The Landlord's Hypothec

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The Landlord's Hypothec

Andrew Sweeney

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Preface

This book is a slightly amended version of my doctoral thesis submitted to the University of Edinburgh in 2020. It aims to add to the research already undertaken on rights in security in Scots law and published in this *Studies in Scots Law* series.

My main thanks must go to the three professors who contributed a substantial amount to my research. Without the suggestions and guidance of my two supervisors, Professor Kenneth Reid and Professor Andrew Steven, this book would be much poorer. Professor Reinhard Zimmermann provided me with the valuable experience of being a member of his *Lehrstuhl* in the Max Planck Institute for Comparative and International Private Law in Hamburg for two years. I cannot thank them enough.

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Andrew Sweeney
Edinburgh
June 2021

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Other Abbreviations

1867 Act	Hypothec Amendment (Scotland) Act 1867 (30 & 31 Vict c 42)
1880 Act	Hypothec Abolition (Scotland) Act 1880 (43 Vict c 12)
1985 Act	Companies Act 1985 (c 6)
1986 Act	Insolvency Act 1986 (c 45)
2002 Act	Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17)
2007 Act	Bankruptcy and Diligence etc (Scotland) Act 2007 (asp 3)

2016 Act	Bankruptcy (Scotland) Act 2016 (asp 21)
AD	South African Appellate Division Reports
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)
BGH	*Bundesgerichtshof*
C	The Codex of Justinian
CC	*Code civil* (French Civil Code)
CPD	Cape Provincial Division Reports
D	The Digest of Justinian
EdinLR	*Edinburgh Law Review*
FC	Faculty Collection
Guth Sh Cas	W Guthrie, *Select Cases Decided in the Sheriff Courts of Scotland*, 2 vols (1879 and 1894)
InsO	*Insolvenzordnung* (German Insolvency Code)
JJ	*Journal of Jurisprudence*
JLSS	*Journal of the Law Society of Scotland*
JR	*Juridical Review*
LCC	Louisiana Civil Code
NLS	National Library of Scotland
NRS	National Records of Scotland
NLR	Natal Law Reports
SA	South African Law Reports
SALJ	*South African Law Journal*
SCLR	Scottish Civil Law Reports
Sh Ct Rep	*Scottish Law Review and Reports of Cases in the Sheriff Courts of Scotland* (1885–1963)

SLC	Scottish Law Commission
SLCR	Scottish Land Court Reports
SLT	*Scots Law Times*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (Journal of Contemporary Roman-Dutch Law)
TPD	Transvaal Provincial Division Reports
TSAR	*Tydskrif Vir Die Suid-Afrikaanse Reg* (Journal of South African Law)
WLD	Witwatersrand Local Division Reports
ZAGPJHC	South Gauteng High Court, Johannesburg
ZPO	*Zivilprozessordnung,* German Civil Procedure Code

1 Introduction

1-01. The hypothec has a long history in Scots law. Since its introduction in the sixteenth century, it has been the subject of numerous cases seeking to clarify the rights it gives to a landlord, and several statutes diminishing these rights. Yet, the law is still far from settled. This stems from a failure to understand the nature of the hypothec, a failure from which Lord Kames was not exempt. In his *Eludications*,[1] he concluded that:

> The hypothec under consideration, whether affecting corn or cattle, is, in its nature, so singular, as to create a doubt, whether such a legal conception of it can be formed, as to account for all its avowed consequences. It is admitted, that a hypothec upon the cattle, bars not the tenant from alienating any particular horse, ox, or sheep, or even quantities of them; provided sufficiency be left for the hypothec. It follows clearly, that no individual is hypothecated; and yet, upon that supposition, it is difficult to conceive that the whole stock or herd can be hypothecated. To avoid that difficulty, one is led to think, that there is no hypothec here in a proper sense; but only a preference given to the landlord before the tenant's other creditors, not as having any real right, but upon equitable considerations; a preference *inter chirographarios*, as termed in the Roman law. But in avoiding *Scylla*, we are driven upon *Charibdis*. If the hypothec be reduced to a preference *inter chirographarios*, it cannot affect *bona fide* purchasers for a valuable consideration; which however it does by established practice. In short, this hypothec seems not easily reducible to just principles.

1-02. Several centuries later, the nature of the hypothec is still the subject of disagreement. It has been equated to a floating charge[2] or a "form of floating security",[3] or alternatively it has been viewed as a right that becomes real through sequestration for rent,[4] or again as a mere preference in insolvency.[5] Paton and Cameron accept both that the landlord has a "real right of hypothec" and that this real right is put "into force by attaching specific subjects and making his

[1] H Home, Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1777) Art X.

[2] Gow, *Mercantile Law* 299.

[3] Rennie, *Leases* para 17-17. See also Rankine, *Leases* 401 for a similar description.

[4] Stewart, *Diligence* 460; D A Brand, A J M Steven and S Wortley, *McDonald's Conveyancing Manual*, 7th edn (2004) para 25.94.

[5] D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 189.

right a real right over them. His right of hypothec is converted into a real right of pledge."[6] Despite the doubts sometimes expressed, however, the hypothec is a real right. It is a right directly in an item, created when that item is brought into the leased premises and the rent from the tenant is due and unpaid.[7] And this right is immediately enforceable. A landlord can, for example, prevent the removal of the goods or, if they have been removed, require them to be brought back.[8] The hypothec also gives the landlord a right to defeat any creditor of the tenant who seeks to attach the goods.[9]

1-03. Much of the confusion is caused by the landlord's inability to follow goods when removed from the leased premises. Whilst it is true that a landlord often cannot follow goods taken from the premises, these are examples of when the real right of hypothec has been extinguished.[10] This book emphasises the hypothec's nature as a real right, which allows the consequences of the right to become clearer for landlords, tenants and insolvency practitioners.

1-04. That the hypothec grants the landlord a real right in the goods has not been affected by the Bankruptcy and Diligence etc (Scotland) Act 2007, which reformed the law by removing third parties' goods from the scope of the hypothec and abolishing the landlord's unique enforcement procedure of sequestration for rent.[11] But whilst the landlord retains his real right, the 2007 Act was enacted without adequate research into the then law. There is therefore much doubt about what the 2007 Act reform achieved and how it affects the underlying common law. This book also attempts to solve some of these issues.

1-05. The book is divided into three parts. Part A is an account of the history of the hypothec from its introduction into Scots law in the sixteenth century to the reforms of the Bankruptcy and Diligence etc (Scotland) Act 2007. Part B addresses the "lifecycle of the hypothec", i.e. the creation of the hypothec, its subject-matter, and its extinction. Part C discusses the hypothec's enforcement and so is likely to be of most interest to practitioners. It contains a thorough analysis of the effects of the hypothec in liquidation, receivership, administration and bankruptcy. Through this analysis, we can see the continued benefits of the hypothec for landlords, and the need for insolvency practitioners to consider its effects.

[6] Paton and Cameron, *Landlord and Tenant* 215. See also the statement on sequestration for rent in G Watson, *Bell's Dictionary and Digest of the Law of Scotland*, 7th edn (1890, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 2, 2012) 997, where it is written that "The sequestration renders special the landlord's right, which was before general, and makes it attach to each individual article sequestrated, so as to entitle the landlord to recover the property or the value of the cattle, &c . . ."

[7] See Gloag and Irvine, *Rights in Security* 416 for the law before the Bankruptcy and Diligence etc (Scotland) Act 2007.

[8] For a discussion on the warrant to carry back, see paras 10-22–10-26 below.

[9] See paras 9-14–9-18 below.

[10] Discussed at length in chapter 9 below.

[11] For a discussion on this, see paras 4-53 and 4-55–4-57 below.

PART A
HISTORY

2 Early Law

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A. ROMAN LAW

2-01. The landlord's hypothec was first seen in Roman law. Whilst certain characteristics of the hypothec are also found in the law of ancient Greece – including the use of the word *hypothēkē* for a non-possessory security[1] – the consensus is that the Roman law of hypothec was of native origin and developed from the law of *pignus*.[2] Thus, any discussion on the hypothec must involve a brief introduction to the law of Rome.

2-02. Roman law did not always permit the use of hypothec. Before the classical period, creditors mainly used personal security (i.e. a guarantee from someone other than the debtor) to ensure the payment of a debt. Despite this, the law of real securities was not forgotten; it went through a series of improvements that eventually created the hypothec. First, there was the *fiducia cum creditore*, which involved a transfer of ownership of the collateral to the creditor,[3] but this form of security could not have been ideal for either party. As the ownership was transferred to the creditor, the debtor was left with merely a personal right against the creditor to reacquire the transferred property, and

[1] For a discussion on the law of ancient Greece, see D M MacDowell, *The Law in Classical Athens* (1978) 143.

[2] R Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law*, 3rd edn (transl J C Ledlie, 1907) 354; W L Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (1938) 381; R W Lee, *Elements of Roman Law* (1944) 172; H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn (1972) 303; J A C Thomas, *Textbook of Roman Law* (1976) 332.

[3] In Scots law, this is called an improper security.

the collateral could not be used to secure another debt.[4] On the other side, the creditor, by acquiring ownership, took the risk that the property was damaged. Unsurprisingly, therefore, another security right was developed: *pignus*, or pledge. As in modern practice, *pignus* gave the creditor a subordinate real right over (rather than ownership of) the collateral. But, as the possession of the property was still handed to the creditor, the property was unavailable for use by the debtor. It was still far from ideal for either creditor or debtor.

2-03. By the time of the later Republic the *hypotheca* was developed. A right of hypothec could be created whilst both possession and ownership remained with the debtor; only an agreement between the security-granter and the creditor was needed to create the security right.[5] The first hypothec arose from the contract of lease, beginning a relationship that would remain until today. A tenant would agree that the rent owed to the landlord would be secured by a right of hypothec over the crops grown on the leased land.[6] Although initially restricted to crops, by the time of the classical law, the hypothec could burden all the tenant's goods brought within the leased premises. As the landlord had no possession of the collateral, he needed a way to remove the goods from the tenant's possession. This was granted in the form of the *interdictum Salvianum*.[7] Later, the *actio Serviana* would allow a landlord to follow the goods into the hands of a third party – this was an *actio in rem*.[8]

2-04. The final stage of development was to dispense with the need for an agreement between the parties – now, whenever a lease was agreed and goods were brought into the premises, the hypothec arose by operation of law. For rural leases, the crop was impliedly hypothecated, whereas everything brought into urban premises was burdened.[9] Exactly when the hypothec became implied is not known for sure, but it has been dated to the end of the first century AD and certainly by the late classical period at the latest.[10] The increasing number of tenants who were unable to pay their rent may have been the motivation behind the law implying the hypothec.[11] It has, however, also been argued

[4] Of course, the collateral may have come from a third party.

[5] D.13.7.9.2 (Ulpian).

[6] Jolowicz and Nicholas, *Historical Introduction* 303; R van der Bergh, "The development of the landlord's hypothec" (2009) 15 Fundamina 155 and 163; P J du Plessis, "Towards the medieval law of hypothec", in J W Cairns and P J du Plessis (eds), *The Creation of the Ius Commune: From Casus to Regula* (Edinburgh Studies in Law vol 7, 2010) 159 at 162; P J du Plessis, *Borkowski's Textbook on Roman Law*, 6th edn (2020) 308; C Anderson, *Roman Law for Scots Law Students* (2021) 274-75.

[7] Thomas, *Roman Law* 332; Anderson, *Roman Law for Scots Law Students* 275.

[8] D.47.2.63.8 (Africanus); I.4.6.7; Van der Bergh, "The development of the landlord's hypothec" 165; Anderson, *Roman Law for Scots Law Students* 275.

[9] The reason for this is unknown: see Du Plessis, "Towards the medieval law of hypothec" 165.

[10] B W Frier, *Landlords and Tenants in Imperial Rome* (1980) 107; Du Plessis, "Towards the medieval law of hypothec" 162. Cf Schulz who writes that the classical law was free from "devastating legal hypothecs": see F Schulz, *Classical Roman Law* (1951) 411.

[11] An account of this can be seen in Du Plessis, "Towards the Medieval Law of Hypothec" 165.

that the hypothec became implied after the express agreement became used universally in leases without negotiation. If the parties would always agree on the creation of a right of hypothec, there would have been little need for the law to require the parties to give their express consent.[12]

2-05. The post-classical period saw an expansion in both the number of hypothecs and the property they could burden.[13] Debtors could now grant a right of hypothec over the entirety of their estate.[14] But such a large number of hypothecs, with their lack of publicity, must have produced difficulties.[15] Third parties, unaware of the existence of a right of hypothec over property, were protected by the criminal law, which penalised debtors who granted successive securities over the same items without disclosing the full picture.[16] For modern Civilian legal systems, however, criminal sanctions were an insufficient safeguard and, as a result, the number of hypothecs they accepted was restricted.[17] Scots law was no different.

2-06. In Scots law, the default rule is that the goods must be handed to a creditor before a right in security is created,[18] and the widespread use of hypothecs, as in Roman law, has been consistently rejected.[19] Only a few hypothecs now remain,[20] and the landlord's hypothec is the only one that arises by operation of law.[21]

[12] P J du Plessis, "Theory and practice in the Roman law of contracts", in T A J McGinn (ed), *Obligations in Roman Law* (2013) 131 at 147.

[13] Schulz, *Classical Roman Law* 404.

[14] D.20.1.1. (Papinian).

[15] W J Zwalve, "A labyrinth of creditors: a short introduction to the history of security interests in goods", in E M Kieninger (ed), *Security Rights in Movable Property in European Private Law* (2004) 38 at 43.

[16] D.47.20.3.1. (Ulpian); Zwalve, "A labyrinth of creditors" 43.

[17] See, for example: M Planiol, *Treatise on the Civil Law* (transl Louisiana State Law Institute, 1939) §2402; §1205 BGB.

[18] Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017) para 17.18.

[19] Stair I.13.14; Bankton I.17.1–3 (vol I, 383–84); Erskine III.2.34; Bell, *Commentaries* II, 24ff; Gloag and Irvine, *Rights in Security* 188; W M Gordon, "Roman influence on the Scots law of real security", in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society Sup vol 2, 1995) 157 at 168; A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) para 6-07.

[20] The bonds of bottomry (a security over a ship) and *respondentia* (a security over the cargo of a ship) are rarely, if ever, used today. Certain statutory rights in security, however, do exist. There is the ship mortgage (see the Merchant Shipping Act 1995 s 16(1) and Sch 1 para 7), the aircraft mortgage (see the Civil Aviation Act 1982 s 86; Mortgaging of Aircraft Order 1972, SI 1972/1268), and the agricultural charge (see the Agricultural Credits (Scotland) Act 1929 s 5). For a discussion on the agricultural charge and its connection to the floating charge, see A D J MacPherson, "The 'pre-history' of floating charges in Scots law", in J Hardman and A D J MacPherson (eds), *Floating Charges in Scotland: New Perspectives and Current Issues* (forthcoming).

[21] Of course, there is also the solicitor's hypothec over the expenses to be paid to his or her client. This secures the fees due to the solicitor. Strictly speaking, however, this is not a right of

B. EARLY SCOTS LAW

(1) *Regiam Majestatem*

2-07. The landlord's hypothec was present in Roman law, as just seen. We have, however, no evidence for the law of Scotland until the publication of the *Regiam Majestatem,* which gives an account of Scots law at the start of the fourteenth century.[22] In a section entitled "pledge" it is written that, for a creditor to obtain a right in security in an item, the debtor can give "possession of the subjects of pledge to the creditor, or he does not".[23] This appears to leave open the possibility that possession of the collateral can be left with the debtor, but Book 3, chapter 4 of *Regiam* removes the possibility of enforcement in the King's Court for securities created only by agreement between a creditor and a debtor (i.e. hypothecs). There is also a justification for this lack of enforcement: the protection of third parties and "the risk that the same thing may have been previously pledged, and may again be pledged, to other creditors".[24] From this, we can be fairly certain that there was no equivalent of the Roman hypothec in fourteenth-century Scotland. Landlords were not excepted from this rule,[25] which left a medieval landlord with the same enforcement mechanisms as any other creditor – that is to say through the brieve of distress.[26]

2-08. The brieve of distress, which was designed to prevent creditors attaching the property of debtors by their own authority, was presumably brought to Scotland along with the extending reach of the Anglo-Norman state.[27] The brieve was designed to allow a creditor to seize the property of his debtor if that

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hypothec. Instead, the solicitor's right is obtained through an implied assignation of the client's right to receive the expenses, thereby allowing the solicitor to obtain a decree for expenses. On this, see A J Sim, "Rights in Security over Moveables", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 20 (1991) paras 103–107. A solicitor also has a right of lien in a client's papers in security of the fees owed by the client. This right was originally called the solicitor's hypothec, but this was incorrect because the solicitor has possession of the papers. On this, see Steven, *Pledge and Lien* para 10-83.

[22] H L MacQueen, *Common Law and Feudal Society in Medieval Scotland* (1993) 91; J W Cairns, "Historical introduction", in K Reid and R Zimmermann, *A History of Private Law in Scotland* (2000) vol 1, 14 at 43. There is much debate about the reliability of *Regiam*, helpfully summarised in Steven, *Pledge and Lien* paras 3-16 and 3-17.

[23] *Regiam Majestatem* (ed Lord Cooper, Stair Society vol 11, 1947) III.2 (hereinafter *Regiam*). This is probably taken from Glanvill (Anonymous, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (transl G D G Hall, 1990) X.6).

[24] *Regiam* III.4. There remains the possibility that such agreements between creditor and debtor were enforceable in the ecclesiastical, local and private courts.

[25] W M Gordon, "Roman influence on the Scots law of real security", in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society Sup vol 2, 1995) 157 at 168.

[26] *Regiam* I.5.5; A J M Steven, "The landlord's hypothec in comparative perspective" (2008) 12 Electronic Journal of Comparative Law 1 at 4–5.

[27] W Ross, *Lectures on the History and Practice of the Law of Scotland, Relative to Conveyancing and Legal Diligence*, 2nd edn (1822) I, 385ff; D Maxwell, "Diligence", in C G H Paton (ed), *Introduction to Scottish Legal History* (Stair Society vol 20, 1958) 229.

debtor defaulted on the repayment of a debt. Its procedure incorporated both proof of the debt and execution of the judgment.[28] If a creditor could prove to the sheriff the existence of a debt, his debtor was given 15 days to pay. Failing payment, the debtor's cattle (presumably a debtor's main or only assets of value at that time) were sold or, if sale was impossible, forfeited to the creditor.

(2) Sixteenth-century *Practicks*

2-09. No evidence exists for the development of the law between *Regiam* and the *Practicks* compiled in the sixteenth century, a gap of more than 200 years.[29] But, after the Court of Session was established in 1532, digests of case decisions were compiled by those who sat as judges.[30] These are the so-called "decision *Practicks*". The first such compilation was that of John Sinclair, who sat as a judge from 1540 to 1566.[31] Within these *Practicks* there is a record of a decision dated 1541 that contains the statement that a landlord had the right to poind the goods of his tenant:

> Ane lard or lord may be his awin officiaris creat in court poind his tenent for the deweteis of his landis and byrunnis being liquidat. Utherwyis he may call his tenentis befoir his awin baillie and caus thair liquidat the samyn and get his tenent convict thairin.[32]

This indicates that the ability of a landlord to enforce payment of rent had not moved on a great deal from *Regiam*. Sinclair does, however, provide the first mention of a landlord's priority over his tenant's other creditors. In his report of a case dated 20 September 1546 he states that:

> Domini Consilii decreverunt dictum arreistamentum relaxandum ad petitionem dicti domini tenentis predicti ad effectum predictum, quia de practica Scotie the males, deweteis and firmes of the landis aucht and sould be first payit, et quoad ea dominus terrarum prefertur ceteris omnibus creditoribus tenentis ipsius . . .[33]

[28] T D Fergus (ed), *Quoniam Attachiamenta* (Stair Society vol 44, 1996) ch 36.

[29] Such evidence is perhaps not to be expected, for during this period any rights arising from tacks (leases) were settled by the local barony courts. On this, see J W Cairns, "Historical introduction", in Reid and Zimmermann, *History of Private Law in Scotland* vol 1, 14 at 55.

[30] H McKechnie, "Practicks 1469–1700", in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 25–26.

[31] Cairns, "Historical introduction" 72; A L Murray, "Sinclair's Practicks", in A Harding (ed), *Law-Making and Law-Makers in British History* (1980) 90 at 93.

[32] As yet unpublished. This is taken from §81 of the text edited by A L Murray at http://home.uni-leipzig.de/jurarom/scotland/dat/sinclair.html (based on EUL Lai.III.488(a), but also found in NLS Adv MS 22.3.4 at folio 83).

[33] Sinclair, *Practicks* §395. Rough translation: it was decided that the arrestment should be relaxed on the petition of the owner because it was the practice of Scotland that the rents of the land ought and should be paid first, and are preferred to all the other creditors of the tenant.

This preference of a landlord over other creditors of his tenant is also present in a case recorded by an anonymous source around the same period.[34] The fact that the date attributed to the case is close to the case in Sinclair's *Practicks* (the anonymous report is dated to 20 December 1546) leaves open the possibility that it is the same case as that reported by Sinclair.[35] The anonymous author reports that a landlord wanted the moveable goods of his tenant to be released (lowsit) from an arrestment obtained by the tenant's other creditors.[36] This action was based on the premise that the landlord was preferred over the tenant's other creditors for the payment of rent. The court found in favour of the landlord, holding that the goods of the tenant ought to be released from the arrestment as it was "the practik of Scotland the lord or laird of the ground in payment of his maillis and dewties is preferit to all uther creditouris".

2-10. Both cases (if indeed there are two) indicate that by the middle of the sixteenth century, at the latest, a landlord had a preference over his tenant's other creditors for the payment of his rent and a corresponding right to prevent those creditors attaching the goods on the premises. As yet, there had been no adoption of civilian terminology, but the landlord's right was certainly similar to the landlord's hypothec as it came to develop in the later law.

2-11. Dated slightly later than the *Practicks* of Sinclair are the *Practicks* of Maitland, compiled between 1550 and 1580, and those of Colvill, from between 1570 and 1593. Neither contains a reference to landlords being privileged creditors or having a right of hypothec.[37] Next in chronology is the *Practicks* compiled by Balfour, which has been dated to 1579 although he is likely to have continued to add to it until his death in 1583.[38] In line with the previous decisions, Balfour reports that a landlord has to use (ordinary) diligence over the goods of his tenant to recover any rents due to him. He notes, within the chapter concerning poinding, the case of *Wauchop v Borthwick* (1537), where the court held that:

> The Lord proprietar, and heritabill fewar of ony landis, may poind and distreinzie his tenentis, occupyaris thairof, their gudis and geir, by ane precept direct to ane

[34] Sinclair, *Practicks* §395 (supplementary practick no 522). The author of the "supplementary practicks" has not been identified by those who have examined the manuscripts. For more information, see the preface to A L Murray's text of Sinclair's *Practicks*.

[35] The case from the anonymous source also appears in the Advocates Library manuscript (NLS Adv MS 22.3.4 at folio 233) under the date of 20 September 1546, which would make it the same as the case attributed to Sinclair in EUL Lai.III.488(a).

[36] Arrestment is not usually associated with corporeal moveables, but according to Stewart it is an off-shoot of poinding and was initially a diligence in security over moveable property. On this, see J G Stewart, *A Treatise on the Law of Diligence* (1898) 1–5.

[37] This conclusion was reached from a survey of the *Practicks* in NLS Adv 22.3.4. For the dates of the *Practicks*, see McKechnie, "Practicks 1469–1700" 26; R Maitland, *Practicks* (transl R Sutherland, 2007).

[38] J Balfour, *Practicks* (reprinted by Stair Society, vols 21 and 22, 1962 and 1963) xxxii.

> Officiar to that effect, for the last thre termis maillis bypast auchtant to him of the saidis landis.[39]

This right was available to both landlords and superiors,[40] and so provides no evidence of the reception of the Roman law concept of hypothec. Indeed, Balfour does not mention the numerous hypothecs, both express and implied, present in Roman law and even states that, in order to create an express right in security over the property of a debtor, whether moveable or immoveable, the property has to be handed over to the creditor.[41] Yet he does record a case which held that landlords are to be paid their rent in preference to the tenant's other creditors. This case, like Sinclair's above, is attributed to 20 September 1546 so it is likely that they both refer to the same decision. Balfour records the court as deciding that:

> [t]he maillis, fermis and dewteis of ony landis aucht and sould be first payit be the tenent to his maister, befoir the making of payment of ony uther debtis auchtand be the tenent to ony uther creditouris, to quhome the Lord of the ground aucht and sould be preferrit: And gif ony creditour hes obtenit ane decreit aganis the tenent, and be vertue thairof hes causit arreist his gudis and geir beand upon the said Lordis ground, the said arrestment aucht to be lousit be ane Judge at the instance of the Lord of the ground, desirand the samin to ceis untill he be completelie payit of the maillis and dewteis auchtand to him.[42]

2-12. If these various *Practicks* are accurate, Scots law, by the mid-sixteenth century, had accepted that landlords had a preference over their tenants' other creditors for the payment of rent. This is a key feature of the modern landlord's hypothec. Admittedly, the reports do not restrict this preference to the goods that have been present on the leased premises at some point, which was the position in Roman law and remains the position in modern Scots law. What Balfour does do, though, is to restrict the right of the landlord to prevent diligence by other creditors to those goods "beand (being) upon the said Lordis ground". Therefore, whilst the sixteenth-century *Practicks* contain no reference to the right of a landlord being a "hypothec", two features of the hypothec were certainly present: (i) the landlord's preference over the tenant's other creditors, and (ii) the landlord's right to release goods on the leased premises from a poinding brought by another creditor of the tenant.

[39] *Wauchop v Borthwick* 13 December 1537, Balfour, *Practicks* 398 c IX. There are also statements that a "lord of the ground" has a right to "poind and distreinzie his tenent, for the dewtie of his landis" (Balfour, *Practicks* 398 c X).

[40] Ross, *Lectures* II, 400.

[41] Balfour, *Practicks* 194 c II.

[42] *Anonymous* 20 September 1546, Balfour, *Practicks* 153 c VII.

(3) Craig's *Jus Feudale*

2-13. Finalised around 1606,[43] Craig's *Jus Feudale* mentions neither the Roman hypothec nor the landlord's preference. Instead, Craig, although predominately focusing on feudal law, states that the law of both Scotland and England permits a landlord to bring a brieve against his tenant to enforce the payment of rent.[44] Much later, in discussing the development of the hypothec, Hunter was to cite both Craig and Balfour as evidence for the conclusion that there was no acceptance of the hypothec in late sixteenth- and early seventeenth-century Scotland.[45] But, as we have seen, by the time of Craig and Balfour there was already authority for a landlord's preference over other creditors and for a right to stop a poinding brought by those creditors against the tenant's goods on the leased premises.

(4) Seventeenth-century case-law

2-14. Both Hunter and Rankine attribute the first appearance of a landlord's privilege in Scots law to *Wardlaw v Mitchell* (1611),[46] a case concerned with a competition between an arresting creditor and a landlord.[47] In this case Wardlaw had obtained a decree against Mitchell and had arrested his corns, stacks, horse and oxen. This arrestment was subsequently broken by Gray, Mitchell's landlord, who carried away the crops and goods. As the "master of the ground", Gray asserted that he had a privilege over the goods and the crops from the leased land for the payment of rent due by his tenant, Mitchell. For our purposes, the main issue was in relation to the crops of the land. Wardlaw argued that the landlord was not privileged over the other creditors for all such crops. Rather, a landlord's privilege only covered the "current crop and year". The court held that the landlord had a privilege over the current crop for the rent of the current year (only).[48] Crucially, the principle of the landlord's privilege was not contested, suggesting that by this time it was already well-established. Indeed, the decisions above show that it was well-established.[49]

2-15. In addition to the cases within the *Practicks* mentioned above, there is a case from 1610, *Sir Robert Hepburn*, which accepts the landlord as a privileged

[43] But not published until 1655.

[44] T Craig, *Jus Feudale* (Stair Society vol 64, 2017, transl L Dodd) I.11.5.

[45] R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 359.

[46] *Wardlaw v Mitchell* (1611) Mor 6187. The Morison's Dictionary report is a straight copy from Lord Haddington's report of the case in his *Practicks* (NLS Adv MS 24.2.1 case no 2302).

[47] Hunter, *Landlord and Tenant* II, 359; J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 366.

[48] For the landlord's right of hypothec in the crops grown on the leased land and the rent that it secured, see paras 3-10–3-16 below.

[49] See paras 2-09–2-12 above.

creditor. Although not found in Morison's *Dictionary*, the decision can be found in the unpublished reports compiled by Lord Haddington, who became Lord President of the Court of Session in 1616. According to Lord Haddington, the court decided that a landowner or liferenter has a right to call upon any intromitter with the corns grown on his leased land to pay him his ordinary rents.[50] Intromission, in this context, means the intrusion on existing rights. This once again demonstrates that a landlord had a protected right over the produce from his leased land.

2-16. Although these cases show that a landlord was privileged over his tenant's other creditors, and that he could follow the crops grown on the leased land into the hands of a third party, the civilian terminology of "hypothec" was yet to be adopted. The word does not appear until *Hay v Keith* (1623),[51] where the court held that the "master of the ground" had a preference, over all other creditors of his tenant, in relation to the crops grown on the leased land without first having to attach them through diligence. Hay pursued Keith because Keith had intromitted with the crop of 1616. Hay argued that Keith was liable to pay the rent for that year because Hay, as the landowner, was preferred over all other creditors. The report in Morison's *Dictionary* includes a recognition that "whatever was growing upon the ground that year, whereof the farms [i.e. rent] were sought, was hypothecated for that year's farm to the master *primo loco*". The use of "hypothec" to describe the right of a landlord cannot have been universal at that time – Lord Haddington makes no use of it in his report on the same case and instead continues to use "privilege".[52] Soon after, however, in a report of *Lady Dun v Lord Dun* (1624),[53] Lord Haddington does make use of "hypothec" to describe the right of a landlord, suggesting that it had become the accepted terminology. In this case, Lady Dun, the liferenter of land, had brought the case against Lord Dun because he had received from her tenant (and, therefore, intromitted with) the corns of the land. It was held that "the corns that grew upon my ground are tacite hypothecated to me for my duty", which meant that Lord Dun was liable to Lady Dun for the rent. From this point onwards, numerous cases discuss the landlord's "hypothec" over the crops grown on leased land.[54]

2-17. Leaving aside the cases recorded in the *Practicks* (which could relate to urban leases), all the cases discussed were concerned with the rights of a rural

[50] *Sir Robert Hepburn* (1610) NLS Adv MS 24.2.1 case no 1777; NLS Adv MS 6.2.7. For a commentary on the manuscripts containing Lord Haddington's *Practicks*, see S Brooks, "The decision practicks of Sir Thomas Hamilton, first Earl of Haddington" (2004) 8 EdinLR 206 at 220.

[51] *Hay v Keith* (1623) Mor 6188, (1624) Mor 6217; also described in Stair I.13.15.

[52] *Hay v Keith* (1623) Mor 6188 at 6191.

[53] *Lady Dun v Lord Dun* (1624) Mor 6217, NLS Adv MS 24.2.1 case number 3116.

[54] *Swinton v Seton* (1627) Mor 6218, taken from Lord Nicolson's *Practicks* (NLS Adv MS 24.3.3 at page 287); *Fowler v Cant, Gray, & Lady Lawrieston* (1630) Mor 6219; *Hay v Elliot* (1639) Mor 6219; *L Polwarth* (1642) Mor 6221; *The Town of Edinburgh v The Creditors of Provan* (1665) Mor 6235, (1665) Mor 15274; *Cumming of Altyr v Lumsden* (1667) Mor 6237; *Countess of Traquair v Cranston* (1667) Mor 6221, (1667) Mor 10024.

landlord.[55] It took until 1630 before it was held that an urban landlord also had a privilege. The case was *Dick v Lands* (1630), which held that an urban landlord could prevent the poinding of the *invecta et illata* within the leased premises by another creditor of the tenant until he received his rent.[56] There was, however, no reference to this being a consequence of the landlord's right of "hypothec", with the first reference to the "hypothec" of an urban landlord not coming until *The Town of Edinburgh v The Creditors of Provan* (1665).[57]

2-18. By the mid-seventeenth century the use of "hypothec" to describe the landlord's right had gradually taken the place of "privilege". The only subsequent case that viewed the landlord as a privileged creditor without basing this on a right of hypothec was *Lady Dunipace v Watson & Vert* (1750).[58] Here, the court held that "[h]ouse-rent for one year was . . . to be a privileged debt, on the same principle with a servant's wages". In the nineteenth century, Bell and Hunter were both to accept that the landlord has a preferred right to one year's rent, but only if the tenant dies.[59] This was based on the decision in *Lady Dunipace* and on Erskine's statement that a year's rent of the house in which the tenant dies is preferred.[60] Goudy, however, in his treatise on *Bankruptcy*, did not restrict the case's application to when the tenant had died. Despite this, he denounced the decision as "unsatisfactory".[61] This seems to be correct. Erskine provided no authority for his view that a year's rent of a house was to be preferred if the tenant died inside, and *Lady Dunipace* has never since been accepted by the courts. On the basis of this, the preference for a year's rent cannot be good law.

(5) Hope's *Major Practicks*

2-19. By 1633, when Hope wrote his *Major Practicks*, the landlord's hypothec was firmly established in Scots law. Indeed, Hope was counsel in *Hay v Keith* (1623), when "hypothec" was first used to describe the right of a landlord, and in *Lady Dun v Lord Dun* (1624), which followed soon after.[62] His commentary on the *Corpus Iuris Civilis,* believed to have been written between 1603 and 1604, demonstrated Hope's knowledge of the tacit hypothecs present in Roman

[55] If the main subject of the lease is the land and its produce, the lease is "rural". If, however, the tenant seeks primarily to make use of buildings or other man-made objects that have been erected on the land, the lease is "urban". See Rankine, *Leases* 174.

[56] *Dick v Lands* (1630) Mor 6243. For a discussion on *invecta et illata*, see chapters 7 and 8 below.

[57] *The Town of Edinburgh v The Creditors of Provan* (1665) Mor 6235, (1665) Mor 15274.

[58] *Lady Dunipace v Watson & Vert* (1750) Mor 11852.

[59] Bell, *Principles* §1405; Hunter, *Landlord and Tenant* II, 436.

[60] Erskine III.9.43.

[61] H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 516.

[62] F J Grant, *The Faculty of Advocates in Scotland 1532–1943* (1944) 104.

law.[63] Hope certainly made use of the word "hypothec". The Lords of Session, he wrote, were given, as an exception from the general rule against non-possessory securities, an "expressam hypothecam" over the King's custom.[64] Yet, there was no use of "hypothec" in his *Major Practicks* to describe the landlord's right. He wrote only that:

> Be the practique of Scotland, the maills and dewties of the lands should be first satisfied; and the master of the ground is preferred befoir all wthers his tennants' creditors in peyment of the fermes of his lands, with the goods that ar on the ground.[65]

Although Hope makes no use of the word "hypothec" here, the description of the landlord's right matches the landlord's hypothec in both Roman law and modern Scots law. The landlord, writes Hope, has a preference over the tenant's other creditors to those goods "that ar on the ground". And, following the decision in *Hay v Keith* (1623), Hope writes that:

> Dominus fundi hes action against quhatsomever persones (etiam per mille manus) for the fermes of the ground of the last crope; and siclyke hes action against him who coft and therefter sauld to a third partie for the pryce receavit be him.[66]

2-20. Writing at the same time as Hope, Spottiswoode gave a similar account of the preference of a landlord over other creditors of his tenant:

> The Lord of the Ground should be paid of his Ferms and Duties before all other Creditors, and if any Creditor causes arise the Tenants Goods being upon the Ground, the same Arrestment ought to be loosed by the Judge at the Lord's Instance, until he completely paid of his Duties owing him.[67]

Whilst, as Balfour and Spottiswoode demonstrate, the use of "hypothec" to describe the right of a landlord in relation to the crops grown in and goods brought into the leased premises was far from universal, the key features of the modern law were already established by the early-seventeenth century. This is not surprising as the evidence from the *Practicks* suggests that there was already an acceptance that a landlord had a preference in relation to the goods on the leased premises over his tenant's other creditors by the middle of the sixteenth century.

[63] NLS Adv MS 6.2.8, NLS Adv MS 6.2.9. This was despite Hope having received no foreign legal education. For biographical details, see D Stevenson, "Hope, Sir Thomas, of Craighall, first baronet (1573–1646)", in *Oxford Dictionary of National Biography* (2004) vol 28, 31.

[64] J A Clyde (ed), *Hope's Major Practicks 1608–1633* (Stair Society vols 3 and 4, 1937 and 1938) II.9.1 and II.9.3.

[65] *Hope's Major Practicks* VI.19.2.

[66] *Hope's Major Practicks* VI.19.11.

[67] R Spottiswoode, *Practicks of the Laws of Scotland* (1706) 201.

C. INSTITUTIONAL WRITERS

2-21. By the time Stair's *Institutions of the Law of Scotland* was first published in 1681, the landlord's hypothec was well established. Attention had turned to details: each Institutional Writer in turn considered what goods could become subject to a hypothec,[68] and by what process the landlord could enforce his right in the goods (including when they had been sold or transferred to a third party).[69]

[68] Stair IV.25.2–3; Bankton I.17.8–10 (vol I, 386–87); Erskine II.6.61–64; Bell, *Commentaries* II, 28–33. See also G Mackenzie, *The Institutions of the Law of Scotland* (1694) II.6; W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 3, 2012) 173; J Steuart, *Dirleton's Doubts and Questions in the Law of Scotland, Resolved and Answered* (1715) 158.

[69] Stair I.13.15; Bankton I.17.12 (vol I, 387); Erskine II.6.58–60; Bell, *Commentaries* II, 33–34.

3 Foreign Influence?

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A. INTRODUCTION

3-01. The Scots law of hypothec has its origin in Roman law. Stair, Bankton and Erskine subscribe to this view,[1] and, since the publication of Hunter's work in the first half of the nineteenth century,[2] it has been the universal opinion of those writing on the law of hypothec. But an opposing view can be found amongst some of the highest authorities, including Lord Kames, Baron Hume and Walter Ross. They argue that the hypothec had a native development unique to Scotland and that the law only came to adopt Roman terminology for this native institution in the early seventeenth century. This view has some merit, for, although certain key features of the modern law were already apparent in the sixteenth-century *Practicks*, the use of civilian terminology was not seen until the case-law from the 1620s.[3]

3-02. Despite these uncertainties, the hypothec in modern Scots law certainly appears to be Roman in origin and is, as it was in Roman law,[4] a real right.[5] A

[1] Stair I.13.14ff; Bankton I.17.7ff (vol I, 385–86); Erskine II.VI.56ff.

[2] R Hunter, *A Treatise on the Law of Landlord and Tenant*, 1st edn (1833).

[3] See paras 2-09–2-18 above.

[4] R van der Bergh, "The development of the landlord's hypothec" (2009) 15 Fundamina 155.

[5] The hypothec's nature as a real right is referenced at various points throughout, but see, in particular, chapter 1 above and chapter 9 below.

probable source of this Roman influence was the education of Scottish students in the French universities of the sixteenth century. Yet, although the Scots hypothec is Roman in origin, the writings of those who held other opinions – especially those of Kames – have shaped the development of the law. It is, therefore, worth addressing the views that the hypothec is not Roman, at least to understand the ways in which Kames and others understood and influenced the law.

B. NATIVE DEVELOPMENT

3-03. A late example of the rejection of Roman law as the origin of the Scots hypothec is contained in the *Journal of Jurisprudence* for 1864. An anonymous author wrote that:

> The fiction that the right of the landlord over the crop and stock of the farm is derived from the Roman law of hypothec, has produced its influence more by a confusion of the language of our law, than by a modification of the actual nature of the right.[6]

From those who claim that the hypothec cannot be traced back to Roman law, two main theories can be distinguished. The first is that the hypothec is a relic of the view that the landlord owned the crops grown on the leased land. The second is that the hypothec developed from the ancient brieve of distress.

