

has then only a lien in respect of the sum due under that policy.[160] Normally, the recovery of possession would restore the broker's general lien.[161]

D. COMMERCIAL AGENT'S LIEN

(1) Introduction

17-48. The lien of the commercial agent or factor is one of the two most important general liens recognised at common law.[162] It was introduced in order that factors could willingly offer credit, knowing that the property of their principal which was in their hands would act as security.[163] Over the years, the courts extended the number of individuals entitled to exercise this lien, thus magnifying the importance of the right in commercial terms.[164] The factor's lien is also recognised in other jurisdictions, for example by English,[165] German[166] and Roman-Dutch law.[167] The term 'factor', however, is not used in modern commercial law, the replacement term being 'commercial agent'.[168] The textbooks discussing lien have yet to catch up with this. An attempt to do so is made here.

(2) Historical background

17-49. The commercial agent's lien may be traced back to the seventeenth century, arising initially in respect of factors appointed to look after landed estates. In *Chalmers v Bassily*,[169] it was held that a factory was revocable, but with 'the factor being always refunded of what he profitably expended upon consideration thereof, before he quit possession'.[170] It was clear as early as 1735 that the lien applied to any type of property which the factor was holding.[171] Erskine noted the factor's right and, further, that it extended to a right to retain debts from the principal:

[160] *Near East Relief v King, Chasseur & Co Ltd* [1930] 2 KB 40 at 44 *per* Wright J.

[161] *Levy v Barnard* (1818) 8 Taunt 149; 129 ER 340.

[162] The other being the solicitor's lien. See below, paras 17-73–17-92.

[163] Bell, *Commentaries* II, 109; Bell, *Principles* § 1445; Gloag, 'Lien' para 490.

[164] See below, paras 17-54–17-57.

[165] Whitaker, *Lien* 102–112; Hall, *Possessory Liens* 37–38; N Palmer and A Mason, 'Lien' in *Halsbury's Laws of England*, vol 28 (1997 reissue) para 728; *Kruger v Wilcox* (1775) Amb 252, 27 ER 168; *Drinkwater v Goodwin* (1775) 1 Cowp 251, 98 ER 1070. For the American common law, see Jones, *A Treatise on the Law of Lien* ch 9.

[166] § 397 *HGB*; E J Cohn, *Manual of German Law* vol 2 (1971) paras 7.116 and 7.139. This is a special rather than a general lien.

[167] Voet 16.2.20; T J Scott and S Scott, *Wille's Law of Pledge and Mortgage in South Africa* (3rd edn, 1987) 95.

[168] Macgregor, 'Agency and Mandate' para 57. For an example of a recent case, see *Lonsdale v Howard & Hallam Ltd* [2007] 1 WLR 2055.

[169] (1666) Mor 9137.

[170] (1666) Mor at 9137. See also *Pearson v Murray* (1672) Mor 2625.

[171] *Stephens v Creditors of York Buildings Co* (1735) Mor 9140.

> 'Thus a factor may … retain his balance, not only till he recover payment of his expenses … but also till he be relieved of the separate engagements he hath entered into on his constituent's account, which retention will be effectual against all diligences that may be used by the constituent's creditors.'[172]

17-50. Bell was the first writer to give a comprehensive account of the factor's right to retain the principal's property, also being the first to refer to it as a lien and a general lien at that.[173] He made much use of the English law on the matter, in particular the landmark case of *Kruger v Wilcox*.[174] Heavy reliance has been placed upon Bell's statement of the law in subsequent years.[175] The period beginning with Bell may be regarded as the modern law.

(3) A general lien?

17-51. It has been settled since Bell introduced the term 'general lien' into Scots law that the lien of the factor or commercial agent is such a lien.[176] Nevertheless, it is suggested that the matter may not be as certain as it seems. If a person appoints a commercial agent, he or she is appointing an individual with wide-ranging powers. Commercial agents perform a wide range of functions, such as buying or selling their principal's property or lending the principal money. The lien covers all debts arising in terms of these functions: this is why it is said that the lien is general. However, it is surely arguable that all the debts arise under the same contract: the contract of commercial agency. The lien, if this view is taken, can only be regarded as a special lien. This much seems to have been appreciated by Bell who said of the factor's lien:

> 'This right might almost be ranked among the special liens, from the peculiar nature of the contract of factory, as a right resulting out of the *actio contraria* of the contract by which the principal engages to indemnify the factor.'[177]

17-52. To take this view would mean that if a party employed a commercial agent for some months one year and then for some months two years later, property in the agent's hand in terms of the second period could not be retained for debts due in respect of the first.

17-53. At a wider level, however, it must be accepted that the lien is capable of being viewed as a general one. The reason for this is that it may be possible to analyse the relationship between commercial agent and principal as simply that: a relationship. In that way the principal can be regarded as

[172] Erskine III.iv.21.

[173] Bell, *Commentaries* II, 109–112; Bell, *Principles* §§ 1445–1450.

[174] (1775) Amb 252, 27 ER 168. See Cross, *Lien* 246.

[175] See, eg, Gloag and Irvine, *Rights in Security* 363–370; Gloag, 'Lien' paras 490–494; Sim, 'Rights in Security' paras 86–89.

[176] Bell, *Commentaries* II, 109; Bell, *Principles* § 1445; Gloag and Irvine, *Rights in Security* 363; Sim, 'Rights in Security' para 86; Macgregor, 'Agency and Mandate' para 124.

[177] Bell, *Principles* § 1445.

having a set of separate contracts with the agent in respect of different tasks, but with all the debts being secured by a general lien. Parallels may be drawn with the relationship between solicitor and client.[178] The factor's lien since Bell wrote has been held exercisable by individuals who are not factors in the pure sense of the word and as regards whom a contract of factory/commercial agency is not applicable.[179] With respect to these individuals, the lien clearly operates as a general lien.[180] As has been shown elsewhere, the law has moved to recognising a general lien in favour of all types of agent, a commercial agent just being one example.[181]

(4) The meaning of 'factor'

17-54. Originally, the lien applied merely to land stewards or mercantile agents.[182] A mercantile agent is an individual employed as a general agent to conduct the business affairs of a merchant in a particular place.[183] He or she is entitled to buy and sell goods on behalf of the principal and will often make advances of money to that party. The Factors Acts apply to the activities of such an individual.[184] Towards the end of the nineteenth century, the courts began to widen the definition of 'factor' so that the lien could be conferred in favour of a wider class of individuals. In *Miller v Hutcheson & Dixon*,[185] a firm of auctioneers received horses to sell on commission and kept them in their stables until they were sold. They made advances to the owner using the animals as security. On his bankruptcy they claimed a general lien for the balance due to them, arguing that they were factors. By a majority, the Second Division held in their favour. Lord Justice-Clerk Moncreiff stated:

> 'I do not know what an auctioneer is if he be not a commercial agent. Goods are sent to him that he may turn them into money by public sale, and he may, if he chooses, advance money on the goods consigned to him.'[186]

17-55. Lord Young, who took a very wide view as to where general liens arise, saw the lien as arising as a matter of contract.[187] Lord Craighill, however, dissented. He pointed out that the auctioneers admitted that they were also livery stable keepers. Consequently, he reasoned that the horses were held by the auctioneers in that capacity and not as factors.[188]

[178] See below, para 17-83.

[179] See below, paras 17-54–17-57.