(1) Landlord's ownership of crops

(a) Kames' theory

3-04. Addressed first is the theory that the hypothec is a relic of the landlord's ownership of the crops grown on the land. This was Lord Kames' theory and it was the most cited amongst those who signed up to the belief that the hypothec was not Roman in origin. Hume accepted it as correct,[7] and it also formed part of counsel's submissions before the Court of Session in more than one case.[8] Kames' theory, set out in his *Elucidations*, first published in 1777, was that the hypothec was a result of the landlord's ownership of the produce grown on leased land.[9] He believed the ownership of the produce to be accessory to the landlord's ownership of the ground – which in turn was a result of the development of the law of lease in Scotland.

[6] Anonymous, "The law of hypothec" (1864) 8 JJ 395 at 399.

[7] Hume, *Lectures* vol IV, 8 and 14.

[8] *Blane v Morison* (1785) Mor 6232; *Ogilvie v Wingate* (1791) Mor 7884.

[9] H Home, Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1777) Art X. See also H Home, Lord Kames, *Historical Law Tracts* (1758) Tract IV. Although Erskine subscribed to the same theory, Kames was the more influential of the two. The theory will therefore be referred to as "Kames' theory".

3-05. Under Kames' account of the history of the law of lease, those who first worked the land were themselves owned by the landowner and, therefore, the landlord also owned any produce from the land.[10] Later, freemen took the place of bondsmen. These free labourers were entitled to retain a proportion of the produce of the land but handed the rest to the landowner as a "rent". Despite this change from bondsmen to freemen, the landlord was still owner of the produce and could vindicate his ownership in it.[11] This ownership was transferred to the tenant when the rent was paid, i.e. the payment of the rent was a suspensive condition of the transfer of the crops to the tenant. Kames argued that at this early stage in the development of the law of lease the right of the landlord could not be described as a hypothec because he had ownership of, and not a subordinate real right in, the produce from his land. But as rent began to be paid in money, as opposed to the produce of the land, tenants were – by necessity – given a right to dispose of the produce of the land. This changed the nature of the tenant's right in the crop; the tenant was now the owner of the crops grown on the land.[12] Despite the landlord no longer owning the crop, the law continued to give him a right to follow and sell the crop as if he were the owner until the point at which the rent for the year in question was paid by the tenant.

3-06. As the landlord's right in the crop was no longer one of ownership, Kames believed that the continuation of a right over any crop sold to a third party could no longer be based on principle but rather "upon consuetude". Those applying the law had been so used to granting the landlord an action against the crops grown on the leased land on the basis of his ownership that this was "blindly sustained" even though the crops were no longer the landlords'. In other words, although the landlord was no longer seen as the owner of the crops, the right to follow the goods continued as if he were the owner. As Kames wrote:

> Our forefathers, far from being sharp-sighted in law-distinctions, did not advert to the consequences of converting corn-rent into money. A real action, at the instance of the landlord against a purchaser of the crop, was familiar in the case of corn-rent; and the same action was blindly sustained for supporting the claim of money-rent, though the crop was no longer the landlord's property.[13]

And, as money-rent had resulted in the crops no longer being owned by the landlord, it was, according to Kames, only "natural" to burden the cattle (which were never thought to be owned by the landlord), too, as security for the rent.

[10] Kames, *Historical Law Tracts* Tract IV.

[11] Kames, *Elucidations* Art X.

[12] When discussing the hypothec, Erskine II.6.67 wrote that the landlord was the owner of the crops until they were reaped. This, however, was not correct. Landlords did not own industrial crops grown on the leased land: see Stair II.1.2; Bankton II.1.10 (vol I, 506); Erskine II.2.4 and II.6.11; Bell, *Commentaries* II, 2.

[13] Kames, *Elucidations* Art X.

3-07. This account had striking similarities with that given by Domat and Voet for the development of the hypothec over crops grown on leased land in Roman law. Domat's examination of the landlord's hypothec over crops began with a statement that:

> The Proprietor of an Estate that is farmed out, has the Preference on the Fruits that grow on it, for the payment of his Rent. And this preference is acquired by Law, altho' the Lease make no mention of it. For these Fruits are not so much his Pledge, as they are his Property, till he has got payment of his Rent.[14]

It may, therefore, have been a theory of the history of the Roman law of hypothec that Kames was tracing in his *Elucidations*. But if this was the law of Rome, it was not – and is not – the law of Scotland. In Scots law, industrial growing crops never seem to have been regarded as owned by the landlord, even when still in the ground,[15] and they could be poinded for the farmer's debts.[16] Another possibility is that Kames applied the history of poinding of the ground to the hypothec, for both he and Walter Ross provided a similar account of the history of the former.[17]

3-08. Although we cannot be sure as to Kames' sources, we can be fairly certain that his account of the history of the hypothec in Scots law was not accurate. The entire theory seems to have derived from Kames' "conjectural or philosophical" approach to legal history.[18] He provided no dates for his account, and the timing of the introduction of money rents (crucial to Kames' theory) seems unlikely to have been as late as the seventeenth century, when the landlord's privilege became known as the hypothec. Furthermore, the hypothec was available not only to the owners of land but also to landlords under a sub-lease;[19] it arose, in other words, from the contract of lease rather than from the ownership of land. Kames also provided no adequate explanation for why the hypothec was later given to an urban landlord whose land produces no crop that could be said to be owned by the landlord. Indeed, Kames' wider theory on the history of lease, which is built on the idea that slaves worked the land, is generally regarded as incorrect.[20]

[14] J Domat, *The Civil Law in its Natural Order* (transl W Strahan, 1722) I, 371; J Voet, *Commentary on the Pandects* (transl P Gane, 1955–58) XX.2.7 See also M Planiol, *Treatise on the Civil Law* (transl Louisiana State Law Institute, 1939) §2621.

[15] Stair II.1.2; Bankton II.1.10 (vol I, 506); Erskine II.2.4 and II.6.11; Bell, *Commentaries* II, 2.

[16] J A Clyde (ed), *Hope's Major Practicks 1608–1633* (Stair Society vols 3 and 4, 1937 and 1938) VI.28.26.

[17] Kames, *Historical Law Tracts* Tract IV. For more on Ross, see paras 3-17–3-21 below.

[18] A Rahmatian, *Lord Kames: Legal and Social Theorist* (2015) ch VI.

[19] See para 5-02 below.

[20] R Bell, *A Treatise on Leases: explaining the nature, form, and effect of the contract of lease, and the legal rights of the parties*, 4th edn (1825) I, 1–24; R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) I, 48.

3-09. Of course, the landlord's ownership of the crops would have provided one explanation for his right to follow them into the hands of a third party. This right, however, is also easily explained by Roman law and the hypothec's nature as a real right. A hypothec in Roman law created a *droit de suite*: a right to follow the goods and enforce the real right against any possessor.

(b) Distinctive rules in respect of crops?

3-10. Kames' theory also provided a rationale for the once-important difference between the hypothec's effect over crops and the hypothec over other goods. It came to be accepted that, at common law, the right of hypothec over crops secured the rent that was due for the year in which the crops were grown, and only that year's rent.[21] This hypothec was long-lasting: it was not extinguished until either the rent for that year was paid or the rent was extinguished through prescription. By contrast to this, other items, such as cattle and goods, were subject to a right of hypothec in security only for the current term's rent.[22] Kames' theory attempted to rationalise this by asserting that the landlord's right in crops was more secure and permanent than over other goods because it was based on the previous understanding of the law, i.e. that the landlord was the owner of the crops until the rent was paid. Under Kames' understanding of the law before the introduction of money-rent, once the rent for any particular year had been paid, the landlord impliedly agreed to transfer ownership of the crop grown in that year and he no longer had the right to follow it. The logical consequence of this argument was that the crop of one year could not secure the rent of another year, whether before or after the year in which the crop was grown:

> The crop being the landlord's property, and continuing to be his property till he draw his rent out of it, it is evident, that he is not intitled to draw the rent of one crop out of any other crop. To obtain preference for the rent of any crop upon any subsequent crop, the landlord must do diligence . . .[23]

Although the right of a landlord in the crops was no longer one of ownership, Kames believed that "our forefathers have inadvertently apply'd the same rule to the hypothec of corn for money-rent, though in its nature very different".[24] Even before Kames, Erskine had accepted this theory as a justification for the difference between the effect of the hypothec over crops and other goods – the crops, Erskine wrote, "belong truly to the proprietor".[25]

3-11. But the view that crops and other goods are treated so differently by the law of hypothec was not settled by the eighteenth century, when both Erskine

[21] See para 4-02 below.
[22] See paras 9-08–9-13 below.
[23] Kames, *Elucidations* Art X.
[24] Kames, *Elucidations* Art X.
[25] Erskine II.6.57.

and Kames were writing. An alternative account, put forward here, is that Kames' theory actually encouraged this difference of treatment – that it was a cause of it rather than a consequence.[26]

3-12. Prior to the mid-eighteenth century, case-law already supported the view that crops could not secure the rent of years before their growth.[27] This rule, however, was also applied to other types of moveable property. Such property, whether crops or other goods, could not (at common law) secure rent due for years before they were on the premises.[28] In *Wardlaw v Mitchell* (1611), for example, the court had decided that a landlord was preferred to the other creditors for the rent of the current crop.[29] In *Hay v Keith* (1623),[30] the court had held that an intromitter of a crop growing in 1616 remained liable for the rent of that year in perpetuity. And, in *Crawfurd v Stewart* (1737), the Lords had found that the crop of 1736 could not secure the rent of 1735.[31] But of course the crop of 1736 could not have secured the rent of 1735 because it had not been on the premises in 1735: the crop of 1736 did not exist in 1735.

3-13. The next question was whether crops could secure rent due for the year after their growth, i.e. whether crops grown in 1750 could secure rent due for the tenant's possession in 1751. In Kames' time there was nothing that prevented this. Admittedly, Bankton, writing around 1750, wrote that the crops secured only the rent for the year "of which they are the product".[32] But Stair had previously written that the fruits on the ground were tacitly hypothecated "for the terms of the year's rent when the crop was on the ground, but not for prior or past years".[33] In other words, if the crop was on the leased ground during any given year, it secured that year's rent. As seen above, the then case-law also said nothing about the crops securing only the rent due for the year they were grown. In *Hay v Keith* there was nothing that stated that the crop of one year could not secure the rent of a subsequent year. As the crop had been removed from the premises in 1616, it could not, on any view, be security for a subsequent year. And Forbes, providing evidence of the law between the time of Stair and Bankton, did not say that the crop grown in one year secured only the rent for that year. Instead, he wrote that: "[a] Setter of Lands in the Country hath a tacit Hypotheck, or Legal Pledge for the immediate last Years Rent, on the Fruits and Growth of the Ground . . ."[34]

[26] Indeed, this distinction is not seen in other jurisdictions which grant the landlord a right of hypothec. Reference can be made to Germany, South Africa and Louisiana, for example.

[27] As Robert Bell wrote, this question had been "long settled": Bell, *Leases* I, 363.

[28] For the current position, see paras 9-08–9-10 below.

[29] *Wardlaw v Mitchell* (1611) Mor 6187.

[30] *Hay v Keith* (1623) Mor 6188.

[31] *Crawfurd v Stewart* (1737) Mor 6193.

[32] Bankton I.17.8 (vol I, 386).

[33] Stair I.13.15. Cf Stair IV.26.5.

[34] W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 3, 2012) 173.

3-14. In his *Institute* (1773), Erskine said that there was no difference between a hypothec over crops and one over goods whilst they remained on the premises; crops were:

> by law impignorated for that year's rent only that is current, when the landlord exercises his right. All these fruits, whether yet growing, or in the tenant's granaries, are, by the present practice, without distinction of crops of which they are the growth, understood to fall under the landlord's hypotheck, as a security for that year's rent, in so far as relates to this right of retention. Thus a landlord may stop a creditor who offers to poind his tenant's corns, from carrying off, even such of them as are the growth of a year the rent of which has already been paid, unless he shall leave a quantity sufficient for the payment of the rent of that year in which the creditor useth his diligence.[35]

Thus, crops from one year but left on the premises could be retained for the rent of a subsequent year. This must have been because the crops were hypothecated for the rent of each year during which they remained on the premises. And this was the same rule as the hypothec over goods, a view that had earlier been supported by Dirleton, who wrote that: "If the master should suffer the Rents of diverse Years to ly over unpayed, tho' they may only amount to one Year's Duty, yet no *hypotheck* for the same, but only for the present Year's Rent."[36] Even Stair wrote that an acquirer of crops or goods was secure if he ensured that the rent for the present year was paid. Scots law, he wrote, permitted:

> only of the hypothecation of the fruits and goods on the ground, belonging to tenants or possessors, for the rent; and the *invecta et illata* in houses, for the mails of the houses. Which hypothecations extend only to one year, that commerce be not thereby hindered: for buyers or other acquirers may and should see that the present year's rent, when they buy, be satisfied, and then they are secure.[37]

Upon this view, there was no difference between the hypothec over crops and the hypothec over other goods. Erskine, however, also said in his *Institute* that, if the crops had been removed from the premises, they "stand hypothecated for the rent of that year of which they are respectively the crops. . ."[38] Likewise, in his *Principles*, Erskine wrote only that crops were security for the year in which they were grown.[39] These statements seemed to contradict his previous view that the crops were security for the year's rent that was current if they remained on the premises. Despite the confusion revealed by Erskine's statements, it could not be said with any certainty at the time that the law did not allow the crop of one year to secure the rent of a subsequent year. Although it was possible

[35] Erskine II.6.58.

[36] J Steuart, *Dirleton's Doubts and Questions in the Law of Scotland, Resolved and Answered* (1715) 158–59.

[37] Stair IV.25.1.

[38] Erskine II.6.60.

[39] J Erskine, *The Principles of the Law of Scotland*, 4th edn (1769) II.6.26.

that crops could secure the rent of years subsequent to their growth, Kames disliked this idea. He wrote that "to hypothecate the same corn successively for the rent of different years, would be pernicious equally to the landlord and to his tenant".[40] It seems that this view took hold by the mid-eighteenth century, seemingly encouraged by the view that the hypothec over crops rested on the landlord's right of ownership. By the nineteenth century, it was the dominant theory.

3-15. The case-law from the nineteenth century addressed only the question of whether crops grown in one year could secure the rent due for the possession of the farm in a previous year. And, like the seventeenth-century case-law, it was held that they could not.[41] Undeterred by the lack of authority, however, Hume firmly rejected Stair and Erskine's view that the crop of one year could secure the rent of a subsequent year if it remained on the leased premises.[42] To do this, he fell back on Kames' theory that the crop was, in reality, owned by the landlord rather than subject to a right of hypothec. Around the same time, George Joseph Bell also accepted Kames' view that the landlord's right over the crops was based on ownership and that, therefore, the crop of one year was security only for the rent due for that year:

> In agricultural or grass farms, the produce of the farm is hypothecated for the rent of the year whereof it is the crop, and for none else; the right remaining to the landlord as long as the crop is extant in the possession of the tenant. The principle of this doctrine seems to be, that the hypothec is over the fruits, as property reserved, to the extent of the rent; and that the reserved right attaches as long as they continue on the farm, and while that rent is due.[43]

Thus, by the late nineteenth and early twentieth century, the established view was that crops secured only the rent due for the year of their growth.[44] However lacking in authority, the position adopted by Kames was influential and helped to develop the law in such a way as to differentiate between the hypothec over crops and the hypothec over other goods. It was unsurprising, therefore, that even Bell was unable to come to a clear conclusion on the origin of the hypothec. He wrote that:

> As established in the law of Scotland, the right of the landlord has been sometimes called a right of property; sometimes a mere hypothec, originating from a tacit contract. But without pretending to determine precisely whether the origin of the

[40] Kames, *Elucidations* Art X.

[41] *Stewart v Rose* (1816) Hume 229; *Earl of Cassilis v Creditors of Ramsay* (1816) Hume 230; *Dalhousie v Dunlop* (1828) 6 S 626, affd (1830) 4 Wilson & Shaw 420; *Horn v McLean* (1830) 8 S 454; *Young v Welsh* (1833) 12 S 233; *McClymont & McClymont v Cathcart* (1848) 10 D 1489.

[42] Hume, *Lectures* vol IV, 14.

[43] Bell, *Commentaries* II, 32.

[44] Hunter, *Landlord and Tenant* II, 385; J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 385; J G Stewart, *A Treatise on the Law of Diligence* (1898) 472.

> right is to be referred to the one or to the other principle (neither, perhaps, being fully adequate to account for all the effects), it may be represented as a right of hypothec, convertible by a certain legal process into a real right of pledge.[45]

This confusion was caused by the landlord's hypothec in Scots law being influenced by both Roman law and by Kames' theory.

3-16. It could also be said that Kames' theory prevented the three-month rule, which is discussed elsewhere in this work,[46] from being accepted for the hypothec over crops. Briefly, the three-month rule meant that the hypothec in security of each year's rent was extinguished three months after the end of the year in question. There is no evidence for why this rule was not applied to the hypothec over crops. When the Court of Session decided in 1737 that a crop grown in 1736 could not secure rent due for 1735,[47] both sets of counsel accepted, in their submissions, that the hypothec expired three months after the term of payment of the rent. Even in 1623, Lord Haddington had disputed the perpetual nature of the landlord's right over crops:

> I reasoned against that which was decided by interlocutor in the said cause 3d February, . . . as any other creditor using greater diligence, could not be staid to poind the goods, being upon the master's ground for respect of any farm auchtand [owning] to the master for preceding years; so if the master used not his diligence to be paid of the last year's duty within that year, his privilege expired, and thereafter any creditor preventing him by diligence should be preferred to him who had neglected to use his privilege within the year appointed for his privilege; otherwise, if the master claim without timely diligence, should be a stay of commerce, because it should hinder a man to buy the tenant's gear . . .[48]

And, in a passage already quoted,[49] Stair believed that a right of hypothec in crops or other goods was security only for the "present year's rent". But it seems that after Kames' theory became influential, and it was thought that the landlord's right in the crops grown on the leased land was a relic of the once-accepted view that he was the owner of the crops, this right could not be lost three months after the term of payment. Rather it would only be lost if and when the tenant paid the rent for the year in question.

(2) Brieve of distress

3-17. The second and quite different theory was that the hypothec evolved from the right of a landlord to distress his tenant for the payment of rent by

[45] Bell, *Commentaries* II, 27.
[46] See paras 9-11–9-12 below.
[47] *Crawfurd v Stewart* (1737) Mor 6193.
[48] *Hay v Keith* (1623) Mor 6188 at 6192-93 per Lord Haddington.
[49] See para 3-14 above.

means of the brieve of distress. An example of this view was contained in the *Journal of Jurisprudence* for 1866:

> It was probably growing partiality for the civil law, and the endeavour after what was considered a more learned, or a more philosophical expression of the legal institution, which caused the development of the old law of distress into the landlord's hypothec and sequestration.[50]

According to this theory, although the native law of distress became subject to Roman terminology, the underlying law continued unaltered. It can certainly be accepted that similarities exist between the landlord's hypothec and the brieve of distress, similarities that encouraged Bankton to view distress for rent in England (the successor to the brieve of distress) as the English equivalent of the Scottish hypothec.[51] After all, both distress for rent and the hypothec are unique to landlords. Both predominantly affect goods on the leased premises whilst allowing a landlord, in certain circumstances, to follow items removed from the premises.[52] Both also allow a landlord to sell goods owned by third parties.[53] But, whatever the similarities, the hypothec in Scots law is unlikely to have originated from the law of distress.

3-18. The theory that the hypothec has its origin in the law of distress has, on several occasions, been attributed to Walter Ross and his *Lectures*.[54] Yet, although Ross' *Lectures* are often challenging to understand (and, like Kames' *Elucidations*, contain a dearth of evidence), this does not appear to be an accurate reflection of his view on the history of the hypothec. Ross instead saw in the brieve of distress the origin of the diligence of poinding of the ground, which was available to a feudal superior (and also a heritable creditor). He did not argue that distress was the source of the hypothec.

3-19. It may assist in the understanding of Ross' views to set out his theory of poinding of the ground, which bears a resemblance to the accepted history of distress for rent in English law.[55] Ross attributed the first appearance of

[50] Anonymous, "The law of hypothec" (1866) 10 JJ 71 at 76–77. The South African hypothec has also been described as a "hybrid" between the old Dutch law of distress and the Roman law of hypothec: G T Morice, "The landlord's lien in Roman and old Dutch law" (1911) 28 SALJ 512.

[51] Bankton I.17.4 (vol I, 389–90).

[52] For the law of hypothec, see chapter 9 below. For England, see the Law Commission's Report on *Landlord and Tenant: Distress for Rent* (Law Com No 194, 1991) para 2.14.

[53] For the law of England, see *Jervis v Pillar Denton Ltd* [2014] EWCA Civ 180, [2015] Ch 87 at para 22 per Lewison LJ. For Scotland, see paras 4-44–4-54 below.

[54] Hunter, *Landlord and Tenant* II, 360; A J M Steven, "The landlord's hypothec in comparative perspective" (2008) 12 Electronic Journal of Comparative Law 1 at 5; A J M Steven, "Rights in security over moveables", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 334 at 347.

[55] Law Commission, Report on *Landlord and Tenant: Interim Report on Distress for Rent* (Law Com No 5, 1966) para 3.

attaching (formerly called distressing and then poinding)[56] a debtor's property for payment of a debt to the practice of landlords and superiors attaching the goods of their tenants and vassals.[57] This attachment of a vassal's goods took over from the previous practice of terminating the right of the vassal for breach. This change, Ross wrote, was a reaction to the increasing dominance of feu-farm tenure over the feudal tenure of wardholding.[58] In feu-farm the main obligation on a vassal was to pay feu-duty, which was easily enforced by the attachment of goods, whereas the main obligation in wardholding was to provide military service to the superior, which was most effectively enforced by removing a vassal in breach and replacing him with someone capable of performing the obligations.

3-20. Ross's theory was that this practice evolved into distress and then eventually into the diligences of poinding and poinding of the ground. His entire discussion on the attachment of goods and the brieve of distress was in relation to his explanation of poinding of the ground. Admittedly, Ross did mention the hypothec within this discussion, but only to demonstrate the influence of Roman law on the Scots law of lease and its effect on introducing the hypothec into Scots law. This mention of hypothec was done to contrast the position of a landlord with that of a superior and to argue that the latter did not have a right of hypothec.[59] Ross stated that:

> In Scotland, with the body of the Roman law, we, in later times, admitted the distinctions between the contract of location and the emphyteusis. The tenant, by tack, had only a personal right to the possession; the entire radical property remained with the landlord; and therefore, in his favour, the hypothec upon the fruits came also to be received as law.[60]

This, he believed, could be contrasted with a superior's ability to poind the ground, which evolved from distressing a vassal's goods and was not subject to Roman influence:

> Feu-holdings are still admitted to bestow a right or estate in the land, according both to the Roman and English acceptation; and consequently, the distress of the feuar or vassal must proceed upon English principles; and we are now to show,

[56] Poinding was abolished by the Abolition of Poinding and Warrant Sales (Scotland) Act 2001. For the current provision, see the Debt Arrangement and Attachment (Scotland) Act 2002 s 58(1). It may be argued that poinding of the ground, after being abolished by the 2001 Act (at Sch 3 para 27), has come back to life because the 2002 Act repeals the 2001 Act. Whilst the 2001 Act was clear that the abolition of poinding included poinding of the ground (ss 1(1) and 1(3)), the 2002 Act is not. This argument is certainly attractive but seems unlikely to be successful.

[57] W Ross, *Lectures on the History and Practice of the Law of Scotland, Relative to Conveyancing and Legal Diligence*, 2nd edn (1822) II, 392ff.

[58] Ross, *Lectures* II, 393.

[59] Ross, *Lectures* II, 406. This is against the weight of authority, on which, see *Laurie v Yuille & Laurie* 24 January 1823 FC; Stair II.4.7; Erskine II.6.63.

[60] Ross, *Lectures* II, 401.

that it is, in fact, a remainder of the ancient distress, essentially the same with the poinding.[61]

3-21. If anything, Ross' account of the hypothec is similar to Kames': it was the landlord's ownership of the crop that gave him a right of hypothec over the crops. In any event, it was certainly the origin of poinding of the ground, and not the landlord's hypothec, which Ross attributed to the old brieve of distress. And Ross was not alone with this view; Stair, Erskine, and Bell also linked the brieve of distress only to poinding.[62] On this view, the brieve of distress thus evolved into diligence, or execution, against the moveable property of a debtor, rather than into a right in security (such as the hypothec) in such property.[63]

(3) Unique native development

3-22. One final possibility worth discussing, if only briefly, is that the hypothec was a development from within Scotland but independent of the brieve of distress and the landlord's ownership of the land. This would certainly explain the acceptance of a preference for the landlord in the sixteenth century, before the adoption of the term "hypothec". Scots lawyers, who were increasingly taught Roman law, may then have found that their landlord's preference was similar to the Roman law of hypothec and, understandably, adopted the Civilian name for what was otherwise a domestic institution.

3-23. Whilst this cannot be ruled out entirely, there is no evidence of the landlord's preference until 1546. By this time, the Court of Session had been established and filled with lawyers who had been educated under the increasing influence of the *ius commume*. As Roman law is thus the most likely source of the Scottish hypothec, it is to Roman law that we now turn.

C. ROMAN LAW

(1) Roman law: for and against

3-24. In a passage already quoted,[64] Ross appeared to state that the hypothec was taken from Roman law at the same time as Scots law began to distinguish between feudal tenure and the contract of lease. If that is correct, it would infer adoption of the hypothec prior to the Leases Act 1449, which gave leases real effect. It would also place the Roman hypothec in Scots law before it found its

[61] Ross, *Lectures* II, 401.
[62] Stair IV.47.24; Erskine III.6.20; Bell, *Commentaries* II, 56.
[63] See *Re Wanzer Ltd* [1891] 1 Ch 305.
[64] See para 3-20 above.

way into other countries of the *ius commune* such as the states of Germany.[65] This is unlikely and, with uncertainty as to whether this was actually Ross' view, it is rejected here.

3-25. Hunter, Robert Bell, Rankine, and Paton and Cameron were also of the view that the landlord's hypothec was Roman in origin,[66] although this was founded on the mistaken belief that *Wardlaw v Mitchell* was the first case accepting a preference in favour of a landlord.[67] The view, however, appears to be correct. The evidence from the cases reported in the *Practicks* of Sinclair and Balfour points towards the presence of a landlord's privilege similar to that of the hypothec as early as 1546. This would coincide with the increasing influence of the *ius commune* in Scots law, which had begun shortly before the establishment of the Court of Session in 1532. Four of the new procurators (from a total of only 10) that could appear in all actions before the new court had studied in the University of Orléans, where Roman law would have been a significant aspect of their curriculum.[68] Sixteenth-century Scots lawyers constantly referred to Roman law,[69] and by the end of the century civil law was used whenever the Scottish sources provided no answer to a problem at hand.[70] For example, references to the *ius commune* and classical Roman jurists were found in the *Practicks* of Sinclair,[71] in which the first mention of a landlord's preference is also found.[72]

3-26. Having found the preference in Roman law, landlords of the mid-sixteenth century may have attempted to implant it into Scots law. Yet, whilst the theory that the landlord's hypothec was transplanted from Roman law at this time is attractive, it is not beyond dispute. One could point towards the 77-year gap between 1546, the first mention that can be found of a landlord being a privileged creditor, and 1623, when there is the first use of the term "hypothec". It is curious that, if the 1546 decision was influenced by Roman law, the Roman name was not used. Yet it seems possible that the court deliberately avoided the use of the Latin word. In addition, French law has never accepted the use of "hypothec" to describe the landlord's right, instead describing it as the *privilege*

[65] M Schmoeckel, J Rüchert and R Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* vol 3 (2013) §§535-580a paras 120–123.

[66] Hunter, *Landlord and Tenant* II, 355ff; Bell, *Leases* I, 361; Rankine, *Leases* 366; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 199.

[67] See chapter 2 above.

[68] J W Cairns, "Historical introduction", in Reid and Zimmermann, *History of Private Law in Scotland* vol 1, 70; A L Murray, "Sinclair's Practicks", in A Harding (ed), *Law-Making and Law-Makers in British History* (1980) 90; P Stein, *Roman Law in European History* (1999) 87.

[69] P Stein, *The Character and Influence of the Roman Civil Law* (1988) 315.

[70] J W Cairns, "The civil law tradition in Scottish legal thought", in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997) 191 at 196; Cairns, "Historical introduction" 72–73.

[71] Murray, "Sinclair's Practicks" 96, 97 and 102.

[72] See para 2-09 above.

du bailleur d'immeuble. Despite this, the French right is still seen as Roman in origin. The teaching of law to Scots in France is likely to have caused the introduction of the hypothec to Scots law in the sixteenth century and, therefore, it is not surprising if Scots lawyers, too, did not adopt the Roman term.

3-27. Another potential difficulty with the view that the landlord's hypothec was taken from Roman law is the lack of acceptance of the other Roman hypothecs, both tacit and express, at the same time. Aside from the various express hypothecs, Roman law, by the reign of Justinian, granted tacit hypothecs to protect numerous classes of creditor. There was, for example, the fiscal's hypothec in security of unpaid tax, a wife's hypothec over her husband's estate to secure her dowry, and a ward's hypothec over his tutor's estate to secure any costs against his tutor.[73] An explanation for the absence of such rights of hypothec in Scots law could have been the lack of demand for their introduction. By contrast, wealthy landlords were probably among the small class of persons who were likely to bring a case before the Court of Session at a time when the hypothec may have been accepted. Indeed, the first case which addressed the issue of a hypothec in favour of a creditor other than a landlord was not until *Keith v Keith* in 1688,[74] a case concerning a wife's right over her husband's goods for the recovery of a dowry. On the basis of Roman law, it was argued that a wife had a hypothec over her husband's goods. Whilst this was the case in Roman law, the Lords refused to accept that it was so in Scots law because it had "never yet [been] decided upon a full hearing before the Lords" and to do so would "endanger creditors and commerce". Only a decade later, the same result was reached in *Balcanquall v Bavilaw* (1698),[75] the report of which refers positively to *Keith v Keith* as a case that had been rationally decided and had settled the law. Later, in *Lowrie v Burns* (1735),[76] the court also rejected the existence of a tacit hypothec over a house in favour of a repairer.

3-28. All of these cases seeking to introduce further hypothecs into Scots law were decided after the publication of the first edition of Stair's *Institutions* in 1681, and this may explain the rejection of other hypothecs. Whilst the law of corporeal moveable security in Scotland was not settled by Stair's work, his clear assertion that Scots law had not accepted the many tacit hypothecs found in Roman law would certainly have presented an obstacle to the recognition of other hypothecs.[77]

[73] R Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law*, 3rd edn (transl J C Ledlie, 1907) 355; J A C Thomas, *Textbook of Roman Law* (1976) 333; P J du Plessis, *Borkowski's Textbook on Roman Law*, 6th edn (2020) 145; C Anderson, *Roman Law for Scots Law Students* (2021) 275.

[74] *Keith v Keith* (1688) Mor 11833.

[75] *Balcanquall v Bavilaw* (1698) 4 Bro Sup 403. This was followed again in *Allan v His Creditors* (1713) Mor 11835.

[76] *Lowrie v Burns* (1735) Mor 6240.

[77] J Dalrymple, Lord Stair, *The Institutions of the Law of Scotland*, 1st edn (1681) I.10.61.

3-29. A final argument against the theory that the Scots law of hypothec emanated from Roman law is that the two rights are far from identical. Under Roman law, property brought into leased premises remained subject to the hypothec even if later removed or sold by the tenant,[78] and landlords could obtain the goods from third parties by using the *actio Serviana*. This can be contrasted with Scots law where most goods that are removed or sold are free from the hypothec.[79] This significant difference, however, does not appear to have been present in the first centuries of the hypothec's existence in Scotland. Initially, goods removed from the premises generally remained burdened by the landlord's right of hypothec. Exceptions were developed thereafter, but the cases concerning crops that had been sold and transferred to a third-party purchaser are evidence of the hypothec following the goods wherever they might go. And even Roman law released goods from the hypothec in certain circumstances, in particular when a tenant sold items from a shop,[80] a rule that has found its way into Scots law.[81] Additionally, other jurisdictions that have adopted the Roman hypothec, such as France, only allow the landlord to follow the goods for a short period of time after their removal from the leased premises.[82] Thus, differences between Roman law and modern Scots law are not fatal to the conclusion that the Scots hypothec was Roman in origin.

3-30. All in all, the view that the landlord's hypothec was taken by Scots law from Roman law remains the most plausible of any theory. Furthermore, it fits with the more general position that the law of moveables, as opposed to land, was heavily influenced by Roman law.[83] That influence is likely to have come from the European continent when Scottish students were being taught Roman law in France or the Netherlands, with these students returning home to apply their newly acquired knowledge in Scotland.

(2) Dutch influence

3-31. In the sixteenth and seventeenth centuries, when the first references to the landlord's hypothec (or preference) occurred in Scotland, Scottish students were travelling to continental universities for a legal education that was not yet available in Scotland. There is a record of 1600 Scots studying at Leiden University in the Netherlands between the fifteenth and nineteenth centuries, whilst universities in Utrecht and Groningen were also popular destinations.[84]

[78] Pothier describes this as a "perfect hypothec": see R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) §229.

[79] See chapter 9 below.

[80] D.20.1.34 (Scaevola).

[81] See paras 9-37–9-40 below.

[82] See para 9-20 below.

[83] P Stein, *The Character and Influence of the Roman Civil Law* (1988) 341.

[84] J C Gardner, "French and Dutch influences", in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 226 at 233.

This makes the Netherlands a possible channel for the introduction of the landlord's hypothec into Scots law. It was, however, not until after the Reformation that the Netherlands, taking over from France, became the main destination for Scottish students.[85] Most of the 1600 Scots studying at Leiden arrived there in the second half of the seventeenth century and this would have been too late to have had an influence on the introduction of a landlord's preference or even the adoption of the name "hypothec", which had occurred in 1623.

3-32. Roman-Dutch law is, therefore, unlikely to have been the route through which the hypothec become established in Scots law. Nevertheless, the writers on Roman-Dutch law would surely have been a useful source for the further development of the law. In particular, Scots lawyers of the eighteenth and nineteenth centuries were strongly influenced by Voet, who published the first volume of his *Commentary on the Pandects* in 1698.[86] Voet will reappear frequently in this book.

(3) French influence

3-33. If the teaching of Roman law to Scots in the Netherlands came too late to have been the route through which the hypothec was introduced into Scots law, a more likely source would have been the universities in France. Before Scots travelled to the Netherlands, France was the main destination for a legal education as relations were good between the two countries prior to the union of the Scottish and English Crowns in 1603.[87] Many advocates appearing before the Court of Session in its early years had received their legal education at a French University. John Sinclair graduated from the University of Paris in 1531 after attending the University of St Andrews. At the University of Orléans, where Roman law was taught, there were so many Scots that there was a separate Scottish student nation until 1532.[88] Paris was also a popular destination and, although an education in Roman law was banned in 1219, the teaching of Canon law was dominant there.[89] It would have been natural if Scots

[85] P Stein, *Roman Law in European History* (1999) 87; H L MacQueen, "The foundation of law teaching at the University of Aberdeen", in D Carey Miller and R Zimmermann (eds), *The Civil Law Tradition and Scots Law* 53 at 63; J E du Plessis, *Compulsion and Restitution* (Stair Society vol 51, 2004) 89; P J du Plessis, *Borkowski's Textbook on Roman Law*, 6th edn (2020) 384–85.

[86] See, for example, *Blane v Morison* (1785) Mor 6232.

[87] T B Smith, "English influences on the law of Scotland" (1954) 3 American Journal of Comparative Law 522 at 542; W M Gordon, *Roman Law, Scots Law and Legal History: Selected Essays* (Edinburgh Studies in Law vol 4, 2007) 299–304.

[88] Gordon, *Roman Law, Scots Law and Legal History: Selected Essays* 332*;* O F Robinson et al, *European Legal History,* 3rd edn (2000) 230; J Kirkpatrick (ed), "The Scottish nation in the University of Orleans", in *Miscellany of the Scottish History Society* vol 2 (1904) 47 at 64.

[89] P J du Plessis, *Borkowski's Textbook on Roman Law*, 6th edn (2020) 369; Kirkpatrick, "The Scottish nation in the University of Orleans" 53.

lawyers, taught Roman law in France in the sixteenth century, brought back their knowledge of Roman hypothecs and sought to introduce them into Scots law. If this is correct, those Civilian-trained lawyers successfully established the landlord's hypothec in the sixteenth, or early-seventeenth, century.

3-34. There is much evidence for the influence of French law on the Scots law of hypothec and certain related areas. The tenant's obligation to plenish the premises is found in neither Roman-Dutch law nor South African law. It is likewise absent from the BGB but is found in the French *Code civil*. It seems more than plausible that French law was the reason for the presence in Scots law of an obligation on the tenant to plenish the premises with goods sufficient to provide security to the landlord.[90] In addition, there is a Scottish case (decided in 1665) that accepts the right of a landlord to claim the sub-rents directly from a sub-tenant.[91] This direct action against a sub-tenant, with whom a landlord has no contractual relationship, is not permitted in Roman-Dutch law, South African law or German law. Again, however, it is accepted in French law. This will be discussed in greater detail below,[92] but it demonstrates a connection between the Scots and French law of landlord and tenant, and the influence that the latter may have had on the former. One final example of French influence on the Scots law of hypothec is seen in the common law rules on the hypothec's effect against negotiable instruments.[93] Before the law was settled by the Bankruptcy and Diligence etc (Scotland) Act 2007, Scottish jurists followed the French rule that the hypothec could not cover bank notes or other negotiable instruments. This was, however, not the rule in Germany, South Africa and Louisiana.

3-35. French influence, such as it was, did not end on the hypothec's introduction into Scotland, and the writings of later French jurists would have been a useful source for Scots lawyers to draw upon. Commentaries on the landlord's hypothec were written by the French jurists Jean Domat (1625-96) and Robert Joseph Pothier (1699-1772), who were attempting to reconcile French customary law with Roman law. Domat wrote his *Les lois civiles dans leur ordre natural* in 1689 and it was translated into English in 1722.[94] Pothier's *Traité du contrat de louage* was published in 1764 and contains a detailed examination of the French landlord's hypothec in the mid-eighteenth century.[95] He is known to have had an influence on Scots law and on George Joseph Bell in particular,[96] and again will reappear frequently in the book.

[90] For more on the plenishing order, see paras 10-02–10-15 below.

[91] *The Town of Edinburgh v The Creditors of Provan* (1665) Mor 6235, (1665) Mor 15274.

[92] See paras 8-15–8-27 below.

[93] See para 8-13 below.

[94] J Domat, *Civil Law in its Natural Order* (transl W Strahan, 1722) I, 369ff.

[95] Translated by G A Mulligan as R J Pothier, *Treatise on the Contract of Letting and Hiring* (1953). For the landlord's hypothec, see §§226–76.

[96] K G C Reid, "From textbook to book of authority: the *Principles* of George Joseph Bell" (2011) 15 EdinLR 6 at 24.

4 Decline

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A. INTRODUCTION

4-01. Once the landlord's hypothec was established it became a frequently-used remedy for the enforcement of rent. But political change in the nineteenth century caused much debate on, and critique of, the privileges of the landowning classes. As the law of hypothec was one of those privileges, it did not escape heavy criticism. As a result, it came to be restricted by a series of statutes beginning with the Hypothec Amendment (Scotland) Act 1867.

B. RURAL LEASES

(1) Introduction

4-02. In the early-to-mid nineteenth century those addressing the law of hypothec were predominantly concerned with its effect on crops. It was accepted that, under the then common law,[1] a landlord of a farm had a right of hypothec over crops grown on the leased land in security for the rent of the year they were produced.[2] This right appeared to be perpetual in the sense that it was not extinguished until that year's rent was paid. Thus, even when the crops had been transferred to a third-party purchaser acquiring in good faith (or if they were poinded by a creditor of the tenant), a landlord could follow them and demand their return or, if they had been consumed or otherwise destroyed, payment of their value.[3] Such a third party was described as an "intromitter", having interfered with the landlord's right of hypothec.

4-03. As a result, those who purchased crops from a tenant farmer were taking the risk that the rent due for the year of the crops' production had not yet been paid.[4] Only in certain circumstances were third parties protected from this risk. First, the 40-year negative prescription discharged the tenant of any unpaid rent and thus extinguished the hypothec. Second, the hypothec over crops was extinguished when they had been brought to, and sold at, a public market (called "sale by bulk", i.e. transported to the market and not sold by sample).[5] This protection for third parties was introduced by the courts and was apparently based on the belief that complete publicity was provided by a sale in a public market.[6] Third, landlords were restricted to demanding payment, or the return of the produce, from the immediate purchaser. This protected any subsequent good-faith acquirers.[7] Even cumulatively, however, these restrictions were far from protecting all third-party purchasers and the law was strongly in favour of landlords.

(2) *Dalhousie v Dunlop*

4-04. By the 1820s, the perceived injustice caused by the landlord's seemingly perpetual right of hypothec over crops was coming under increasing criticism.

[1] See the discussion on the influence of Lord Kames at paras 3-04–3-16 above.

[2] Hume, *Lectures* vol IV, 14.

[3] For more on this, see chapters 9 and 10 below.

[4] In *Lamington v Oswald* (1688) Mor 6224, 19 years had elapsed before the landlord successfully claimed the crops from the third party.

[5] Erskine II.6.60; Hume, *Lectures* vol IV, 11.

[6] *Dalhousie v Dunlop* (1828) 6 S 626; W Ferrier, *Letter to the Landholders of Scotland, on the Proposed Change in the Landlord's Hypothec* (1831, NLS 5.1024(25)) 4. It is likely that this rule derived from French law. See R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) §265.

[7] Bankton I.17.8 (vol I, 386); Hume *Lectures* vol IV, 10. See also para 9-34 below.

In *McTavish v Scott* (1830), this aspect of the law was described by Lord Brougham, the (Scottish) Lord Chancellor in the new Whig government, as "of a nature exceedingly strong and very peculiar, arising from the former state of that country, and from the fact of the landlords having made the laws, and not the tenants, and still less the traders, who, probably, had no existence at the origin of the law".[8] In the same year, Lord Brougham was to give the sole speech in a House of Lords decision that would bring the law of hypothec, and its effect over crops in particular, to the attention of Parliament.

4-05. *Dalhousie v Dunlop* concerned a landlord who brought an action of repetition against the purchaser of barley, a distiller, on the basis that the purchaser had interfered with his hypothec over the crop. The barley had been grown on leased land and sold by sample at a public market for a fair price by the representatives of the deceased tenant. Despite the good-faith purchase, the landlord sought the value of the barley from the purchaser. In the Inner House it was decided, by a majority of 12 to 2, that the landlord could follow the barley into the hands of the purchaser and require payment of the rent for the year that the crop was produced.[9] According to the majority, this decision inevitably followed precedents that were to be regarded as having settled the law. Lord Alloway, however, in a strong dissenting opinion, expressed concern that the decision would hamper the interests of commerce.[10] Crops, he noted, were usually sold by sample. If the only way to protect acquirers was to sell in bulk (thus engaging the exception mentioned earlier),[11] this would increase costs to the detriment of both tenants and landlords.

4-06. On appeal to the House of Lords,[12] Lord Brougham found the law to be settled and upheld the Inner House's decision: a landlord could follow crops into the hands of a third party even if the third party was in perfect good faith, unless the sale was by bulk at a public market. But whilst the decision of the Inner House was affirmed, Lord Brougham used the opportunity to criticise severely the then state of the law. Of primary concern was the injury to trade, with the law of hypothec being "so alarming a description to the commercial interests of that part of the united kingdom [i.e. Scotland], of a nature indeed so inconsistent with all principles, and so utterly repugnant to the most established doctrines of English commercial law, as well as the law of landlord and tenant".[13] Amidst several references to English commercial principles, Lord Brougham said that "nothing could be more simple or more easy than the decision of the case" if the facts were applied to a case under English law.[14] In England, only

[8] *McTavish v Scott* (1830) 4 Wilson & Shaw 410 at 414–15 per Lord Brougham.
[9] *Dalhousie v Dunlop* (1828) 6 S 626.
[10] (1828) 6 S 626 at 631–36. Lord Gillies concurred with this opinion.
[11] See para 4-03 above.
[12] *Dalhousie v Dunlop* (1830) 4 Wilson & Shaw 420.
[13] (1830) 4 Wilson & Shaw 420 at 427 per Lord Brougham.
[14] (1830) 4 Wilson & Shaw 420 at 428 per Lord Brougham.

crops still present on the leased premises were subject to distress for rent.[15] By contrast, the law of Scotland would, as Lord Brougham was to argue in a subsequent debate in the House of Lords, hinder a tenant's trade.[16] This law, he claimed, had survived only because the landlord's right over crops had become "obsolete" owing to the lack of knowledge that such a right even existed.[17] But with litigation having now reached the House of Lords, the hypothec's effect on crops would become notorious, with great harm to the agricultural economy.[18]

4-07. Underlying Lord Brougham's objections to the law was the view that the landlord's right to follow the crops into the hands of a good-faith purchaser was essentially unfair on those purchasers, who counted brewers, grain-dealers, and distillers amongst their number. Such a concern for third parties was not novel and had even been brought up by Lord Haddington in *Hay v Keith* (1623) in an attempt to persuade his fellow judges that the law should allow a right of hypothec to secure only the current year's rent.[19] That the law was prejudicial to third parties could hardly be doubted, but it also hindered agricultural tenants, who had to sell their crop in order to pay the rent. And whereas the tenant of a shop had an "unlimited power of selling his shop-goods; for he rents the shop for that very end, that he may have it as a place of sale",[20] the tenant of a farm had no such ability.

(3) The Bills of the early 1830s

4-08. Having entered the House of Commons in 1810, Lord Brougham was a Whig politician of long-standing, who, by the standard of the time, held "radical" views.[21] It is therefore not surprising that, within weeks of the publication of the decision in *Dalhousie v Dunlop*, he stated his intention of introducing a Bill to extinguish rights of hypothec over crops that were sold to purchasers who were without notice of rent arrears.[22] But despite Lord Brougham's forceful criticism of this aspect of the hypothec,[23] the Bill was withdrawn after it became known that a large number of landlords "were dreadfully alarmed at the Bill" and had "taken great umbrage, and expressed themselves as if it would make all landed property insecure".[24] Subject to particular criticism was the Bill's failure

[15] J B Bird, *The Laws Respecting Landlords, Tenants, and Lodgers*, 11th edn (1833) 75–76.

[16] Hansard HL Deb vol 1 (14 December 1830) cols 1117–19.

[17] Hansard HL Deb vol 1 (14 December 1830) cols 1117–19.

[18] Anonymous, "Landlord's right of hypothec" (1831–32) 1 Edinburgh Law Journal 604 at 607–08.

[19] *Hay v Keith* (1623) Mor 6188 at 6193. See the quote at para 3-16 above.

[20] Erskine II.6.64. For more on this, see also paras 9-37–9-40 below.

[21] M Lobban, "Brougham, Henry Peter, first Baron Brougham and Vaux (1778–1868)", in *Oxford Dictionary of National Biography* (2004) vol 7, 970.

[22] Hansard HL Deb vol 1 (14 December 1830) cols 1117–19.

[23] Hansard HL Deb vol 1 (14 December 1830) cols 1117–19.

[24] Hansard HL Deb vol 2 (7 February 1831) cols 203–04.

to require the delivery of the produce to the purchaser before the hypothec was extinguished – the Bill would have extinguished the hypothec over crops as soon as the purchaser had paid the price.[25] Further concern was raised about the requirement for a landlord to give public notice of his tenant's arrears if he wished to retain his security. Such notice, it was thought, would harm a tenant's reputation.[26] The predominant argument, however, was that the law should not be changed in any way that would impinge upon the rights of landowners.

4-09. This opposition remained when Bills were introduced to Parliament in 1831, by Lord Belhaven, and 1832, by William Gillon MP. Both Bills were unsuccessful,[27] despite attempts to balance the interests of those involved and increase the protection of landlords. Gillon's Bill had even contained the requirement that a landlord be given notice in writing of the day of the sale, the quantity and type of produce being sold, and the names of the purchaser and seller. Not only could a landlord not lose his hypothec without prior warning of a sale, he was also given 14 days after the delivery of the produce to a good-faith purchaser in which to enforce the hypothec.

4-10. The failure of these Bills, however, was not solely caused by those seeking to preserve the rights which the hypothec conferred. Some politicians stood on the opposite side of the debate, arguing that the Bills were not radical enough. According to this group, the only suitable alteration of the law would be to put the sale of crops on the same footing as the sale of goods from a shop.[28] Although it may have been influential, this more radical opinion was not the most prominent. The most influential voices were simply against any alteration in the law. Perhaps the leading example of this view was the 1832 Report of a Committee of the Society of Writers to the Signet, responding to William Gillon's Bill. This Report recommended that "no alteration whatever, in the Landlord's Right of Hypothec, is necessary or expedient", a recommendation that would certainly have had an impact on the opinion of those in Parliament after it was sent to every Scottish Peer and MP.

(4) Reform: for and against

4-11. Various justifications for leaving the law alone were included in the WS Society's Report. The committee responsible for its preparation put a positive spin on the need for sales to take place in bulk at a public market. Such sales,

[25] W Ferrier, *Letter to the Landholders of Scotland, on the Proposed Change in the Landlord's Hypothec* (1831, NLS 5.1024(25)) 7.

[26] Ferrier, *Letter* 8.

[27] Hypothec (Scotland) Bill, [HC] Bill 142, 1831–32; Hansard HC Deb vol 10 (9 February 1832) cols 186–89. Another Bill (Hypothec (Scotland) Bill [HC] Bill 329, 1836) was also introduced by Whig politicians Patrick Chalmers MP and Fox Maule-Ramsay MP (the future eleventh Earl of Dalhousie).

[28] Anonymous, "Landlord's right of hypothec" (1831–32) 1 Edinburgh Law Journal 604 at 606.

it was argued, were favourable to purchasers of corn because of the regulated nature of the markets and the "assurance of the seller's right of property".[29] The Report also addressed the concerns raised by Lord Brougham in his judgment. Against the argument that the hypothec hindered the commercial interests of Scotland, the committee argued that no bankruptcies could be associated with the hypothec.[30] Nor could there be said to be any injury to consumers, a conclusion reached by the committee on the basis that "consumers have never complained".[31] This absence of complaints was despite the law being well-known – the ability of a landlord to follow the goods had been decided as long ago as *Hay v Keith* (1623),[32] was discussed in all Institutional writings (to that date),[33] and also in *Dalhousie v Dunlop*, which had come only 34 years after the House of Lords reached the same decision in *Smart v Ogilvie* (1796).[34] It must be noted, however, that the 1796 decision was not cited by the court in *Dunlop*, suggesting that it may have been little known at that time.[35] Nonetheless, the committee appears to have been correct in saying that the hypothec was well-known, at least amongst solicitors and the landed classes advised by them.[36] Finally, the committee argued that the law was not inconsistent with commercial principles, for the hypothec had been present in Roman law, was bound up with the whole law of landlord and tenant,[37] and benefitted both landlord and tenant because it allowed a tenant to take a lease over land he would otherwise be unable to afford.[38]

4-12. A strong argument was made that the law of Scotland ought not to be judged, as the Lord Chancellor had done, against the position in England, where no right of hypothec existed. Rights in security, by their nature, have third-party effect and lose much of their purpose if they can be lost through the transfer of the subject-matter.[39] Such an appeal to the nature of real rights could have been countered by reference to the fact that hypothecs had already been restricted on the grounds of commercial necessity. As matters stood, the hypothec did not cover crops transferred beyond their immediate intromitter or sold in bulk at a public market. The real effect of the hypothec had not stood in the way of commercial necessity in the past.

[29] *Resolutions Adopted by the Society of Writers to His Majesty's Signet, Upon . . . A Bill to Regulate the Landlord's Right of Hypothec in Scotland* (1832, NLS 6.2317(5)) (henceforth *Report by WS Society*) 13.

[30] *Report by WS Society* 7.

[31] *Report by WS Society* 8.

[32] *Hay v Keith* (1623) Mor 6188. For a discussion on this case, see para 2-16 above.

[33] Stair I.13.15; Bankton I.17.8 (vol I, 386); Erskine II.6.58.

[34] *Smart v Ogilvie* (1796) 3 Pat App 490.

[35] It was cited in Hume's *Lectures* vol IV, 11, but may have misunderstood the Lords' decision.

[36] This was despite Lord Brougham's claim that the landlord's right over crops sold to third parties had become "obsolete" because of a lack of knowledge. On this, see para 4-06 above.

[37] *Report by WS Society* 9.

[38] *Report by WS Society* 11ff. On this point, see W Ferrier, *Letter to the Landholders of Scotland, on the Proposed Change in the Landlord's Hypothec* (1831, NLS 5.1024(25)) 4–5.

[39] *Report by WS Society* 9.

4-13. The hypothec's third-party effect was undoubtedly in conflict with one important aspect of property law: the publicity principle. Appeal to this principle had been made in an article published in 1831, whose author wrote that property should not be burdened, unless "the burden shall be obvious to the world by means of some public and unequivocal circumstance, such as possession".[40] Yet, according to the WS committee, the hypothec – which gave a landlord such a strong right in the crops grown on his leased land and was financially disadvantageous to traders – was entirely compatible with principles of fairness. Purchasers of crops were not "entitled to have their safety or interest consulted and provided for, in preference, and to the prejudice of the landed and agricultural classes".[41] Assertions like this were part of a thread that ran throughout the WS Report to the effect that landowners were naturally superior to, and more worthy of protection than, any other class of businessman.

4-14. The main concern driving reform was the negative commercial impact on those with whom a tenant-farmer traded. The opposition to change was based on the, seemingly correct, understanding that the hypothec had not hitherto hindered the trade in agricultural produce despite it being a well-known aspect of the law. Of course, this lack of hindrance might have been a result of few landlords actually choosing to enforce their right against third parties, a fact accepted by the drafters of the WS Society's Report. As landlords did not regularly enforce their right against third parties, the proposed amendments would have little practical effect. Nevertheless, landowners wished to retain their right regardless. Whatever the merits of the debate, Parliament was dominated by the landowning class and it is unsurprising that the Bills of the early 1830s were unsuccessful.

(5) The debate renewed: 1850–1865

4-15. With the landlords' argument trumping those of the purchasers of grain, it took 20 years before another attempt was made to reform the law. Once again, Lord Brougham – now out of office – was the proposer of the legislation. In 1850 he introduced two Bills that would have extinguished the right of hypothec over crops sold at public market.[42] But, despite the focus on the protection of the corn trade rather than the restriction of the hypothec (the Bills were entitled the "Removal of Obstructions in Corn Trade (Scotland) Bill"), they were unsuccessful and the push for reform once again failed.

[40] Anonymous, "Remarks on 'bill to regulate the landlord's right of hypothec in Scotland'" (1831–32) 1 Edinburgh Law Journal 204 at 205–06.

[41] *Report by WS Society* 7.

[42] Removal of Obstructions in Corn Trade (Scotland) Bill, [HL] Bill 19, 1850; Removal of Obstructions in Corn Trade (No 2) (Scotland) Bill, [HL] Bill 51, 1850.

4-16. A decade or so later, the hypothec once again became the subject of litigation. In *Barns v Allan* (1864),[43] Ayrshire grain-dealers purchased meal made from oats grown on leased land. The landlords of the land in question demanded the value of the meal from the purchasers. Although the raw produce had been processed, it was held that there was no difference between the unprocessed oat and the processed meal.[44] The decision in *Dalhousie v Dunlop*[45] was therefore followed, but not without contention as the first jury refused to follow the trial judge's advice and instead found in favour of the traders who had purchased the meal from the tenant. It seems the jury were driven by "a sense of justice" to find against the landlord and prevent the purchaser of the meal being forced to pay twice.[46] Nevertheless, their verdict was inconsistent with the law and was set aside on appeal.[47] The decision in *Barns v Allan* was handed down in the midst of increasing dissatisfaction amongst tenant farmers about the law relating to game and improvements made to the leased subjects.[48] Accompanying this was an increasing clamour from the mercantile classes for reforms in their own interests. Combined, these two groups – tenant farmers and mercantile men – pressed for reform.[49] And so the hypothec, now if not before, became a politically sensitive issue, with most support for reform being found within the Whig Party and its Liberal Party successor. In the 1865 general election there were several Liberal candidates arguing in favour of reforming the law of hypothec.[50] The Liberal MP for Forfarshire, Charles Carnegie, a key figure in the politics of the hypothec, had already moved, in 1864, for the appointment of a Royal Commission to investigate the hypothec in relation to agricultural leases. Prior to this motion, however, James Moncreiff, Lord Advocate in the Liberal Government of 1859–65, confirmed to the House of Commons that it was the government's intention to set up a Royal Commission.[51] The Commission was assembled in the same year and was tasked with assessing "the law relating to the landlord's right of hypothec in Scotland, in so far as regards agricultural subjects". Among those appointed to the Royal Commission were Carnegie, George Young (the Liberal

[43] *Barns v Allan* (1864) 2 M 1119.

[44] This also applied to wine, wool, milk and other commodities obtained from the produce of the land. On this, see *Goldie v Oswalds* (1839) 1 D 426.

[45] *Dalhousie v Dunlop* (1830) 4 Wilson & Shaw 420; see paras 4-04–4-07 above.

[46] Discussed in A Robertson, *Remarks on the Law of Hypothec as at Present Interpreted in Scotland* (1864, NLS Yule.36(11)).

[47] It appears that the second report (3 M 269), addressing the expenses of the first trial, is incorrect. This states that the first jury found in favour of the pursuer, but, as noted in the first report (2 M 1119), it was the defenders (as the purchasers of the produce) who were favoured by the first jury's decision.

[48] I G C Hutchinson, *A Political History of Scotland 1832-1924: Parties, Elections and Issues* (1986) 104–05.

[49] *Dundee Courier*, 26 January 1864, 2.

[50] *The Scotsman*, 9 June 1865, 4 (Edward Craufurd, successful candidate for Ayr Burghs); *The Scotsman*, 12 June 1865, 7 (Andrew Agnew, successful candidate for Wigtownshire); *The Scotsman*, 26 June 1865, 8 (William Napier, unsuccessful candidate for Selkirkshire).

[51] Hansard HC Deb vol 174 (2 May 1864) col 1978.

Solicitor-General and future Lord Young, Senator of the College of Justice) and George Hope (a leading tenant farmer, agriculturist and aspiring politician).

4-17. In their report, published in 1865, the Commission accepted the general principle that a landlord has a preference over crops grown by his tenant. This principle, they argued, "has existed for centuries, not only without complaint, but as a subject of commendation, both by legal writers and by persons practically conversant with its operation. That system is intimately interwoven with the land rights of Scotland."[52] Any alteration to the landlord's right would "be followed by alterations in the tenancy of land in Scotland, which must act injuriously on the tenants, and especially on the smaller tenants, and would probably remove many of that valuable and industrious class from their present possessions".[53] It seemed that nothing had changed since the Committee of the Society of Writers to the Signet had published their report in 1832. The Commission, however, did propose some reform. They recommended that good-faith purchasers of crops, who had both taken delivery and paid the price, should be protected from a claim by the landlord.[54] Such a reform was said to be desirable because the right to follow the corn was used infrequently and there were insufficient bulk markets to provide a realistic alternative to sale by sample. This recommendation was soon to find its way into legislation.

(6) The Hypothec Amendment (Scotland) Act 1867

4-18. The Liberals won a majority in the general election of 1865 and, in February 1866, Lord Advocate Moncreiff announced the Government's intention to implement the reforms proposed by the Royal Commission.[55] Before this could be done, however, the Government fell in June 1866, following divisions on a proposed Reform Act, and was succeeded by a Conservative administration under Lord Derby.[56] With the Conservative Party traditionally representing the landowning class it would naturally have been expected that reform of the hypothec would be dropped. But this was not the case. In February 1867 the Lord Chancellor, Lord Chelmsford, introduced a Hypothec Amendment (Scotland) Bill into the House of Lords.[57] The Bill had a surprisingly smooth path through Parliament. The only objections in the House of Lords, during the

[52] *Report of Her Majesty's Commissioners Appointed to Consider the Law Relating to the Landlord's Right of Hypothec in Scotland, in so far as Regards Agricultural Subjects* (1865, 3546) xix.

[53] *Royal Commission on Hypothec* xix.

[54] *Royal Commission on Hypothec* xx.

[55] Hansard HC Deb vol 181 (9 Feb 1866) col 305.

[56] Lord Palmerston led the Liberal Party for the election of 1865, but he died in October of that year and was succeeded as Prime Minister by Lord John Russell.

[57] Hansard HL Deb vol 185 (14 Feb 1867) col 334. For the Bill, see the Hypothec Amendment (Scotland) Bill, [HL] Bill 100, 1867.

second reading of the Bill, came from the Earl of Selkirk, a Conservative Peer, and from the eleventh Earl of Dalhousie, a descendant of the ninth Earl who had been the landlord in *Dalhousie v Dunlop*.[58]

4-19. The lack of resistance cannot easily be explained. Of course, the Conservatives did not have a majority in the House of Commons and would have been aware of the support for the reform on the Liberal opposition benches.[59] But this would not explain the lack of opposition in the Conservative-dominated House of Lords. Perhaps of greater importance was that the hypothec had increasingly become an electorally significant issue; there was even said to be a "pre-occupation in Scotland with the law of hypothec" between 1867 and 1880.[60] This was caused in part by the animosity between tenant farmers and their landlords in relation to the hypothec which, by this time, had even been described by agriculturists in Galashiels as a "national grievance".[61] There was likely to have been a desire within both main parties to reduce the divisions between landowners and tenants. Conceding some reform now might dampen the latter's desire for more reform later.[62] That was certainly the calculation of the eleventh Earl of Dalhousie when he stated that, whilst the demand from tenant farmers was "unreasonable", "it was wise and prudent on the part of the Government to offer some concession, rather than let an agitation go on, the object of which was to get rid of the law altogether".[63] There may indeed have been a genuine wish to appease the tenant farmers, but the Conservative support for – or rather limited opposition to – a reform of the hypothec must also be placed in the wider political context of the time. Upon the collapse of the Liberal Government in 1866, the new Conservative administration led by Lord Derby sought to seize the opportunity, after many years in the political wilderness, to demonstrate their ability to govern.[64] The principal example of this attitude was the Reform Bill introduced by Disraeli in March 1867 and supported by the Tories in Parliament despite their traditional opposition to reforms of the franchise. If this was the Conservatives' strategy, however, they were not to be rewarded for it: at the general election called by Disraeli in 1868 the Liberals won a significant majority once again.

[58] Hansard HL Deb vol 185 (1 Mar 1867) cols 1222–27.

[59] It must be noted that not all Liberals were in favour of the amendments. George Douglas Campbell, the eighth Duke of Argyll, was a Liberal Peer but also strongly against any alteration of the hypothec. The Duke was, however, a large landowner and did not hold the same views on land law as the majority of Liberals in the 1860s: see H C G Matthew, "Campbell, George Douglas, eighth duke of Argyll in the peerage of Scotland, and first duke of Argyll in the peerage of the United Kingdom (1823–1900)", in *Oxford Dictionary of National Biography* (2004) vol 9, 777.

[60] D C Bennett, *Aspects of British Electoral Politics 1867–1880* (unpublished PhD thesis, King's College London, 2014) 203.

[61] *The Scotsman*, 20 March 1867, 8.

[62] *The Scotsman*, 19 October 1866, 8.

[63] Hansard HL Deb vol 185 (1 Mar 1867) col 1126. The eleventh Earl had previously introduced a Bill to the House of Commons to amend the hypothec in 1837 (at para 4-09 above).

[64] D Cannadine, *Victorious Century: the United Kingdom, 1800–1906* (2017) 337.

4-20. The Hypothec Amendment (Scotland) Act 1867 enacted the Royal Commission's recommendations. In keeping with the Royal Commission's scope, the Act was largely confined to agricultural leases, with only the introduction of a register of sequestrations for rent being applicable to all leases.[65] Within the Act, section 3 was the most important, providing that:

> Whensoever any Agricultural Produce shall have been *bona fide* purchased by any Person for its fair marketable Value from the Tenant or Lessee of any Farm or Lands, and shall have been actually delivered to the Purchaser, and removed from such Farm or Lands, and the Price thereof shall have been paid . . . all Right of Hypothec competent to the Landlord, Lessor, or Person or Persons entitled to the Rent of such Farm or Lands over such Agricultural Produce shall cease and determine.[66]

The Act also ended the landlord's right of hypothec over crops in security of any given year unless it was enforced within three months following the conventional term of payment for the year's rent, or last portion thereof.[67] Taken together, these amendments brought the hypothec's effect over crops closer to the hypothec's effect over other goods. The opportunity was also taken to clarify whether the hypothec covered a rural tenant's furniture and farming implements,[68] a debate that had remained unsolved since first raised in Dirleton's *Doubts*.[69] Finally, the Act made it clear that the hypothec covered cattle or other livestock owned by a third party that were brought on to leased land for grazing, but only up to the value of the payment due to the tenant for the grazing.[70]

(7) Pressure for further reform

4-21. Although only limited alterations were proposed by the Royal Commission in 1865 and subsequently enacted by the 1867 Act, these were

[65] Hypothec Amendment (Scotland) Act 1867 ss 2 and 7. The register of sequestrations for rent was a list of those sequestrations successfully brought before a particular sheriff court. They proved to be of limited effectiveness due to the lack of an index. The surviving volumes of the register are held by the National Records of Scotland.

[66] This section also protected purchasers at a public auction if the landlord had been given seven days' notice of the intention to sell by public auction and no sequestration had been obtained and registered during this notice period.

[67] 1867 Act s 4. For more on this three-month rule, see para 3-16 above, and paras 9-11 and 9-12 below.

[68] 1867 Act s 6. They were excluded.

[69] J Steuart, *Dirleton's Doubts and Questions in the Law of Scotland, Resolved and Answered* (1715) 158. See also Stair IV.25.2 and I.13.15; W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 3, 2012) 173; Bell, *Commentaries* II, 28–29; *Keiry v Ross & Robson* (1685) Mor 6239; *Alison v The Creditors of Campbell* (1748) Mor 6246; *McClymont & McClymont v Cathcart* (1848) 10 D 1489; *Grant of Kilgraston v McCrostie & The Errol Chemical Co* (1863) 2 Scottish Law Magazine & Sheriff Court Reporter 141.

[70] 1867 Act s 5. On this, see paras 8-34–8-46 below.

viewed as sufficient concessions to tenant farmers and as removing any contentious aspects of the law.[71] Yet those who thought that the 1867 Act would put the matter of the hypothec to rest were mistaken. Demand for the abolition of the hypothec could even be said to have intensified. This push for further reform ought to have been expected. Even the members of the Royal Commission could not come to a unanimous decision on whether the hypothec should be retained, with four of the eleven members dissenting from its recommendation. Of those who desired a more significant alteration, two were Liberal MPs (Charles Carnegie and George Young, the then Solicitor-General) and two were tenant farmers (George Hope and Adam Curror).[72] Although a member of the Royal Commission, Carnegie disagreed with its recommendations and even introduced a Bill to abolish the hypothec at the same time as the passage of the 1867 Act through Parliament.[73] His concern about the Bill that was to become the 1867 Act was that, "[so] far as the merchants and farmers are concerned, they would be left just in much the same position as if the law remained unaltered".[74] Carnegie's Abolition Bill had the support of the Scottish Chamber of Agriculture,[75] and a survey of the speeches made in the House of Commons during its second reading indicates that the Bill had significant backing from Liberal MPs.[76] The Bill was ultimately defeated by a majority of 129, but the division on the second reading produced 96 MPs in favour.

4-22. Meanwhile, the 1868 general election had provided another majority for the Liberal Party in the House of Commons and enabled them to form a government under the leadership of Gladstone. Support for the abolition of the hypothec within the Liberals, and the introduction of Bills by Carnegie (who had in February 1869 introduced the same Hypothec Abolition Bill as in 1867),[77] induced the House of Lords to establish a Select Committee on the hypothec in 1869.[78] Whilst the Liberals held a majority in the Commons, the House of Lords was dominated by Conservatives and it is unsurprising that the Committee arrived at the same conclusion as the Royal Commission only four

[71] See the eleventh Earl of Dalhousie's speech at para 4-19 above.

[72] *Report of Her Majesty's Commissioners Appointed to Consider the Law Relating to the Landlord's Right of Hypothec in Scotland, in so far as Regards Agricultural Subjects* (1865, 3546) xxv.

[73] Hypothec Abolition (Scotland) Bill, [HC] Bill 54, 1867.

[74] Hansard HC Deb vol 187 (8 May 1867) col 188.

[75] *Scottish Chamber of Agriculture Discussion on the Report of Her Majesty's Commissioners on the Law Relating to the Landlord's Right of Hypothec* (1866, NLS 1880.21(5)).

[76] Hansard HC Deb vol 187 (8 May 1867) cols 187–207.

[77] Hypothec Abolition (Scotland) Bill, [HC] Bill 4, 1868–69; Hansard HC Deb vol 194 (18 Feb 1869) cols 112–13. This made it to a second reading: Hansard HC Deb vol 198 (21 July 1869) cols 368–98. For Carnegie's 1867 Bill, see para 4-21 above.

[78] Hansard HL Deb vol 194 (12 Mar 1869) cols 1178–84. For the report, see *Report from the Select Committee of the House of Lords on the Law of Hypothec in Scotland* (HL Paper 45, 1868–69) (henceforth *Report from the Lords Select Committee*).

years previously: no major reform.[79] Those advocating abolition and those in favour of retention repeated many of the same arguments as had been used on previous occasions.[80]

(8) Abolition: for and against

4-23. To its critics, the hypothec failed to comply with the commercial principle of equality among creditors (the "commercial principles" argument), or was even a hangover of serfdom.[81] By the nineteenth century there had been a large increase in Scotland's industrial base, with a growth in the number of merchants who supplied seed and manure. Whilst such merchants were vital for a tenant-farmer's business, they were disadvantaged by the landlord's security.[82] Quite apart from the injustice of the situation, the disadvantageous position of other creditors was said to restrict the credit available for tenants.[83] On this view, tenant-farmers were unable to secure loans because their main asset, their farm produce, was already burdened by the hypothec. Another, more specific, criticism of the hypothec came from the perceived high rents that it produced. The hypothec was said to create a demand for land that was larger than would otherwise be the case. The hypothec, so this argument went, allowed more people to become tenants on the basis of the underlying security granted to the landlord. Put differently, were it not for the hypothec, a landlord would look only to affluent tenants and the competition for farms would be reduced. This perceived increased competition, and the inflated rents it produced, would be reduced if the hypothec was abolished.[84] One final argument of those who favoured abolition was that landlords, secure in their rents, paid little regard to the identity and skill of their tenants.[85] Those who perhaps deserved to acquire a lease might be unable to do so.

4-24. Such arguments in favour of abolition were met by those wishing to preserve the hypothec. The House of Lords Select Committee rejected the view

[79] *Report of Her Majesty's Commissioners Appointed to Consider the Law Relating to the Landlord's Right of Hypothec in Scotland, in so far as Regards Agricultural Subjects* (1865, 3546) (henceforth *Royal Commission on Hypothec*). See paras 4-16 and 4-17 above.

[80] See, for example, Hansard HC Deb vol 187 (8 May 1867) cols 187–207.

[81] Hansard HL Deb vol 175 (31 May 1864) col 882; Hansard HC Deb vol 189 (8 May 1867) col 189; Hansard HC Deb vol 247 (5 May 1869) col 247; Hansard HC Deb vol 239 (3 Apr 1878) col 509.

[82] *Royal Commission on Hypothec* xiv–xv; *Report from the Lords Select Committee* iii–iv; Highland and Island Society, *Report on the Present State of the Agriculture of Scotland* (1878, NLS, NE.23.e.8) 130.

[83] *Royal Commission on Hypothec* xv–xvi; *Report from the Lords Select Committee* iv.

[84] This would have relieved tenants from the decreasing profit margins caused by the repeal of the Corn Laws in 1846.

[85] A Robertson, *Remarks on the Law of Hypothec as at Present Interpreted in Scotland* (1864, NLS Yule.36(11)) 11.

that the hypothec allowed landlords to lease to those with no skills, concluding that:

> There is no doubt that it would be an exceedingly bad system of managing landed property, to accept as tenants those who might offer the highest rents, without reference to their ability to perform their engagements, or to cultivate the land properly.[86]

To counter the "commercial principles" argument the Committee recited other examples of privileges being granted to particular creditors.[87] A landlord, it was further contended, was fully deserving of his preferential position because of his lack of control and greater exposure to risk as compared to other creditors (the "greater risk" argument). Those other creditors could stop extending credit to their debtors if they defaulted on payments, but a landlord was tied into a relationship with his tenant until he could recover possession of his property.[88] If other creditors were harmed by the landlord's privileged position, the fault, thought the Select Committee, rested with them. They ought to have been aware of the landlord's claim when dealing with a farmer and have adjusted their terms accordingly.[89]

4-25. The Committee even argued that the law of hypothec was beneficial to tenants. Armed with a right of hypothec, landlords required neither upfront payment of rent nor other security for future rent.[90] This allowed "many industrious and enterprising men to obtain farms which they would not otherwise have sufficient capital to take".[91] This argument was often used by those who believed that the abolition of the hypothec would only benefit large tenants, with significant capital, but harm smaller ones.[92]

(9) Evaluation

4-26. Many of the points raised on both sides can only have been based on speculation. Whether the hypothec caused rents to rise was not assessed in detail by either the Royal Commission or the Select Committee. The contention that the hypothec encouraged landlords to be indifferent towards the skill of their tenants appears to have been exaggerated. On the opposite side of the argument, the prediction that landlords would demand upfront rent payments without the security of the hypothec ignored the practicalities of being a tenant-farmer.

[86] *Report from the Lords Select Committee* vi.

[87] *Report from the Lords Select Committee* iv.

[88] *Report from the Lords Select Committee* v.

[89] *Report from the Lords Select Committee* iv–v.

[90] See, for example, the evidence of the Lord Advocate, James Moncreiff, in *Report from the Lords Select Committee,* Minutes of Evidence, para 332.

[91] *Report from the Lords Select Committee* v.

[92] For example, Henry Baillie-Cochrane MP (Hansard HC Deb vol 187 (8 May 1867) col 193) and Sir Robert Anstruther MP (Hansard HC Deb vol 187 (8 May 1867) col 195). This may have been the rationale behind retaining the hypothec for leases of less than two acres in the Hypothec Abolition (Scotland) Act 1880. On this, see para 4-33 below.

A farmer would need to grow and sell crops before being able to pay the first rent; the abolition of the hypothec would not change this.[93] The "greater risk" argument of those favouring retention of the hypothec overestimated the risk to landlords and understated the risk to other creditors. A trader selling goods on credit to a tenant-farmer who later became insolvent was at risk of losing both the goods and the repayments. In comparison, a landlord was not likely to lose the value of his property and had the significant advantage of being able to re-let it to another tenant. Agricultural landlords also had the benefit of the Act of Sederunt of 1756 which, if their tenant had fallen into one year's rent arrears, permitted them to demand caution for the unpaid rent and for the next five crops.[94]

4-27. In the absence of any strong economic argument for the retention of the hypothec (or, indeed, for its abolition), those arguing against reform fell back on the view that landlords were deserving of their privileged position – a view that had been noticeable in the debates and reports of the first half of the nineteenth century. This attitude was particularly apparent in the report of the Committee of Writers to the Signet, which in 1832 recommended that:

> Neither on principles of equity or state policy, are the corn-dealers entitled to have their safety or interest consulted and provided for, in preference, and to the prejudice of the landed and agricultural classes. They are not the growers or the consumers of the corn, but mere middlemen, notoriously given to speculate, and whose reverses of fortune, like those of the distillers, do not much, if at all, affect the welfare of the state, or indeed their own visible circumstances in many cases.[95]

The Committee, quoting Thomas Chalmers from his book *Political Economy*,[96] wrote that:

> And in demonstrating the paramount importance of agriculture over commerce, it is emphatically observed, that "The Owners of the Soil, in virtue of the property which belongs to them, have a natural superiority over all other classes of men, which by no device of politics or law, can be taken from them".[97]

It was even urged by those seeking retention of the hypothec that any abolition would cause the "main pillars of the State to be injured, and deeply injured, merely to please, or even to profit, a few whisky manufacturers or corn-dealers . . ."[98]

[93] *Scottish Chamber of Agriculture Discussion on the Report of Her Majesty's Commissioners on the Law Relating to the Landlord's Right of Hypothec* (1866, NLS 1880.21(5)) 16.

[94] Act of Sederunt anent Removings, 14 December 1756.

[95] *Resolutions Adopted by the Society of Writers to His Majesty's Signet, Upon . . . A Bill to Regulate the Landlord's Right of Hypothec in Scotland* (1832, NLS 6.2317(5)) (henceforth *Report by WS Society*) 7.

[96] T Chalmers, *On Political Economy, in connexion with the Moral State and Moral Prospects of Society* (1832). The Committee also cited Adam Smith.

[97] *Report by WS Society* 7.

[98] W Ferrier, *Letter to the Landholders of Scotland, on the Proposed Change in the Landlord's Hypothec* (1831, NLS 5.1024(25)) 11.

4-28. Of course, it would have been difficult, even in the second half of the nineteenth century, to defend the hypothec on the basis of the "natural superiority" of landlords, but there were also arguments about its importance within the law of leases. "The right of Hypothec", observed the Committee drafting the 1832 report, "is not a mere branch of the law of Landlord and Tenant, but, in truth, the root of the matter."[99] Even as late as 1865, when the Royal Commission reported, such opinions remained prevalent.[100] This was a stronger argument, but, in the event, the eventual abolition of the agricultural and residential hypothec did not result in landowners refusing to grant leases. Although the hypothec may at one time have been a significant factor for landlords, any argument that the hypothec lay at the "foundation" of leases was simply incorrect.[101]

(10) Abolition

4-29. By the late 1860s the argument seemed to have reached a stalemate, with both sides entrenched in their views. To enable further reform, a shift in politics was needed. Such a shift appeared to have occurred during the late 1860s and early 1870s. At a time when Gladstone's Government was preoccupied with the Irish land issue and with education in England,[102] the hypothec was debated in the House of Commons and its abolition was supported by members of the Government.[103] George Young MP, a dissenting member of the Royal Commission in 1865, had become Lord Advocate in November 1869 and made it known that he supported the hypothec's abolition.[104] Yet, despite this support from the Government, and their majority of over 100 in the Commons, there was to be no further reform of the hypothec at this time. Charles Carnegie introduced abolition Bills into the Commons in 1869 and 1871,[105] but both failed. By this point, the hypothec had come to the attention of English MPs, and they were far from supportive of any proposal for abolition. During the debate on the second reading of Carnegie's last hypothec Bill, in 1871, attention had begun to turn to whether the law of distress in England might follow the hypothec's fate. The Lord Advocate's incautious statement that he would also favour the abolition of the law of distress resulted in several appeals to English

[99] *Report by WS Society* 11.

[100] *Royal Commission on Hypothec* xix.

[101] And nobody would argue this today. See chapter 12 for a brief discussion on whether the hypothec should be retained after the reforms of the Bankruptcy and Diligence etc (Scotland) Act 2007.