[180] *Miller v Hutcheson & Dixon* (1881) 8 R 489; *Glendinning v Hope & Co* 1911 SC (HL) 73.

[181] See above, paras 17-11–17-12 and below, paras 17-54–17-57.

[182] Erskine III.iv.21; Bell, *Commentaries* II, 109–110; Bell, *Principles* § 1445. However, Bell in his *Commentaries* at II, 112 states that a broker is regarded as a factor.

[183] Gloag and Irvine, *Rights in Security* 364.

[184] Factors Act 1889; Factors (Scotland) Act 1890.

[185] (1881) 8 R 489.

[186] At 491.

[187] At 492–493.

[188] At 494.

17-56. Lord Craighill's dissent has some force, but with judicial opinion moving in favour of defining 'factor' more widely, little notice has been taken of it. In subsequent cases, it has been readily accepted that auctioneers are entitled to exercise a factor's lien.[189] Likewise, it is also accepted that stockbrokers may also exercise it. The matter was settled in the important case of *Glendinning v Hope and Co*.[190] In that case the Second Division refused to admit a general lien in favour of Edinburgh stockbrokers as they were not satisfied it had been established by usage. The House of Lords reversed this decision, noting the English authority in favour of recognising such a lien.[191] However, they also upheld the appeal on the grounds of fundamental principle. Lord Kinnear stated the law to be as follows:

> 'Every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal over which he has power of control and disposal, is entitled, in the first place, to be indemnified for the moneys he has expended or the loss he has incurred, and, in the second place, to retain such properties as come into his hands in his character of agent until his claim for indemnity has been satisfied.'[192]

17-57. This statement has been accepted as an accurate one.[193] The law now confers a general lien on any type of agent rather than just a factor or commercial agent.[194]

(5) Sub-agents (sub-factors)

17-58. An agent may in turn appoint a sub-agent.[195] Such an individual is entitled to retain goods entrusted to him or her in respect of specific advances made upon them, if unaware of the existence of the principal when contracting with the agent.[196] Bell states that a sub-factor cannot claim a lien for a general balance which will be enforceable against the principal, even where he did not know that there was a principal.[197] Gloag and Irvine are sceptical about the authority of Bell's statement and cite the English position where the matter turns upon whether the sub-factor knew about the

[189] *Crockart's Tr v Hay & Co Ltd* 1913 SC 509; *Mackenzie v Cormack* 1950 SC 183.

[190] 1910 SC 209 rev'd 1911 SC (HL) 73.

[191] In particular, *Jones v Peppercorne* (1858) Johns 430, 70 ER 490 and *In re London and Globe Finance Corporation* [1902] 2 Ch 316. See Lord Atkinson at 1911 SC (HL) 73 at 74–75 and Lord Shaw of Dunfermline at 82–83.

[192] 1911 SC (HL) 73 at 78.

[193] See *Crockart's Tr v Hay & Co Ltd* 1913 SC 509 at 520 *per* Lord Salveson; Gloag, 'Lien' para 491.

[194] See above, paras 17-11–17-12.

[195] Bell, *Commentaries* I, 518–519; Bell, *Principles* § 1446; Gloag and Irvine, *Rights in Security* 366; Gloag, 'Lien' para 491.

[196] Bell, *Commentaries* I, 518–519; Bell, *Principles* § 1446; Gloag and Irvine, *Rights in Security* 366; Gloag, 'Lien' para 491; *Ede and Bond v Findlay, Duff & Co* 15 May 1818 FC.

[197] Bell, *Commentaries* I, 519; Bell, *Principles* § 1446, relying upon *M'Call & Co v James Black & Co* (1824) 2 Sh App 188.

principal or not.[198] It is submitted, however, that there is much to be said for Bell's view. It coheres with two clear principles of Scots law: first, that general liens are only admitted exceptionally and, secondly, individuals are generally not entitled to assert liens over property which is not their own.[199]

(6) Debts secured

17-59. In principle the lien covers all debts arising out of the commercial agency relationship.[200] Thus it will secure the agent's salary;[201] commission;[202] expenses;[203] advances made to the principal[204] and any guarantees authorised by the principal, or of which the principal is aware.[205] It will not, however, cover debts assigned to the commercial agent by other creditors of the principal.[206] Naturally, the lien will not secure debts which arise in circumstances where the agent is acting in a non-agent capacity. Consequently, it will not cover the price of goods supplied by the agent to the principal as an independent merchant.[207] Likewise, where the agent also acts as a broker, debts due to him or her as broker are not secured by the lien.[208]

(7) Property covered

17-60. The lien extends in general to all the property of the principal which has come into the hands of the agent in the ordinary course of work for the principal.[209] Thus it will attach to goods sent to the principal, goods bought for the principal, bills, policies of insurance and shipping documents.[210] There would seem to be no reason why the lien should not cover land, although

[198] Gloag and Irvine, *Rights in Security* 366. The English authority is *Mildred v Maspons* (1883) 8 App Cas 874.

[199] See above, paras 13-35–13-40.

[200] Bell, *Commentaries* II, 112; Bell, *Principles* § 1448; Gloag and Irvine, *Rights in Security* 363; Gloag, 'Lien' para 490; Sim, 'Rights in Security' para 86.

[201] Bell, *Commentaries* II, 112; Bell, *Principles* § 1448; *Stephens v Creditors of York Buildings Co* (1735) Mor 9140.

[202] *Sibbald v Gibson* (1852) 15 D 217.

[203] Bell, *Commentaries* II, 112; Bell, *Principles* § 1448; Gloag and Irvine, *Rights in Security* 363 citing the English case of *Curtis v Barclay* (1826) 5 B & C 141; 108 ER 52.

[204] Bell, *Commentaries* II, 112; Bell, *Principles* § 1448; Gloag and Irvine, *Rights in Security* 363 citing the English case of *Foxcroft v Devonshire* (1760) 2 Burr 931, 97 ER 638.

[205] Bell, *Commentaries* II, 112; Bell, *Principles* § 1448; Gloag and Irvine, *Rights in Security* 363 citing the English case of *Houghton v Matthews* (1803) 3 Bos & Pul 485, 127 ER 263.

[206] *Pearson v Murray* (1672) Mor 2625.

[207] *Miller & Paterson v M'Nair* (1852) 14 D 955.

[208] *M'Call & Co v James Black & Co* (1824) 2 Sh App 188.

[209] Bell, *Principles* § 1447; Gloag and Irvine, *Rights in Security* 363; Macgregor, 'Agency and Mandate' para 124.