[102] G F Millar, "Young, George, Lord Young (1819–1907)", in *Oxford Dictionary of National Biography* (2004) vol 60, 896.

[103] Hansard HC Deb vol 205 (22 Mar 1871) col 435 (the Lord Advocate, George Young).

[104] Hansard HC Deb vol 200 (28 Mar 1870) col 723.

[105] Hypothec Abolition (Scotland) Bill, [HC] Bill 4, 1868–69; Hypothec Abolition (Scotland) Bill, [HC] Bill 9, 1871.

MPs to vote against the Bills reforming the law of hypothec.[106] At the division for its second reading, it was the votes of English MPs that caused the Bill to fail.[107] The fate of the law of distress in England was now bound up with the fate of the hypothec in Scotland.

4-30. After Carnegie left the House of Commons in 1872 the mantle of reform was taken up by other Liberal MPs such as Sir David Wedderburn, who introduced a Bill in early 1873 for the abolition of the entire law of hypothec.[108] Wedderburn was not hopeful of getting the Bill passed due to the lack of support from English MPs,[109] and when it reached a second reading the law of distress in England was, once again, an important, and perhaps decisive, issue.[110] Wedderburn lost his seat in the 1874 general election, but the abolition of the hypothec for agricultural landlords was supported throughout the 1870s by other Scottish Liberals including James Barclay, the successor to Charles Carnegie as MP for Forfarshire.[111]

4-31. The support of a large percentage of the Liberals for the hypothec's abolition was secure, but of more significance to the potential success of any legislation was the change in attitude amongst Conservatives in the lead-up to the 1874 general election. This was a reaction to losses suffered in traditionally Conservative county seats as tenants became more electorally influential and increasingly concerned with matters such as the hypothec and game laws.[112] An appeal for tenant-farmers to put pressure on those in power had been given as early as 1866 when one member of the Scottish Chamber of Agriculture said that:

> I do trust that members will not come here simply to talk and express their opinions, but that they will do their utmost to have them carried into effect. He that is here conscious of the impolicy of the hypothec law should endeavour to make himself heard where laws are both made, amended, and repealed – in other words that he will employ his franchise in favour of that man who holds sentiments akin to his own, and will give them substantial support in the Houses of Parliament.[113]

[106] Hansard HC Deb vol 205 (22 Mar 1871) col 426 (George Gregory), col 438 (Edward Gordon), and cols 440–42 (George Leeman).

[107] Highland and Island Society, *Report on the Present State of the Agriculture of Scotland* (1878, NLS, NE.23.e.8) 130.

[108] Hypothec Abolition (Scotland) Bill, [HC] Bill 21, 1873; Hansard HC Deb vol 214 (7 Feb 1873) col 183.

[109] *The Scotsman*, 5 Feb 1873, 5.

[110] Hansard HC Deb vol 216 (25 June 1873) cols 1340–73.

[111] Hypothec (Scotland) (No 2) Bill, [HC] Bill 49, 1878; Hypothec (Scotland) (No 3) Bill, [HC] Bill 101, 1878. See also the Hypothec (Scotland) Bill, [HC] Bill 29, 1878.

[112] I G C Hutchinson, *A Political History of Scotland 1832–1924* (1986) 106. See also G Pentland, "By-elections and the peculiarities of Scottish politics, 1832–1900", in G Otte and P Readman (eds), *By-elections in British Politics, 1832–1900* (2013) 273 at 283.

[113] *Scottish Chamber of Agriculture Discussion on the Report of Her Majesty's Commissioners on the Law Relating to the Landlord's Right of Hypothec* (1866, NLS 1880.21(5)) 37 (Mr Hope).

Tenant-farmers did indeed increase their influence in Parliament and in 1868 William McCombie became Scotland's first MP from a background as a tenant-farmer.[114] The increasing importance of tenant-farmers could have been the result of the increase in the electorate, although it only rose by 23,000 between 1869 to 1883.[115] Another cause may have been the Secret Ballot Act 1872 which allowed tenants to vote for a candidate without fear of eviction by their landlords. Whatever the cause, their increasing influence was being directed in part towards the rising dissatisfaction with the hypothec.[116] To be successful in the counties of Scotland, Conservative candidates had little choice but to alter their policy on the subject and, alongside demonstrating their support for the abolition of the hypothec, they emphasised the failure of the Liberal Government to legislate on the issue.[117] This time, the policy change may have worked for the Conservatives, as they gained 12 Scottish seats from the Liberals at the 1874 general election (most of which were county seats)[118] and won a majority in the House of Commons.

4-32. Such overwhelming support amongst Scottish MPs, both Liberal and Conservative, appeared to clear the path for the abolition of the hypothec, but when Robert Vans-Agnew, Conservative MP for Wigtownshire, brought forward a Bill for abolition in 1874, and again in 1875, it failed to get the support of the Government and was ultimately unsuccessful.[119] Perhaps due the experience of the Liberal government before them, the Conservatives under Disraeli were wary of English MPs voting against abolition in an effort to protect the law of distress.[120] The Bills were also not restricted to agricultural leases and so would have affected all tenancies (with the exception of dwelling-houses). This may have persuaded more members to reject the Bills.

[114] J R MacDonald, "McCombie, William (*bap.* 1805, *d.* 1880)", rev Anne Pimlott Baker, in *Oxford Dictionary of National Biography* (2004) vol 35, 147. He had previously been the vice-president of the Scottish Chamber of Agriculture when it produced a report in 1866 favouring the abolition of the hypothec.

[115] C Cook and B Keith, *British Historical Facts 1830–1900* (1975) 115.

[116] G Hope, "Hindrances to agriculture (from a Scotch tenant farmer's point of view)", in A Grant (ed), *Recess Studies* (1870) 375 at 392–93.

[117] Pentland, "By-elections and the peculiarities of Scottish politics, 1832–1900" 285; *The Scotsman*, 28 January 1874, 7 (Robert Baillie-Hamilton, successful candidate for Berwickshire); *The Scotsman*, 29 January 1874, 6 (William Stirling-Maxwell, successful candidate for Perthshire); *The Scotsman*, 31 January 1874, 8 (Roger Montgomerie, successful candidate for North Ayrshire).

[118] For example, North Ayrshire, South Ayrshire, Berwickshire, Dumfriesshire, South Lanarkshire, Midlothian, and Roxburghshire.

[119] Hypothec (Scotland) Bill, [HC] Bill 39, 1874 (the Government did not grant time for a second reading: Hansard HC Deb vol 219 (19 May 1874) cols 479–80); Hypothec (Scotland) Bill, [HC] Bill 5, 1874–75; Hansard HC Deb (10 Mar 1875) cols 1533–92. A further two Bills introduced by Vans-Agnew were withdrawn before the House of Commons could call a division on a second reading: Hypothec (Scotland) Bill, [HC] Bill 32, 1877; Hypothec (Scotland) Bill, [HC] Bill 29, 1878.

[120] *Dundee Courier*, 21 May 1874, 2.

4-33. It took until 1879 for the Government to support a Bill abolishing the agricultural hypothec (again introduced by Vans-Agnew), although, after passing a second reading in the House of Commons and being considered in committee, it failed through lack of parliamentary time.[121] Finally, however, after a decade of almost annual attempts to abolish the hypothec in relation to agricultural leases, a Bill, again introduced by Vans-Agnew, passed into law, being rushed through in the two-month session of Parliament before the general election of March 1880.[122] Titled the Hypothec Abolition (Scotland) Act 1880, it provided as follows in its opening section:

> From and after the eleventh day of November one thousand eight hundred and eighty-one, herein-after called the commencement of this Act, the landlord's right of hypothec for the rent of land, including the rent of any buildings thereon, exceeding two acres in extent, let for agriculture or pasture, shall cease and determine . . .

This sudden change in the attitude of the Conservative Government appeared to have been a reaction to a Liberal campaign. By 1878, the leadership of the Liberal Party had made it clear that it was their policy to abolish the agricultural hypothec and publicised the fact that the Conservatives had failed to act during their years in office. Although Gladstone's Midlothian campaign is more noted for its contributions on foreign policy, he made frequent references to so-called Scottish issues, including the law of hypothec.[123] Against this background, the Conservatives may have thought that it would be expedient to pass legislation in favour of tenant-farmers.[124] As it happens, the passing of the Bill brought little political advantage for the Conservatives, as had also been the case after the passing of the 1867 Act. In the general election of 1880, the Conservatives lost nine county seats to the Liberals, and 13 seats in all throughout Scotland.[125]

[121] Hypothec Abolition (Scotland) Bill, [HC] Bill 3, 1878–79. For the second reading, see Hansard HC Deb vol 244 (19 March 1879) cols 1222–88. It reached committee stage – Hansard HC Deb vol 245 (1 April 1879) cols 169–85, Hypothec Abolition (Scotland) Bill, [HC] Bill 119, 1878–79 – but failed to reach report stage (Hansard HC Deb vol 246 (27 May 1879) cols 1401–05). The Government could not give the Bill time for further consideration: Hansard HC Deb vol 247 (19 June 1879) col 179.

[122] Hypothec Abolition (Scotland) Bill, [HC] Bill 34, 1880. The Bill had sufficient support to avoid a division on the second and third readings in the House of Commons: Hansard HC Deb vol 250 (25 Feb 1880) cols 1410–25; Hansard HC Deb vol 251 (10 Mar 1880) cols 775–76.

[123] He described the Conservative support for the abolition of the hypothec as a "Tulchane" calf, used to induce the Scottish farmers to vote for them (*The Scotsman*, 27 November 1879, 5). A tulchane (or tulchan) calf was the skin of a calf stuffed with straw and placed near a cow in order to induce the cow to give milk. Within the same speech, Gladstone said that: "When the profession of a particular opinion on a given measure is necessary for gaining a seat there are no bounds to the toleration of the Tories. For that reason, members favourable to the abolition of hypothec are allowed to stand as Tories, and are accepted as good and sound Tories if they come from Scotland."

[124] Of course, not all Scottish MPs could be persuaded. Lord Elcho (a founder of the Liberty and Property Defence League) remained a firm opponent of any change. On this, see, for example: Hansard HC Deb vol 249 (8 August 1879) col 530.

[125] H J Hanham, *Elections and Party Management: Politics in the Time of Disraeli and Gladstone* (1959) 156.

(11) Last rites

4-34. Despite the name of the 1880 Act, the agricultural hypothec was not completely abolished. It retained a marginal existence, surviving in relation to leases of land of less than two acres, and also for premises used as tree nurseries or market gardens regardless of extent.[126] This rather arbitrary distinction between leased premises greater than two acres and those below was to survive until the Bankruptcy and Diligence etc (Scotland) Act 2007,[127] section 208(3) of which provided that "[t]he landlord's hypothec no longer arises in relation to property which is kept . . . on agricultural land". The definition of "agricultural land" in the Agricultural Holdings (Scotland) Act 1991, namely "land used for agriculture for the purposes of trade or business", was adopted here.[128] In turn, the definition of "agriculture" included:

> horticulture, fruit growing; seed growing; dairy farming; livestock breeding and keeping; the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds; and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes: and "agricultural" shall be construed accordingly.[129]

Land used for horticultural purposes, which retained the hypothec under the 1880 Act, was thus now excluded.[130] Today any landlord of agricultural land not used for the purposes of a trade or business, even if there are crops and animals kept upon it, still retains the hypothec. Otherwise the landlord's hypothec in relation to rural leases has been almost entirely abolished. This gradual eclipse of the rural hypothec from 1867 onwards was not, however, followed, at least in the short term, by a corresponding decline in the urban hypothec.

C. URBAN LEASES

4-35. A common view during the 1860s was that if the agricultural hypothec was to be abolished the urban hypothec would ultimately suffer the same fate.[131] Indeed, some, such as Charles Carnegie, had already advocated the abolition

[126] J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 372.

[127] Section 208 of the Bankruptcy and Diligence etc (Scotland) Act 2007 came into force on 1 April 2008. For the commencement provisions, see the Bankruptcy and Diligence etc (Scotland) Act 2007 (Commencement No 3, Savings and Transitionals) Order 2008, SSI 2008/115, art 3.

[128] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(13), applying Agricultural Holdings (Scotland) Act 1991 s 1(2).

[129] Agricultural Holdings (Scotland) Act 1991 s 85(1).

[130] There is also now an exclusion for premises used as market gardens, see Lord Gill, *Agricultural Tenancies*, 4th edn (2017) para 51-08.

[131] *Report of Her Majesty's Commissioners Appointed to Consider the Law Relating to the Landlord's Right of Hypothec in Scotland, in so far as Regards Agricultural Subjects* (1865, 3546) x; *Report from the Select Committee of the House of Lords on the Law of Hypothec in Scotland* (HL Paper 45, 1868–69).

of the hypothec in its entirety. None of Carnegie's attempts to have an abolition Bill passed (in 1867, 1869, and 1871) was restricted to agricultural leases.[132] Subsequent Bills introduced into the House of Commons in the mid-1870s sought the abolition of the hypothec except in relation to dwelling-houses,[133] but these Bills too were to fail.

4-36. After the Hypothec Abolition (Scotland) Act 1880 abolished the hypothec in relation to agricultural leases, it took 10 years before attention turned to the urban hypothec, again as a result of the action of Liberal politicians. Archibald Cameron Corbett, the Liberal MP for Glasgow Tradeston, introduced a Bill for the abolition of the hypothec in 1893.[134] The Liberal MP for Glasgow Blackfriars and Hutchesontown, Andrew Provand, introduced another Bill in 1895.[135] Both failed to reach a second reading. In the early-twentieth century the Liberal MP, and future Labour candidate, James Dundas White introduced Bills for the abolition of the hypothec in 1908, 1909, 1910, and 1912.[136] None received a second reading. As the hypothec was now almost solely an urban issue it was unsurprising that all these MPs represented burghs. Despite the enthusiasm from certain MPs, there was insufficient demand for the abolition of the urban hypothec for it to be a politically important issue. Lord Advocate Watson's assessment of the situation in 1879 remained true throughout this period:

> There was, however, this distinction between urban and agricultural hypothec – that, practically, no legislation had been demanded, so far as he knew, in the one case, whereas it was clamorously demanded in the other. Whenever the urban landlord or tenant made out a case and complained, it would be time for the Legislature to interfere; but that House ought not to occupy itself with remedying fancy grievances, when those labouring under them, appeared to be totally unaware of their existence.[137]

It might have been expected that the new anti-landlord sentiment in the urban areas of the early-twentieth century would have resulted in the abolition of the hypothec, at least in relation to residential properties.[138] But it appears that

[132] Hypothec Abolition (Scotland) Bill, [HC] Bill 54, 1866–67; Hypothec Abolition (Scotland) Bill, [HC] Bill 4, 1868–69; Hypothec Abolition (Scotland) Bill, [HC] Bill 9, 1871. The Hypothec Abolition (Scotland) Bill, [HC] Bill 21, 1873 would have also abolished the entire law of hypothec.

[133] Hypothec (Scotland) Bill, [HC] Bill 39, 1874; Hypothec (Scotland) Bill, [HC] Bill 5, 1875.

[134] Hypothec Complete Abolition (Scotland) Bill, [HC] Bill 153, 1893–94.

[135] Hypothec (Scotland) Bill, [HC] Bill 152, 1895.

[136] Hypothec Abolition (Scotland) Bill, [HC] Bill 125, 1908; Hypothec Abolition (Scotland) Bill, [HC] Bill 113, 1909; Hypothec Abolition (Scotland) Bill, [HC] Bill 105, 1910; Hypothec Abolition (Scotland) Bill, [HC] Bill 301, 1912–13. The Hypothec Abolition (Scotland) Bill, [HC] Bill 249, 1911 was introduced by Godfrey Collins MP, Liberal MP for Greenock, after James Dundas White lost his Dunbartonshire seat before winning the 1911 Glasgow Tradeston by-election.

[137] Hansard HC Deb vol 244 (19 March 1879) col 1260.

[138] T C Smout, *A Century of the Scottish People 1830–1950* (1987) 269.

the hypothec was not an important issue to urban voters, and, perhaps more importantly, a significant number of urban tenants were unable to vote before 1918. Residential tenants would have been concerned with the conditions in which they lived, rather than whether their landlord had a preferential security over the goods brought into the premises. Residential tenants were unlikely to have valuable assets in their homes anyway. And, if an urban tenant had valuable assets in the leased premises, it was easy to remove them unburdened by the hypothec; for whilst it was difficult for a tenant-farmer to sell the crops unburdened by the hypothec, an urban tenant could extinguish a right of hypothec in an item if it was sold in the ordinary course of living or if sufficient other goods were left behind.[139] As the hypothec was not a hindrance to the trade of an urban tenant, there was not the same demand for reform as there had been from tenant-farmers.

4-37. Nevertheless, many of the arguments for the abolition of the agricultural hypothec could be and were used in respect of the urban hypothec. In relation to fairness, for example, there was said to be no reason why a "claim for lodgings should have a preferential money claim over claims for food and clothing".[140] A commercial tenant was unable to conduct his business without the support of wholesalers extending credit. Such wholesalers were as vital to the tenant's business as the premises from where it was conducted, and such suppliers ought not to be disadvantaged by the landlord's hypothec.[141] The ability of urban tenants to secure credit was said to be hampered by the hypothec; in 1880 the alleged unfairness to tenants and those extending credit to them was even an inspiration for a poem.[142] As before with the rural hypothec, those wishing to retain the urban hypothec emphasised the unique position of landlords as creditors who were unable to mitigate their losses through the immediate removal of a tenant in arrears. Ordinary creditors of a tenant could refuse to extend further credit by stopping deliveries of goods; landlords had no such luxury.[143]

(1) Leases of dwelling-houses

4-38. Although there was only limited demand for the abolition of the urban hypothec, Sir Henry Campbell-Bannerman's Liberal government in the early years of the new century did consider reforms in the context of residential property. This was against the backdrop of there being little protection at common law for residential tenants; even clothes appeared to be subject

[139] See paras 9-35–9-40 below.

[140] Hansard HC Deb vol 196 (5 May 1869) col 250 (Charles Carnegie MP).

[141] Letter from J A S Murray in *The Glasgow Herald*, 21 October 1886, 11.

[142] R Bird, "The landlord's hypothec", in R Bird, *Law Lyrics* (1888) 36.

[143] See, for example, the opinion of the Glasgow Landlords' Association reported in *The Glasgow Herald,* 1 April 1893, 3.

to the hypothec,[144] and the position of implements of trade was far from settled.[145]

4-39. In 1907 a Departmental Committee on House-Letting in Scotland, chaired by Lord Guthrie, reported on the letting of working men's dwellings.[146] The report made clear that working men supported the abolition of the hypothec,[147] but that a possible alternative was the "exemption of bedding and furniture from the landlord's hypothec, to the appraised value of £15 to £20".[148] Ultimately, the Committee recommended exempting all plenishings to the value of £10 from the hypothec in addition to an exemption for "bedding, wearing apparel, tools and implements of trade",[149] a recommendation that was included within an unsuccessful House-Letting (Scotland) Bill introduced to the House of Commons by the Liberal MP for Falkirk Burghs, John Murray Macdonald, in 1908.[150] Despite this defeat, the Government soon adopted the recommendations of the Departmental Committee and introduced their own House Letting and Rating (Scotland) Bill.[151] They were, however, unable to proceed with the Bill after the House of Commons would not agree to amendments made by the House of Lords (none relating to the hypothec) and the Bill had to be withdrawn in December 1909.[152] Following this failure five Conservative and Unionist MPs brought forward a Bill in 1910 which included the hypothec clause recommended by the Departmental Committee report whilst omitting the controversial clauses amended by the Lords.[153] In the same year Liberal MP Murray Macdonald introduced a similar Bill to the one he had presented in

[144] *Countess of Callander v Campbell* (1703) Mor 6244; Hume, *Lectures* vol IV, 23; Rankine, *Leases* 374. There may, however, have been an exclusion for clothes necessary for the tenant (Bell, *Commentaries* II, 29; Bell, *Principles* §1276; Rankine, *Leases* 374; J G Stewart, *A Treatise on the Law of Diligence* (1898) 466; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 299), which would have mirrored the exclusion from poinding of clothes not extravagant for the debtor (Stewart, *Diligence* 345). The items excluded from the hypothec often mirrored those excluded from poinding. See, in particular, the statutory exclusions of the late twentieth and early twenty-first century described at paras 4-41 and 4-42 below.

[145] *Moore v McKean* (1895) 11 Sh Ct Rep 231; *Wright v Kemp* (1896) 4 SLT 16, (1896) 12 Sh Ct Rep 180; Stewart, *Diligence* 466; T M Stewart, "Hypothec and Tools of Trade" (1896) 12 Scottish Law Review 176 at 181. For a discussion on implements of trade, see paras 8-02–8-05 below.

[146] *Report of the Departmental Committee on House-Letting in Scotland, Volume 1: Report* (1907, Cd 3715).

[147] *Report on House-Letting in Scotland* 15.

[148] *Report on House-Letting in Scotland* 16.

[149] *Report on House-Letting in Scotland* 23.

[150] House-Letting (Scotland) Bill, [HC] Bill 12, 1908, cl 21. It was re-introduced a month later as the House-Letting (Scotland) Bill (No 2), [HC] Bill 224, 1908 and later withdrawn by the Speaker before a second reading because it went beyond its title (Hansard HC Deb vol 188 (15 May 1908) col 1439).

[151] House Letting and Rating (Scotland) Bill, [HC] Bill 154, 1909.

[152] Hansard HL Deb vol 4 (1 Dec 1909) col 1393 (Lord Pentland).

[153] Small Dwelling-Houses in Burghs Letting (Scotland) Bill, [HC] Bill 66, 1910.

1909.[154] Neither Bill reached a second reading. In the House of Lords a Bill was also introduced by the third Earl of Camperdown, a Liberal Peer, but, whilst it passed a second reading, it progressed no further.[155]

4-40. After the constitutional crisis caused by the People's Budget and the resulting Parliament Act of 1911, the Liberal Government introduced the House Letting and Rating (Scotland) Bill.[156] This was given a relatively smooth path through Parliament and received Royal Assent on 16 December 1911. Section 10 provided that:

> All bedding material as well as all tools and implements of trade used or to be used by the occupier of a small dwelling-house or any member of his family, as the means of his, her, or their livelihood, which are in the dwelling-house, and also such further furniture and plenishing in a small dwelling-house as the occupier may select to the value, according to the sheriff officer's inventory, of ten pounds, shall be wholly exempt from the right of hypothec of the owner.

This Act applied only to burghs and to urban areas within counties with a population greater than 10,000 people, and to any areas with fewer than 10,000 people if the town or county council agreed to its introduction. Within those burghs the Act only applied to small dwelling-houses valued at £10 or less in the valuation roll if the town population was less than 20,000, £15 or less if the population was less than 50,000, and £21 or less if the population was above 50,000.[157] Although all implements of trade, bedding material, and plenishings to the value of £10 were exempt from the hypothec after the 1911 Act came into force on 15 May 1912, all other goods remained burdened. Rankine's prediction that the 1911 Act would "practically put an end to the right of hypothec in such cases" proved to be incorrect and it remained an important right against tenants of dwelling-houses.[158] In 1960, for example, there were 3,837 actions of sequestration for rent in Glasgow Sheriff Court, albeit mostly brought by the local authority.[159]

4-41. When the Law Reform (Diligence) (Scotland) Act 1973 restricted the property available to be poinded there was no corresponding change to the hypothec. In fact, the Local Government (Scotland) Act 1973 repealed the

[154] House-Letting (Scotland) Bill, [HC] Bill 102, 1910.

[155] Small Dwelling-Houses in Burghs Letting (Scotland) Bill, [HL] Bill 39, 1910.

[156] House Letting and Rating (Scotland) Bill, [HC] Bill 5, 1911.

[157] A further exception was made for premises used as inns or hotels: see House Letting and Rating (Scotland) Act 1911 s 1.

[158] Rankine, *Leases* 373. The opportunity to reform the law was not taken by the Scottish Home Department in 1958 when they addressed the law of diligence: see *Report of the Committee on Diligence* (1958, Cmnd 456).

[159] *Scottish Home and Health Department: Legal and General Files, Landlord's right of hypothec as it affects goods held by a tenant on hire or under a hire purchase agreement* (1961–62, NRS HH41/1536).

1911 Act, leaving a tenant without any protection from the hypothec.[160] The Debtors (Scotland) Act 1987 finally extended to the hypothec those exceptions already applicable to poinding. As a result, the following were excluded from the hypothec regardless of where they happened to be situated: all clothes reasonably required by the debtor (tenant) or family, tools or equipment of trade reasonably required (this time only to the value of £500),[161] medical equipment reasonably required, education items (to the value of £500), and children's toys and items for the upbringing of a child.[162] There was also a list of exempt goods if found in a dwelling-house which included beds, food, heating equipment, curtains, floor coverings, fridges and cleaning equipment.[163] This removed from the ambit of the hypothec most, if not all, the plenishings of a dwelling-house and rendered the residential landlord's right of hypothec largely redundant. It is, therefore, unsurprising to find that there were no reported cases relating to a landlord's right of hypothec over goods in a dwelling-house after the 1987 Act.

4-42. The Debt Arrangement and Attachment (Scotland) Act 2002 added to the exceptions by including implements of trade reasonably required (now up to the value of £1000), any vehicle reasonably required (initially up to the value of £1000 but now increased to £3000),[164] a mobile home that was the debtor's principal residence,[165] garden tools, and money.[166] There was a further exception for essential assets contained within a dwelling-house, now including microwaves, radios, telephones, televisions, and computers.[167] These reforms were bound up with the almost contemporaneous abolition of poinding and the belief that poinding had been "unduly harsh and intrusive" because of the ability to enter into a debtor's home.[168]

4-43. Already largely abolished in substance, the hypothec in relation to goods contained in dwelling-houses was not abolished in law until the Bankruptcy

[160] Local Government (Scotland) Act 1973 Sch 29.

[161] Compare with the provisions under the 1911 Act: see para 4-40 above.

[162] Debtors (Scotland) Act 1987 s 99(1) applying s 16(1) of the Act.

[163] Debtors (Scotland) Act 1987 s 99(1) applying s 16(2) of the Act.

[164] The value of a vehicle excluded from attachment and the hypothec was raised to £3000 by regulation 4 of the Bankruptcy (Scotland) Amendment Regulations 2010, SSI 2010/367. This came into force on 15 November 2010.

[165] For the previous provisions in relation to mobile homes, see Debtors (Scotland) Act 1987 s 26.

[166] Debt Arrangement and Attachment (Scotland) Act 2002 s 60(2)(a) applying s 11(1).

[167] 2002 Act s 60(2)(b) (now repealed) applying Sch 2.

[168] *Policy Memorandum to the Debt Arrangement and Attachment (Scotland) Bill*, introduced in the Scottish Parliament on 7 May 2002, para 7. There was the possibility that attaching a debtor's assets in his or her home was contrary to Article 8 of the European Convention on Human Rights ("Everyone has the right to respect for his private and family law, his home and his correspondence"): see F McCarthy, "Human rights and the law of leases" (2013) 17 EdinLR 184 at 199–200)

and Diligence etc (Scotland) Act 2007.[169] This formed part of the Scottish Executive's strategy to prevent the attachment of assets in a debtor's home, and followed on from the protections granted in the 2002 Act.[170] "Dwelling-house" was defined in the Act as including:

> (a) a mobile home or other place used as a dwelling; and
> (b) any other structure or building used in connection with the dwellinghouse.[171]

Buildings used in connection with a dwelling-house would include garages, sheds, greenhouses or other outbuildings.[172] All the moveable property contained within such buildings was now excluded from the hypothec, but this did not exclude the shed or greenhouse itself, assuming that it was moveable property.[173]

(2) Third parties' goods

4-44. A curious feature of the hypothec was that it covered certain goods within the leased premises even though they were not owned by the tenant,[174] except in cases where the landlord had notice that the goods were owned by a third party and that the goods should not be subject to the hypothec.[175] If a third party found its goods subject to the hypothec, the only protection was to apply to the sheriff to have the tenant's property sold first.[176]

4-45. This was allowed despite Roman law rejecting the possibility that goods owned by someone other than the tenant could become subject to the hypothec without the consent of their owner:

> . . . the Servian action on pledge states that nothing can be held as pledged property except what is in the estate (*bona*) of the person obligating it, and it is quite certain

[169] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(3)(a).

[170] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 1012.

[171] 2007 Act s 208(13).

[172] D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) paras 98 and 438. When the Bankruptcy and Diligence etc (Scotland) Bill was introduced, it adopted the definition of dwelling-house contained in the Debt Arrangement and Attachment (Scotland) Act 2002 s 45. This would have meant that garages or other structures did not come within the definition. Goods contained in such structures would, therefore, have been covered by the hypothec. But, by the time the Bill had been amended at stage 2, it had been changed to the current wording. This may have been because of the problems mentioned in A J M Steven, "Goodbye to sequestration for rent" 2006 SLT (News) 17 at 19.

[173] Moveable property kept in a garden would also not be excluded: D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) paras 98 and 438.

[174] For what goods were, or were not, burdened by the hypothec, see chapter 7 below.

[175] See paras 7-33–7-35 below.

[176] *McIntosh v Potts* (1905) 7 F 765; *Scottish & Newcastle Breweries Ltd v Edinburgh District Council* 1979 SLT (Notes) 11 at 12 per Lord Ross; Rankine, *Leases* 376.

that another's property cannot be obligated as a pledge by a third party without the owner's consent.[177]

In Scotland, early case-law, as well as Stair, appeared likewise to restrict the hypothec to goods owned by the tenant,[178] but by the time of Bankton it had been accepted that the hypothec could cover third parties' goods.[179] Later, the law evolved to create the general principle that all goods on the premises were covered.[180] It can be questioned whether this was a legitimate development of the law especially as it did not fit with the principle that no man can pledge goods he does not own: *res aliena pignori dari non potest*.[181]

(a) Justifications

4-46. A standard justification in Scotland was that the third party consented to its goods being subject to the hypothec by allowing them to be brought into the premises.[182] Aware of the risk, the third party could adjust the terms of the contract with the tenant accordingly. In this justification there is evidence that this aspect of the hypothec was taken from the law as described by Voet and Pothier, both of whom accept that the hypothec covers third parties' goods if the items furnish the premises with the consent of the third party.[183] This view has long been criticised as inadequate,[184] for agreeing to give possession of goods to a tenant is clearly not the equivalent of consenting to them being burdened by the hypothec in security of rent. In any case, the landlord had a hypothec over goods even where their owner was unaware that they were in the leased premises or had expressed in a contract with the tenant that they were not to be burdened.[185]

4-47. Another (closely related) view was that the hypothec covered third parties' goods on the basis of the tenant's reputed ownership. Upon this view,

[177] C.8.15.6. See also, D.13.7.9 (Ulpian); D.13.7.32 (Marcianus); D.20.1.16.7 (Marcianus); C.8.15.1; C.8.15.2. Cf B W Frier, *Landlords and Tenants in Imperial Rome* (1980) 109–10.

[178] *Anonymous* (1672) 2 Bro Sup 670; Stair IV.25.1 and IV.25.3, which requires the fruits and goods on the ground to belong "to the tenants or possessors". See also H M Milne (ed), *The Legal Papers of James Boswell*, vol 1 (Stair Society vol 60, 2013) LP1.

[179] Bankton I.17.10 (vol I, 387).

[180] See para 7-05 below.

[181] *Jaffray v Carrick* (1836) 15 S 43 at 45 per the Lord Ordinary. This is made clear in the law of pledge. The general rule is that a pledgee will acquire no right against the owner of the goods if the pledgor had neither ownership of the goods nor authorisation from the owner. On this, see A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) paras 6-35–6-70.

[182] *Jaffray v Carrick* (1836) 15 S 43; *Dundee Corporation v Marr* 1971 SC 96 at 100 per Lord President Clyde. See also R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) §241; J Voet, *Commentary on the Pandects* (transl P Gane, 1955–58) XX.2.5.

[183] Pothier, Lease §241; Voet, *Commentary* XX.2.5.

[184] Rankine, *Leases* 375.

[185] See paras 7-33–7-35 below.

the landlord acquired a right of hypothec over the goods owned by a third party on the basis of his good faith.[186] Previously, Scots law had allowed a creditor to attach goods not owned by the debtor if they were in the debtor's natural possession with the consent of the owner.[187] As Bell wrote, "goods and effects are held responsible for the debts of those in whose hands they are found".[188] This was based on the presumption of ownership that arose from the possession of moveables, and the fact that the credit of the possessor was raised as a result of having possession of the items.[189] It would not have been surprising if the law of hypothec, which had its own unique enforcement diligence, was also influenced by this principle. Indeed, when writing in the early nineteenth century about the hypothec burdening third parties' goods, Bell said that "[t]here is only one principle upon which it could be justified, viz. the tenant's having a collusive possession and reputed ownership of the articles, and seeming to be entitled to the full disposal of them, and, consequently, to the power of tacitly impledging them for his rent".[190] In addition, three sheriff court decisions supported the view that the hypothec's coverage of third parties' goods rested upon the tenant's reputed ownership of the items.[191] This seemed intuitively correct, for the hypothec was said to cover goods owned by a third party unless the tenant held them against the will of their owner.[192] But the hypothec covered far more items than would have come under the doctrine of reputed ownership. In particular, items possessed by the tenant under a contract of hire were caught by the hypothec but did not come within reputed ownership. Another creditor of the tenant was therefore unable to sell the item for the tenant's debts.[193] Thus, the

[186] The prevailing opinion in German law is that a landlord cannot acquire a *Vermieterpfandrecht* in good faith: see J Baur and R Stürner, *Sachenrecht*, 18th edn (2009) §55.40; O Palandt, *Bürgerliches Gesetzbuch*, 79th edn by H Wicke (2020) §1257 para 2. But it appears to have been accepted in French law: see M Planiol, *Treatise on the Civil Law* (transl Louisiana State Law Institute, 1939) §§2399 and 2470; L Aynès and P Crocq, *Droit des sûretés*, 12th edn (2018) 354–55. It is also accepted in Belgian law: see B Verheye, "Towards sustainable real estate in a circular economy", in S Demeyere and V Sagaert (eds), *Contract and Property with an Environmental Perspective* (2020) 77 at 121. The good-faith acquisition of a pledge has been rejected in Scots law; on this, see Steven, *Pledge and Lien* para 6-35.

[187] K G C Reid, *The Law of Property in Scotland* (1996) para 532; Bell, *Commentaries* I, 269ff.

[188] Bell, *Commentaries* I, 269.

[189] See the discussion in G Watson, *Bell's Dictionary and Digest of the Law of Scotland*, 7th edn (1890, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 2, 2012) 515. For an analysis of the law of reputed ownership, see P M Brogan, "Reputed ownership in Scots Law: an historical and doctrinal analysis" (2021) 25 EdinLR 23.

[190] Bell, *Commentaries*, 1st edn (1804) II, 332–33. This was not to be his final view, for Bell was later to conclude that the third party is taken to know the law and takes the risk: Bell, *Commentaries*, 7th edn (1870) II, 30.

[191] *Milne v The Singer Sewing Machine Co* (1881) 25 JJ 499; *Singer Sewing Machine Co v Docherty* (1882) 26 JJ 445; *Wheeler & Wilson Sewing Machine Co v McRitchie & Bruce* (1884) 28 JJ 498.

[192] See para 7-32 below.

[193] Bell, *Commentaries* I, 275.

hypothec's coverage of third parties' goods could not be adequately explained by the reputed ownership doctrine.[194]

4-48. The influence of the law of distress may also be considered here. It has already been noted that the law of hypothec was closely linked to the law of distress, the predecessor to the law of poinding.[195] Distress for rent, an English landlord's method of recovering rent, covered all goods on the leased premises irrespective of whether they were owned by the tenant or not.[196] It seems plausible that the similarities between the two institutions would have encouraged the introduction into Scots law of the rule of distress for rent that a landlord could attach third parties' goods. But, of course, the hypothec developed independently of the law of distress.[197] Other justifications – such as personal bar, and the avoidance of fraud – have also been suggested.[198] None sufficiently justifies the coverage of goods owned by third parties.

(b) Misgivings

4-49. Despite this lack of an adequate justification for the hypothec covering third parties' goods, this aspect of the law was little criticised during the nineteenth century.[199] The early reports of the Law Commissions under George Joseph Bell recommended only a declaration of the law for the sake of clarity, but not any substantial amendment.[200] Admittedly, a series of sheriff court cases later in the century attempted to remove from the hypothec single articles that were notoriously hired to tenants, for example sewing machines.[201] The sheriffs in these cases may have been influenced by the recent restriction of the hypothec in relation to rural leases – an issue that was politically prominent in the 1870s[202] – as well as by the view that reputed ownership cannot be claimed in respect of goods which, notoriously, a possessor is unlikely to own. Be that

[194] *Dundee Corporation v Marr* 1971 SC 96.

[195] See paras 3-17–3-21 above.

[196] Law Commission, Report on *Landlord and Tenant: Distress for Rent* (Law Com No 194, 1991) para 2.7.

[197] See paras 3-17–3-21 above.

[198] For a list, see A J M Steven, "The landlord's hypothec in comparative perspective" (2008) 12 Electronic Journal of Comparative Law 1 at 9–10.

[199] Although Bell was not certain of the law: see Bell, *Commentaries* 1st edn (1804) II, 332.

[200] *Second report by His Majesty's Commissioners, Scotland* (1835, 63).

[201] *Milne v The Singer Sewing Machine Co* (1881) 25 JJ 499; *Singer Sewing Machine Co v Docherty* (1882) 26 JJ 445; *Watson v The Singer Manufacturing Co* (1884) 28 JJ 658, (1885) 1 Sh Ct Rep 20; *Wheeler & Wilson Sewing Machine Co v McRitchie & Bruce* (1884) 28 JJ 498; *Stevenson v Donaldson* (1884) 28 JJ 277; *Wheeler & Wilson Manufacturing Co v McKenna* (1886) 2 Sh Ct Rep 123; *Haddow v McKim* (1886) 2 Sh Ct Rep 246. These cases went against the previous view that hired sewing machines were covered by the hypothec: see, for example, *The Howe Machine Co v Gerrie's Trs* (1879) 2 Guth Sh Cas 275.

[202] *Milne v The Singer Sewing Machine Co* (1881) 25 JJ 499 and *Stevenson v Donaldson* (1885) 28 JJ 277.

as it may, the success of this approach was short-lived,[203] being subsequently rejected by the Court of Session.[204] Therefore, the general rule remained: all goods owned by a third party, whether a single item or the entire plenishing, were subject to the hypothec unless excluded under another ground.[205]

4-50. The first legislative attempt to remove third parties' goods from the ambit of the hypothec was the House-Letting (Scotland) Bill introduced by Murray Macdonald in 1908. This Bill would have removed "any articles of furniture which are not the property of the tenant or occupier".[206] But, as discussed above,[207] the Bill did not reach a second reading. Soon after it might have been expected that the decision in *Ryan v Little* (1910) would have increased demand for reform.[208] In *Ryan* a third party had purchased goods from a shop but had left them in the premises to collect at a later date. It was held that the landlord's hypothec covered those goods for as long as they remained on the premises and that they could be validly included within a sequestration for rent. The decision was brought to the attention of the Lord Advocate, Alexander Ure (the future Lord President Strathclyde) but he could not commit to any legislation on the matter.[209] Subsequently, in the report stage of the House-Letting and Rating (Scotland) Bill in 1911 an amendment was proposed that would have removed all goods not belonging to the tenant from the ambit of the hypothec.[210] This amendment, however, was rejected and the hypothec continued to cover the goods of third parties. This put the issue of reform to bed for four decades.