[210] Bell, *Principles* § 1447; Gloag and Irvine at 363; Macgregor, 'Agency and Mandate' para 124; *Stephens v Creditors of York Buildings Co* (1735) Mor 9140; *Miller and Paterson v M'Nair* (1852) 14 D 955; *Gairdner v Milne & Co* (1858) 20 D 565.

the matter has not been considered in modern times.[211] The lien has been said to attach also to the incorporeal property of the principal held by the agent.[212] This is perhaps misleading. Whilst the agent may indeed retain such property, for example sums owed to the principal, the right here is a right of retention rather than a lien.[213]

17-61. A unique feature of the agent's lien is that it is regarded as giving the agent a right to the price of goods sold on behalf of the principal and then delivered to the purchaser, where the agent has stated that the price is payable to him or her but where the purchaser has not yet paid.[214] This was first established in the case of *Stephens v Creditors of York Building Co*,[215] decided in 1735. There the Court of Session held that:

> 'If a factor sells his constituent's effects and takes the price payable to himself, he will be preferable in a competition to his constituent, so long as he has anything to claim by the *actio contraria*. And for the same reason, it was found, that he must be preferable to the constituent's creditors arresting the price in the purchaser's hand.'[216]

17-62. The report does not disclose the court's reasoning. In England the same conclusion was reached by Lord Mansfield and his colleagues in the bankruptcy case of *Drinkwater v Goodwin*,[217] decided forty years later, in 1775. Bell was quick to point out the obvious difficulty with these decisions, namely that lien is a security universally considered to rest upon possession and that possession is absent here.[218] In England this problem is apparently reasoned away on the ground that the agent's right to recover the price is independent from that of the principal.[219]

17-63. The juridical nature of the right was discussed by the court in *Miller and Paterson v McNair*.[220] For some reason, *Stephens* was not cited to the court, but *Drinkwater* was. Lord Justice-Clerk Hope, a noted civilian when it came to matters involving security, could not bring himself to recognise it as one of lien.[221] That a factor with regard to the price as yet received was not in the same position as one with the possession of goods was a matter on which he could 'entertain little doubt'.[222] Lord Medwyn was less troubled about

[211] It may be remembered that the factor's lien first applied to land stewards: see above, para 17-49.

[212] Sim, 'Rights in Security' para 86.

[213] Erskine III.iv.21; *Stevenson, Lauder & Gilchrist v Dawson* (1896) 23 R 496. Scots law generally does not admit subordinate real rights in respect of incorporeal moveables. See above, paras 5-05–5-06 and 12-05–12-09.

[214] Bell, *Commentaries* II, 111; Bell, *Principles* § 1447; Gloag and Irvine, *Rights in Security* 367–368.

[215] (1735) Mor 9140.

[216] (1735) Mor 9140.

[217] (1775) 1 Cowp 251, 98 ER 1070.

[218] Bell, *Commentaries* II, 111.

[219] Bell, *Commentaries* II, 111.

[220] (1852) 14 D 955.

[221] At 959–960.

[222] At 960.

what the recognition of such a right would do to established principles of Scots law. For his part, he saw the right in respect of the unpaid price as 'an extension of [the factor's] lien, which partakes rather of compensation, or … balancing of accounts in bankruptcy'.[223] Lords Cockburn and Murray seemed prepared to recognise the right simply as lien.[224] The case was in the event decided on another point.[225] However, in *Mackenzie v Cormack*,[226] decided a century later, Lord Patrick focused on the judgments other than that of Lord Hope, as well as the writings of Bell, to state that it was long 'settled'[227] that the right was one of lien.

17-64. With respect, the right is not a lien over the price. In the first place, as Bell noted,[228] the price is not in the hands of the factor or agent. That objection is *prima facie* not fatal, for the right could be rationalised as a case of Scots law embracing the doctrine of equitable lien known in England.[229] However, such a rationalisation would be a false one. A lien is a real right enforceable against the world. Against whom is the right in respect of the unpaid price enforceable? It is enforceable only against the principal and his creditors. The right against the buyer is purely personal. Were it to be otherwise the law of sale of goods would be subverted. A seller who has handed over goods to a buyer is not a secured creditor for the price. Commercial agents are not privileged over other sellers.

17-65. The right is in fact not a right in respect of the price, but a right in respect of the right to be paid the price. The principal has a personal right to be paid by the buyer. The agent has a right over that personal right, the nature of which is unclear. Whether this right can be categorised as one of lien is open to question, because a lien in respect of incorporeal property is considered generally to be impossible.[230] Certainly, it forms part of the agent's armoury against the principal with regard to securing payment. In certain circumstances, however, the agent will be regarded as having waived the right. Thus, in the *Miller* case (above),[231] the factor after selling in his own name had declared his principal and consented to a bill for the price being drawn in the principal's favour. This was held to amount to waiver, even although the principal became bankrupt before the bill was sent.

(8) The need for custody

17-66. The lien depends on the agent holding the property of the principal.[232] Lord Justice-Clerk Hope considered that the factor's lien was confined to

[223] At 963.
[224] At 966–967.
[225] That is, that the lien had been waived. See below, para 17-65.
[226] 1950 SC 183.
[227] At 196.
[228] Bell, *Commentaries* II, 111.
[229] Palmer and Mason, 'Lien' para 754ff.
[230] See above, para 9-03.
[231] (1852) 14 D 955.
[232] Bell, *Commentaries* II, 110; Bell, *Principles* § 1449; Gloag and Irvine, *Rights in Security* 367.

property over which the factor has actual possession.[233] The view echoes that of Bell.[234] It has subsequently been accepted, however, that the lien will extend to property which is in the hands of an agent for the factor, even although the factor has never held the property.[235] Thus civil possession through an agent appears enough to establish the lien.

(9) The lien as a real right

17-67. The lien of the commercial agent is a real right which will be good in the case of the principal's insolvency and also against his creditors executing diligence.[236] Where the agent has sold goods and the buyer has paid the price to the principal, the agent is then not permitted to retain the goods in security of the general balance owed by the principal.[237] The case which decided the point reached the House of Lords, where the Lord Chancellor noted that that the buyer had made payment:

> 'The price was therefore paid, and it was impossible to maintain that the respondents had any lien on the goods. If the cause had been tried at Guildhall, it could not have lasted a moment.'[238]

17-68. This approach, although it amounts to a statement of English superiority, does nonetheless cohere with the general approach of Scots law in limiting the effect of general liens upon third parties.[239] On the other hand, the general lien of the factor has been held to prevail over any right to retain of a buyer in respect of damages where the goods are disconform to contract.[240]

(10) Exclusion

17-69. The lien of the commercial agent will be excluded in respect of any goods sent to him or her, if they are regarded as having been specifically appropriated.[241] Thus where goods are sent for the benefit of specific creditors the agent may not exercise a lien for his or her general balance in respect of them.[242] Clear evidence of the specific appropriation will be required.[243] It

[233] *Miller and Paterson v M'Nair* (1852) 14 D 955 at 959. He was also prepared to recognise a lien where the actual possession had been given up, but where the lien was reserved by agreement.

[234] Bell, *Commentaries* II, 110.

[235] *Gairdner v Milne & Co* (1858) 20 D 565. See Gloag and Irvine, *Rights in Security* 367.

[236] *Stephens v Creditors of York Buildings Co* (1735) Mor 9140; *Miller and Paterson v M'Nair* (1852) 14 D 955.

[237] Bell, *Principles* § 1447; Gloag and Irvine, *Rights in Security* 369–370.

[238] *Stirling & Sons v Duncan* (1823) 1 Sh App 389 at 393. See also *Scott & Neill v Smith & Co* (1883) 11 R 316.

[239] See above, paras 17-04–17-05.

[240] *Scott & Neill v Smith & Co* (1883) 11 R 316.

[241] Bell, *Commentaries* II, 110–111; Bell, *Principles* § 1447; Gloag and Irvine, *Rights in Security* 368–369; Gloag, 'Lien' para 494.

[242] Bell, *Commentaries* II, 110–111; Bell, *Principles* § 1447; Gloag and Irvine at 368–369; Gloag, 'Lien' para 494.

[243] Gloag and Irvine, *Rights in Security* 368.

has been held in England that where bills are drawn upon a factor bearing on their face a reference to a particular cargo, this is insufficient to amount to specific appropriation of the cargo to the payee of the bills.[244]

17-70. The lien will also be excluded if the agent waives it.[245] In this connection, it has been held that a factor is not implied to have waived the lien over certain property, simply because a bill has been taken from the principal in respect of the amount owed to the factor for the purchase of the same.[246]

(11) Enforcement and extinction

17-71. The lien allows the commercial agent to retain the property until the balance due by the principal is met. Additionally, as commercial agents have a general power to sell goods which they hold, they are able to do so in order to recover the sums which they are owed.[247] In England it has been held that a factor cannot do this if the principal objects.[248]

17-72. The lien may be extinguished in a number of ways. In particular, the lien will be lost if the property leaves the agent's hands.[249] If this happens, the agent is not entitled to stop the goods *in transitu* in order to preserve it.[250] However, if the agent recovers custody of the goods fairly, the lien being a general lien will be restored.[251] More accurately, it may be said that a new general lien is created.[252]

E. SOLICITOR'S LIEN

(1) Introduction

17-73. Solicitors have a general lien over their clients' papers in respect of their account.[253] This is a long-established right, the scope of which has been the subject of a very large body of case law, particularly in the eighteenth

[244] *Brown, Shipley & Co v Kough* [1894] 29 Ch D 848.

[245] Gloag and Irvine, *Rights in Security* 369; Sim, 'Rights in Security' para 89. See also *M'Donald & Halkett v M'Grouther* (1821) 1 S 190 (NE 186).

[246] Gloag and Irvine at 369; Sim, 'Rights in Security' para 89. See also *M'Donald & Halkett v M'Grouther* (1821) 1 S 190 (NE 186); *Gairdner v Milne & Co* (1858) 20 D 565.

[247] Bell, *Principles* § 1450; Gloag, 'Lien' para 487.

[248] *Smart v Sandars* (1848) 5 CB 895, 136 ER 1132.

[249] Bell, *Commentaries* II, 112; Bell, *Principles* § 1449; Gloag and Irvine, *Rights in Security* 367.

[250] Bell, *Commentaries* II, 89; Gloag and Irvine, *Rights in Security* 369; Gloag, 'Lien' para 493. Except where he is held to be the consignor: Bell, *Commentaries* II, 112.

[251] Bell, *Principles* § 1449.

[252] Bell, *Commentaries* I, 112.

[253] Bell, *Commentaries* II, 107; Bell, *Principles* § 1438; Hume, *Lectures* III, 50; Begg, *Law Agents* 204; Gloag and Irvine, *Rights in Security* 384; J Graham Stewart, *Diligence* (1898) 174; Shaw, *Security over Moveables* 61; Sim, 'Rights in Security' para 94.

and nineteenth centuries. Indeed there have been more court decisions on the solicitor's lien – or law agent's lien as it is alternatively known – than on all the other general liens put together. This case law has provided the basis for detailed treatments of the subject by Bell,[254] Hume,[255] Begg,[256] and Gloag and Irvine.[257] Given this and, further, that parts of the case law deal with matters of little relevance today,[258] the present study is not intended to be a comprehensive one. Rather, focus will be placed on areas of particular importance.

(2) Basis

17-74. The history of the solicitor's lien has already been the subject of some attention when the general history of lien was examined.[259] It was shown there that the right was originally known as the writer's hypothec, before the terminology was changed, under the influence of Bell, to that of the law agent's lien.[260] It was also seen that the origins of the lien probably lie with the similar right recognised by English law.[261] The first case on the matter was decided in 1697.[262] The first writer to refer to it was Bankton.[263]

17-75. The precise basis of the lien is a matter which is subject to an interesting discussion by Gloag and Irvine.[264] They isolate a number of authorities which, contrary to the orthodoxy, apparently take the view that the right is a special and not a general lien. Important among these is Erskine who saw the lien as arising because the law agent has performed labour on the papers which he is entitled to retain.[265] Two things, however, may be said about this. First, the law of lien in Erskine's time was in a somewhat nascent state. Secondly, his precise wording is that there can be retention until the agent's 'bill of accounts be paid'. That wording would seem to suggest a general lien.

17-76. Statements from Lord Rutherfurd Clark and Lord Young do, however, indicate that these judges perceived the lien as special and not

[254] Bell, *Commentaries* II, 107–109; Bell, *Principles* §§ 1438–1444.

[255] Hume, *Lectures* III, 50–54.

[256] Begg, *Law Agents* 204–209.

[257] Gloag and Irvine, *Rights in Security* 384–395.

[258] For example, whether a lien over title deeds can be enforced against subsequent heirs of entail. On this matter, see *Murray v Elibank* (1829) 8 S 161 and Gloag and Irvine, *Rights in Security* 391. It ceased to be possible to create new entails as a result of the Entail (Scotland) Act 1914. All remaining entails were abolished on 28 November 2004 by the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 50.

[259] See above, paras 10-83–10-85.

[260] See above, paras 10-83–10-85, 10-93 and 10-123–10-133.

[261] See above, paras 10-83–10-85.

[262] *Cuthberts v Ross* (1697) 4 Br Sup 374.

[263] Bankton I.xvii.15.

[264] Gloag and Irvine, *Rights in Security* 385–386.

[265] Erskine III.iv.21.

general.[266] As Gloag and Irvine correctly point out, these views are misplaced.[267] The solicitor's lien has always been understood to be an exceptional right, rather than one simply arising in terms of mutual obligations under a specific contract. In 1749 the Court of Session described it as 'a creature of the Court introduced for the agent's security, who otherwise would not undertake the affairs of a person of doubted circumstances'.[268] In 1791, in the landmark case of *Harper v Faulds*,[269] the defenders, who successfully argued that a general lien did not arise under every contract, accepted that the law agent's right was an exception. They submitted:

> 'But had there been a general right of retention, there could have been no occasion for introducing it in the particular case of agents.'[270]

17-77. For his part, Bell stated that the lien had come into existence 'partly by the force of usage and partly by judicial creation'.[271] It is thus clear that the basis of the solicitor's lien is not to be found in the general law of contract. Rather, the right has arisen in terms of the specific role the solicitor plays in society and the importance that role is recognised to have. The same may be said as regards the solicitor's lien in English law, which is accepted to have been introduced by the courts.[272] The fact that the solicitor enjoys a unique and important right has been illustrated both north and south of the border by the consistent refusal of the courts to confer it upon individuals other than qualified law agents.[273]

(3) Development

17-78. The relative strength of the solicitor's lien as a mechanism to make the client pay his account has been diminished over the years. It was a right which was at its most powerful at the end of the eighteenth century, in light of the important case of *Hamilton of Provenhall's Creditors*.[274] There it was held that the lien could be enforced against a creditor with a prior constituted heritable security. The report does not disclose why the judges saw fit to ignore the principle of *prior tempore potior jure*.[275] The argument of the successful agent was that solicitors could not be expected to search the records for prior securities before they accepted business. This hardly seems

[266] *Robertson v Ross* (1887) 15 R 67 at 72 *per* Lord Rutherfurd Clark and at 71 *per* Lord Young.

[267] Gloag and Irvine, *Rights in Security* 386.

[268] *Creditors of Lidderdale v Nasmyth* (1749) Mor 6248 at 6249.