(c) Reform

4-51. Only after the Second World War did the issue of the hypothec covering third parties' goods become an important one for politicians. This was caused by the increased number of goods acquired on hire-purchase in the 1950s and 1960s. Of course, the use of hire-purchase was not a new phenomenon and had been relatively common as early as the late-nineteenth and early-twentieth centuries.[211] But the post-war period saw a significant expansion in the demand for domestic appliances, such as washing machines and televisions, that for most

[203] See *Middleton v MacBeth* (1895) 11 Sh Ct Rep 9; *Armour v Robert Maver & Son* (1908) 24 Sh Ct Rep 238. Cf *Yost Typewriter Co Ltd v MacSorley* (1905) 21 Sh Ct Rep 228.

[204] *Dundee Corporation v Marr* 1971 SC 96.

[205] See para 7-05 below.

[206] House-Letting (Scotland) Bill, [HC] Bill 12, 1908, cl 21.

[207] See para 4-39 above.

[208] *Ryan v Little* 1910 SC 219. For a full discussion of this case, see paras 9-51–9-58 below.

[209] Hansard HC Deb vol 11 (7 Oct 1909) cols 2193–94; Hansard HC Deb vol 15 (16 Mar 1910) col 352.

[210] Hansard HC Deb vol 32 (28 Nov 1911) cols 351–53 (Henry Watt MP).

[211] See, for example, *Milne v The Singer Sewing Machine Co* (1881) 25 JJ 499; *Dickson v Singer Manufacturing Co* (1886) 2 Guth Sh Cas 269; *Brough v Hendry* (1892) 8 Sh Ct Rep 215; Rankine, *Leases* 376.

people could only be afforded through hire-purchase.[212] The potential for such goods to be used as security for the purchaser's rental payments caused anxiety amongst sellers of such goods. In the 1960s there were several exchanges of correspondence between Scottish MPs and the Secretary of State for Scotland, John Maclay, and Lord Advocate, William Grant (the future Lord Grant, Lord Justice-Clerk) on the issue.[213] This activity was caused by concerns raised by the Scottish Radio Retailers' Association that their members, who sold goods on hire-purchase, would lose out in a sequestration for rent of the purchaser's goods. This pressure for reform was, however, unsuccessful. The Conservative Government of the time did not feel compelled to alter the law and believed that they could resist any pressure to protect those selling goods on hire-purchase.

4-52. In 1964 the Law Reform Committee for Scotland returned to the question and asserted that it was "manifestly wrong that a person should be allowed to do diligence against the goods of a person who is not his debtor".[214] They observed that the law had developed at a time when the goods in leased premises would not have been held on hire-purchase. But now the law had to balance the rights of the landlord to prevent the tenant from stocking the premises with goods he does not own, and the rights of a third party who will have his ownership extinguished without his consent if the goods are sold by the landlord. When balancing the respective losses of landlords (if the law were to be changed) and third-party owners (if it were not), the Committee concluded that:

> the loss which may be suffered by a landlord is likely to be less than that of the owner of the goods. The former loses his rent (the amount depending on what the rent is and how long it is allowed to remain outstanding) but retains his house, whereas the latter may lose not only his profit but the asset itself.[215]

It was their recommendation that the hypothec should not cover goods the tenant does not own.[216] Despite this, the Government, once again, failed to act and the hypothec continued to cover goods not owned by the tenant.

4-53. Eventually, this pressure led to an alteration of the law, but only a minor one. Goods possessed by a tenant under a hire-purchase agreement, where the hirer/seller had served a notice of default or had commenced proceedings to enforce the agreement, were excluded from the hypothec.[217] When, 12 years

[212] D Sandbrook, *Never Had it So Good: A History of Britain from Suez to the Beatles* (2005) 114.

[213] *Scottish Home and Health Department: Legal and General Files, Landlord's right of hypothec as it affects goods held by a tenant on hire or under a hire purchase agreement* (1961–62, NRS HH41/1536).

[214] *Fourteenth Report of the Law Reform Committee for Scotland* (1963–64, Cmnd 2343) para 16.

[215] *Fourteenth Report of the Law Reform Committee* para 19. See also, I P Millar, "The fourteenth report of the law reform committee for Scotland" 1964 JR 262.

[216] Cf the dissenting opinions in *Fourteenth Report of the Law Reform Committee*, Appendix.

[217] Consumer Credit Act 1974 s 104. See also Water (Scotland) Act 1980 s 35(2)(b) which states that fittings supplied by Scottish Water are not to be subject to the landlord's hypothec.

later, the Scottish Law Commission consulted on the matter, all submissions they received were in favour of removing the ability of a sequestration for rent to cover goods belonging to a third party.[218] No action was taken at this stage, however, and the removal of all goods belonging to a third party had to await the Bankruptcy and Diligence etc (Scotland) Act 2007. Indeed, this change was the principal reason for reforming the hypothec in the 2007 Act. In the view of the Scottish Executive, the practice of including third-party property was "wrong in principle" and a breach of Article 1, Protocol 1 of the ECHR.[219] This policy objective was enacted in section 208(4) of the 2007 Act, which provided that the hypothec "no longer arises in relation to property which is owned by a person other than the tenant". The result was to remove hired, lent and deposited goods from the scope of the hypothec. Today, even where a third party wishes to give the landlord a security over the items, it would appear that they cannot be subject to the hypothec. Only a pledge would be possible in such circumstances. This must also remove goods owned by the tenant as trustee, but items co-owned by the tenant are covered to the extent of the tenant's right.[220] What section 208(4) does not do is extinguish the hypothec over those goods that have been transferred to a third party at a time when already burdened with a right of hypothec. It only prevents goods from becoming subject to the hypothec if they are owned by a third party. Goods that are transferred whilst burdened are subject to special rules, discussed elsewhere.[221] Although goods owned by a third party can no longer be subject to the hypothec, the legislation does not state who bears the burden of proof. An individual who possesses goods is presumed to be their owner,[222] and, following this principle, it is thought to be the third party who has the burden of proving that the goods are not owned by the tenant.[223]

4-54. Sub-tenant's goods were also removed from a landlord's right of hypothec.[224] Previously, a head landlord had a right of hypothec over the goods of a sub-tenant, but only up to the value of the sub-rent due to the head tenant

[218] Consultative Memorandum on *Protection of the Onerous Bona Fide Acquirer of Another's Property* (Scot Law Com CM No 27, 1976) para 49. See also Consultative Memorandum on *Diligence: General Issues and Introduction* (Scot Law Com CM No 47, 1980) para 5.11.

[219] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, paras 1009–10. This was also the view amongst academic commentators: see A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.48; A J M Steven, "Goodbye to the landlord's hypothec?" 2002 SLT (News) 177 at 178–79; A J M Steven, "Property law and human rights" 2005 JR 293 at 305–06; F McCarthy, "Human rights and the law of leases" (2013) 17 EdinLR 184 at 199–200.

[220] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(7).

[221] See paras 9-25–9-60 below.

[222] K G C Reid, *The Law of Property in Scotland* (1996) para 114.

[223] *Adam v Sutherland* (1863) 2 M 6 at 8 per Lord Deas; *Boni v McIver* (1933) 49 Sh Ct Rep 191 at 195 per Sheriff Menzies; Rankine, *Leases* 374. This would be consistent with the provision for the diligence of attachment: see Debt Arrangement and Attachment (Scotland) Act 2002 s 13(1).

[224] L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 6.11.

(unless the sub-lease was not authorised by the landlord).[225] As a landlord no longer has a right of hypothec in the goods of a sub-tenant, the hypothec can now be entirely circumvented by a sub-lease (unless the hypothec also covers sub-rents),[226] an event made more likely by the implied power of a tenant in an urban lease to sub-let the premises. Although this was not considered by the Scottish Executive at the time of the 2007 Act, it had been raised by the Law Reform Committee in 1964, when it was their opinion that, despite the risk that a landlord would be left with no security when the tenant granted a sub-lease, there ought not to be any difference between a sub-tenant's goods and those belonging to any other third party.[227] The Committee even accepted that such a change could result in the security becoming "virtually valueless". It appears a strange position for the Scottish Executive to retain the hypothec whilst at the same time permitting it to become redundant in respect of a significant number of premises. If a head landlord is entitled to a tacit security for the payment of rent from his tenant, that security ought not to be lost merely because of the presence of a sub-lease.

D. SEQUESTRATION FOR RENT

4-55. Early case-law did not propose a unique procedure to enforce the hypothec. Instead, like any other creditor, a landlord had to make use of poinding.[228] It is not known why poinding was thought inadequate for the purposes of enforcing the hypothec, but by the mid-eighteenth century the courts had developed sequestration for rent.[229] Bankton made reference to the right of a landlord to sequestrate the goods of his tenant, if only in relation to enforcing the hypothec before the rent was due.[230] One explanation for the introduction of a unique enforcement procedure may have been that the hypothec was often so entangled with the law of distress that a distress-like procedure was introduced.[231] This would explain why sequestration could only affect the goods when they were on the leased premises – a warrant to carry the goods was necessary to bring them back.[232]

[225] R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 409–13; W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897) 423; Rankine, *Leases* 397ff.

[226] On which, see paras 8-15–8-27 below.

[227] *Fourteenth Report of the Law Reform Committee for Scotland* (1964, Cmnd 2343) para 22.

[228] See chapter 2 above.

[229] See the reference to "sequestration" in *Countess of Callander v Campbell* (1703) Mor 6244 and *Birny v Heriot* (1709) Mor 2911.

[230] Bankton I.17.11 (vol I, 387).

[231] See paras 3-17–3-21 above.

[232] Sequestration for rent was often classified as a diligence (see, for example, Stewart, *Diligence* 460). Although the term diligence is normally used to describe the process through

4-56. Once established, sequestration for rent became widely used by landlords to enforce their hypothec and was available even after the insolvency of the tenant.[233] There was little doubt that it was a useful remedy for landlords and, although it was used relatively infrequently in later years – for example, only nine times in the whole of 2004[234] – the threat of its use was itself a valuable enforcement mechanism.[235] Nevertheless, the Scottish Executive characterised it as "a harsh version of the abolished diligence of poinding and warrant sales",[236] justifying this view by reference to the ability of a landlord to obtain a warrant of sequestration without the tenant being present or informed. It seemed that it was especially undesirable that sequestration for rent could be brought in security of rent that had not yet become due. There was opposition to the proposed abolition from the consultation responses, but nevertheless the Scottish Executive took the decision that sequestration for rent ought to be abolished, and this was given effect by section 208(1) of the Bankruptcy and Diligence etc (Scotland) Act 2007.

4-57. In abolishing sequestration for rent the Scottish Executive believed that the hypothec itself would not be affected and that a landlord could use the diligence of attachment to enforce the hypothec outside of insolvency.[237] Sequestration for rent, however, had become so intrinsically linked with the hypothec that it was through an action of sequestration for rent that most of the features of the hypothec had been brought out. Despite this, it should not be forgotten that the hypothec existed, and was enforced, before it had developed its unique enforcement procedure. To this earlier position, the law has now returned.

E. CURRENT POSITION

4-58. The hypothec has been steadily restricted since the Hypothec Amendment (Scotland) Act 1867. It has lost its enforcement procedure, its ability to burden goods when they are owned by someone other than the tenant, and its ability to cover goods brought on to agricultural land or into a dwelling-house. Landlords of commercial premises, however, can still benefit from the hypothec. Whilst

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which an unsecured creditor obtains a right in the property of a debtor, the term is not reserved solely for such actions. Sequestration for rent was a "real diligence" because it merely sought to enforce a right in the goods already held by the landlord.

[233] On this, see chapter 11 below.

[234] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, table 16.

[235] A McAllister, "The landlord's hypothec: down but is it out?" 2010 JR 65 at 67.

[236] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill* para 1019.

[237] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill* para 1019. For the use of attachment to enforce the hypothec, see paras 10-27–10-35 below.

its usefulness to such landlords may have been reduced by the abolition of sequestration for rent, and the restriction of the hypothec to goods owned by the tenant, it can still provide some security for unpaid rent, especially if a tenant has become insolvent.

PART B
LIFECYCLE

5 Creation and Assignation

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A. REQUIREMENTS OF CREATION

5-01. As with a right of pledge,[1] a right of hypothec is created only when the requirements of both contract law and property law are met. At common law this is achieved by: (i) the conclusion of a contract of lease, and (ii) the good(s) being brought on to the leased premises by or on behalf of the tenant.[2] Added by the Bankruptcy and Diligence etc (Scotland) Act 2007 is (iii) failure by the tenant to pay rent when it falls due. While (i) (a contract of lease) necessarily predates (iii) (default in the rental obligation), it need not predate (ii) (bringing in the goods) although in practice it usually does. Regardless of when the right of hypothec in an individual item is created, once it comes into existence it secures all rent due and unpaid,[3] even if that rent became due months before the goods were brought on to the premises.

(1) Contract of lease

5-02. First, as just mentioned, there must be a contract of lease over heritable property.[4] It is from this lease that the debt, i.e. rent, arises and is secured by

[1] A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) ch 6.

[2] There was no need – at common law – for the goods to be owned by the tenant. On this, see paras 4-44–4-54 above.

[3] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8)(a).

[4] *Ruilton v Muirhead* (1834) 12 S 757; *Scott v Anderson* (1865) 1 Guth Sh Cas 305; *Kennedy v Miller* (1898) 14 Sh Ct Rep 355.

the hypothec.[5] Only a contract of lease is sufficient, but it does not matter if it is a sub-lease,[6] or an interposed lease, as they have the same contractual nature as a head-lease.[7] This is because the hypothec is for the benefit of a landlord under a lease, and not only for the owner of the ground.[8] A licence is, however, not sufficient, and it is important to make the distinction with a lease where the hypothec is concerned. So, where the contract lacks one of the traditional cardinal elements of rent, duration, premises and parties (to leave aside the debated question of whether a lease must grant the tenant exclusive possession of the premises),[9] it cannot be a lease, and a right of hypothec cannot arise.

5-03. There is one case that seems to require more than just a contract of lease to have been agreed, but this appears to rest on its particular facts – facts that cannot arise today. In *The Heritable Securities Investment Association Ltd v Thomas Wingate & Co Trs*,[10] an *ex facie* absolute disposition of a shipyard had been granted by a debtor to its creditor with an immediate leaseback in favour of the former. The creditor argued that a hypothec over goods brought into the premises by the debtor arose automatically after the lease had begun. But, whilst the *ex facie* absolute owner was able to grant a valid leaseback to the debtor,[11] the court looked at all the arrangements between the parties and, in doing so, saw numerous circumstances indicating that the arrangement had been crafted solely to enable the creditor to obtain a right of hypothec over the *invecta et illata*.[12] The rental payments were significantly greater than justified by the value of the

[5] Previously, it was debated whether liquidated damages could be secured: see W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897) 417. It is now clear that the hypothec only secures rent: 2007 Act s 208(8)(a).

[6] *MacKinnons v Cumisky* (1894) 2 SLT 16; Gloag and Irvine, *Rights in Security* 421. Bell, *Commentaries* II, 32 and Hume, *Lectures* vol IV, 19 viewed the head-tenant's hypothec as an assignation of the head-landlord's hypothec, but this could not be the case. Hume's view was restricted to the hypothec over crops, a view that was influenced by the theory that the head-landlord's right was based on his ownership (as to which see paras 3-04–3-16 above). For more on a right of hypothec with respect to sub-tenants, see paras 8-14–8-33 below.

[7] *Christie v MacPherson* 14 December 1814 FC.

[8] R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) §231. This was Kames' misunderstanding: see paras 3-04–3-16 above.

[9] *Conway v City of Glasgow Council* 1999 SCLR 248 at 253–56 per Sheriff Gordon QC; *South Lanarkshire Council v Taylor* [2005] CSIH 6, 2005 SC 182 at paras 5 and 6 per Lord President Cullen; *Cameron v Alexander* 2012 SLCR 50; *St Andrews Forest Lodges Ltd v Grieve & Grieve* [2017] SC Dun 25, 2017 GWD 14-224 at para 29 per Sheriff Collins QC; *Devon Angling Association v Scottish Water* [2018] SAC (Civ) 7, 2018 SC (SAC) 35 at paras 20 and 21 per Sheriff Holligan; R Rennie et al, *Leases* (2015) *Leases* para 2-12.

[10] *The Heritable Securities Investment Association Ltd v Thomas Wingate & Co Trs* (1880) 7 R 1094. This case is discussed in Anonymous, "A mere sham, a mere contrivance and device" (1891) 7 Scottish Law Review 141.

[11] For a discussion on the rights of a creditor infeft with an *ex facie* absolute disposition, see *The Scottish Heritable Security Co Ltd v Allan, Campbell & Co* (1876) 3 R 333.

[12] (1880) 7 R 1094 at 1100–01 per Lord Ormidale and at 1103 per Lord Gifford. Cf the dissenting judgment of Lord Young.

premises; the total rent was equal to the repayments due under the loan from the *ex facie* absolute owner; there was an agreement that the lease had been granted for the greater security of the *ex facie* absolute owner; and any so-called rent was to be credited as a repayment of the loan.[13] These conditions, taken together, led to the conclusion that the arrangement was entered into with the purpose of granting the landlord a security over the property within the leased premises and that no true relationship of landlord and tenant had ever existed.[14] For the hypothec to arise, there must be a genuine contract of lease with the main purpose of granting possession of the premises to a purported tenant.[15]

5-04. This case was solely concerned with the effects of an *ex facie* absolute disposition and so is no longer of direct relevance. Today a sale and leaseback arrangement that is solely designed to act as security over heritable property is excluded by section 9(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which says that a grant of heritable security can only be achieved by means of a standard security). Where it is a genuine sale and leaseback arrangement, however, there would be no reason why the hypothec should not arise.

(2) The hypothec as an implied term

5-05. Whether the hypothec becomes part of the contract of lease as an implied term or is based on a freestanding rule of law is something that has not previously been the subject of discussion. On one view, the hypothec can be equated to a term implied in law, i.e. a "default" term imposed on certain types of contract.[16] Such terms are described in various ways, such as "inherent in the nature of the contract",[17] "necessary incidents",[18] "legal incidents",[19] or "default" or "background" provisions.[20] Alternatively, the hypothec might arise

[13] (1880) 7 R 1094 at 1096 and 1100 per Lord Ormidale.

[14] (1880) 7 R 1094 at 1100 per Lord Ormidale and at 1103 per Lord Gifford.

[15] This has similarities with section 62(4) of the Sale of Goods Act 1979, which prevents the provisions of the Act applying where the transaction in question is "intended to operate by way of mortgage, pledge, charge, or other security." This means that the form of the transaction, i.e. a sale, is not conclusive and the reality of the transaction will be looked into by the courts. For an introduction to the issues raised by section 62(4), see G L Gretton, "The concept of security", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of J M Halliday* (1987) 126 at 135–38.

[16] For the distinction between terms implied in law and those implied in fact, see, for example, *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at paras 14ff per Lord Neuberger.

[17] *Sterling Engineering Co Ltd v Patchett* [1955] AC 534 at 547 per Lord Reid.

[18] *Scally & Others v Southern Health & Social Services Board* [1992] 1 AC 294 at 307 per Lord Bridge of Harwich.

[19] *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 at 1196 per Lord Denning MR.

[20] K Lewison, *The Interpretation of Contracts*, 6th edn (2015) para 6.01; T D Rakoff, "The implied terms of contracts: of 'default rules' and 'situation-sense'", in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (1997) 191 at 197. They are also called "general rules" in *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 at 594 per Lord Tucker.

purely by force of law when certain conditions are fulfilled, albeit that one of these conditions is the existence of a contract of lease. In other words, the hypothec does not need to be brought into the contract of lease as such.[21] The first view encounters certain difficulties. The hypothec places no obligation on the tenant; it is unclear how the inclusion of third parties' goods could be based on an implied term between the landlord and tenant;[22] and the hypothec cannot be expanded by agreement of the parties (which is not a trait shared by other implied terms). This last point could be explained by the underlying principle that the law will not enforce a conventional hypothec, leaving the landlord to rely only on the one implied by law. The first point could be explained by the assertion that not every contractual right needs to be associated with a specific obligation. A contract such as a lease contains a variety of rights and obligations. The bundle of rights in favour of the landlord (including the hypothec and the right to receive the rents from the tenant) that is created by the contract of lease is met with a bundle of rights in favour of the tenant (for example, the right to receive possession of the premises). The right of hypothec does not need to be met with a directly correlative obligation on the tenant.

5-06. As it happens, the choice between these views is unimportant because in either case it would be possible for the parties to contract out of the hypothec.[23] But, for what it is worth, the hypothec is here said to be based on a term implied into the contract of lease. This is consistent with the current understanding of the law of lien.[24] It would also be in accordance with the views of Voet,[25] Hunter,[26] Rankine,[27] and the prevailing view in South Africa.[28]

(3) Lease as a contract

5-07. A lease operates at two levels: whilst agreement between the purported landlord and tenant does not of itself create a real right of lease, it may be

[21] N Jansen and R Zimmermann (eds), *Commentaries on European Contract Laws* (2017) 807ff.

[22] This was raised in G J Bell, *Commentaries*, 1st edn (1804) II, 333. There was no adequate justification for the hypothec's coverage of third parties' goods. For a discussion on this, see paras 4-44–4-54 above.

[23] R Austen-Baker, *Implied Terms in English Contract Law*, 2nd edn (2017) para 1.32.

[24] *National Homecare Ltd v Belling & Co Ltd* 1994 SLT 50 at 54 per Lord Penrose; *Wilmington Trust Co v Rolls-Royce plc* [2011] CSOH 151, 2011 GWD 32-681 at para 19 per Lord Hodge. Cf the English understanding in M Bridge (et al), *The Law of Personal Property*, 2nd edn (2018) para 15-028.

[25] J Voet, *Commentary on the Pandects* (transl P Gane, 1955–58) XX.2.1.

[26] R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 360–61.

[27] J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 366. See also J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 299.

[28] A J Kerr, *The Principles of the Law of Contract*, 6th edn (2002) 372; R Brits, *Real Security Law* (2016) 436; I Knobel, "The tacit hypothec of the lessor" (2004) 67 THRHR 687 at 692–93.

enough to be classified as a contract of lease.[29] The requirements for a lease then to become a real right, of which the most important are possession by the tenant (for "short" leases of 20 years or less) and registration in the Land Register (for longer leases), appear to be of no relevance to the creation of the hypothec.[30] For the creation of the hypothec, a lease as a contract is sufficient. Admittedly, this view rests on no authority,[31] but it seems to follow from the origin of the hypothec in Roman law. Although a lease in Roman law did not grant the tenant a real right,[32] the landlord was given the right of hypothec over any goods brought into the leased premises. There is no reason for departing from the position in Roman law in this respect. Thus, an agreement that meets the requirements for a contract of lease is sufficient to give the landlord a hypothec over goods brought into the premises. As a tenant does not need to have a real right before the right of hypothec arises, there is strictly no requirement to take possession of the premises under the Leases Act 1449. This leaves aside the fact that it is unlikely that any goods will be brought into the premises if the tenant does not take possession. The goods could, however, be sent into the premises or transferred to the new tenant before he acquires a real right of lease.

5-08. One consequence of this view is that the rent under a lease granted by an unregistered holder of land, such as the grantee of an unregistered disposition, will be secured by a right of hypothec.[33] And this would be equally applicable

[29] This has, admittedly, been rejected in Lord Gill, "Two questions in the law of leases", in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 255. But the overwhelming balance of authorities rejects Lord Gill's view. On this, see *Johnston v Cullen* (1676) Mor 15231; *Inglis v Paul* (1829) 7 S 469 at 473; *Brock v Cabbell & Co* (1830) 8 S 647; *Campbell v McLean* (1870) 8 M (HL) 40 at 46 per Lord Westbury; *Millar v McRobbie* 1949 SC 1 at 6 per Lord President Cooper; G Mackenzie, *The Institutions of the Law of Scotland* (1694) II.6; Stair II.9.1; Bankton II.9.3 (vol II, 95); Erskine II.6.23; J Steuart, *Dirleton's Doubts and Questions in the Law of Scotland, Resolved and Answered* (1715) 412; R Bell, *A Treatise on Leases: explaining the nature, form, and effect of the contract of lease, and the legal rights of the parties*, 4th edn (1825) I, 88; Rankine, *Leases* 1; P Webster, *Leasehold Conditions* (Studies in Scots Law, forthcoming) ch 1; P Webster, "The continued existence of the contract of lease", in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing So Practical as a Good Theory – Festschrift for George L Gretton* (2017) 119.

[30] These requirements are found, respectively, in the Leases Act 1449 (APS ii, 35 c 6, RPS 1450/1/16–17) and the Registration of Leases (Scotland) Act 1857 (see in particular ss 1, 2, 20B and 20C).

[31] See, however, D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 2, taking the view that implied into a contract of lease are all the "definite rights and obligations derived from the law of leases during the currency of the contract".

[32] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 351.

[33] A lease by an unregistered holder does not have real effect. For a discussion on unregistered holders, see G L Gretton and K G C Reid, *Conveyancing*, 5th edn (2018) ch 25.

to the rent under a lease granted by someone whose right rested on completed missives to buy the subjects.[34]

(4) Long leases

5-09. If the contract is a long lease, it needs to be registered in the Land Register for the tenant to obtain a real right,[35] but an unregistered long lease, whilst not binding on a successor owner of the land, would remain a valid contract and grant the landlord the benefit of the hypothec. The only provision that points to another conclusion is section 20B(2) of the Registration of Leases (Scotland) Act 1857, which was introduced by the Land Registration etc (Scotland) Act 2012[36] but is intended to have the same effect as the second part of section 3(3) of the Land Registration (Scotland) Act 1979 (now repealed).[37] Section 20B(2) states that:

> (2) Registration in the Land Register of Scotland is the only means –
>
> (a) whereby rights or obligations relating to a registered lease become real rights or obligations, or
>
> (b) of affecting such real rights or obligations.

The purpose of the first part of section 3(3) of the 1979 Act was to prevent a tenant acquiring a real right in a long lease until the lease was registered. This was re-enacted in the new section 20C of the 1857 Act.[38]

5-10. Section 20B(2) is not the clearest of provisions, but a wide interpretation could allow the conclusion that the hypothec is a right "relating to a registered lease". Under this interpretation, registration would be the only way for the hypothec to become a real right. Such an interpretation goes too far, however, for three reasons. First, it is not the purpose of the Land Register to govern the creation of a security right over corporeal moveable property. Second, it has been said that the second half of section 3(3) of the 1979 Act, i.e. the predecessor of section 20B(2) of the 1857 Act, dealt only with rights that were granted after the initial registration of the lease. On this analysis, only an alteration to a lease required to be registered in order to become real. This appears to have been the

[34] Rennie, *Leases* para 8-15. Cf *Weir v Dunlop & Co* (1861) 23 D 1293.

[35] Registration of Leases (Scotland) Act 1857 ss 20B and 20C. Long leases could first be registered after the Registration of Leases (Scotland) Act 1857 s 1, but this was merely to permit their use as collateral (Hansard HC Deb vol 145 (17 June 1857) cols 1943) and it was not a requirement to create a real right. The Land Registration (Scotland) Act 1979 excluded long leases from the protection of the 1449 Act and registration in the Land Register was now the only way for a tenant under a long lease to obtain a real right.

[36] See Land Registration etc (Scotland) Act 2012 s 52.

[37] For the justification behind the re-enactment of the 1979 Act without amendment, see Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222, 2010) para 9.28.

[38] For the justification behind the re-enactment of the first part of s 3(3), see Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222, No 2010) para 9.9.

view of the Scottish Law Commission (the originator of section 20B(2)), which dealt with the second half of section 3(3) of the 1979 Act only when discussing the effect of alterations to registered leases.[39] Such a view also finds support in the structure of the legislation. Section 20B(2) comes directly after a provision that grants a real right to the tenant under a registered lease, leading to the conclusion that the provision has been designed to have effect only after the lease has been registered. The final reason centres on the history of the law of leases. Under the Leases Act 1449 a tenant had (and for short leases still has) to take possession of the leased premises before the lease became a real right. As we have seen above, however, the lease does not need to be a real right before a right of hypothec can arise.[40] For long leases, this requirement of possession has been replaced with a requirement that the lease is registered in the Land Register. Registration can thus be viewed as the alternative to (or replacement for) possession. And as a tenant was not required to take possession of the premises before the right of hypothec was created, there is no need for the lease to be registered before the hypothec is created.

5-11. With no requirement for registration or possession, all that is needed is the bare contract of lease. There is, however, a formality requirement for leases of more than a year. In general, such a lease must be in formal writing.[41] An oral lease for more than a year has no effect against the parties themselves;[42] and as it is not a lease, or even a contract, the hypothec would not arise.

(5) Bringing on to the premises

5-12. A lease is indispensable to the creation of the hypothec, but, as the hypothec is a real right in a thing, there needs to be a thing that is burdened by the right. This introduces the specificity principle of property law, which requires that each right must have an identified object.[43] Importantly, each object brought into the leased premises is, itself, subject to a unique right of hypothec.

[39] Report on *Land Registration* paras 9.24ff. See also *Registration of Title Practice Book* (1991, looseleaf) para C.23.

[40] See para 5-07 above.

[41] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(i), (b), (7). But the absence of formality can be cured by personal bar under s 1(3), (4). For private residential tenancies, the requirement of writing has been removed by the Private Housing (Tenancies) (Scotland) Act 2016 s 3. Of course, the hypothec no longer applies to dwelling-houses anyway. On this, see Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(3)(a) and paras 4-38–4-43 above.

[42] *Keith v Johnston's Tenants* (1636) Mor 8400; Erskine II.6.30; L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 2.3. Cf *Gray v MacNeil's Executor* [2017] SAC (Civ) 9, 2017 SLT (Sh Ct) 83, discussed in K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 173–76.

[43] For an introduction, see S van Erp and B Akkermans, "Property rights: a comparative view", in B Bouckaert (ed), *Property Law and Economics* (2010) 31 at 45–46.

This is not fully understood.[44] Rankine writes that the hypothec only becomes a "real right over specific subjects" through sequestration for rent.[45] And Paton and Cameron excellently epitomise the confusion about whether a right of hypothec affects individual items when they write that: "the landlord can put his real right of hypothec into force by attaching specific subjects and making his right a real right over them. His right of hypothec is converted into a real right of pledge."[46] But the hypothec is not like the floating charge which withholds rights in individual items until the charge has attached.[47] The hypothec grants the landlord a real right in each individual item, i.e. each item brought into the leased premises. This is the subject-matter of the hypothec.[48] Thus, there needs to be a point at which an object becomes capable of being specified as subject to the real right of hypothec. This is easy for other real rights. A standard security, for example, is not created until registered in the Land Register, and a pledge until the object pledged is handed over to the creditor. In contrast, the hypothec does not require delivery to the creditor. Instead, a right of hypothec is created in a specific item when the item is brought into the leased premises (provided rent is due and unpaid). At this point, the individual goods can be identified by the parties as being subject to the hypothec, thus meeting the principle that each item subject to a real right must be capable of specification.[49] At common law, it did not matter whether the tenant was the owner of the goods, but after the Bankruptcy and Diligence etc (Scotland) Act 2007 the goods must now be owned by the tenant.[50] If goods owned by a third party are brought into the premises but ownership is subsequently transferred to the tenant, the hypothec attaches only at the point that the ownership is transferred. At common law there was also no requirement for the tenant to be in rent arrears, but this was changed by the 2007 Act. This latter point is discussed below.[51]

5-13. The act of bringing the goods into the premises is equivalent to the handing over of possession when an item is pledged or becomes subject to a lien. Some have even argued that the landlord acquires possession of the goods when they are brought into the premises. This is based on the "container" theory, which views the landlord as acquiring civil possession of goods brought into the premises – the "container" – because he has civil possession of the premises

[44] Even Erskine writes (II.6.61) that "the hypotheck on the cattle is not, like that on the corns, special, so as to affect every cow, or sheep, or lamb; but is general, upon the whole stock or herd . . ."

[45] Rankine, *Leases* 401. A similar opinion is given in Stewart, *Diligence* 460.

[46] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 215.

[47] A D J MacPherson, *The Floating Charge* (Studies in Scots Law vol 8, 2020) ch 2.

[48] For the subject-matter, see chapters 7 and 8 below.

[49] Cf G L Gretton and A J M Steven, *Property, Trusts and Succession*, 3rd edn (2017) para 4.16. Of course, proving that the goods were on the premises may be a stumbling point.

[50] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4).

[51] See paras 5-15–5-20 below.

themselves.[52] Such a view cannot be correct. Although the landlord has civil possession of the premises, this does not mean that he has possession of the contents of the premises. A landlord does not give an "objective impression of control of items that may happen to be on the land or in the premises" that he has leased to a tenant.[53]

5-14. In German law, the act of bringing goods on to the premises (*einbringen*)[54] is said to fulfil the publicity requirement.[55] Yet, the publicity is often minimal or even non-existent. Third parties such as the tenant's creditors will typically be unaware that the premises are leased, let alone that the rent is unpaid, and that goods have been brought inside. But minimal publicity or not, it is the act of bringing in that creates the hypothec. And this requirement is a strict one. If an item has not been brought on to the leased premises, it cannot be burdened by the hypothec.[56] For example, a car parked by a tenant on the street outside a leased shop is not caught by the hypothec for the rent of the shop.[57] Additionally, where one tenant leases two premises from the same landlord, the goods brought on to one cannot be used as security for the rent of the other. Where, however, the tenant brings items into communal areas, such as stairwells, corridors, or basements, that are leased from the same landlord, the items would be subject to the landlord's hypothec.

(6) Must the rent be due?

5-15. At common law the rent did not need to be due before the hypothec attached to the items in the leased premises.[58] The hypothec was a security both for rent that was due and for rent that would become due – it could, in other words, secure a future, contingent debt. This feature is shared by many other jurisdictions which grant the landlord an equivalent security. In particular, the Louisiana Supreme Court has held that the Court of Appeal was wrong in

[52] M Planiol, *Treatise on the Civil Law* (transl Louisiana State Law Institute, 1939) §2402 hints at this view, and see also W Ross, *Lectures on the History and Practice of the Law of Scotland, Relative to Conveyancing and Legal Diligence*, 2nd edn (1822) II, 406: "The master in a lease, on the other hand, is held to be still in the natural possession, notwithstanding the lease". German law rejects such a view. For the German understanding, see J Baur and R Stürner, *Sachenrecht*, 18th edn (2009) §55.36.

[53] C Anderson, *Possession of Corporeal Moveables* (Studies in Scots Law vol 3, 2015) para 3-35.

[54] §562 BGB.

[55] P Bruns, "Gegenwartsprobleme des Vermieterpfandrechts" 2019 *Neue Zeitschrift für Miet- und Wohnungsrecht* 46 at 49.

[56] *Millar v Austin* (1859–60) 2 Scottish Law Journal & Sheriff Court Record 5; *Novacold v Fridge Freight (Fyvie) Ltd (in receivership)* 1999 SCLR 409 at 410 per Sheriff Principal Risk QC.

[57] Unless the street is privately owned and included in the lease.

[58] *Preston v Gregor* (1845) 7 D 942; *Reid v MacGregor* (1902) 18 Sh Ct Rep 259; *Owens v Henderson* (1909) 25 Sh Ct Rep 149 at 152 per Sheriff Menzies.

finding that "the lien arose only when the rent became due", and instead held that the landlord's lien "attaches to chattels as soon as they are brought on the leased premises, and that said lien is no wise dependent upon the maturity of the rent".[59] This is also the case in Germany.[60]

5-16. The Scottish position was brought out by *Reid v MacGregor*,[61] where, although goods were removed from the leased premises before the rent had become due, the landlord was held entitled to require their return to the premises because they had become subject to the hypothec as soon as they were brought in.[62] As Sheriff Strachan put it:

> During the currency of the lease and before the rent falls due the landlord's hypothec extends to all the goods in the premises, and no one is entitled to remove any of these goods without taking care that the rent is paid. If he does remove any of these he becomes liable for the rent as an intromitter with the hypothec, and it is no answer that he left sufficient goods in the premises to cover the hypothec.[63]

5-17. Although this was a fundamental principle of the law of hypothec, it does not appear to have been considered when the Scottish Executive prepared what was to become the Bankruptcy and Diligence etc (Scotland) Act 2007. Nevertheless, in section 208(8) of the 2007 Act, the common law position was altered. The provision states that:

> (8) The landlord's hypothec –
> (a) is security for rent due and unpaid only; and
> (b) subsists for so long as that rent remains unpaid.

It has been mooted that this provision means that a right of hypothec is still created from the commencement of the lease and it is only its enforcement that is delayed until there are "arrears of rent".[64] But it is the use of "subsists" that is crucial here. The hypothec is in existence for so long as the rent that is "due and unpaid . . . remains unpaid". When the rent is paid, the hypothec expires. If the tenant is punctual in the payment of rent, as most tenants are, an item could now be brought on to premises without ever becoming subject to the hypothec. Only the goods on the premises after the rent has been unpaid will become subject to the hypothec and, thus, the law as described by Sheriff Strachan has been fundamentally changed. Yet, whilst the hypothec can only arise when rent is due and unpaid, goods brought into the premises after the tenant has fallen

[59] *Youree v Limerick* 157 La 39 (1924).

[60] F J Säcker (et al), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* 8th edn (2020) §562 para 8.

[61] *Reid v MacGregor* (1902) 18 Sh Ct Rep 259.

[62] For the warrant to carry back goods, see paras 10-22–10-26 below.

[63] (1902) 18 Sh Ct Rep 259 at 261 per Sheriff Strachan.

[64] D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 442. See also A McAllister, "The landlord's hypothec: down but is it out?" 2010 JR 65 at 72.

into rent arrears become security for all rent due and unpaid, even if the rent was due before they were taken into the premises.[65]

5-18. It appears that section 208(8) was designed to prevent a rather strange aspect of the hypothec whereby landlords could proceed to enforcement in respect of rent not yet due.[66] At common law, sequestration for rent, the then enforcement mechanism, was allowed both for rental arrears and also in security of rent that was to become due within the current year but where the rental term had not yet arrived.[67] The latter aspect was called "sequestration in security" and was usually done at the same time as a sequestration in payment of rent already due. If a tenant was close to insolvency, the landlord could even sequestrate in security although no rent was due. This was, however, a very unusual action.[68] Yet if the practice of sequestrating for rent not yet due was what the Scottish Executive sought to prevent, this was already achieved by the abolition of sequestration for rent itself.[69] That done, the hypothec could have been left to secure all rent due and to become due. It would, in other words, have been reduced to a non-possessory pledge in security of a conditional debt. Indeed, it is not unusual to have a right in security for the purpose of securing a debt that is future and contingent.[70] As this, however, was not the route taken by the Scottish Executive, Scots law finds itself in the same position as, for example, South Africa, where the right of hypothec only arises when tenants are in default on their rental payments.[71]

5-19. By the time a tenant falls into rent arrears, and the hypothec first springs into life, the tenant may well be financially insecure. McAllister draws attention to the consequences of this when he writes that:

> At any time when there is no rent owing, there can be no right of hypothec. However, as soon as a quarter's rent becomes due, a right of hypothec will come into being in respect of that quarter's rent . . . It does not seem in keeping with the nature of a

[65] There is no reason why this should not include royalties such as those payable under a mineral lease. On this, see R Rennie, *Minerals and the Law of Scotland* (2001) 126; D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 102.

[66] Consultation Paper on *Enforcement of Civil Obligations* (2002) (available at https://webarchive.nrscotland.gov.uk/20200120121848/https://www2.gov.scot/Publications/2002/04/14590/3531) para 5.304; *Explanatory Notes to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 624.

[67] See, for example, A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.68.

[68] See Paton and Cameron, *Landlord and Tenant* 207; A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.68.

[69] A McAllister, "The landlord's hypothec: down but is it out?" 2010 JR 65 at 71.

[70] See, for example, Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(c).

[71] G Wille, *Landlord and Tenant in South Africa*, 5th edn (1956) 206; R Brits, *Real Security Law* (2016) 436; S Viljoen, *The Law of Landlord and Tenant* (2016) 312.