[269] (1791) Bell's Octavo Cases 440.

[270] At 457.

[271] Bell, *Commentaries* II, 107. Others place the emphasis on usage: Hume, *Lectures* III, 50 and Begg, *Law Agents* 204.

[272] Sir William Holdsworth, *History of English Law* (2nd edn) vol 12 (1938) 60.

[273] *Morrison v Fulwell's Tr* (1901) 9 SLT 34; *Findlay v Waddell* 1910 SC 670; *Macrae v Leith* 1913 SC 901 (Scotland); *Hollis v Claridge* (1813) 4 Taunt 807, 128 ER 549; *Steadman v Hockley* (1846) 15 M & W 553, 153 ER 969; *Sanderson v Bell* (1834) 2 C & M 304, 149 ER 776 (England).

[274] (1781) Mor 6253.

[275] On which see Reid, *Property* para 684.

sufficient ground for disregarding general principle. Nevertheless, the decision was looked upon favourably in a couple of later decisions in one of which the court observed 'that the case was well decided'.[276]

17-79. As the years progressed, opinion became increasingly hostile towards the rule established in *Provenhall's Creditors*. Bell 'lamented' it, stating that the effect was 'to extend the lien beyond its legitimate terms'.[277] He recalled Lord Justice-Clerk Macqueen saying that it 'made his hair stand on end'.[278] Lord President Dunedin said that *Provenhall's Creditors* had been 'followed and regretted since'.[279] Eventually, the decision was reversed by the Conveyancing (Scotland) Act 1924, section 27. The power of the lien was thereby reduced.

17-80. Its potency has also been lessened by the Conveyancing and Feudal Reform (Scotland) Act 1970, section 45 which provides that a sasine extract is equivalent in law to a recorded deed. The vast majority of cases concerning the solicitor's lien involve the solicitor retaining title deeds.[280] It was common practice for agents to leave notes in red ink reminding their staff not to release deeds to clients until they paid their accounts.[281] The effect of the 1970 Act is that such an exercise of the lien can be circumvented by the client – or any other party wishing the deeds – going to Register House and obtaining extracts.

17-81. With respect to the Land Register, formerly the actual land certificate was required in order to apply to the Keeper for registration of an interest in land.[282] Thus the detention of the certificate by a solicitor *prima facie* would cause the client problems. In practice, the client was unaffected. For the former Land Registration (Scotland) Rules allowed the Keeper to dispense with the obligation to produce the certificate where there is 'good cause' for the failure to produce it.[283] The Keeper stated that 'good cause' included the fact that the certificate was held by a solicitor exercising a lien.[284] Under the new Land Registration Rules,[285] the Land Certificate no longer has to be submitted, with the Keeper implementing a policy of dematerialisation.[286] The lien is therefore of no practical use here.

[276] *Campbell v Smith* 1 Feb 1817 FC. Compare the opinion of the Lord Ordinary. See also *Campbell & Clason v Goldie* (1822) 2 S 16 (NE 14).

[277] Bell, *Commentaries* II, 108.

[278] Bell, *Commentaries* II, 109.

[279] *Macrae v Leith* 1913 SC 901 at 905. There had also been criticism in *Murray v Scott* (1829) 8 S 161; *Callander v Laidlaw* (1834) 12 S 417; *Kemp v Young* (1838) 16 S 500 and *Renny & Webster v Myles & Murray* (1847) 9 D 619. See Begg, *Law Agents* 222.

[280] This fact becomes readily apparent on reading any of the standard treatments of the lien, eg, Gloag and Irvine, *Rights in Security* 384–395.

[281] G L F Henry, 'Solicitor's Lien' (1962) 3 *The Conveyancing Review* 85.

[282] Land Registration (Scotland) Rules 1980, SI 1980/1413, r 9(3).

[283] Land Registration (Scotland) Rules 1980 r 18(1).

[284] J Urquhart, 'Snippets from the Conveyancing Committee' (1997) 42 *JLSS* 193 at 194.

[285] Land Registration (Scotland) Rules 2006 (SSI 2006/485).

[286] See http://www.ros.gov.uk/registration/landandchargecerts.html.

17-82. It must be accepted that the *de facto* removal of title deeds from the scope of the solicitor's lien seriously reduces its utility. Nevertheless, there are numerous other documents which the solicitor may effectively retain, such as deposit receipts;[287] wills;[288] and papers kept in the client's file.[289] The solicitor's lien is therefore still a useful right today, notwithstanding the statutory provisions which have somewhat negatived its power.

(4) Debts secured

17-83. The lien secures in general the solicitor's entire business account.[290] There are, however, a considerable number of debts not covered. It does not extend to a yearly salary offered by the client.[291] In the case of an instructing agent, it will not cover the account of an Edinburgh agent because the former does not incur liability for the latter's account.[292] Equally, the lien will not secure the account of an English agent, unless the instructing solicitor has paid that account or is liable to do so.[293] In contrast, where the solicitor is employed to borrow money, the lien will extend to the account of the lender's agent, if he has paid it.[294]

17-84. The lien does not secure cash advances made to the client,[295] nor cautionary obligations undertaken for the client's benefit.[296] The same is true of duties paid for the client,[297] or recognisances for the expenses of the opposing party in an appeal to the House of Lords.[298]

(5) Custody by the agent

17-85. The lien depends on the solicitor having custody or possession of the client's papers.[299] These must have come into the solicitor's hands lawfully

[287] *Wight's Tr v Allan* (1840) 3 D 243.

[288] *Paul v Meikle* (1868) 7 M 235.

[289] *Yau v Ogilvie & Co* 1985 SLT 91; *McCormack v James Finlay Corporation Ltd*, 11 March 1986 Outer House, unreported; *Boyd v Drummond, Robbie & Gibson* 1994 SCLR 777.

[290] Bell, *Commentaries* II, 107; Bell, *Principles* § 1438; Hume, *Lectures* III, 50; Begg, *Law Agents* 211–214; Gloag and Irvine, *Rights in Security* 388–389; *Menzies v Murdoch* (1841) 4 D 257 at 265 *per* Lord Fullerton.

[291] *Cuthberts v Ross* (1697) 4 Br Sup 374; *York Buildings Co v Dalrymple* (1738) Elchies, *Hypothec* No 9.

[292] *Largue v Urquhart* (1883) 10 R 1229; Law Agents (Scotland) Act 1873 s 21. Previously, there was liability and the lien was good: *Walker v Phin* (1831) 9 S 691.

[293] *Liquidator of Grand Empire Theatres v Snodgrass* 1932 SC (HL) 73.

[294] *Inglis & Weir v Renny* (1825) 4 S 113.

[295] *Creditors of Lidderdale v Nasmyth* (1749) Mor 6248; *Moncrieff v Colville* 1 Dec 1799, unreported (see Bell, *Commentaries* II, 107); *Christie v Ruxton* (1862) 24 D 1182.

[296] *Grant's Representatives v Robertson* (1801) Mor, *Hypothec* App No 1.

[297] *Skinner v Paterson* (1823) 2 S 354 (NE 312).

[298] *Kemp v Young* (1838) 16 S 500.