> real right, which we have already confirmed hypothec is, that it should periodically flicker on and off, like a lamp with a faulty connection.[72]

McAllister further suggests that this puts in doubt all the rights connected to the hypothec, such as the plenishing order and the warrant to carry back.[73] Yet whilst it is correct to say that the real right of hypothec would only arise when the rent is due and unpaid, the rights that arise from the contract of lease, such as the right to have the premises plenished, ought presumably to continue as before.[74] The right to have the premises plenished does not arise from the right of hypothec but from the contract of lease. Indeed, the plenishing obligation cannot originate from the right of hypothec, for it can arise before there is anything in the leased premises which can become burdened by the hypothec.[75] By contrast, the right to obtain a warrant to carry back an item into the leased premises can only be granted if the goods have been on the premises when rent was due and unpaid; otherwise, there is no real right of hypothec in the specific items concerned and their return cannot be demanded.[76]

5-20. An example illustrates the current state of the law. A lease begins on 1 June with rent to be paid quarterly in advance. The rent is duly paid. At this stage, the landlord can demand that the premises are plenished, but any goods brought in are not subject to the right of hypothec because no rent is due and unpaid. If the tenant fails to pay the rent that becomes due on 1 September, the hypothec springs into life and attaches to all goods that are on the premises the following day. Any goods that have been taken out of the premises before 2 September will not, however, be subject to the hypothec. If the rent is subsequently paid, the hypothec will be extinguished, only to arise again if the rent due on 1 December is not paid. Goods removed before this date will not be subject to the hypothec.

B. ASSIGNATION

5-21. The right of hypothec arises from and follows the right to demand rent from a tenant.[77] Whoever has the right to demand rent has the benefit of any hypothec that arises to secure that rent. Conversely, a right of hypothec cannot exist in the hands of anyone other than the party with a right to receive the

[72] McAllister, "The landlord's hypothec: down but is it out?" 72. See also L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 6.7; A J M Steven and S Skea, "The landlord's hypothec: difficulties in practice" 2010 SLT (News) 120 at 123.

[73] For a discussion on these, see chapter 10 below. There is no necessity in retaining the plenishing order but without it the benefit of the hypothec would often be lost.

[74] For a further discussion, see paras 10-02–10-15 below.

[75] *Thomson v Handyside* (1833) 12 S 557 at 559 per Lord President Hope.

[76] Only a plenishing order could be sought. On plenishing orders, see paras 10-02–10-15 below.

[77] Hunter, *Landlord and Tenant* II, 364; Gloag and Irvine, *Rights in Security* 422.

rents. This right to receive the rents is assignable, and so, therefore, must be the hypothec.

5-22. The consequences of an assignation of rent depend upon whether the rent is already due or yet to become due. Assignation of the former is of a debt now due together with an accessory security, whilst assignation of the latter is merely of a contingent debt that may result in the creation of a hypothec in the future if and when that debt is not paid. An example of the former is where the landlord chooses to assign unpaid rent to a third party. Another is where a cautioner, having paid the rent of the tenant, is entitled to receive an assignation of the underlying debt (the rent) and of the hypothec which has arisen in security of that debt (*beneficium cedendarum actionum*).[78] Whilst a cautioner is generally entitled to an assignation, the landlord is not required to grant an assignation to any other party who pays the rent.[79] After all, doing so would prejudice the landlord's interest by granting to a third party a security that would rank ahead of any later-arising hypothec in security of future unpaid rental payments. The same principle can be applied to a creditor arresting rents. A creditor of the landlord can arrest rent due and current, although not future rents,[80] but this does not transfer to the arrester any right of hypothec that secures the unpaid rent. Nor is the landlord required to assign this right. The reason that a landlord is required to grant an assignation to a cautioner appears to be that the obligation is implied into the cautionary obligation itself.[81] If, on the other hand, a landlord is insured under a rent-guarantee policy, the insurer, by virtue of its right of subrogation, will be able to sue the tenant in the name of the landlord and make use of any right of hypothec; this, however, is not a form of assignation.[82]

5-23. More common than an assignation of rent due and unpaid is the assignation of the right to receive future rents. Examples of this can be separated into two general categories. First, a landlord transfers his right of ownership of

[78] *Stewart v Bell* 31 May 1814 FC. See also Bell, *Commentaries* II, 33; Bell, *Leases* I, 226–27; Gloag and Irvine, *Rights in Security* 422; Paton and Cameron, *Landlord and Tenant* 209. Hunter argues that the law does not require an express assignation: see Hunter, *Landlord and Tenant* II, 159; *Hutchinson & Dixon v Kerr & Lockhart* (1861–62) 3 Scottish Law Journal & Sheriff Court Record 56. This view is doubted as it is contrary to *Garden of Troup v Gregory* (1735) Mor 2112, (1735) Mor 3390. See also *Villaswan Ltd (in receivership) v Sheraton Caltrust (Blythswood) Ltd (in liquidation)* 1999 SCLR 199.

[79] *Graham v Gordon* (1842) 4 D 903; *Steuart v Stables* (1878) 5 R 1024; *Guthrie & McConnachy v Smith* (1880) 8 R 107. See L J Macgregor and N R Whitty, "Payment of another's debt, unjustified enrichment and ad hoc agency" (2011) 15 EdinLR 57.

[80] Stewart, *Diligence* 49; G L Gretton, "Diligence and enforcement of judgments", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 265. To obtain a right over future rents, an adjudication would be required.

[81] Bell, *Commentaries* II, 33.

[82] If a landlord wants to avoid an insurer making use of any right of hypothec, a waiver of subrogation would allow this to take place.

the leased premises.[83] Second, the right to the rent is transferred by itself.[84] If a landlord dispones the leased premises, the disponee acquires a right of hypothec once the assignation of rents takes effect (which may occur before or after the registration of the disposition and transfer of ownership) and the rent owed to the disponee becomes due and unpaid. This follows from the hypothec being an accessory right in security: when the right to the underlying debt (the rent) is transferred, any right of hypothec securing this debt benefits the transferee (*accessorium sequitur principale*). The date when the assignation of rents takes effect depends on the wording of the disposition. If it contains an immediate assignation of rents, the disponee obtains the right to receive the rent that falls due after the disposition is delivered and intimation is made to the tenant.[85] If that rent is unpaid, the assignee acquires a right of hypothec in the goods within the premises on that date. A disposition that sets out unambiguously when the rents will be assigned is preferable for certainty, but if this is not done the fall-back position of section 16(3) of the Land Registration (Scotland) Act 1979 fills the gap left by the parties. The second example is where a landlord assigns the right to receive the rents without transferring the underlying right of ownership or lease. The position is the same as a transfer of the underlying right, and the assignee of rent has the benefit of any right of hypothec that may arise to secure the rent due to him.[86] If, as has been recommended by the Scottish Law Commission, a register of assignations is created, the rents will be assigned upon the registration – rather than intimation to the tenant – and from this date the assignee will have a right of hypothec in security of the rent.[87]

5-24. Sometimes a transfer can occur without the agreement of the landlord. A creditor of the landlord could, for example, obtain an adjudication and acquire the right to enter into possession, grant a lease,[88] and, from the date of adjudication, claim any rents from any pre-existing lease.[89] Before the rents can be claimed, the adjudger must either obtain the consent of the debtor or proceed

[83] This is equally applicable to when a head-tenant transfers its right, or to the creation of an interposed lease.

[84] One proposal considered by the Scottish Law Commission was that the right to receive future rent should be capable of being burdened by the proposed new statutory pledge, but this was ultimately rejected: see H Patrick, "Reform of security over moveable property: a view from practice" (2012) 16 EdinLR 272 at 277; Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017) para 22.18.

[85] The disponee's right is, of course, vulnerable to a subsequent disponee registering its right in the Land Register and, thus, becoming owner: see G L Gretton and K G C Reid, *Conveyancing*, 5th edn (2018) para 11-20 and ch 25. An assignation of rents also has no effect against a singular successor of the disponer who has completed title: Erskine III.5.5; Bell, *Commentaries* I, 793.

[86] *Anderson v Provan* (1665) Mor 10377; *Wedderburn v Mann* (1707) Mor 10399.

[87] Report on *Moveable Transactions* paras 13.26–13.33.

[88] An adjudger can only grant a lease of up to 7 years or 21 years if permitted by a sheriff (Heritable Securities (Scotland) Act 1894 ss 6 and 7).

[89] Stair III.2.39; Scottish Law Commission, Discussion Paper *on Adjudications for Debt and Related Matters* (Scot Law Com DP No 78, 1988) para 5.120.

with an action of maills and duties.[90] Similarly, a standard-security holder can enter into possession of the premises if the debtor is in default,[91] claiming any rent due from that date. Such parties will have the benefit of any right of hypothec in security of the rent they are owed.[92]

5-25. Assigning the right to receive future rents – whether by transfer of the ownership of the leased premises or by a bare assignation of rents – does not cause any pre-existing right of hypothec to be transferred to the assignee.[93] Where the right to receive rents is split between the two parties, one being entitled to the rent due before the assignation and the other for the rent due thereafter, there are correspondingly two rights of hypothec.[94] Any right of hypothec that has already arisen will secure the rent that remains due to the assignor. For rent that arises thereafter, the assignee of the rents acquires a new right of hypothec over any goods within the premises after the rent due to him becomes due and unpaid. This seems to be the only possible analysis of the law, for the assignor and assignee cannot benefit from the same right of hypothec. But as these two hypothecs are likely to be over the same goods, a question of ranking arises,[95] with the first-arising hypothec taking precedence.[96] Having two rights of hypothec over the same goods is by no means unknown. In *Christie v MacPherson*,[97] a landlord had granted a lease to a tenant, who had then sub-let the premises to a sub-tenant. When the head-lease ended, the landlord granted a lease directly to the sub-tenant, but some unpaid rent was still due to the former head-tenant. The sub-tenant's goods, which remained in the premises throughout, had thus become burdened by one hypothec in favour of the head-tenant and another in favour of the head-landlord (for rent due under the new lease). It was questioned which had priority, and the court held that the head-tenant's hypothec was preferred because the head-tenant's hypothec had arisen first.

[90] Stewart, *Diligence* 621ff. Any rent acquired by the adjudger is used to reduce the debt due. On this, see Adjudication Act 1621 (APS iv, 611 c 7, RPS 1621/6/19). But a creditor need not obtain a new decree of maills and duties against each new tenant (*Holmes v Gardner* (1889) 16 R 705). The action of maills and duties has survived an attempt at abolition (see Bankruptcy and Diligence etc (Scotland) Act 2007 s 207 (which has never been brought into force)).

[91] Conveyancing and Feudal Reform (Scotland) Act 1970 Sch 3 para 10(3).

[92] It has been said that the right of a heritable creditor of a landlord to poind the goods of a tenant up to the value of the unpaid rent was based on an assignation of the landlord's right of hypothec. See the discussion on poinding of the ground in Stewart, *Diligence* 502 n 3.

[93] *Wright v Morgan* (1897) 5 SLT 197 at 198–99 per Sheriff-Substitute Strachan. Cf Planiol, *Civil Law* §2489, where it is suggested that a landlord who sells the land loses the right of hypothec.

[94] If there were multiple assignations of the rent, there would be multiple parties with the benefit of any hypothec arising to secure the rent owed to them.

[95] Prior to the Bankruptcy and Diligence etc (Scotland) Act 2007, the disponer would only retain the right of hypothec until three months after the end of the term during which the rents were assigned. For a discussion on the terms of a lease, see paras 9-08–9-13 below.

[96] In German law, they will rank *pari passu:* F J Säcker (et al), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* 8th edn (2020) §562 para 24.

[97] *Christie v MacPherson* 14 December 1814 FC.

6 Variation and Exclusion

PARA

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A. INTRODUCTION

6-01. When a contract of lease is entered into in respect of heritable property, and rent becomes due and unpaid, the landlord obtains a right of hypothec in the goods brought into the leased premises. This, however, is only the default position. The parties are, naturally, free to design their relationship in a way that prevents the creation of a right of hypothec.

B. EXPRESS EXCLUSION AND AMENDMENT

6-02. As with any implied term, the term as to the hypothec can be excluded by the parties: *expressum facit cessare tacitum*.[1] The same is true even if, contrary to the view taken in this work,[2] the hypothec is seen as an independent rule of law and not an implied term. Admittedly, when a right is implied by law, considerations of public policy may prevent the enforceability of an attempted exclusion,[3] and this principle might possibly apply to the hypothec, making it an "invariable" or "mandatory" rule. Yet, in this context at least, it is difficult to see why the contractual freedom of the parties should not be respected. This is

[1] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at paras 14 and 28 per Lord Neuberger; W M Gloag, *The Law of Contract*, 2nd edn (1929) 289.

[2] See paras 5-05–5-06 above.

[3] *Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd* [2006] CSOH 136, 2007 SC 12 at para 16 per Lord Drummond Young.

a view supported by the rationale for the hypothec as a rule implied by law. As Rankine writes:

> The existence of hypothecs is only justified by expediency and the common advantage of the parties; and these can only co-exist where the *nexus* takes its origin in a custom known to everyone, and does nothing to interrupt the ordinary use and employment of the thing hypothecated.[4]

If it is correct to say that the hypothec is accepted solely on the basis of the advantage to the parties to the lease, the landlord ought to be free to give up the benefit conferred by law.[5] Indeed, such exclusion would benefit the tenant's other creditors, who would see an increase in the number of assets against which they can claim in the event of the tenant's insolvency, or attach by diligence beforehand. It is true that the creditors of the landlord would sometimes be disadvantaged by the exclusion of the hypothec, but this is not a sufficient ground to prevent such an exclusion.[6] Of course, for an exclusion to be effective, the agreement of both parties is required, and a unilateral notice by the tenant would not be sufficient to modify or exclude the hypothec.[7]

6-03. Whatever historical justification may be found for the hypothec, and so for preferring the claims of the landlord,[8] landlords are now seen in the same light as any other creditor. There is no discernible policy reason for preventing a landlord from agreeing to exclude the hypothec. This view is further reinforced by analogies taken from the law of lien and tacit relocation. A lien over goods in the possession of a creditor arises by operation of law, but it is a right that can be excluded either by an express stipulation in the contract before the security is created or by agreement thereafter.[9] Tacit relocation, which likewise has its

[4] J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 367.

[5] Before third parties' goods were excluded from the hypothec (see paras 4-44–4-54 above), a hirer of machinery would sometimes require the landlord to waive any right of hypothec over the hired item before it was moved on to the leased premises. On this, see A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.61. An agreement between the hiree of the goods (i.e. the tenant under the lease of the premises) and the hirer excluding the hypothec would not be sufficient. On this, see paras 7-33–7-35 below.

[6] Unless it was a gratuitous alienation. On this, see: Bankruptcy (Scotland) Act 2016 s 98 (sequestration); Insolvency Act 1986 s 242 (winding up and administration); and the common law of fraud on creditors. For the common law rule, see *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, 2020 SC (UKSC) 23 at paras 23–25 per Lord Hodge; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 22–35. For a full analysis of the underlying common law, see J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) ch 4.

[7] See para 7-37 below. Cf the position for goods owned by third parties discussed at paras 7-33–7-36 below.

[8] See the arguments in chapter 4 above.

[9] Bell, *Principles* §1418; Bell, *Commentaries* II, 91; W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897) 360; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 293; A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) para 11-17; A J M Steven, "Lien as an excludable and equitable right"

roots in Roman law,[10] and can be found in other civilian jurisdictions, is also thought to be excludable by the agreement of the parties.[11] In South Africa, where the hypothec is widely accepted as arising from an implied term in the contract of lease, the commentaries are split between those that accept the hypothec can be excluded by contract,[12] and those that do not.[13] But German law is clear and permits the exclusion of the *Vermieterpfandrecht*.[14] Gow, the main Scottish writer who addresses the issue, writes that a landlord has no preference where the hypothec is excluded by "convention".[15] Halliday too thought that the hypothec could be excluded by agreement,[16] and when the Bill that became the Bankruptcy and Diligence etc (Scotland) Act 2007 was introduced into the Scottish Parliament it was the Scottish Executive's opinion that the hypothec could be opted out of in the contract of lease.[17] All in all, it can be safely concluded that the hypothec can be validly excluded by the parties' agreement.[18]

6-04. If outright exclusion of the hypothec is possible, the parties are presumably equally free to amend its operation. This would, for example, allow the debts secured by the hypothec to be restricted: instead of securing all rent due and unpaid, the hypothec could secure only a specific percentage. Certain goods could also be excluded from the hypothec.[19] This facility could be of practical use. A landlord, unwilling to agree to the exclusion of the hypothec as a whole, might be prepared to agree to the exclusion of certain items. The advantages, from a tenant's point of view, are obvious. A tenant wishing to bring into the leased premises a particularly high-value item, such as a piece of machinery, may wish to have it excluded from the hypothec. This would allow its removal from the premises at any time without the risk of it being brought

(2008) 12 EdinLR 280; M Wiese, "A South African perspective on a lien as real security right in Scottish law" (2017) 1 TSAR 89 at 111.

[10] D.19.2.13.11 (Ulpian).

[11] *MacDougall v Guidi* 1992 SCLR 167; Scottish Law Commission, Discussion Paper on *Aspects of Leases: Termination* (Scot Law Com DP No 165, 2018) paras 2.13–2.17.

[12] *Isaacs v Hart & Henochsberg* (1887) 8 NLR 106; I Knobel, "The Tacit Hypothec of the Lessor" (2004) 67 THRHR 687 at 692–93; G Glover, *Kerr's Law of Sale and Lease*, 4th edn (2014) 452; W A Joubert and J A Faris (eds), *The Law of South Africa* vol 14 part 2, 2nd edn (2007) para 32.

[13] M Nathan, *The Common Law of South Africa* (1904) II, 934–35; *Solgas (Pty) Ltd v Tang Delta Properties CC* [2016] ZAGPJHC 158 at para 7 per Crutchfield AJ; R Brits, *Real Security Law* (2016) 436; A J van der Walt and G J Pienaar, *Introduction to the Law of Property*, 7th edn (2016) para 19.1.

[14] P Bruns, "Gegenwartsprobleme des Vermieterpfandrechts" 2019 *Neue Zeitschrift für Miet- und Wohnungsrecht* 46 at 47.

[15] Gow, *Mercantile Law* 299.

[16] D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) 349.

[17] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 996.

[18] For the same conclusion as to Jersey law, see R MacLeod, *Property Law in Jersey* (2016) 58.

[19] This is supported in G Lyon, *Elements of Scots Law, in the Form of Question and Answer; with a Copious Appendix* (1832) 32.

back by the landlord. It would also enable another secured creditor, such as a floating-charge holder,[20] to take priority. Although legislation provides that the hypothec (as a right in security arising by operation of law) takes priority over any floating charge,[21] this would not affect goods excluded from the hypothec. Such an agreement to exclude may even be to a landlord's long-term advantage. After all, his tenant may need credit to finance the continuation of the business within the premises and the resulting flow of rental payments.[22]

6-05. But whilst the restriction of the hypothec appears possible, its expansion is not. Anything that goes beyond what is implied in law must be based on the agreement of the parties, and Scots law does not permit conventional hypothecs over corporeal moveables.[23] So, for example, an agreement to cover goods that have not yet been brought into the premises would be ineffectual, as would be an agreement for the hypothec to secure debts not secured by the hypothec implied by the common law.[24]

C. SUCCESSORS

6-06. Having agreed with a landlord on the exclusion or amendment of the hypothec, a tenant may be concerned about whether the agreement will bind a successor landlord or an assignee of the hypothec.[25] Unfortunately, no assistance on this topic can be gained from the closely-related law of lien because, in general, a lien cannot be assigned.[26] In relation to the assignation of the hypothec, two scenarios can be discussed. The first is the transfer of the landlord's right of ownership to a third party, who thus becomes the landlord, bound by the lease contract. The second is an assignation of the rents.

[20] Or the proposed non-possessory statutory pledge, see Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017) ch 20.

[21] Companies Act 1985 s 464(2). Due to the issue of a right of hypothec arising after the floating charge has attached (a post-insolvency hypothec), an insolvency practitioner may need to obtain a waiver from the landlord of its right of hypothec before moving goods owned by the insolvent company into the leased premises during an insolvency proceeding. For more on this, see paras 11-29–11-39 and 11-47 below.

[22] It may also allow the business to be sold in a pre-pack administration. For a discussion of the difficulties faced by an administrator wishing to sell a tenant's business in a pre-pack, see paras 11-08 and 11-40–11-47 below.

[23] R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 361.

[24] *Sandeman & McLennan v Thomson* (1866) 1 Guth Sh Cas 75 at 79 per Sheriff Glassford Bell. This has been put on a legislative footing in Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8)(a).

[25] On assignation, see paras 5-21–5-25 above.

[26] Steven, *Pledge and Lien* para 14-17. The law of floating charges is also of no assistance because the floating-charge holder has no real right in the property covered by the charge until attachment. For a discussion on the nature of a floating charge before its attachment, see A D J MacPherson, *The Floating Charge* (Studies in Scots Law vol 8, 2020) ch 2.

6-07. For the first, the unique position of the hypothec, as a right implied into the lease, must be addressed. If the initial contract of lease – or later agreement between the landlord and tenant – expressly excludes the hypothec, this may be an agreement that runs with the land or, alternatively, an agreement which is personal to the original parties.[27] Leases can contain both.

6-08. When a landlord's or tenant's interest is transferred, only those terms which are *inter naturalia* of the lease transmit against the successor. Although there has been literature and litigation on the subject of terms *inter naturalia*,[28] the status of a clause excluding the hypothec has, unsurprisingly, not been the subject of either. What is clear is that, when deciding whether a term is *inter naturalia* of a lease, no account is taken of the successor landlord's knowledge of the term,[29] or of the inclusion of a clause binding successors.[30] Instead, Paton and Cameron, and Gloag, require the clause to be a common one before it can become *inter naturalia*;[31] if this is the applicable test, any clause excluding the hypothec could not be *inter naturalia*. This view has, however, been challenged.[32] Whilst modern case-law gives support to the idea that the regular use of a particular clause could result in it becoming a term *inter naturalia* of the lease, it also accepts that this is not the only possible basis for a term to transmit against successor landlords. Thus, in *Optical Express (Gyle) Ltd v Marks & Spencer plc*, Lord Macfadyen said that:

> Whether an obligation is binding on singular successors depends on whether it is inter naturalia of the lease. It is clear from *Bisset v Magistrates of Aberdeen* that one factor relevant to determining whether an obligation is inter naturalia of the lease will be whether it is one of common occurrence in the particular class of lease, but it seems to me that the authors of both Gloag on *Contract* and Cameron and Paton on *Landlord and Tenant* perhaps go too far in suggesting that that is the only test.[33]

[27] There is no difference between an express exclusion contained in the original lease and a later agreement which varies the lease. On this, see P Webster, *Leasehold Conditions* (Studies in Scots Law, forthcoming) ch 2.

[28] See, for example, Webster, *Leasehold Conditions*; D Haughey, "Transmission of lease conditions in Scots law – a doctrinal-historical analysis" (2015) 19 EdinLR 333.

[29] Webster, *Leasehold Conditions* ch 9.

[30] Webster, *Leasehold Conditions* paras 3-58–3-62; R Rennie et al, *Leases* (2015) para 15-03. Parties are, however, able to "make a term which would otherwise be a real condition personal": Webster, *Leasehold Conditions* para 3-59.

[31] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 95; W M Gloag, *The Law of Contract*, 2nd edn (1929) 234. See also K S Gerber, *Commercial Leases in Scotland*, 4th edn (2021) para 22-02.

[32] Webster, *Leasehold Conditions* ch 3, and para 3-23 in particular.

[33] *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 at 650 per Lord Macfadyen. See also *The Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 at paras 38–40 per Lord Drummond Young.

It seems that a term is not prevented from being *inter naturalia* merely because it is not current practice to insert it into a lease.[34] Instead, the question is whether the clause in question is sufficiently connected to the lease and to the relationship between the landlord and tenant.[35] That explains the decision reached in *Optical Express* itself, where Lord Macfadyen held that an exclusivity clause stating that Optical Express were to be the sole opticians in a shopping centre was not *inter naturalia* of the lease because it had "nothing directly to do with the lease of [the premises]".[36] It did not regulate the relationship between the current landlord and tenant, but rather between the tenant and the tenants of the other premises in the shopping centre.

6-09. In the light of this analysis, a clause in a lease excluding the hypothec (or amending its operation) would be binding on successor landlords. Admittedly, the hypothec is not an essential aspect of the relationship between the landlord and tenant as compared with, for example, the obligation to pay rent or take possession of the land. But it is closely connected to the obligation to pay rent, which is indisputably *inter naturalia* of the lease. This is made clear by Rankine, who states that the hypothec is "*inter naturalia* of a lease – tacitly a part of the contract".[37] And if the implied term creating the hypothec is deemed to regulate the relationship between landlord and tenant, so an agreement to exclude or amend the hypothec must also be an intrinsic aspect of the relationship. It may be added that whether a formal variation of the lease is effectual against a successor does not depend on whether the successor was aware of it, but if the successor is unaware, he may have recourse against the predecessor.[38]

6-10. Where the exclusion of the hypothec is contained in an agreement separate from the lease itself, it is important to mark the difference between a formal variation of the lease and a mere back-letter intended only to bind the parties to the agreement.[39] In the latter case, the right of a successor landlord to obtain a hypothec would not be excluded by the agreement. A personal exclusion of this kind would thus be a rather weak instrument, and a tenant (or his creditors) would need to obtain the agreement of the new landlord if the exclusion of the hypothec was to continue.

[34] Webster, *Leasehold Conditions* para 3-23; Haughey, "Transmission of lease conditions in Scots law" 353–58.

[35] Webster, *Leasehold Conditions* para 3-38; Haughey, "Transmission of lease conditions in Scots law" 341 and 358–59.

[36] 2000 SLT 644 at 650 per Lord Macfadyen. For a different view, see *Davie v Stark* (1876) 3 R 1114 at 1118 per Lord Justice-Clerk Moncreiff.

[37] Rankine, *Leases* 366. See also Paton and Cameron, *Landlord and Tenant* 199.

[38] Webster, *Leasehold Conditions* para 2-40.

[39] Webster, *Leasehold Conditions* paras 2-52–2-57. See also the views in A J M Steven, "Keeping the goalposts in sight" 2000 SLT (News) 143 at 144.

6-11. As previously mentioned, the creation of the hypothec to secure rent due under a long lease does not require the lease to be registered in the Land Register.[40] That would suggest that the right of hypothec could, equally, be discharged or amended without the need to register that discharge or amendment. This would, however, mean that a third party purchasing the landlord's interest might find that the right of hypothec has been excluded without his knowledge.[41]

6-12. The law on this topic under the Land Registration (Scotland) Act 1979 was, in the view of one in-depth study, "unclear",[42] and although extensive reforms were undertaken by the Land Registration etc (Scotland) Act 2012, the Scottish Law Commission had previously recommended that the new legislation should merely re-enact the existing law in respect of leases.[43] On one view, the registration of an exclusion of the hypothec is required before it will bind a successor of the landlord. This derives from section 20B of the Registration of Leases (Scotland) Act 1857 (as introduced by the 2012 Act). This states that:

> (2) Registration in the Land Register of Scotland is the only means –
>
> (a) whereby rights or obligations relating to a registered lease become real rights or obligations, or
>
> (b) of affecting such real rights or obligations.

It was Peter Webster's view that "section 3(3) [now section 20B of the 1857 Act], however, insists upon registration in order to make the lease and its terms real. It is the clearest indication that a term must appear on the register (albeit on the tenant's title sheet) in order to bind a successor." [44] This view has the merit of protecting purchasers of the landlord's interest. Equally persuasive, however, is the view that registration is not required. Indeed, this is Webster's current view. He writes that: "The SLC expressed no final opinion about whether section 3(3) required a variation to be registered in order to have 'real' effect. It is suggested that the stronger argument is that section 3(3) did not do so, both because of the points made by the SLC and because naturally one would not describe a term of a lease as something that 'relates to' the lease."[45] Even if this view is

[40] See paras 5-09–5-11 above.

[41] As Webster, *Lease Conditions* para 2-60 writes, the question to be answered is "whether a prospective purchaser can rely on the details provided by the register, or whether he must make further enquiries to ascertain whether the terms of the lease are different from those registered, as may be the case if there is an unregistered variation or back-letter."

[42] P Webster, *The Relationship of Tenant and Successor Landlord in Scots Law* (PhD thesis, University of Edinburgh, 2008) 39.

[43] Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222, 2010) para 9.28. See also Webster, *Leasehold Conditions* paras 2-63 and 2-91. For a discussion on the law if the landlord's title is still recorded in the Register of Sasines, see Webster, *Leasehold Conditions* paras 2-65–2-72.

[44] P Webster*, The Relationship of Tenant and Successor Landlord in Scots Law* (PhD thesis, University of Edinburgh, 2008) 36. See also 39: "Section 3(3) is the clearest indication that registration is a constitutive requirement of a real condition of a registered lease. . ."

[45] Webster, *Leasehold Conditions* para 2-83, and see also paras 2-92, 2-98 and 2-100.

incorrect and registration is indeed required to make lease terms real, there is a strong argument that this general rule does not apply to any agreement relating to the hypothec. If registration of an alteration to a lease is required by section 20B, such registration appears to be required only for alterations of rights or obligations which became real by the initial registration of the lease. But a right of hypothec can be created when a lease is agreed upon and goods are brought into the premises without any need for the lease to have been registered.[46] In addition, it would be a peculiar result if, the landlord and tenant having agreed to exclude the hypothec contractually, it remained as a real right in the lease and therefore was resurrected when the landlord's interest was transferred.[47] And, as discussed above,[48] it would not seem to be the purpose of the Land Register to govern whether a right in security over moveables is, or is not, created. Nonetheless, due to the uncertainty in this area of the law, it is advisable for a tenant who wishes to exclude a landlord's hypothec to register the variation of the lease.

6-13. This takes us back to a bare assignation of rents. As an assignee takes the right in the same condition as the cedent, and all defences available to the debtor against the cedent are also available against the assignee, if the right of hypothec has been excluded before the assignation there will be no right of hypothec available to the assignee.

D. IMPLIED EXCLUSION

(1) Introduction

6-14. An implied term can also be excluded by implication.[49] This can occur, for example, if the term to be implied is incompatible with the express terms of the contract,[50] the test being whether the implied term is excluded by necessary implication of any express term.[51] Discovering examples of implied exclusion

[46] See paras 5-09–5-11 above.

[47] For discussion, see Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222, 2010) paras 9.26–9.27.

[48] See paras 5-09–5-11 above.

[49] Cf the English case of *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717 per Lord Diplock. This is not the law in Scotland, on which see *Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd* [2006] CSOH 136, 2007 SC 12 at paras 14–16 per Lord Drummond Young.

[50] *Re Southern Rhodesia* [1919] AC 211 at 244–45; *Sterling Engineering Co Ltd v Patchett* [1955] AC 534 at 547 per Lord Reid; *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at paras 14–32 per Lord Neuberger. For a discussion on the exclusion of a term implied into a contract of lease, see *Whitelaw v Fulton* (1871) 10 M 27.

[51] *Mars Pension Trustees Ltd v County Properties & Developments Ltd* 1999 SC 267 at 271 per Lord Prosser; *Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd* [2006] CSOH 136, 2007 SC 12 at paras 14–16 per Lord Drummond Young.

of the hypothec is not an easy task. Before the Bankruptcy and Diligence etc (Scotland) Act 2007, one example was perhaps the implied restriction of the hypothec by a landlord who granted permission for a sub-lease. This is addressed in more detail below.[52] There now appears to be little or no possibility for the implied exclusion of the hypothec by necessary implication of the terms in a lease. In one case it was suggested that a provision in the lease for payment of the rent in advance demonstrates the landlord's lack of reliance on the hypothec and therefore its implied exclusion;[53] but this view is not generally supported in the case-law.[54] An entire agreement clause would also not exclude the hypothec, at least by implication. This follows the rule that a clause that makes reference to the exclusion of implied terms (but not to a specific implied term) will not prevent an implied term from arising.[55]

(2) Exclusion by grant of express security

6-15. A landlord with the benefit of the hypothec might also obtain an express security over the moveables within the premises. Such an express security may be a floating charge or, if recent recommendations of the Scottish Law Commission are implemented,[56] a statutory pledge.[57] In such a case it may be argued that the grant of an express security supersedes the implied security. This was the view of the Privy Council in one decision from 1866, where the court dealt with the law of lien. It was stated that:

> But lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limits their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum*. If a Consignee takes an express security, it excludes general lien.[58]

[52] See paras 8-14–8-33 below.

[53] *Edinburgh Albert Buildings Company Ltd v General Guarantee Corporation Ltd* 1917 SC 239 at 245 per Lord Mackenzie.

[54] *Dundee Eastern Cooperative Society Ltd v Anderson* (1900) 16 Sh Ct Rep 257; *MacLeod v Deacon* (1901) 17 Sh Ct Rep 269.

[55] This belief is strengthened by *Great Elephant Corporation v Trafigura Beheer BV & Co* [2012] EWHC 1745 (Comm), [2013] 1 All ER (Comm) 415 at paras 89–91 per Teare J, where terms implied by the Sale of Goods Act 1979 s 12 were challenged by the presence of an entire agreement clause which did not directly mention implied terms. Their implication was not prevented by the clause. The Outer House has decided that terms implied in law are not excluded by a generic entire agreement clause: *Burnside v Promontoria (Chestnut) Ltd* [2017] CSOH 157, 2018 GWD 2-35.

[56] Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017).

[57] This is not an unlikely scenario, with the hypothec being restricted to commercial premises after the Bankruptcy and Diligence etc (Scotland) Act 2007.

[58] *Re Leith's Estate* (1866) LR 1 PC 296 at 305.

This general view on the taking of express securities finds support from Lord Drummond Young whilst discussing the right of retention:

> When an express security is granted in respect of one party's obligations under a contract, it can reasonably be inferred that the express security is intended to supersede the implied security conferred by the right of contractual retention. That is especially so where the express security is conferred over land, rather than merely relying on the withholding of contractual rights.[59]

Despite such opinions, the grant of an express security to secure rental payments should not necessarily imply the exclusion of an implied security.[60] By obtaining an express security, a landlord may simply be wishing to strengthen his position, rather than exchanging a security implied by law for an express one. Further, the hypothec grants more, and better, rights to a landlord than an express security. A floating charge ranks below the hypothec, and is also subject to the prescribed part and other preferable securities. Even if the landlord were to obtain the new statutory pledge in security of the rent over the goods within the leased premises (assuming this becomes available), the hypothec would still be of use. The hypothec would rank above a floating charge (irrespective of when the charge had been created or if it contained a negative pledge clause),[61] whereas a statutory pledge would rank below a floating charge granted by the tenant before its creation if the charge contained a negative pledge clause.[62] The weakening of his position is not something that the landlord can be said to have necessarily implied by agreeing to take an express security.

(3) Exclusion in respect of furnished leases

6-16. When a landlord leases furnished premises, the lease implies no obligation on the tenant to furnish the premises.[63] The basis of this is clear: it would make no sense if the landlord both furnished the premises and required the tenant to bring in furnishings. This rule is also applied whenever premises are let for a purpose inconsistent with an obligation on the tenant to stock the premises with goods which might be subject to the hypothec.[64] The prime example is where

[59] *JH & W Lamont of Heathfield Farm v Chattisham Ltd* [2018] CSIH 33, 2018 SC 440 at para 39 per Lord Drummond Young.

[60] See L Richardson, "What do we know about retention now?" (2018) 22 EdinLR 387 at 392. See the same conclusion in R Slovenko, *Treatise on Creditors' Rights under Louisiana Civil Law* (1968) 264, and J Domat, *The Civil Law in its Natural Order* (transl W Strahan, 1722) I, 376.

[61] See paras 11-29–11-39 below.

[62] Companies Act 1985 s 464(1).

[63] *Gardner v Anderson Bros* (1890) 6 Sh Ct Rep 57. See also R A Simpson, *Landlord and Tenant* (1927) 10. For more on the tenant's obligation to plenish the premises and how this is enforced (the plenishing order), see paras 10-02–10-15 below.

[64] For the goods subject to the hypothec, see chapters 7 and 8 below.

premises are let as a warehouse or auction house.[65] The purpose of the lease is to store goods owned by third parties, and if the landlord required the tenant to plenish the premises with goods of his own, the purpose would be frustrated. As well as displacing the obligation to furnish, leases of furnished premises may also impliedly exclude the hypothec itself. On this view, if premises are leased furnished and the tenant brings in goods of his own, the landlord will acquire no right over them.[66] As furnished lets are found mainly in respect of residential premises, the importance of this implied exclusion (assuming it to exist) has been much reduced since the Bankruptcy and Diligence etc (Scotland) Act 2007,[67] but it remains a possibility for commercial premises.

6-17. The leading case is *Edinburgh Albert Buildings Co Ltd v General Guarantee Corporation Ltd*,[68] where the court was asked to decide whether a piano owned by someone other than the tenant but brought into Edinburgh's Albert Hall had become subject to the hypothec. The General Guarantee Corporation, which owned the piano, entered the landlord's sequestration process in an attempt to have the piano removed on the basis that it was not subject to the hypothec. Their submissions included arguments based on the tenant's lack of ownership (on the understanding that only the goods of a tenant are subject to the hypothec),[69] but there was also a statement that:

> when premises were let, as these were, fully furnished, there was no room for hypothec, for the terms of the bargain implied that the landlord had waived his right to have the premises plenished in security for his rent.[70]

It was their claim that the landlord's decision to grant the lease had been based purely on the tenant's personal credit and, therefore, the right of hypothec did not arise.[71] In reply, the landlord submitted that the hypothec was an implied term in every lease of urban premises and "it covered whatever was brought into the premises by the tenant".[72] The landlord conceded that the hypothec could be excluded expressly or impliedly, but argued that this had not been achieved merely by letting the premises furnished.[73]

[65] *Gardner v Anderson Bros* (1890) 6 Sh Ct Rep 57.

[66] J J Gow, *The Law of Hire-Purchase in Scotland*, 2nd edn (1968) 204. See also *Bell v Andrews* (1885) 12 R 961 at 964 per Lord Shand, but this comment relates to a furnished room taken by a lodger rather than a tenant.

[67] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(3)(a).

[68] *Edinburgh Albert Buildings Company Ltd v General Guarantee Corporation Ltd* 1917 SC 239.

[69] See paras 4-44–4-54 above.

[70] 1917 SC 239 at 242.

[71] This understanding could align the hypothec with that of lien, where the security can be excluded if it can be shown that the creditor relied only on the personal credit of the debtor. For this, see Bell, *Commentaries* II, 91.

[72] 1917 SC 239 at 242.

[73] 1917 SC 239 at 243.

6-18. The First Division found in favour of the General Guarantee Corporation, with Lord President Strathclyde focusing on the express stipulations in the contract, with reference to the rent being paid for the premises with "furnishings and fittings". "It is obvious", he stated, "that the landlords relied on the personal security of the tenant alone".[74] In similar vein, Lord Mackenzie said that a furnished lease "prevents the landlord successfully putting forward a principle upon which his hypothec is said to rest, viz., that he is entitled to have the subjects plenished with articles which may be subject to his hypothec".[75] These opinions go too far: excluding the tenant's obligation to plenish the premises does not inevitably result in the exclusion of any right of hypothec as well. After all, the tenant may supplement the landlord's furnishings with furnishings of his own. In addition, the right of hypothec is not based on the right to have the premises plenished. The tenant's obligation to plenish the premises arises independently of the right of hypothec and often before any goods are brought into the premises.

6-19. It seems that the court was influenced by the fact that the piano was owned by someone other than the tenant. As his "ground of judgment", the Lord President stated that there had previously been no case that allowed the hypothec to burden a good if it was a single item owned by someone other than the tenant, all other goods within the premises were excluded from the hypothec, and the rent was paid in advance.[76] The court seemed to pay too much attention to the fact that the good in question was a single hired item. It was a common view at the turn of the twentieth century that single hired items were excluded from the hypothec, but this was later found to be wrong.[77] It seems also that the judges simply refused to find in favour of the landlord unless there was authority for the hypothec applying in the same circumstances. As the judges were incorrect in their view that the hypothec did not cover single hired items, the case as a whole is of doubtful authority. At most, the *ratio* is that third parties' goods are excluded from the hypothec if the premises are let furnished.[78] A different conclusion may be expected today if the item in question were owned by the tenant. Merely by agreeing to provide the furnishings of the premises, the landlord has not necessarily consented to the exclusion of the security for rent. Instead, it is likely that a landlord will expect a tenant to bring in goods in addition to the furnishings that are already provided, and that such items will then become subject to the right of hypothec.

[74] 1917 SC 239 at 243 per Lord President Strathclyde.

[75] 1917 SC 239 at 245 per Lord Mackenzie.

[76] 1917 SC 239 at 244 per Lord President Strathclyde.

[77] See para 4-49 above.

[78] R A Simpson, "The landlord's hypothec in urban subjects" (1931) 47 Scottish Law Review 296 at 299; R A Simpson, "The law relating to furnished houses" (1931) 47 Scottish Law Review 362 at 364.

7 Subject-matter (1): General Part

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A. A GENERAL PRINCIPLE?

7-01. A right of hypothec can only arise in respect of corporeal moveable property brought into the leased premises; but not everything brought in is burdened by the hypothec. This chapter sets out the principles to be applied when analysing whether an item brought into leased premises can become subject to the hypothec. This may be important, for example, for an insolvency practitioner who wishes to challenge a landlord's claim to have a priority over certain items in the leased premises. By rejecting the landlord's right, the value of the items will be free for division among all creditors.

7-02. Scots law has adopted a broad definition of the property that can become subject to the landlord's hypothec. As was said in one case:

> [T]his right of hypothec covers in general all goods in the possession of the tenant in the premises, whether he owns them or has hired them from a third party.[1]

[1] *Dundee Corporation v Marr* 1971 SC 96 at 100 per Lord President Clyde.

Thus, when addressing the question of whether an item is subject to the hypothec, we should start from the assumption that it is included merely by being brought on to the premises by the tenant, before then addressing whether there is any justification for its exclusion. What needs to be explained, in other words, is not the inclusion of goods – for, in principle, all goods brought into the premises are included – but rather the exclusion of certain classes of goods. This becomes apparent when the definition of *invecta et illata* is considered. The phrase *invecta et illata* is commonly used to describe those goods that are subject to the hypothec and, in Scottish commentaries, it has often been defined as all the goods brought into the leased property.[2] Such an all-encompassing definition is consistent with Roman law; in Watson's translation of the *Digest*, for example, *invecta et illata* are defined as "property brought on to the premises".[3] It is also consistent with the law of South Africa,[4] Louisiana,[5] France,[6] Italy,[7] and Germany.[8]

7-03. Early decisions, prior even to the adoption of the term "hypothec" to describe the landlord's priority, employed a wide definition for those goods over which the landlord had a preference.[9] Balfour's *Practicks* used "gudis and geir" (goods and possessions) to describe those items over which a "Lord proprietar" had priority for the payment of rent.[10] "Gudis and geir" appears to have excluded nothing and to have been at least as extensive as the equivalent rule in Roman law for urban landlords. After the adoption of the term "hypothec", the wide-ranging scope of the right was preserved. The position of dwelling-houses demonstrates this best. In the seventeenth and eighteenth centuries it was accepted that the hypothec covered all goods brought into a house. Stair included "all the proper goods of the possessor [tenant]"[11] within the definition of *invecta et illata* and Forbes, writing half a century later, thought that "Heretors of rented Houses have also a tacit hypotheck for a Year's Rent upon *invecta et illata*, all the Tenant's

[2] Stair I.13.15; Bankton I.17.10 (vol I, 386–87); Erskine II.6.64; Bell, *Commentaries* II, 29; Bell, *Principles* §1275; W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations (*1897) 417; J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 373; D M Walker, *The Law of Civil Remedies in Scotland* (1974) 317; S C Styles, *Glossary: Scottish and European Union Legal Terms and Latin Phrases*, 2nd edn (2003) 84.

[3] D.20.2.2 (Marcian). See also D.20.2.6 (Ulpian).

[4] W A Joubert and J A Faris (eds), *The Law of South Africa* vol 14 part 2, 2nd edn (2007) para 33(a); G Wille, *Landlord and Tenant in South Africa*, 5th edn (1956) 196; W E Cooper, *Landlord and Tenant*, 2nd edn (1994) 181; R Brits, *Real Security Law* (2016) 441.

[5] V V Palmer, *The Civil Law of Lease in Louisiana* (1997) para 6-2.

[6] §2332(1) *Code civil*.

[7] Art 2764 *Codice civile*.

[8] §562(1) BGB.

[9] See chapter 2 above.

[10] See para 2-11 above.

[11] Stair IV.25.3. For more on this, see "The second exception: outwith the ordinary goods" at paras 7-20–7-31 below.

Moveables in these Houses, or other Mens Goods found there after the Term of Payment".[12] Shortly before Forbes' statement of the law, the Court of Session gave a similar opinion, concluding that "furniture *et omnia invecta* [all that is brought in] stood hypothecated for the house-mail".[13] Later in the eighteenth century, Erskine, whilst giving specific examples of "household stuff", such as "plate, paintings, books", said that the hypothec included "whatever else is brought into the house".[14] Hume also adopted an all-encompassing definition of *invecta et illata*,[15] and Graham Stewart (at the turn of the twentieth century) began his discussion with the statement that "all moveables brought on to the premises" are included.[16]

7-04. Despite the clarity and authority of such accounts, dissenting voices appeared during the nineteenth century. George Joseph Bell doubted whether there was a general principle that the hypothec covered all goods and instead provided a description of particular goods that were subject to the hypothec.[17] For the purposes of his account, he divided urban premises into dwelling-houses on the one hand and commercial premises on the other.[18] This was similar to the account later given by Hunter, who distinguished dwelling-houses from shops and warehouses and, in respect of the former, thought that the hypothec covered "[h]ousehold furniture, books, paintings, plate, jewels (and perhaps wines)".[19]

7-05. A distinction also came to be made between goods owned by the tenant and those that were not, with an evident reluctance to accept that the hypothec could cover goods owned by someone other than the tenant.[20] This represented a further move from the all-encompassing nature of the hypothec, and one which has been influential. Thus, whilst more recent texts on the hypothec provide that the hypothec covers all goods owned by the tenant, they start from the position that goods owned by a third party are excluded.[21] This was also the view of the court. Lord Justice-Clerk Moncreiff said that the property of third parties was burdened by the hypothec only if it "came under any exceptions to the general rule of the law of hypothec, viz., that the property of third parties

[12] W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 3, 2012) 173. For third parties' goods, see paras 4-44–4-54 above.

[13] *Countess of Callander v Campbell* (1703) Mor 6244.

[14] Erskine II.6.64.

[15] Hume, *Lectures* vol IV, 23.

[16] J G Stewart, *A Treatise on the Law of Diligence* (1898) 466.

[17] Bell, *Commentaries* II, 29.

[18] Bell, *Commentaries* II, 31.

[19] R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 374–75.

[20] See para 4-49 above.

[21] See, for example, Gloag and Irvine, *Rights in Security* 418; J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 293.

does not fall under the landlord's right".[22] But this was a misperception, for the accepted rule came to be that the hypothec covered all goods brought into the leased premises, whether owned by the tenant or not.[23] This was demonstrated by *DH Industries Ltd v RE Spence & Co Ltd*,[24] where the landlord had attached by sequestration an industrial machine owned by a third party but situated on the leased premises. As "the only ground relied upon by the pursuers [the third party] is their ownership of the machine", the sheriff held that the machine was not excluded from the scope of the hypothec.[25] Thus, the fact that the goods are owned by a third party is insufficient to remove them from the hypothec at common law, with the third party needing to prove that they come within one of the exceptions (discussed below).[26] Nonetheless, the unease with which the courts addressed the hypothec's coverage of third parties' goods is understandable, not least due to the lack of a suitable principle on which to base it.[27] After the Bankruptcy and Diligence etc (Scotland) Act 2007 only the tenant's goods can be burdened by the hypothec.[28]

7-06. Admittedly, the description of the hypothec as an all-encompassing security that covers everything brought into the leased premises belies the complexity of whether certain items are caught. Decisions concerning the subject-matter of the hypothec have often attempted to find a justification for the inclusion (or exclusion) of particular goods. But stating that all goods are covered by the hypothec provides the appropriate starting point for any analysis.

B. APPLICATION OF THE GENERAL PRINCIPLE

7-07. The hypothec's universal coverage of goods brought into the premises is not restricted to leases of dwelling-houses. In commercial leases, it would cover

[22] *The Pulsometer Engineering Co Ltd v Gracie* (1887) 14 R 316 at 318 per Lord Justice-Clerk Moncreiff.

[23] *Dundee Corporation v Marr* 1971 SC 96 at 100 per Lord President Clyde. It was also said that the third party was presumed to have consented to his goods being burdened by the hypothec, but this view was needed only because of the accepted theory that the hypothec affected the goods of third parties on the basis of consent. See, for example, *Orr v Jay & Co* (1911) 27 Sh Ct Rep 158 and paras 4-44–4-54 above. It is interesting to note that, before Bankton, there is no evidence for the hypothec covering third parties' goods. On this, see para 4-45 above.

[24] *DH Industries Ltd v RE Spence & Co Ltd* 1973 SLT (Sh Ct) 26. See also *Blane v Morison* (1785) Mor 6232 at 6234 per the Lord Ordinary; *Dundee Corporation v Marr* 1971 SC 96; *Scottish & Newcastle Breweries Ltd v Edinburgh District Council* 1979 SLT (Notes) 11.

[25] 1973 SLT (Sh Ct) 26 at 27 per Sheriff Hook. See also *The Howe Machine Co v Gerrie's Trs* (1879) 2 Guth Sh Cas 275; *Owens v Henderson* (1909) 25 Sh Ct Rep 149 at 151 per Sheriff Moffatt.

[26] *Middleton v Macbeth* (1895) 11 Sh Ct Rep 9 at 12 per Sheriff Brown.

[27] See paras 4-44–4-54 above.

[28] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4).

stock-in-trade,[29] manufactured goods,[30] shelving, cash registers, machinery and tools.[31] Where the lease subjects include part of a river or loch, any fish caught there are, as produce from the water, subject to the hypothec. This principle would equally apply to fishing leases,[32] but not to timber leases, which may be said to be a sale of timber rather than a lease in the proper sense.[33] In *Duguid v Hector*,[34] fishing equipment, such as boats and nets, were held to be included within the hypothec.[35] Under a mineral lease, drilling equipment and all other machinery are subject to the hypothec,[36] along with minerals that have been mined.[37]

C. EXCEPTIONS: IN SEARCH OF A RATIONALE

(1) Permanency?

7-08. To the general rule that everything brought into the leased premises falls within the hypothec there are a number of established exceptions. Often, however, the reason why some items are excluded and some not is far from self-evident, and the cases fail to express a principle, or set of principles, that is being followed.[38] In a search for a principle, a suitable starting point might seem to be Roman law. Within the *Digest* there is a statement that, of the goods on the leased premises, "only those which are kept there, are pledged".[39] This concentrates on whether the goods are "permanent" plenishings of the premises, and Voet and Bell cite this requirement of permanency as the defining feature of

[29] D.20.1.34 (Scaevola); J Voet, *Commentary on the Pandects* (transl P Gane, 1955–58) XX.2.5; R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) (henceforth Pothier, *Lease*) §249. Stock owned by someone other than the tenant was also subject to the hypothec (at common law): see *The Lu-mi-num Cycle Co v Goldie* (1900) 16 Sh Ct Rep 79. Cf Rankine, *Leases* 378–79; Stewart, *Diligence* 469; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 206; A McAllister, *Scottish Law of Leases,* 3rd edn (2002) para 5.59 (which seems to misunderstand Bell's statement on goods stored in a warehouse or pledged to the tenant). For Bell's view, see Bell, *Principles* §1276; Bell, *Commentaries* II, 31.

[30] Cf Hume, *Lectures* vol IV, 27.

[31] For tools of trade, see paras 8-02–8-05 below.

[32] *Cumming of Altyr v Lumsden* (1667) Mor 6237; *Molison v Smith & Nicol* (1687) Mor 6239; Bankton I.17.10 (vol I, 387); Rankine, *Leases* 380.

[33] Bell, *Commentaries* II, 27 n 7.

[34] *Duguid v Hector* (1902) 18 Sh Ct Rep 186.

[35] Hume, *Lectures* vol IV, 23; C Stewart, *Rights of Fishing* (1892) 163; Paton and Cameron, *Landlord and Tenant* 203.

[36] Erskine II.6.64; Hume, *Lectures* vol IV, 23; R Stewart, *Mines, Quarries and Minerals in Scotland* (1894) 107; Rankine, *Leases* 379; *Marquis of Breadalbane v The Toberonochy Slate Quarry Company* (1917) 33 Sh Ct Rep 154. Cf Hunter, *Landlord and Tenant* II, 381–82, where he doubted the extension of the hypothec over machinery.

[37] *Tennent v McBrayne* (1833) 11 S 471; *Weir's Executors v Durham* (1870) 8 M 725.

[38] Rankine, *Leases* 373.

[39] D.20.2.7.1 (Pomponius).

goods subject to the hypothec. Voet requires the goods to have been brought on to the leased premises with the intention that they "shall remain while the time of hiring lasts".[40] Bell's similar account centres on the intention for the goods to remain on the premises ("meant to remain permanently in the house").[41] As might be expected, Voet's view has found its way into South African law, where:

> The general principle seems to be that the lien[42] extends to all articles brought on to the leased premises by the tenant or by anyone else, provided they are brought there with the intention (to use the language of the Digest 20.1.32), '*ut ibi perpetuo essent non a temporis causa accommodarentur*'.[43]

There is no consensus as to the length of time required before an item is a "permanent" feature in the leased premises, but Voet and South African authorities require a substantial period. As an example, Cooper says that the goods have to be intended to remain there "indefinitely".[44] But such an emphasis on permanency over-states its importance, at least for Scots law. Whilst duration is a factor to be taken into consideration, there is certainly no requirement of an intention that the goods will remain on the premises for any substantial length of time. This is best demonstrated by the hypothec's coverage of a shop's stock-in-trade despite the obvious intention that such items will be sold at the earliest opportunity.[45] Conversely, Voet uses a lack of permanency to justify the exclusion of goods deposited or pledged to a tenant,[46] notwithstanding the intention for such items to remain on the leased premises for a prolonged period of time, if not the entire duration of a lease.

(2) Exploitation of the leased subjects?

7-09. Perhaps as a result of the difficulties with the "permanency" analysis, Pothier follows a different route. According to Pothier, the hypothec covers only those goods present for the exploitation of the premises. As he explains:

> In order that movables may be subject to the right which custom confers upon the lessor of the premises, the movables must have been brought there for the exploitation of the farm or house let. What movables then answer this description? They are those

[40] Voet, *Commentary* XX.2.5.

[41] Bell, *Commentaries* II, 29.

[42] The landlord's hypothec in South Africa is often referred to as a lien despite it being a non-possessory security.

[43] *Goldinger's Trs v Whitelaw & Sons* 1916 TPD 230 at 240 per Bristowe J. See also R Brits, *Real Security Law* (2016) 442; S Viljoen, *The Law of Landlord and Tenant* (2016) 313; W E Cooper, *Landlord and Tenant*, 2nd edn (1994) 181.

[44] W E Cooper, *Landlord and Tenant*, 2nd edn (1994) 181.

[45] See, for example, Bell, *Principles* §1276.

[46] Voet, *Commentary* XX.2.5.

> which appear to be there for the purpose of remaining there, or for being consumed there, or in order to furnish the house.[47]

Pothier's analysis provides three overlapping characteristics of goods used for the "exploitation" of the premises.[48] The first – permanency – appears not to require the items to be there in perpetuity, but rather that their presence is more than transient. An item would therefore be excluded under Pothier's analysis if, for example, it is merely present in a building overnight and not utilised during that time. The second category – consumed goods – includes raw materials that do not permanently plenish the premises but are used by the tenant within the premises. Fuel would be an example. Finally, Pothier's category of furniture would include, for example, chairs and tables in a dwelling-house, and shelving and cash registers in a shop. Pothier uses his theory to exclude things present merely *en passant*, this including goods brought in by hotel guests, raw materials given to a manufacturer, broken goods handed to a repairer, and pledged goods.[49]

7-10. Pothier's "exploitation" theory has attractions. The inclusion of stock-in-trade is justified under Pothier's doctrine because it is being used to exploit the leased premises as a shop.[50] The exploitation theory can also explain the doubt in the nineteenth century about whether an agricultural landlord has a right of hypothec over *invecta et illata*.[51] Furniture is not brought on to a farm for the purposes of exploiting the farmland, and so there was a view that such items were excluded from the hypothec.[52] Equally, tools of trade in dwelling-houses could be excluded under Pothier's analysis, as indeed seems to be the position at common law:[53] such items do not exploit the dwelling-house. Where there are gaps in the law, Pothier's theory can certainly be of assistance. Would, for example, the hypothec cover the personal effects of a tenant (such as a briefcase or watch)[54] brought each day into commercial premises? Such items are not permanent features, not consumed there, and do not furnish the premises. As they do not therefore exploit commercial premises, they are presumably excluded from the hypothec. Attractive as it is, however, Pothier's theory does not solve every problem. In particular, it cannot explain why certain goods are excluded from the hypothec despite being used to exploit the leased premises. A leased warehouse, for example, is exploited by use as a storage facility, but

[47] Pothier, *Lease* §245. This is similar to Domat's theory and it is likely that Pothier was influenced by him. For Domat, see J Domat, *The Civil Law in its Natural Order* (transl W Strahan, 1722) I, 372.

[48] These rules are applicable to all goods brought on to the leased premises, but "especially with regard to things which do not belong to the lessee": see Pothier, *Lease* §245.

[49] Pothier, *Lease* §§245–46.

[50] Pothier, *Lease* §249.

[51] See para 4-20 above.

[52] Hunter, *Landlord and Tenant* II, 372–73.

[53] See paras 8-02–8-05 below.

[54] It would be unlikely to include effects on the tenant.

it is settled law that the goods brought and stored there are excluded from the hypothec at common law if they are owned by a third party.[55]

(3) Identifying exceptions

7-11. Both Voet and Pothier have been used in argument before the Scottish courts in cases concerning the hypothec,[56] but their justifications have not been adopted. On the contrary, the theory behind what goods are burdened by the hypothec is largely left unexamined by the Scottish courts. Indeed, in 1917 Lord Mackenzie noted that:

> It is doubtful whether a case such as the present, which involves specialties, can be decided upon any general principle. This remark would apply to many cases involving the application of the law of hypothec.[57]

In the absence of any general theory, judgments appear to be based purely on the facts of the case.[58] Nevertheless, it is possible to identify certain grounds for the exclusion of particular goods. These grounds have similarities with aspects of the rationales provided by Voet and Pothier, but also with Roman law and statements given by the Institutional Writers. Five grounds for the exclusion of goods can be developed from the case-law and texts. Admittedly, these are predominantly brought out in cases addressing whether goods owned by someone other than the tenant are subject to the hypothec, and so are of no direct relevance today,[59] but some of them can be applied to any goods present in the leased premises. Goods excluded from the hypothec at common law are: (i) those that are not permanent plenishings; (ii) those outwith the ordinary goods found on the leased premises; (iii) those unlawfully retained by the tenant; (iv) those expressly excluded by their owner; and (v) those that a tenant does not have the right to use. Of these five grounds, numbers (iii) and (v) (and also (iv) if it concerns goods owned by a third party) are no longer of relevance today after the removal of third parties' goods from the scope of the hypothec and so will be outlined only briefly. Taken together, these grounds are more refined than the general statements provided by Voet and Pothier. They also suggest that it will take a highly unusual use, a plainly temporary presence, or a clear lack of a right to use by the tenant, to exclude an item from the subject-matter of the hypothec.

7-12. Unfortunately, there appears to be no single thread connecting the five exceptions, but exception (i) can be grouped with (ii), and exception (iii) with

[55] This is because the tenant has no right to use the items. For more on this, see paras 7-39 and 7-40 below.

[56] *Jaffray v Carrick* (1836) 15 S 43; *Dundee Corporation v Marr* 1971 SC 96.

[57] *Edinburgh Albert Buildings Company Ltd v General Guarantee Corporation Ltd* 1917 SC 239 at 245 per Lord Mackenzie.

[58] *Henderson v Young* (1928) 44 Sh Ct Rep 170 at 175 per Sheriff Brown.

[59] See paras 4-44–4-54 above.

(iv) and (v). Items that are neither permanent plenishings (ground (i)) nor within the ordinary goods found on the leased premises (ground (ii)) can be said to be outwith the definition of *invecta et illata*. Although the literal definition of *invecta et illata* includes all items brought in, it appears, in Scots law, only to encompass goods deemed to *plenish* the premises. Indeed, one of the key rights connected with the hypothec is the ability to obtain a plenishing order.[60] Not all goods qualify. Items present fleetingly or outwith those ordinarily expected in premises of the type in question do not come within the definition of plenishings and are not caught by the hypothec.[61]

7-13. It can be asked why the hypothec does not simply cover all goods brought into the premises. A possible answer lies in the nature of the hypothec as a security implied into the agreement between the landlord and tenant. Arguably, goods caught by grounds (i) and (ii) are not of a kind a landlord would expect to find in the premises and hence to rely upon as security for his rent. As one sheriff put it, the hypothec does not cover goods which are "of the nature of additional adjuncts to furniture, such as the landlord had no right to rely on for the plenishing of the premises".[62] On this basis, the hypothec's subject-matter is tied to those items a landlord may expect to find (and thus rely on as security), taking into consideration the nature of the premises and the nature of the lease. A landlord would not rely on goods that are far removed from those items expected to be in the premises in question, or those with a merely fleeting presence in the premises. Of course, the hypothec is not based upon a term implied in fact and so the expectation of the landlord would have to be assessed objectively.[63] Any landlord's particular knowledge (or lack of knowledge) of goods situated in the leased premises has no effect on the extent of the hypothec.[64]

7-14. Rather than being exceptions to the general rule, therefore, grounds (i) and (ii) can be viewed as defining that rule, and as so defined the rule is that the hypothec covers only those items *brought in by the tenant which are deemed to plenish the subjects let*. A reformulation of the general rule, that everything

[60] See paras 10-02–10-15 below.

[61] This is similar to the French concept, undoubtedly influenced by Domat and Pothier, that the *privilège du bailleur* covers only those goods that "garnissent" the premises in question and not the goods present in the premises only accidentally: see L Aynès and P Crocq, *Droit des sûretés*, 12th edn (2018) 354–55.

[62] *The Salter Typewriter Co v Lightbody* (1909) 25 Sh Ct Rep 197 at 198 per Sheriff Scott Brown. See also M Planiol, *Treatise on the Civil Law* (transl Louisiana State Law Institute, 1939) §2468.

[63] See paras 5-05 and 5-06 above for a brief discussion of the hypothec as an implied term in the contract of lease.

[64] If an item was excluded from the scope of the hypothec, a pledge could be used. Of course, this would require the landlord to take possession of the goods (unless or until the proposed statutory pledge is introduced). For the proposed statutory pledge, see Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017).

brought in is burdened by the hypothec, is therefore possible. This reformulation would concentrate on defining the goods that *plenish* the premises. *Plenishings* would include all goods "permanently" brought into the leased premises that are of the type ordinarily expected in premises of that type. This would bring the law of Scotland close to the French rule as described by Planiol. In his *Treatise on The Civil Law*, he writes that "[t]he law accords the privilege, that is to say, recognizes the existence of the tacit pledge 'on that which furnishes' the premises let".[65] He subsequently writes that: "[t]here are in fact objects found on the rented premises which do not form part of the 'furnishings' . . . They consider as furnishing the house or the farm all that serves for its exploitation, for its convenience or its agreeableness . . ."[66]

7-15. Nonetheless, as a matter of exposition, it is simpler to define the hypothec's subject-matter as all goods brought into the leased premises subject to exceptions. Describing grounds (i) and (ii) as exceptions demonstrates the all-encompassing effect of the hypothec, for in truth the grounds rarely apply. Importantly, this method of proceeding also reflects the onus of proof, for there is a presumption that all goods will be subject to the hypothec if they are brought on to the premises and it is for their owner (whether the tenant or third party) to prove otherwise.[67]

7-16. Grounds (iii), (iv), and (v) seem to have developed from the understanding that the hypothec's coverage of third parties' goods was a result of consent.[68] They are all examples of where the third party cannot be said to have consented. It seems better, however, to describe these grounds as resting upon principles of fairness rather than describing them as examples of the lack of consent from the third-party owner of the goods in question.[69] Lord Deas thought that goods could be excluded from the ambit of the hypothec because "[i]n many cases the application of the rule [that whatever is brought into a house is liable to the hypothec] would be quite unjust and unreasonable".[70] The law will therefore restrict the hypothec in certain circumstances. Not allowing a landlord to take advantage of the unlawful acts of his tenant is an obvious example. Nor will the law allow a landlord to take a security over goods someone has deposited with his tenant for safe-keeping or pledged for security.

[65] Planiol, *Civil law* §2468.

[66] Planiol, *Civil law* §2468.

[67] This follows the discussion in para 4-53 above.

[68] For this, see paras 4-46–4-48 above.

[69] This is because the theory that the third party consented to its goods becoming subject to the hypothec was inadequate: see paras 4-46–4-48 above.

[70] *Nelmes & Co v Ewing* (1883) 11 R 193 at 196 per Lord Deas.

D. THE FIVE EXCEPTIONS

(1) The first exception: lack of permanency

7-17. The first ground for the exclusion of goods is that they are present for a merely temporary period. In comparison to Roman-Dutch and South African law (where goods are excluded unless there is an intention for them to remain there for a substantial period of time),[71] the degree of permanency required before items are subject to the hypothec is minimal. A time limit on the tenant's possession (as with a hire agreement) is insufficient to exclude it from the hypothec. Put another way, goods are only excluded if they are fleetingly present on the leased premises; if they are present for longer than a brief period, they are included. The inclusion of stock-in-trade is one example of this. Another is derived from *Scottish & Newcastle Breweries Ltd v Edinburgh District Council*,[72] where kegs owned by a brewery, but situated in a pub, were held subject to the hypothec. This decision was reached notwithstanding that the kegs were not hired by the pub, that they were intended to be in the leased premises only temporarily, that the tenant was unable to sell them, and that they were collected by the brewery at regular intervals.

7-18. Although the requirement of permanency is not therefore as important or as demanding as some have suggested,[73] items present only for a fleeting period will be excluded. Lord Deas, for example, said that hired items brought into a house for a dinner party are not subject to the hypothec.[74] Inevitably, "on the question of permanency very fine distinctions may have to be drawn",[75] but likely to be excluded would be, for example, an employer's tools taken home at night to an employee's home. That seems untypical because, if the case-law is any guide, the exception will hardly ever apply. In only one reported decision – *Mossgiel SS Co v AA Stewart & Others* – have goods been excluded from the hypothec due to a lack of permanency.[76] This case also addressed the ranking of the hypothec with a shipmaster's lien.[77] Various items were kept in a dwelling-house leased by Mr Pilone. Wishing to return to Italy he entered into a contract to send his furniture to Naples with the Mossgiel Steam Shipping Company. But Mr Pilone was attempting to leave for Italy before paying his creditors in Scotland and, prior to the completion of the journey, an action was

[71] Voet, *Commentary* XX.2.5; *Goldinger's Trs v Whitelaw & Sons* 1916 TPD 230 at 240 per Bristowe J.

[72] *Scottish & Newcastle Breweries Ltd v Edinburgh District Council* 1979 SLT (Notes) 11.

[73] Voet, *Commentary* XX.2.5; Bell, *Commentaries* II, 29 and 31.

[74] *Adam v Sutherland* (1863) 2 M 6 at 8 per Lord Deas.

[75] *Goldinger's Trs v Whitelaw & Sons* 1916 TPD 230 at 240 per Bristowe J. This was, of course, in relation to goods owned by a third party.

[76] *Mossgiel SS Co v AA Stewart & Others* (1900) 16 Sh Ct Rep 289.

[77] Discussed in A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) para 16-39 and below at para 9-64.

raised for a warrant to carry back and sequestrate the items previously in the dwelling-house. This prompted Mossgiel to return the furniture to Scotland, after which the items were placed back in the dwelling-house. The furniture had been obtained on hire-purchase from various dealers, in particular Messrs Jay & Co, and Messrs Brown, Barker & Bell. The sheriff-substitute found that the furniture obtained from Messrs Brown, Barker & Bell had only recently been acquired by Mr Pilone, was placed in the house on 30 June 1899, and removed on 4 July 1899 for transportation to Naples. The leased premises were only used as a storage facility for them. It was the sheriff-substitute's view, applying Lord Deas' opinion (given above), that the items acquired from Messrs Brown, Barker & Bell were excluded from the hypothec. He concluded that:

> Before furniture can be so regarded [within the *invecta et illata*] it must be used and dealt with as plenishing, and relied on by the landlord as a security for the rent. Articles merely stored or deposited in the house or taken there for a casual or transient purpose do not fall within the hypothec.[78]

Conversely, the furniture obtained from Messrs Jay & Co was held to be subject to the hypothec, albeit postponed to the shipmaster's lien. This case demonstrates the hypothec's restriction to those goods a landlord is deemed to rely on for security – items "used and dealt with as plenishing". As the goods were intended to be stored in the house for a short period of four days, they could not be said to plenish the premises.

7-19. There is unfortunately little guidance in the case-law on the question of how short a period will result in the exclusion of goods from the ambit of the hypothec.[79] Arguably, duration is judged according to the nature of the goods. Furniture, for example, is generally present in a dwelling-house for a prolonged period of time and if it is proved that it is intended to be removed after only a few days, it will be excluded from the hypothec. Stock, however, does not last nearly so long and so will be caught by the hypothec although intended to be in the premises for only a short period. Whilst a car that is regularly brought into the leased premises may become subject to a right of hypothec, a car brought on only once and for a very short period of time would probably not be caught.

(2) The second exception: outwith the ordinary goods

7-20. A second category of exclusion is for goods outwith the ordinary items found in the type of premises in question. Admittedly, there are not many cases addressing this exclusion, but there are several statements that appear to refer to

[78] (1900) 16 Sh Ct Rep 289 at 300 per Sheriff-substitute Strachan.

[79] The duration of the kegs' presence in the premises in *Scottish & Newcastle Breweries Ltd v Edinburgh District Council* 1979 SLT (Notes) 11 was not addressed in the averments.

such a rule.[80] In *Dundee Corporation v Marr*,[81] the third-party owner of a juke box had argued that it was outwith the ordinary and necessary furnishings of the premises let and so excluded from the hypothec. Although in the event no evidence was led, Lord President Clyde did not reject the possibility of this being a ground of exclusion.[82] In addressing why certain items were excluded from the hypothec, Lord Clyde attributed their exclusion to "some unusual incident in the course of the tenant's occupation of the premises".[83] Sheriff Barclay, in a case in 1881 that discussed sewing machines in a dwelling-house, stated that:

> The landlord not only attaches the effects of a tenant as being the *property* of the tenant, but in addition these effects must have been brought into the particular premises for which rent is claimed. The landlord of a dwelling-house has a preference over ordinary creditors of the tenant so far at least as the necessary and usual furnishing of the house is concerned. He may regard as his security what is essential to tenancy – *bed and board*. It is not so evident that he is entitled to look to mere articles of luxury, such as musical instruments and other suchlike articles, which rank neither amongst the class of 'household gods or household goods'.[84]

Likewise, Sheriff Brown, 14 years later, wrote that:

> The hypothecary right of the landlord, however, does not depend on contract as to furniture or other articles brought into the house; it primarily includes everything taken into it intended for and reasonably adapted to the use for which the subject is let, being an inherent condition of the relation between landlord and tenant.[85]

7-21. These cases were concerned with whether the hypothec covered items owned by a third party, but there is nothing that would prevent the general principle identified there being applied to goods owned by the tenant.[86] Indeed, an exclusion from the hypothec for goods outwith the norm has some similarity to Pothier's exploitation theory. Pothier writes that only those goods that "exploit" the leased premises are subject to the hypothec, and this rule is not restricted to goods not owned by the tenant.[87] It could, for example, be argued that goods other than ordinary furniture do not "exploit" a dwelling-house. Furthermore, there is a general acceptance that the type of goods burdened by the hypothec

[80] See, for example, *Lawsons Ltd v The Avon India-Rubber Co Ltd* (1915) 2 SLT 327; W M Gloag, "Hypothec", in J L Wark et al (eds), *Encyclopaedia of the Law of Scotland* Vol 8 (1929) para 13, which states that "ordinary household furniture" is burdened by the hypothec.

[81] *Dundee Corporation v Marr* 1971 SC 96.

[82] 1971 SC 96 at 101 per Lord President Clyde.

[83] 1971 SC 96 at 101 per Lord President Clyde.

[84] *Milne v The Singer Sewing Machine Co* (1881) 25 JJ 499 at 501 per Sheriff Barclay.

[85] *Middleton v Macbeth* (1895) 11 Sh Ct Rep 9 at 12 per Sheriff Brown.

[86] A tenant would have had less reason to challenge a landlord who claimed a right of hypothec because his goods were likely to be sold anyway. An insolvency practitioner, however, may challenge a landlord's claim. For the hypothec's effect upon the tenant's insolvency, see chapter 11 below.

[87] Pothier, *Lease* §245.

will vary according to the premises in question. Perhaps hinting at this, Stair states that the hypothec covers "all the *proper* goods of the possessor, which are brought into the house, close or gardens, for the use thereof; as all household-furniture, ornaments, and utensils".[88] He appears, however, to use "proper goods" to signify those goods owned by the tenant,[89] and so he does not provide much help in this context. Bankton and Bell provide more. Bankton writes that "such goods as are there . . . accidentally, and not for the use of the house, are not subjected" to the hypothec.[90] Goods for sale are also excluded from the *invecta et illata* by Bankton. According to Bell, the hypothec only covers certain items, because "[t]he credit is placed upon the furniture *usual and proper* to a house fit for habitation".[91] When describing the extent of the hypothec for house-rent, George Lyon concludes that it covers "every article *used as household furniture*, whether belonging to the tenant or not".[92] Whilst, however, there are a plethora of references to the hypothec covering only those goods that are "proper" or "usual", no actual examples are given of items that are included or excluded on these grounds. The distinction is a challenging one, and goods deemed "proper" will inevitably change according to the nature of the premises.

7-22. What a landlord would expect to find can be brought out by the rule that prevents a tenant from inverting his possession of the premises. A tenant is said to invert the possession (which is a breach of the lease) if he uses the premises in a way that is contrary to the intention of the parties.[93] So, land leased as a farm cannot be used as an ale-house,[94] and premises leased as a shop and dwelling-house cannot be used to keep a horse.[95] This is because a tenant cannot go beyond the use deemed suitable for the "general character of the premises".[96] A farm tenant is not entitled to bring on to the land machinery that is not within the nature of the premises. He would also not be entitled to build "houses for machinery or workmen".[97] When a tenant inverts the possession of the premises by bringing in items he should not, it is unlikely that the landlord will have a right of hypothec over them.

[88] Stair IV.25.3 (emphasis added).

[89] For example, when discussing restitution, Stair writes that "The obligations, whereby men are holden to restore the proper goods of others, are placed here among natural or obediential obligations": Stair I.7.1.

[90] Bankton I.17.10 (vol I, 386–87).

[91] Bell, *Commentaries* II, 29; emphasis added.

[92] G Lyon, *Elements of Scots Law, in the Form of Question and Answer; with a Copious Appendix* (1832) 32; emphasis added. At another point in his text (241), however, Lyon states that the hypothec covers "[h]ousehold furniture, and every thing belonging to the tenant".

[93] *Ford v Hillocks* 20 May 1808 FC; R Bell, *A Treatise on Leases: explaining the nature, form, and effect of the contract of lease, and the legal rights of the parties*, 4th edn (1825) II, 342; Rankine, *Leases* 236.

[94] *Miln v Mitchell* (1787) Mor 15254.

[95] *Hood v Miller* (1855) 17 D 411.

[96] (1855) 17 D 411 at 415 per Lord Justice-Clerk Hope.

[97] *Ford v Hillocks* 20 May 1808 FC.

7-23. The goods a landlord can rely upon will vary according to the nature of the premises and the use permitted by the lease. Importantly, however, goods have to be exceptionally uncommon not to be of the kind expected in the premises and so excluded from the hypothec. The type of goods a landlord would expect to find in leased premises is thus a wide category. For example, in a dwelling-house, a landlord can expect to find a variety of items of furniture but would not expect large quantities of stock intended for sale.[98]

7-24. That a high barrier has to be met before goods can be excluded from the hypothec is demonstrated by a series of cases concerning typewriters hired to a tenant. First, there was *Smith Premier Typewriter Co v Cotton*,[99] where the court was asked whether a typewriter was a teacher's tool of trade (on which more is written elsewhere in this book),[100] and whether it was within the definition of *invecta et illata* of commercial premises let as a language school. One issue was whether the hypothec covered goods owned by a third party,[101] but the main point for current purposes was the acceptance that a typewriter is "an ordinary and usual part of the furniture of a teacher". The same conclusion was reached three years later in *The Salter Typewriter Co v Lightbody* (but, here, the sheriff held that the typewriter was exempt from the hypothec on the ground that it was the tenant's tool of trade).[102] Against this is the case of *Yost Typewriter Co Ltd v MacSorley*, where a typewriter within a dwelling-house was held to be excluded from the hypothec. The sheriff did not discuss whether it was a tool of trade but based his decision on the fact that he could not "think it can be said for a moment that a landlord who lets premises for a dwelling-house can be presumed to have had in contemplation that, if he had to sequestrate for his rent, he might expect to find a typewriter available to his diligence".[103] That view seems questionable. Typewriters, it has been said, were "as much an ordinary and necessary part of the plenishing of the house and such as the landlord is entitled to rely on for his rent".[104] But it seems that the sheriff in *Yost* was simply unwilling to find in favour of the landlord unless there was direct authority for the hypothec applying in a case that contained the same set of facts.[105] Therefore, the decision appears to be wrong.

7-25. In one unreported case a piano was held to be subject to the hypothec despite the premises being used as a restaurant because, according to the sheriff,

[98] This may change over time. It is accepted that, as people work from home more often, it may become expected that a tenant could have large amounts of stock in the house. Since the hypothec no longer applies to leases of dwelling-houses (see paras 4-38–4-43 above), this is unlikely to become an important issue.

[99] *Smith Premier Typewriter Co v Cotton* (1906) 14 SLT 764.

[100] See paras 8-02–8-05 below.

[101] For whether third parties' goods are subject to the hypothec, see paras 4-44–4-54 above.

[102] *The Salter Typewriter Co v Lightbody* (1909) 25 Sh Ct Rep 197.

[103] *Yost Typewriter Co Ltd v MacSorley* (1905) 21 Sh Ct Rep 228 at 229 per Sheriff Fyfe.

[104] Anonymous, "The typewriter" (1916) 32 Scottish Law Review 36 at 39.

[105] This fits into the general reluctance at this time to find that goods owned by a third party were subject to the hypothec. On this, see paras 4-49 and 7-05 above.

there was no qualification of the definition of plenishings and it encompassed all goods situated in the leased premises.[106] A better explanation for the decision is that the presence of a piano, although hardly standard in a restaurant, was not so unusual as to warrant its exclusion from the hypothec.