[299] Bell, *Commentaries* II, 107; Bell, *Principles* § 1438; Begg, *Law Agents* 209–210; Gloag and Irvine, *Rights in Security* 389; *Tawse v Rigg* (1904) 6 F 544.

in his or her capacity as agent for the client.[300] Thus there will be no effectual lien if the solicitor has obtained the papers under false pretences.[301] The same is true where the solicitor has received them after the employment as law agent has terminated.[302] It has been held, however, that papers handed to an agent before he or she is employed are subject to the lien.[303] This may be explained on the ground that at the moment the agency commences the papers are deemed to be obtained as solicitor from the previous capacity in which they were held. Where the client has been sequestrated, the lien is only effectual with respect to papers received by the agent before the client became apparently insolvent.[304]

17-86. As the lien is general the papers may be retained competently for debts which became due before they were delivered to the solicitor.[305] It is of course open to the client to exclude or vary the extent of the lien by express contract.[306] The lien will generally be extinguished when the agent ceases to hold the papers.[307] Where some of the papers are handed back to the client, the rest remain subject to the lien for the entire account.[308] It has been held that where a solicitor gives the papers to another solicitor on loan, the lien is not extinguished.[309] This conflicts with the general principle that lien is dependent on possession and has been criticised elsewhere.[310] The production of the client's papers in a process will not result in the lien being lost.[311]

(6) The lien as a real right

17-87. Begg discusses the solicitor's right in the following terms: 'It is merely a general lien or right of retention, not amounting to a real right either of hypothec or pledge.'[312] Hume had previously expressed a similar view.[313] While it is readily agreed that the solicitor's lien is neither a pledge nor a hypothec, it is in fact a real right effectual against singular successors and creditors.[314] Being a real right, the solicitor is not normally obliged to renounce

[300] Bell, *Commentaries* II, 107; Bell, *Principles* § 1438; Begg, *Law Agents* 209–210; Gloag and Irvine, *Rights in Security* 389; *Tawse v Rigg* (1904) 6 F 544.; *Largue v Urquhart* (1883) 10 R 1229; *National Bank of Scotland v Thomas White and Park* 1909 SC 1308.

[301] *Kerr v Beck* (1849) 11 D 510 at 514 *per* Lord Robertson.

[302] *Renny & Webster v Myles & Murray* (1847) 9 D 619.

[303] *Kerr v Beck* (1849) 1 D 510.

[304] *Jackson v Fenwick's Tr* (1899) 6 SLT 319.

[305] *Menzies v Murdoch* (1841) 4 D 257 at 265 *per* Lord Fullerton.

[306] Bell, *Commentaries* II, 109; Bell, *Principles* § 1444.

[307] Bell, *Commentaries* II, 107; Bell, *Principles* § 1440; *Tawse v Rigg* (1904) 6 F 544.

[308] *Gray v Wardrop's Trs* (1851) 13 D 963 rev'd *sub nom Gray v Graham* (1855) 18 D (HL) 52.

[309] *Renny v Rutherford* (1840) 2 D 676; *Renny v Kemp* (1841) 3 D 1134.

[310] See above, para 13-30.

[311] Bell, *Commentaries* II, 107; *Finlay v Syme* (1773) Mor 6250; *Callman v Bell* (1793) Mor 6255.

[312] Begg, *Law Agents* 205.

[313] Hume, *Lectures* III, 54.

[314] On lien as a real right, see, above, ch 14. That the solicitor's lien prevails against creditors and singular successors is pointed out by Begg, *Law Agents* 220. See also Bell, *Commentaries* II, 108; Bell,

it in favour of caution.[315] That the lien is effective against singular successors was established at a very early time, the court holding that otherwise 'it would in most cases be good for nothing'.[316] Thus, in a later case a solicitor was entitled to withhold a *mortis causa* deed from a person who had acquired right under it until the account due by the granter of the deed – his client – was paid.[317]

17-88. With regard to title deeds the solicitor cannot enforce the right against third parties who have an interest therein which is not derived from his client.[318] Consequently, a solicitor for a liferenter may not withhold from the fiar;[319] and a solicitor for a heritable creditor cannot keep the deeds from the proprietor.[320] The rule essentially does not impinge on the real nature of the lien, for such individuals are not singular successors.

17-89. The solicitor's lien is effective against the client's creditors.[321] Thus, for example, it may be enforced against an adjudger.[322] Where, however, the solicitor has acted for both the borrower and lender in arranging a heritable security, the solicitor will be personally barred from asserting the lien against the lender, unless the solicitor informed the lender that he or she intended to exercise the right at the time the security was granted.[323]

(7) Enforcement

17-90. The solicitor has no right to sell the subject matter of the lien.[324] The right helps him or her to recover the debt because the client or other party wishing the documents is caused inconvenience as long as access cannot be gained to them. The fact that the agent is asserting a lien does not in itself stop his or her account negatively prescribing.[325]

Principles § 1442. Hume denies that the lien is effectual against creditors and singular successors: *Lectures* III, 54. This, however, may be put down to his distaste for the decision in *Provenhall's Creditors* (discussed above, paras 17-78–17-79) and his wish to show that it was wrong.

[315] *Ferguson & Stuart v Grant* (1856) 18 D 536; *Boyd v Drummond, Robbie & Gibson* 1994 SCLR 777. See above, para 15-05.

[316] *Creditors of Lidderdale v Nasmyth* (1749) Mor 6248 at 6249.

[317] *Paul v Meikle* (1868) 7 M 235. See, however, the interpretation of the case of Begg, *Law Agents* 221.

[318] Bell, *Principles* § 1442; Begg, *Law Agents* 223–224; Gloag and Irvine, *Rights in Security* 391.

[319] Sheriff Guthrie in Bell, *Principles* § 1442.

[320] *Liquidator of Weir and Wilson Ltd v Turnbull & Findlay* 1911 SC 1006.

[321] Bell, *Commentaries* II, 108; Bell, *Principles* § 1442; Begg, *Law Agents* 220; Gloag and Irvine, *Rights in Security* 390.

[322] *Dalrymple v Earl of Selkirk* (1751) Elchies, *Hypothec* No 17.

[323] Bell, *Principles* § 1442; *Wilson v Lumsdaine* (1837) 15 S 1211; *Allan v Sawers* (1842) 4 D 1356; *Paterson v Currie* (1846) 8 D 1005; *Gray v Wardrop's Trs* (1851) 13 D 963 rev'd *sub nom Gray v Graham* (1855) 18 D (HL) 52; *Drummond v Muirhead & Guthrie Smith* (1900) 2 F 585.

[324] *Ferguson & Stuart v Grant* (1856) 18 D 536 at 538 *per* Lord Curriehill.

[325] Bell, *Commentaries* II, 108; *Foggo's Exrs v M'Adam* (1780) Mor 6252.

17-91. In the event of the client being sequestrated, or – in the case of a company – being liquidated, the solicitor is required to deliver up the papers on the request of the trustee in sequestration or liquidator.[326] Such delivery, however, is without prejudice to any preference of the solicitor as lien-holder, provided it can be shown that but for it a valid lien is held.[327] The preference which the solicitor gets is one over the whole estate, after the expenses of the sequestration or liquidation have been paid.[328] It has never been settled, however, whether the solicitor, like a floating charge-holder, is postponed to any preferred creditors.[329]

17-92. It would seem somewhat unfair that a solicitor holding a few papers can on surrendering them be preferred in respect of his or her whole account theoretically running into thousands of pounds. The rule, however, dates back to the eighteenth century and has never seriously been questioned.[330] It is of course the right of the court to interfere in any case where it feels that a lien is being exercised inequitably.[331]

[326] Bankruptcy (Scotland) Act 1985 s 38(4); Insolvency (Scotland) Rules 1986, SI 1986/1915, r 4.22(4).

[327] Bankruptcy (Scotland) Act 1985 s 38(4); Insolvency (Scotland) Rules 1986 r 4.22(4); *Rorie v Stevenson* 1908 SC 559; *Garden Haig Scott and Wallace v Stevenson's Tr* 1962 SC 51.

[328] *Paul v Mathie* (1826) 4 S 420 (NE 424); *Skinner v Henderson* (1865) 3 M 867; *Rorie v Stevenson* 1908 SC 559; *Train & McIntyre Ltd v William Forbes Ltd* 1925 SLT 286; *Miln's Judicial Factor v Spence's Trs* 1927 SLT 425.

[329] Sim, 'Rights in Security' para 99.

[330] Bell, *Commentaries* II, 108; Hume, *Lectures* III, 52; *Newland's Creditors v Mackenzie* (1793) Mor 6254; *Hotchkis v Thomson* (1794) Mor 6256; *Jamieson v McIntosh*, 21 May 1810, unreported; *Watson & McNaught v Crawford's Tr*, 16 Dec 1817, unreported; *Paul v Mathie* (1826) 4 S 420 (NE 424); *Skinner v Henderson* (1865) 3 M 867.

[331] *Ferguson & Stuart v Grant* (1856) 18 D 536; *M'Intosh v Chalmers* (1883) 11 R 8. See above, paras 15-04–15-06.

18 Pledge and Lien Compared

A. INTRODUCTION

18-01. The true nature of the distinction between pledge and lien is a matter which has been the subject of little analysis. In England the general approach has been to say that the two rights are distinct because a pledgee has an automatic power of sale, whereas a lien-holder does not.[1] Further, English law regards a pledgee, but not a lien-holder, as having an assignable interest in the subject of the security.[2] These two distinctions unfortunately do not help in Scotland, for the pledgee here has neither an implied right to sell nor, probably, to assign.[3] Moreover, to decide whether the security holder has these rights in England, one is still left with the preliminary question of whether there is a pledge rather than a lien.

18-02. In Scotland, Bell states in his *Commentaries* that 'retention operates as a pledge constituted by tacit or implied consent'.[4] Later on in the same work, he notes that 'a general lien, by express agreement, is in the nature of a pledge'.[5] Lord Young, in a well-known statement, opined that a lien is a

[1] Cobbett, *Pawns or Pledges* 43–44; Hall, *Possessory Liens* 50–51; Bell, *Personal Property* 136–137; M G Bridge, *Personal Property Law* (3rd edn, 2002) 176; J Crossley-Vaines, *Personal Property* (5th edn, 1973) 137 and 459; *Ex parte Hubbard* (1886) 17 QBD 699; *The Odessa* [1916] 1 AC 145 at 159 *per* Lord Mersey.

[2] Bell, *Personal Property* 136–137; Bridge, *Personal Property Law* 176; N Palmer and A Mason, 'Lien' in *Halsbury's Laws of England* (4th edn) vol 28 (1997) para 713; *Donald v Suckling* (1866) LR 1 QB 585.

[3] See above, paras 8-04 and 4-18–4-27.

[4] Bell, *Commentaries* II, 87.

[5] Bell, *Commentaries* II, 102.

'contract of pledge collateral to another contract of which it is an incident'.[6] Gloag and Irvine, for their part, write that 'it is not easy, and may not in all cases be possible, to distinguish'[7] pledge and lien. They regard an express general lien as being 'practically a pledge under a different name'.[8] With respect to special lien, they say that where property is subject to such a right it is 'pledged for the debt, and the possessor has the rights of a pledgee'.[9] Such an approach coheres with much of the case law on lien, where pledge terminology is never far away.[10] A recent example is *Air and General Finance Ltd v RYB Marine Ltd*,[11] where Lord Malcolm described a lien as 'something akin to pledge'.[12]

18-03. While a considerable body of authority clearly equates lien broadly with pledge, the point may be repeated that very little analysis has ever been carried out. Gow, for example, states that a '[l]ien is a legal pledge'.[13] He does not justify the statement. Part of the problem here is that the word 'pledge' can be used in a number of different ways.[14] If it is used in the sense of a general term for a security, like Bankton used it,[15] there can be no doubt that a lien is a type of pledge. If a narrower definition is taken, that 'pledge' means an express security over moveables,[16] then naturally liens arising by operation of law must be regarded as implied pledges and express liens simply as pledges *per se*.

18-04. This book (and most modern authority) has adopted a still more restrictive definition of pledge, viewing it as the real right in security constituted over moveable property by the transfer of possession of the property by pledger to pledgee pursuant to an agreement between them that the property is to be used as security.[17] If such a definition is accepted, then it is submitted that pledge may be distinguished from lien in a number of ways which will now be considered. After this, the particular distinctions between special lien and pledge, and general lien and pledge, will be identified.

[6] *Miller v Hutcheson & Dixon* (1881) 8 R 489 at 492. For a converse statement, see Cross, *Lien* 63: 'a pledge is a lien arising by contract'. This is adopted by Cobbett, *Pawns or Pledges* 35.

[7] Gloag and Irvine, *Rights in Security* 201–202.

[8] Gloag and Irvine, *Rights in Security* 209. This is also the view taken in England by Hall, *Possessory Liens* 32.

[9] Gloag and Irvine, *Rights in Security* 209; Hall, *Possessory Liens* 32.

[10] Eg, *Renny v Kemp* (1841) 3 D 1134 and *Christie v Ruxton* (1862) 24 D 1182.

[11] 2007 GWD 35-589, [2007] CSOH 177.

[12] At para 7.

[13] J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 292. In Germany, real liens such as that of the carrier and the factor are treated as statutory pledges (*gesetzliche Pfandrechten*). See E J Cohn, *Manual of German Law* vol 2 (1971) paras 7.114–7.122.

[14] See above, paras 2-06–2-11.

[15] Bankton I.xvii.1. See also, A Smith, *Lectures on Jurisprudence* (1978, eds R L Meek, D D Raphael and P G Stein) 78–81.

[16] See, eg, D M Walker, *Principles of Scottish Private Law* (4th edn) vol III (1989) 394–396; Denis, *Pledge* 480.

[17] See above, para 2-01.

B. RELATIONSHIP OF THE DEBT TO THE SECURITY SUBJECTS

18-05. The key difference between pledge and lien concerns the property which is the subject of the security. With lien, it is inextricably linked with the debt being secured.[18] For example, the subject of a repairer's lien is the thing which has been repaired. The lien secures the repair bill. Likewise, the subjects of a solicitor's lien are the papers with which the solicitor has worked as a solicitor, the lien securing his or her account. Similarly, the property which a *bona fide* possessor retains is the property which has been improved, the improvements being that for which recompense is sought. The law is clear that a lien cannot be exercised in respect of debts which are extrinsic to the property or the capacity in which it is being held.[19]

18-06. With pledge, any debt or obligation *ad factum praestandum* decided upon by debtor and creditor may be secured.[20] The subject of the pledge need have no connection whatsoever to the secured obligation. For example, a gold bracelet can be pledged in security of debt due to a milkman. Thus the only reason why the property is in the pledgee's hands is for security. This contrasts with lien where the property is handed over for another reason, for example, for work to be performed and then the property is retained in security of the workman's bill. In the words of Sim: '[T]he basis of a lien is usually a collateral or ancillary condition implied by law in a contract whose main preoccupation will be something other than the creation of security.'[21] Similar sentiments have been expressed in a recent English case:

> 'A pledge and a contractual lien both depend on delivery of possession to the creditor. The difference between them is that in the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose.'[22]

C. THE EXIGIBILITY OF THE DEBT

18-07. Pledge may equally secure a term loan as a loan which is payable on demand. Hence, a piece of property may be handed over in order to secure the payment of a debt which is to be discharged in ten years time. With lien, the debt secured is due immediately. This much seems to be accepted in a

[18] On this point, see *Jowitt's Dictionary of English Law* (2nd edn, by J Burke, 1977) sv 'Lien'.

[19] See above, paras 17-32, 17-59, 17-84 and, eg, *Cuthberts v Ross* (1697) 4 Br Sup 374; *M'Call & Co v James Black & Co* (1824) 2 Sh App 188 and *Largue v Urquhart* (1883) 10 R 1229. See also D J T Logan, *Practical Debt Recovery* (2001) 249.

[20] See above, para 4-01. On this as a distinction between pledge and lien, see also R Slovenko, 'Of Pledge' (1958) 33 *Tul LR* 59 at 60. See too H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Personal Property Security* (2007) para 3.53.

[21] Cross, *Lien* 43; A J Sim, 'Rights in Security' in *Stair Memorial Encyclopaedia* vol 20 (1992) para 67.

[22] *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508G *per* Millett LJ.

number of jurisdictions.[23] With lien, the creditor is trying to speed up payment by the debtor by inconveniencing him or her through the detention of his or her property.[24] This contrasts with pledge where the creditor is prepared to give the debtor a period of time to perform the obligation, because the debtor has provided security.

D. PLEDGE RESTRICTED TO MOVEABLE PROPERTY

18-08. It is only possible to pledge moveable property, more precisely corporeal moveables and negotiable instruments.[25] Whilst it is equally competent to have a lien over such property, it would also seem possible to exercise a lien in respect of land. There is case law and institutional authority giving a *bona fide* possessor the right to retain land until he receives recompense for improvements which he has made.[26] There appears to be no reason why there cannot be a lien over land arising under contract.[27] On the other hand, a pledge of land is clearly incompetent.[28]

E. PLEDGEE HAS POSSESSION

18-09. Scots law following Roman law holds that in order for the creditor to have a valid real right of pledge, he or she must be in possession of the property in question.[29] It would seem in contrast that a lien may arise where the creditor has mere custody of the property.[30] Carriers, repairers and storekeepers are good examples. They have mere custody but are entitled to liens.[31] Other cases also come to mind, such as solicitors who have a general lien over title deeds and other papers in their custody. In some cases a lien will require possession on the part of the creditor: the key example is the *bona fide* possessor's lien.[32] There is also a very stateable argument that once an individual, say a carrier, becomes entitled to a lien, by performing the carriage, that party then possesses the property as he or she is then holding the property for his or her own benefit.[33] The acceptance of this argument,

[23] Bell, *Personal Property* 136; I Lawrence, *Textbook on Commercial Law* (1992) 319 (England); § 273 *BGB*; art 1592 *Quebec Civil Code.*

[24] See above, para 9-09.

[25] See above, paras 5-02–5-09.

[26] In particular, *Binning v Brotherstones* (1676) Mor 13401 and Bankton II.ix.68. See above, paras 12-02–12-04.

[27] McBryde, *Contract* paras 20-82–20-85. See above, para 12-04.

[28] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3). See above, para 5-10.

[29] See above, para 8-20.

[30] See above, paras 13-04–13-23.

[31] *Stevenson v Likly* (1824) 3 S 291 (NE 204); *Carntyne Motors v Curran* 1958 SLT (Sh Ct) 6; *Laurie & Co v Denny's Tr* (1853) 15 D 404.

[32] See above, paras 11-19–11-22.

[33] See above, para 13-12.

however, does not alter the fact that the lien arises in a situation where the creditor has custody of the property, in contrast to pledge where the creditor is put directly into possession of the thing.

F. PLEDGE AND SPECIAL LIEN

18-10. A special lien arises by operation of law where certain criteria are satisfied.[34] These have been discussed fully elsewhere.[35] For the sake of convenience it may be stated that such a lien will arise where one party holds the property of another and has a duty to return it but also a counterclaim connected to it. No agreement between the parties, express or implied, is required to bring the lien into existence. In contrast, pledge must be founded upon a contract of pledge, the basis of which is consensus between the pledger and pledgee that the property in question will be pledged.[36]

18-11. Special lien can definitively be said not to be a 'contract of pledge collateral to another contract of which it is an incident'.[37] It is a right which arises automatically in the circumstances set out above.[38] It is no more a contract than the right of compensation or set-off.[39]

G. PLEDGE AND GENERAL LIEN

18-12. As has been seen elsewhere, general lien arises either by implied or express contract.[40] More precisely they are created by express or implied terms in contracts, rather than being contracts themselves.[41] The majority of general liens, for example agency liens, arise by implied contract. They may be distinguished from pledge which is only capable of being created by express contract.[42] As for express lien, it must be accepted that it is the type of lien most alike pledge. This, as has been seen, was the view of Bell, and Gloag and Irvine.[43]

18-13. What, however, must also be remembered is that express general lien does differ from pledge with regard to matters such as the relation of the

[34] It is of course possible to state in a contract that an individual, for example an unpaid seller, has a special lien. However, such a provision is merely declaratory.

[35] See above, ch 16.

[36] See above, paras 6-02–6-06.

[37] *Miller v Hutcheson & Dixon* (1881) 8 R 489 at 492 *per* Lord Young. See above, para 18-02.

[38] See too the position in Louisiana where a lien arises by operation of law depending on the nature of the debt, whereas pledge is contractual: R Slovenko, 'Of Pledge' (1958) 33 *Tul LR* 59 at 60.

[39] See Stair I.xviii.6–7, which treats compensation and retention back-to-back. Note also the discussion in *Harper v Faulds* (1791) Bell's Octavo Cases 440.

[40] See above, ch 17.

[41] Compare *Miller v Hutcheson & Dixon* (1881) 8 R 489 at 492 *per* Lord Young.

[42] See above, para 6-02–6-06.

[43] See above, para 18-02.

secured property to the debt and the exigibility of the debt, discussed previously.[44]

H. CONCLUSION

18-14. It has been shown that there exist a number of differences between pledge and lien in a study which has not been exhaustive. Of course it would be foolish not to admit that there are similarities. Both are types of real security which depend essentially on the creditor holding on to the property in question. An express general lien is probably the lien most like pledge, as both arise from express contract. But just because something shares common features with another, does not mean it is the same thing as the other. A lien may appear like an implied pledge and an express lien simply as a pledge. However, as with all things one should judge not by appearance but by substance. The similarities which do exist between pledge and lien should not be used to compress the latter into the former.

[44] See above, paras 18-05–18-09.

Index

Writers are indexed if they are named in the body of the text. Location references are to paragraph numbers, with 'n' denoting a footnote to the paragraph.

C

E

H

M

Q

R

S

T

U