7-26. A more obvious example of an item excluded from the hypothec would be a horse kept in an ordinary house that contains no facilities for such an animal. It has never been decided whether a horse would be subject to an urban landlord's hypothec,[107] but it would appear to be excluded on account of it being an item not commonly found in premises of this kind. Where, however, the premises contained a stable, a horse brought in would be burdened.[108] A modern example would be commercial premises with a garage or a parking area; a car owned by the tenant would be subject to the hypothec as a result of the nature of the premises. Prior to the abolition of the hypothec in residential leases, it would also have covered a car parked in the driveway of a house. A boat or caravan in a driveway would likewise have been caught because, whilst they are not found outside every home, they are not so unusual as to permit their exclusion.

7-27. One case that demonstrates items that are excluded from the hypothec is *The Pulsometer Engineering Co Ltd v Gracie,*[109] where steam pumps owned by a third party were within the leased premises for the purposes of exhibiting them to potential purchasers. This case may be another example of the courts refusing to go beyond what had already been decided, especially in relation to third parties' goods. But a more general principle can be taken from the judgment. "[T]he nature of the possession of the tenant [of the pumps] here was altogether apart from that [purpose of occupation]",[110] the tenant's possession being "incidental" to his main business.[111] The pumps were undoubtedly there for the exploitation of the premises and so presumably would have been subject to the hypothec under Pothier's doctrine, but the use was in some sense "unusual" and distinct from the tenant's normal use of the premises. The tenant ran a business as a yachting agent from the leased offices, and it was not to be expected that high-value pumps would be in such premises. In the words of Sheriff Brown in a later case: "the *ratio* of the judgment [in *Pulsometer*] being that such things were not germane to the use of the subjects let, and therefore were not relied upon by the landlord as part of his security".[112]

[106] *Wilkie v Cairns*, unreported but noted in *Evening Telegraph*, 4 March 1912, 2.

[107] But it was discussed in D Stewart, *The Law of Horses* (1892) 119.

[108] Hume, *Lectures* vol IV, 26. Cattle in byres are also subject to the hypothec: see *Clark v Keir* (1888) 15 R 458.

[109] *The Pulsometer Engineering Co Ltd v Gracie* (1887) 3 Sh Ct Rep 117, affd (1887) 14 R 316.

[110] (1887) 14 R 316 at 318 per Lord Justice-Clerk Moncreiff.

[111] (1887) 14 R 316 at 318 per Lord Justice-Clerk Moncreiff.

[112] *Middleton v Macbeth* (1895) 11 Sh Ct Rep 9 at 12 per Sheriff Brown.

7-28. The decision may be contrasted with *The Lu-mi-num Cycle Co v Goldie*,[113] where bicycles not owned by the tenant were held subject to the hypothec because the premises were used as a shop to sell bicycles. Although most commentaries treat the fact that the tenant "was an agent for sale and not simply an agent to exhibit samples" as the factor that distinguished *Lu-mi-num* from *Pulsometer*,[114] it is clear that the presence of bicycles in the premises was normal and they were not "incidental to that business he undertakes".[115] As the premises were normally used – and expected to be normally used – to sell bicycles, the hypothec covered the bicycles. There is also South African authority that distinguishes between items that form a part of the "tenant's general stock in trade" and items used in the course of an "isolated transaction made for some special purpose".[116] The latter would be excluded from the hypothec. This, it is contended, is because they are outwith the ordinary goods to be expected by the landlord to be found in premises of that kind.

7-29. The test here operates independently of the landlord's state of knowledge. Instead of the landlord being required to know of the presence of actual goods in the premises, the hypothec arises in respect of all those goods that a reasonable landlord may expect to find. This would take account both of the nature of the premises and the nature of the lease. On this basis, stock deposited in a dwelling-house would be excluded. These items are present on the leased premises for a use unusual for the nature of the premises; and, of course, the use of a dwelling-house as a shop would be an inversion of the possession.[117] Even if the landlord were aware of the goods this would still not bring them within the hypothec.

7-30. Developing this further, it is possible to ask whether furniture in a house in excess of the ordinary and usual level would be excluded from the hypothec. It was reported of a case from 1748 that:

> Mean time the Court was clear, that as in this case Keithick was a gentleman, and whose household furniture exceeded that of an ordinary tenant, in no event, be it hypothec, be it of retention, it could go further than to the *extent of such furniture as might be suitable to an ordinary tenant*.[118]

The court restricted the landlord to a preference over the value of goods that would be "proper for an ordinary tenant". This is the only authority that restricts

[113] *The Lu-mi-num Cycle Co v Goldie* (1900) 16 Sh Ct Rep 79.

[114] See *Lawson v Flint* (1915) 31 Sh Ct Rep 312; *Smith Premier Typewriting Co Ltd v Bruce* (1936) 52 Sh Ct Rep 11.

[115] *The Pulsometer Engineering Co Ltd v Gracie* (1887) 14 R 316 at 318 per Lord Justice-Clerk Moncreiff.

[116] *Goldinger's Trs v Whitelaw & Sons* 1916 TPD 230 at 237 per Mason J.

[117] But, as has been stated above at para 7-23, this may change over time if people begin to use their homes as a place of business. A difficulty may be if office supplies are found in a home. This may include computers. Although not everyone has an office at home, it is not outwith the ordinary use of the premises and so such items would, it is thought, be covered by the hypothec.

[118] *Alison v The Creditors of Campbell* (1748) Mor 6246, emphasis added.

the hypothec to the *quantity* of the goods that would be expected, and the decision may be a result of the court's difficulty in finding that the furniture of an agricultural tenant is subject to the hypothec.[119] Nevertheless, if the hypothec is restricted to those goods that are ordinary for the leased premises in question, it seems that it should also be restricted to an ordinary quantity of those goods. For example, this rule would prevent a landlord of an ordinary house from having a security over a large quantity of high-value jewellery.[120] A more modern example would be an office in which the landlord finds a large quantity of high-value computer equipment. If this was vastly over what would be expected to be found in such premises, the landlord should be restricted to those items that would ordinarily be expected.

7-31. To summarise, this ground excludes those goods that are outwith those ordinarily found in premises of the kind let. The underlying rationale is that the subject-matter of the hypothec is tied to those goods a landlord would expect to find in his premises. The threshold, however, is high, and examples of exclusion will be few and far between.

(3) The third exception: goods unlawfully retained in the premises

7-32. This third ground excluded goods held on the premises unlawfully and, as it was solely concerned with goods owned by a third party, is no longer relevant today. The clearest examples were stolen items,[121] but this ground would also have excluded goods obtained as a result of fraud or duress.[122] In one case, a piano had entered the leased premises with the consent of its owner under a hire-purchase agreement, but the tenant's continued possession was contrary to a decree ordering the piano to be returned. The sheriff held that the piano was, therefore, unaffected by the hypothec.[123] Similarly, in *Jaffray v Carrick,*[124] the hypothec was excluded because the tenant was holding his sister's furniture against a decree ordering its return.

(4) The fourth exception: goods expressly excluded by their owner

7-33. A third party was able to exclude his goods from the hypothec if he informed the landlord (before a sequestration) that the items were not owned

[119] A difficulty discussed at para 4-20 above.

[120] For discussion of whether "jewels and precious stones" are covered by the hypothec in French law, see Planiol, *Civil Law* §2468.

[121] *Dundee Corporation v Marr* 1971 SC 96 at 100 per Lord President Clyde. Generally on this, see Stewart, *Diligence* 467.

[122] *The Life Association of Scotland v Galbraith* (1893) 9 Sh Ct Rep 178.

[123] *John C McKellar Ltd v Crane & Sons Ltd* (1903) 19 Sh Ct Rep 3.

[124] *Jaffray v Carrick* (1836) 15 S 43. See also: Pothier, *Lease* §243; Bell, *Principles* §1276; Hume, *Lectures* vol IV, 24; Hunter, *Landlord and Tenant* II, 379.

by the tenant and should not be relied upon as security for rent.[125] Importantly, however, the third party did not need to obtain the agreement of the landlord, and notice alone was sufficient.[126] This is consistent with the view that the hypothec over third parties' goods arose from the reputed ownership of the tenant or the implied consent of the third party.[127] If the third party rebutted the reputed ownership of the tenant or presumption of consent, there was no ground on which there could be a right of hypothec.

7-34. The fact that a landlord knew goods to belong to a third party did not prevent the goods from being burdened by the hypothec.[128] Nor, seemingly, did an agreement between the third party and tenant.[129] If the landlord was aware of that agreement (but had not received a formal notification of it), it was unclear if the hypothec was excluded. According to Lord President Clyde in *Dundee Corporation v Marr*, the "arrangement would require to have been intimated to the landlords" before it was effectual to exclude the hypothec.[130] Lord President Clyde's view weakened the theory that the hypothec covered third parties' goods on the basis of reputed ownership. This may point us in the direction of Lord Migdale's view, which was that the hypothec was excluded if the landlord "knows of that agreement" between the tenant and the third-party owner.[131] It seems that Lord President's Clyde's view was the stronger of the two. This was consistent with the case-law to the effect that third parties' goods were still subject to the hypothec even if the landlord knew that they were owned by someone other than the tenant.

7-35. A third party's goods were, it seems, subject to the hypothec even if the third party was unaware (and could not have been aware) of their presence in the leased premises.[132] Although South African law requires that the third-party owner knew that the goods were on the premises (or could have easily discovered their presence),[133] there was never any such requirement in Scotland.

[125] *J Marr Wood & Co Ltd v Wishart* (1905) 21 Sh Ct Rep 128; *Orr v Jay & Co* (1911) 27 Sh Ct Rep 158; *Smith v Po* (1931) 47 Sh Ct Rep 141 at 144 per Sheriff Neish; *Dundee Corporation v Marr* 1971 SC 96. A difficulty would have arisen if the landlord had been notified but subsequently transferred his right to a third party. It seems plausible that a notification to a landlord would bind any successor, but there was no authority confirming or rejecting this.

[126] Cf A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.61; Gow, *Mercantile Law* 299; J J Gow, *The Law of Hire-Purchase in Scotland*, 2nd edn (1968) 204.

[127] See paras 4-46–4-48 above.

[128] *Smith v Po* (1931) 47 Sh Ct Rep 141 at 144 per Sheriff Neish. A different result has been reached in South Africa: see *Paradise Lost Properties (PTY) Ltd v Standard Bank of South Africa Ltd* 1997 (2) SA 815, affd 1998 (4) SA 1030 (N).

[129] *Jaffray v Carrick* (1836) 15 S 43 at 45 per Lord Moncreiff; *Dundee Corporation v Marr* 1971 SC 96 at 101 per Lord President Clyde; Pothier, *Lease* §242; Planiol, *Civil Law* §2470.

[130] *Dundee Corporation v Marr* 1971 SC 96 at 101 per Lord President Clyde. See also at 109 per Lord Cameron.

[131] 1971 SC 96 at 105 per Lord Migdale.

[132] *Algie v Sinclair* (1901) 17 Sh Ct Rep 107.

[133] *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266; *Fresh Meat Supply Co v Standard*

Indeed, even if the owner stipulated that the goods were to remain on particular premises, this did not prevent them becoming subject to the hypothec if moved to leased premises.[134] This weakened the argument that the hypothec's coverage of third parties' goods was founded on the third parties' consent.

7-36. In principle, as just explained, the scope of the landlord's right of hypothec was unaffected by an agreement between the third-party owner and the tenant. Two cases cast doubt on this statement. One was *Singer Sewing Machine Co v Hunter & Others*,[135] where a sewing machine was hired to a Mrs Lee on the basis that it remained in her possession. In breach of this agreement, Mrs Lee lent the machine to her son-in-law. When moved to his house, it became subject to a sequestration for rent brought by his landlord. As it was lent in breach of the contract between the machine's owner and Mrs Lee, the sheriff excluded it from the hypothec. In reaching that conclusion, the sheriff relied on the 1808 Court of Session case of *Gow & Shepherd v Anderson,*[136] which involved a similar set of facts. Gow and Shepherd had hired a piano to a man who subsequently gave it to a tenant, a Mrs Anderson. This was done without the consent of Gow and Shepherd. It was held that the piano was not subject to the hypothec of Mrs Anderson's landlord and that Gow and Shepherd could vindicate their property. On an initial reading, it appears that these two cases are examples of the hypothec being excluded by a term in a contract between the third-party owner and the tenant; but in fact they fall within the fifth exclusion (discussed below) which states that the hypothec does not cover goods that the tenant has no right to use. Neither Mrs Lee's son-in-law nor Mrs Anderson was given the right to use the goods by their owners. On this basis, these cases do not weaken the principle that a contract between the tenant and third-party owner could not in itself remove items owned by the third party from the hypothec. If the tenant had breached the hire agreement with the goods' owner by moving the items into leased premises, the hypothec would have attached to the goods nonetheless.

7-37. If goods owned by someone other than the tenant could be excluded from the hypothec by giving notice to the landlord, it seems possible that the same principle could – and can still – be applied to items owned by the tenant himself. Yet, when compared to a third party, a tenant is plainly in a different position *vis-à-vis* the landlord. If a landlord received notice from a *third party* that his goods were not to be included within the hypothec there was recourse against the tenant. A plenishing order could be obtained to require the premises

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Trading Co (Pty) Ltd 1933 CPD 550. See also: W E Cooper, *Landlord and Tenant*, 2nd edn (1994) 185; R Brits, *Real Security Law* (2016) 458; G Wille, *Landlord and Tenant in South Africa*, 5th edn (1956) 201; A J van der Walt and N S Siphuma, "Extending the lessor's tacit hypothec to third parties' property" (2016) 132 SALJ 518 at 526.

[134] *Algie v Sinclair* (1901) 17 Sh Ct Rep 107 at 108 per Sheriff Strachan.

[135] *Singer Sewing Machine Co Ltd v Hunter & Others* (1910) 26 Sh Ct Rep 170.

[136] *Gow & Shepherd v Anderson* (1808) Hume 517.

to be furnished with goods sufficient to secure the rent.[137] By contrast, if a *tenant* is able to exclude items from the hypothec by a simple notice to the landlord (in the same manner as a third party), this would remove the strength of any plenishing order and leave the landlord in a weakened position. But the strongest ground for requiring the agreement of both the landlord and tenant is that there is a contractual relationship between the two, and it is from this relationship that the hypothec arises. The hypothec does not arise from the presumed consent of the parties, unlike the widely-accepted theory behind the hypothec's effect on third parties' goods, but rather rests upon a term implied in law,[138] and therefore needs the agreement of both parties to amend.

7-38. Having agreed with a landlord on the exclusion of certain goods, a tenant may be concerned about whether the agreement would bind a successor landlord or an assignee of the hypothec. This has already been discussed elsewhere.[139]

(5) The fifth exclusion: absence of a right of use

7-39. The final common-law ground of exclusion was based on the tenant's lack of a right to use goods within the leased premises. As with the previous two grounds, it ceased to be relevant after the exclusion of third parties' goods in the Bankruptcy and Diligence etc (Scotland) Act 2007.[140] Only a brief treatment need be given here.

7-40. Where the tenant had the right to use the goods of others, as in *Scottish & Newcastle Breweries Ltd v Edinburgh District Council,*[141] or where the tenant possessed the goods under a contract of hire or gratuitous loan,[142] they were subject to the hypothec unless another ground of exclusion could be found. What was important was the right to use rather than actual use, so that goods stored in an attic were as subject to the hypothec as goods in everyday use. Goods the use of which was shared by the tenant and another occupant of the premises were, equally, subject to the hypothec. For example, if it could be shown that a tenant used an item owned by his spouse, it would have been

[137] This was the sheriff's argument in *Orr v Jay & Co* (1911) 27 Sh Ct Rep 158 at 160 per Sheriff Davidson. For plenishing orders, see paras 10-02–10-15 below.

[138] See paras 5-05 and 5-06 above.

[139] See paras 6-06–6-13 above.

[140] See para 4-53 above.

[141] *Scottish & Newcastle Breweries Ltd v Edinburgh District Council* 1979 SLT (Notes) 11.

[142] *Dundee Corporation v Marr* 1971 SC 96 (for hire); *Wilson v Spankie* 17 December 1813 FC (for gratuitous loan). Where the hire agreement had come to an end or was validly terminated by the goods' owner, the goods could be removed from the premises unburdened by the hypothec: *Novacold v Fridge Freight (Fyvie) Ltd (in receivership)* 1999 SCLR 409 at 412 per Sheriff Principal Risk QC.

subject to the hypothec because the tenant was given the right of use.[143] But in the absence of the tenant's right to use any particular good, the hypothec could not affect it.[144] Examples were items brought in by a lodger,[145] or pledged,[146] or deposited with a tenant.[147] Above all, it excluded items given to a tenant in way of his trade as a repairer. This was because the mere right to control goods or benefit from their presence was not viewed as conferring a right of use.[148]

[143] This is one view of the decision in *Middleton v Macbeth* (1895) 11 Sh Ct Rep 9. Where the tenant had no right to use the goods, they were excluded: see *Crawford v McDonald* (1898) 14 Sh Ct Rep 243; *Simpson v Wilkieson* (1902) 18 Sh Ct Rep 318.

[144] This can be seen in the Outer House decision of *Rossleigh Ltd v Leader Cars Ltd* 1987 SLT 355. In this case, the goods were transferred to a third party and so the tenant no longer had a right to use the goods. They were, therefore, excluded from the hypothec. The termination of a contract of lease or hire-purchase by the owner of the goods did not result in the tenant holding the goods against the wishes of the owner: J J Gow, *The Law of Hire-Purchase in Scotland*, 2nd edn (1968) 204–05. Presumably an action for the delivery of the goods by the tenant would have been required.

[145] *Bell v Andrews* (1885) 12 R 961; *Gardner's Trs v Kerr* (1899) 15 Sh Ct Rep 100 at 103 per Sheriff Strachan; *Algie v Sinclair* (1901) 17 Sh Ct Rep 107; *Kerr v Sim* (1908) 24 Sh Ct Rep 151; *Watson v Dobbie* (1910) 26 Sh Ct Rep 317; *Henderson v Young* (1928) 44 Sh Ct Rep 170; Rankine, *Leases* 378. A lodger should be taken to include family members of the tenant who may – or may not – contribute to the running of the household. This rule is likely to have been brought into Scots law from France: see J Domat, *The Civil Law in its Natural Order* (transl W Strahan, 1722) I, 372.

[146] Pothier, *Lease* §246.

[147] Pothier, *Lease* §245; Rankine, *Leases* 378–79; Paton and Cameron, *Landlord and Tenant* 206.

[148] See the South African case of *Van den Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237 at 239 per Curlewis JA.

8 Subject-matter (2): Special Part

PARA

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A. INTRODUCTION

8-01. As set out in the previous chapter, everything brought into leased premises is covered by the hypothec, subject to certain exceptions. Whilst, however, the subject-matter of the hypothec is clarified by the application of these principles, the case-law highlights some outlying issues that remain problematic. These anomalies may be caused by a lack of understanding of the general principles, a shortage of authority, or the influence of underlying policy considerations. The position of implements of trade can be resolved by placing them correctly within the general principles, as we will see, but incorporeal property sits outside these principles and a different approach must be taken. These outliers will be the subject of this chapter.

B. IMPLEMENTS OF TRADE

8-02. If the general rule explained in the previous chapter is followed, all stock-in-trade, tools and machinery within commercial premises are subject to the hypothec. None of the Institutional Writers, or Hunter and Rankine, exclude them from the hypothec.[1] After the Bankruptcy and Diligence etc (Scotland) Act

[1] As discussed in T M Stewart, "Hypothec and tools of trade" (1896) 12 Scottish Law Review 176.

2007, we are now only concerned with commercial premises,[2] but the position of the hypothec over tools of trade in dwelling-houses was never clear and this uncertainty seems to have spilled over to the law concerning commercial premises.

8-03. The uncertainty may be demonstrated by two sheriff court decisions from the early twentieth century. In *Smith Premier Typewriter Co v Cotton* a teacher brought a hired typewriter on to premises he had leased for the purpose of carrying out his business.[3] Whilst it was held that the typewriter had been properly included in a sequestration for rent, an exception was suggested for tools of trade deemed necessary for a tenant's business (which the typewriter was not). Rankine and Graham Stewart, however, were unequivocal in including "instruments of trade" within the hypothec if contained within business premises,[4] which must be taken to include an office or a school of the kind considered in *Smith Premier Typewriter Co*.

8-04. Being neither temporary plenishings nor outwith the ordinary goods found in commercial premises, instruments of trade do not fall within two of the main exceptions mentioned in the previous chapter. The latter point was accepted by the sheriff in *The Salter Typewriter Co v Lightbody*,[5] where it was found that a typewriter was one of the "indispensable adjuncts to the plenishing [of a commercial college], and the landlord was entitled to expect to find such upon the premises, and to rely upon them as security for his rent".[6] Despite this view, the sheriff felt compelled to follow the earlier case of *Wright v Kemp*,[7] a decision which held that a sewing machine was excluded from the hypothec. The typewriter was therefore excluded. *Wright*, however, concerned a dwelling-house rather than commercial premises and therefore should have been distinguished.[8] It is more arguable that a typewriter in a dwelling-house is outwith the ordinary goods found in premises of that type.[9] But, if brought into commercial premises, tools of trade are, under the common law, subject to the hypothec. To find otherwise would diminish the landlord's hypothec, in some cases leaving it with no substance at all.

[2] The hypothec having been abolished in respect of agricultural leases (para 4-34) and leases of dwelling-houses (para 4-43).

[3] *Smith Premier Typewriter Co v Cotton* (1906) 14 SLT 764.

[4] J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 378; J G Stewart, *A Treatise on the Law of Diligence* (1898) 466. See also G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 202.

[5] *The Salter Typewriter Co v Lightbody* (1909) 25 Sh Ct Rep 197.

[6] (1909) 25 Sh Ct Rep 197 at 199 per Sheriff Scott Brown.

[7] *Wright v Kemp* (1896) 4 SLT 16, (1896) 12 Sh Ct Rep 180, where the sheriff followed *Moore v McKean* (1895) 11 Sh Ct Rep 231.

[8] Tools of trade within dwelling-houses were removed from the ambit of the hypothec by the House Letting and Rating (Scotland) Act 1911. On this, see paras 4-40–4-42 above.

[9] Arguable but surely not correct.

8-05. This is not the end of the matter, however. Section 11(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 lists certain items that are exempt from attachment and the hypothec.[10] Included within this list are:

(a) any implements, tools of trade, books or other equipment reasonably required for the use of the debtor in the practice of the debtor's profession, trade or business and not exceeding in aggregate value £1,000 or such amount as may be prescribed in regulations made by the Scottish Ministers;
(b) any vehicle, the use of which is so reasonably required by the debtor, not exceeding in value £3,000 or such amount as may be prescribed in regulations made by the Scottish Ministers.[11]

If a tenant company has entered liquidation or otherwise ceased business, it will no longer "reasonably require" the tools of trade or other equipment for its business and so they ought to be subject to the hypothec, even if the business is sold in its entirety to another company and resumes trading. Administration, however, is different as the tenant company will still require equipment and tools to continue trading.[12] When a natural person has been sequestrated and carries on a business from commercial premises it is likely that the business will end upon the bankruptcy. Nevertheless, it would appear that any tools or equipment up to the value of £1,000 (or vehicle up to the value of £3,000) would be exempt from the hypothec because a bankrupt tenant will still reasonably require tools post-bankruptcy, when a new business can start trading.

C. INCORPOREAL PROPERTY

(1) Introduction

8-06. That the hypothec might burden certain limited types of incorporeal property might seem surprising.[13] Such things are not capable of possession and

[10] Applied to the landlord's hypothec by s 60(2) of the Debt Arrangement and Attachment (Scotland) Act 2002. Cf D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 438, stating that s 11 of the Debt Arrangement and Attachment (Scotland) Act 2002 excluded items from sequestration for rent and continues to apply to the hypothec only when it is enforced by attachment. This, however, is not correct. Section 60(2) of the 2002 Act states that the goods included in s 11(1) cannot become subject to the landlord's hypothec.

[11] When enacted, the value of a vehicle exempt from attachment and the landlord's hypothec was £1000. This was raised to £3000 by reg 4 of the Bankruptcy (Scotland) Amendment Regulations 2010, SSI 2010/367, which came into force on 15 November 2010.

[12] For the effects of the different insolvency proceedings, see chapter 11 below.

[13] But, as the solicitor's hypothec shows, Scots law is not unfamiliar with the concept of security rights over incorporeal moveable property. This, however, is viewed as an implied assignation to the solicitor of the client's right rather than the creation of a subordinate real right in favour of the solicitor. On this, see A J Sim, "Rights in security over moveables", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 20 (1991) paras 103–107.

cannot, it seems, be attached through sequestration for rent. Yet there is some authority for incorporeals being burdened by the hypothec. Debts, having no physical presence, cannot be "brought into" the leased premises so the general principle and exceptions set out in the previous chapter are of no assistance. Therefore, if the hypothec does cover certain types of incorporeal property, these form a category of their own.

8-07. This possibility, such as it is, is unaffected by the reforms contained within section 208 of the Bankruptcy and Diligence etc (Scotland) Act 2007. Section 208(2)(a) states that "the landlord's hypothec (a) continues . . . as a right in security over corporeal moveable property kept in or on the subjects let . . ." This might seem to remove the possibility of the hypothec covering incorporeal property, but there is no positive assertion that the hypothec is a "right in security over corporeal moveable property" and over nothing else. The legislature seems not to have intended to remove incorporeal moveable property from the ambit of the hypothec. Both the Scottish Executive (as it then was) and the Scottish Parliament appear to have been completely unaware of the possibility that some types of incorporeal property might be covered.[14] It was their aim to preserve the hypothec and the "preference in any ranking process relating to property over which it confers a security".[15] Thus, if a landlord has a right against incorporeal moveable property, this right has not been extinguished by the 2007 Act.

8-08. Scotland, if it does accept that the hypothec covers incorporeal property, would appear to be unique. Other countries have tended to reject the idea. Debts, according to Pothier, are "incorporeals *quae in sole jure consistunt*, and which therefore are not in any particular place, *nullo circumscribuntur loco*: they cannot therefore be reckoned among the things in the house and which are liable for the rent".[16] The law in Louisiana is consistent with this,[17] and in South Africa, one case holds that sums due to a tenant for the sale of the *invecta et illata* are not covered by the hypothec,[18] whilst another decides that a tenant's beer-house licence is a "totally incorporeal thing" that cannot be subject to the hypothec.[19] Similarly, in Germany, the *Vermieterpfandrecht* is said to be restricted to the physical objects brought into the premises, thereby not allowing it to cover

[14] See, for example, *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 997.

[15] *Explanatory Notes to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 619.

[16] R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) (henceforth Pothier, *Lease*) §251.

[17] Art 2707 Louisiana Civil Code.

[18] *Sugarman & SA Breweries Ltd v Burrows* (1916) WLD 73. See also W A Joubert and J A Faris (eds), *The Law of South Africa* vol 14 part 2, 2nd edn (2007) para 33; R Brits, *Real Security Law* (2016) 443.

[19] *Insolvent Estate Dunn* (1911) 32 NLR 539.

debts owed to the tenant.[20] But one right is covered by the *Vermieterpfandrecht*: the *Anwartschaftsrecht*.[21] Briefly, the *Anwartschaftsrecht* is the right given to an acquirer of property in the period when the transferor has done everything necessary to transfer the property in question but ownership has still not transferred because the transferee has not yet fulfilled his obligation(s).[22] Where, for example, a tenant has purchased goods on hire-purchase, an *Anwartschaftsrecht* in favour of the tenant arises and, if the goods have been brought into the leased premises, the *Vermieterpfandrecht* will cover the right. This is not a right over the thing itself, but over the incorporeal right of *Anwartschaftrecht*. This conforms to the general law of *Pfandrecht* (pledge) in Germany, which permits a *Pfandrecht* over a right and, therefore, the *Anwartschaftsrecht*.[23] Scots law does not grant a similar right to a prospective acquirer of property.

8-09. Scots law, for the most part, has taken the same general stance as in other countries and so rejected the possibility of incorporeal moveable property being subject to the hypothec. If the goods themselves are destroyed, the landlord's hypothec cannot cover their economic equivalent, for example any damages due in consequence. *North British & Mercantile Insurance Co v Mitchell* is the best illustration of this.[24] Here, the tenant had taken out an insurance policy to protect against the loss of his stock through fire. In October 1884, a part of the stock was lost in a fire and the tenant failed to pay the rent due the following Martinmas. Consequently, the landlord arrested the sums due to his tenant in the hands of the insurance company, but this arrestment was equalised with arrestments brought by other creditors within 60 days.[25] At the resulting action of multiplepoinding raised by the insurance company, the landlord contended that he was a preferred creditor who ranked above the other arresters because the insurance policy was a surrogate for the goods over which the hypothec had extended. The sheriff rejected this argument on the basis that the hypothec covered only the actual goods, which had been destroyed in the fire. As the hypothec did not cover the insurance sums, the landlord ranked *pari passu* alongside the other arresting creditors in relation to them.

8-10. The same principle was applied in *Gatherar v Muirhead & Turnbull*,[26] where it was held that the sums owed to a tenant from the sale of a piano could not

[20] §562 BGB.

[21] V Emmerich, *Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (2018) BGB §562 para 15a.

[22] The *Anwartschaftsrecht* is a judge-made concept with no reference made to it in the BGB. It is debated whether it is a real or personal right. On this, see H P Westermann, K Gursky and D Eickmann, *Sachenrecht*, 8th edn (2011) §4, 13.

[23] If the landlord wishes to use this right, he will need to pay the outstanding sums due by the tenant, thereby acquiring a *Pfandrecht* over the goods themselves.

[24] *North British & Mercantile Insurance Co v Mitchell* (1885) 1 Sh Ct Rep 230. The same decision was reached in *Guardian Assurance Co Ltd v Craig* (1909) 25 Sh Ct Rep 64.

[25] For the rules on the equalisation of arrestments, see Bankruptcy (Scotland) Act 2016 Sch 7.

[26] *Gatherar v Muirhead & Turnbull* (1909) 25 Sh Ct Rep 357.

be used as a proxy for the piano itself. After one quarter's rent had fallen due, the landlord had sequestrated for rent and obtained a warrant to sell the inventoried goods. Before selling the goods, he obtained a second sequestration for rent, this time in security for the forthcoming quarter's rent. Prior to the second payment falling due, the landlord sold the piano under the warrant to sell obtained under the first sequestration process. The proceeds exceeded the first quarter's rent arrears by £4 10s, this sum being consigned with the sheriff clerk. A third-party creditor of the tenant arrested this sum in the hands of the sheriff clerk as a debt owed to the common debtor (the tenant). Against the third-party creditor, the landlord claimed a preference over the sums for the second quarter's rent on the basis that they were a "*surrogatum* for the hypothec duly and legally attached by the pursuer".[27] This was rejected by the sheriff-substitute on the ground that the piano, when sold and removed from the premises in the process of the first sequestration for rent, could no longer be subject to the hypothec, and the proceeds of the sale could not be used as a substitute for it.[28] There was, therefore, nothing that could have been realised under the second sequestration process.

8-11. These two cases demonstrate an important difference between a hypothec and a floating charge. Although the subject-matter is often released from the hypothec by its sale and removal from the leased premises – in a fashion comparable to the floating charge – the resulting proceeds of sale owed to the tenant do not thereby become burdened by the hypothec.[29] This equally applies to a tenant's right to obtain the purchase price from a purchaser.[30]

8-12. Nonetheless, despite this apparently clear rejection of the hypothec's coverage of incorporeal moveable property, there are some examples of debts that could be subject to the hypothec. These are: negotiable instruments; sub-rents; and debts due to the tenant. As will be seen, the sums in question can all be said to be associated with corporeal moveables contained within the leased premises; but they are not surrogates for them.

[27] (1909) 25 Sh Ct Rep 357 at 358.

[28] The same rationale had been previously applied in *Aitken v McKay* (1906) 22 Sh Ct Rep 47. Cf *Singer Sewing Machine Co Ltd v Galloway & Beasley* (1909) 1 SLT 525, where, after a landlord had included two rent instalments under the same sequestration process, it was held that the landlord had a priority over the sums realised from the sale of the sequestrated items for both instalments even if a third party arrested the sums before the second instalment fell due. This was because both instalments had come under the one sequestration for rent.

[29] For when goods are released from the hypothec by their sale, see paras 9-25–9-60 below.

[30] *Hyslop v Richmond* (1909) 25 Sh Ct Rep 200; J Voet, *Commentary on the Pandects* (transl P Gane, 1955–58) XX.2.2. Cf Stewart, *Diligence* 487, where Stewart writes that the landlord has a preference over any unpaid price of goods sold and delivered from the leased premises; but his reliance on one sheriff court decision on poinding (*Turner v Mitchell & Rae* (1884) 2 Guth Sh Cas 152) is questionable. See also Hume, *Lectures* vol IV, 10, stating that the landlord has a preference over any unpaid sums due to the immediate purchaser of goods from the tenant. This view must be incorrect, for the landlord has no right over the goods after they are sold by the immediate purchaser. On this, see para 9-34 below.

(2) Negotiable instruments

8-13. Although there was no case-law on the point, Scottish jurists consistently rejected the idea that the hypothec could cover negotiable instruments.[31] This opinion could have been questioned, especially as South African,[32] Louisianan[33] and German law[34] permit the hypothec to cover such items. But French law does not allow the hypothec to cover money and it is likely that this influenced those writing on Scots law.[35] The accepted position was eventually placed on a statutory footing by the Bankruptcy and Diligence etc (Scotland) Act 2007, which excluded negotiable instruments by introducing "money" into the "articles exempt from attachment" under section 11(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 (applied to the landlord's hypothec by section 60(2) of the 2002 Act). Money within the 2002 Act was defined as "cash and banking instruments", and banking instruments include promissory notes and negotiable instruments.[36]

(3) Sub-rents and sub-tenants' goods

8-14. At common law, the goods of a sub-tenant were burdened by the landlord's hypothec in favour of the head-landlord. There is, however, also authority for a landlord having a preference over the sub-rents due from a sub-tenant to his tenant. These two rights, such as they are, are connected and so they are both addressed here.

(a) Sub-rents

8-15. A landlord's right to sub-rent due to his tenant can be traced back to Roman law, and to one passage in particular. Ulpian writes that a sub-tenant can discharge the rent owed to the head-tenant by paying the head-landlord, and that a sub-tenant's goods are only burdened by the head-landlord's hypothec in

[31] Bell, *Commentaries* II, 30; Bell, *Principles* §1276; Rankine, *Leases* 373; Gloag and Irvine, *Rights in Security* 418; Paton and Cameron, *Landlord and Tenant* 202; D M Walker, *The Law of Civil Remedies in Scotland* (1974) 317; A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.44.

[32] W E Cooper, *Landlord and Tenant*, 2nd edn (1994) 181; G Wille, *Law of Mortgage and Pledge in South Africa*, 3rd edn by T J Scott and S Scott (1987) 99; W A Joubert and J A Faris (eds), *The Law of South Africa* vol 14 part 2, 2nd edn (2007) para 33(a) n 1; R Brits, *Real Security Law* (2016) 443. Cf G Wille, *Landlord and Tenant in South Africa*, 5th edn (1956) 196–97.

[33] *Succession of Stone* (1879) 31 La Ann 311; V V Palmer, *The Civil Law of Lease in Louisiana* (1997) para 6-2.

[34] B Gramlich, *Beck'sche Kompakt-Kommentare Mietrecht*, 15th edn (2019) §562 para 2.

[35] See Pothier, *Lease* §250; M Planiol, *Treatise on the Civil Law* (transl Louisiana State Law Institute, 1939) §2468.

[36] Debt Arrangement and Attachment (Scotland) Act 2002 s 11(3), applying Bankruptcy and Diligence etc (Scotland) Act 2007 s 175.

security of the value of the sub-rent.[37] Ulpian's text is complex and has been the subject of much debate,[38] but without any concrete theoretical justification having been found. One possible rationale for the rules set out in Ulpian's text is that there is an implied agreement between the tenant and sub-tenant that the latter can discharge his rental obligations by paying the head-landlord.[39] Another is that the rents are the "legal fruits" of the premises and these fruits are burdened by the hypothec in the same manner as the crops and goods on the ground.[40] On either view, a head-landlord has a right of hypothec in the goods of a sub-tenant in security of his right to receive the sub-rents from him.

8-16. That Ulpian's passage was problematic was shown by the differing opinions taken between the Roman-Dutch and French writers. Domat, a French legal scholar writing in the late-seventeenth century, wrote that: "[t]he Fruits and Profits of the Ground that is farmed out, are mortgaged for the Rent of the Farm . . ."[41] He also wrote that a sub-tenant could validly pay his sub-rent to the head-landlord, but if the sub-tenant had already paid the rent to the head-tenant the head-landlord was left with "nothing, either on [the sub-tenant's] Moveables, or their Rents . . ."[42] Pothier was even clearer. He wrote that a landlord had a right to the sub-rents because they were the "civil fruits" of the leased premises. A landlord was able to choose between executing against these sub-rents or alternatively against the sub-tenant's goods (but only up to the value of the sub-rents). Both Pothier and Domat cited Ulpian's passage as the source of their views. With the strength of such views, it is unsurprising that French law, and Italian law (which is heavily influenced by French law), still grants a head-landlord a direct action against a sub-tenant for any unpaid sub-rent.[43]

8-17. By contrast, Roman-Dutch authorities were not so ready to grant a landlord a right against the sub-rents. In the seventeenth century Grotius mentioned neither an action against sub-tenants nor a preference to any sub-rents due to a head-tenant.[44] Later in the same century, Huber, writing on the law of Friesland, wrote plainly that the landlord had no right to either the sub-rents or sub-tenant's goods brought into the leased premises.[45] A landlord could, of course, arrest any sub-rents owed to his tenant, but the goods of a sub-tenant were not burdened by a security right in favour of the head-landlord because there was no contractual relationship between the two parties. At the start of the next century,

[37] D.13.7.11.5 (Ulpian).

[38] See, for example, P A Östergren, *Das gesetzliche Pfandrecht des Vermieters und Verpächters nach römischem Recht* (1905) 65ff; B W Frier, *Landlords and Tenants in Imperial Rome* (1980) 124ff.

[39] Östergren, *Das gesetzliche Pfandrecht* 68–72.

[40] Östergren, *Das gesetzliche Pfandrecht* 72–73.

[41] J Domat, *The Civil Law in its Natural Order* (transl W Strahan, 1722) I, 104.

[42] Domat, *Civil Law* I, 372.

[43] Planiol, *Civil Law* §1754; §1595 *Codice civile*.

[44] H Grotius, *The Jurisprudence of Holland* (transl R W Lee, 1926 and 1936) vol 1, III.19.10.

[45] U Huber, *The Jurisprudence of My Time* (transl P Gane, 1939) II.46.8 and III.10.11

Voet began his commentary by repeating this view of the law. "[A] first lessor" he wrote "has no action on letting against a second lessee, since no contract has been made between them, and one person cannot sue or be sued on the contract of another."[46] He did, however, go on to accept that a sub-tenant could choose to pay the head-landlord instead of the head-tenant. But this was not a result of the head-landlord having a right to the sub-rents themselves. Instead, the sub-tenant could pay the sub-rent to the head-landlord if this was to "free his own goods brought in and carried on, which . . . are by right of pledge at the mercy of the first lessor of the house . . .", or if the payment was a result of managing the affairs of the head-tenant.[47] This second justification for paying the sub-rents directly to the head-landlord was presumably only available to a sub-tenant if the head-tenant was unable to perform his obligations to the head-landlord.[48] Voet grants to a head-landlord a right only against a sub-tenant's goods. In his account, a head-landlord has no right against the sub-rents themselves, but the sub-tenant can choose to pay the sub-rent to the head-landlord, thereby releasing his goods from the hypothec. This is the opposite view to that stated above (and supported by the French authorities) that a head-landlord has a right to the sub-rents from the sub-tenant and, in security of this right, he is also given a right of hypothec in the sub-tenant's goods.[49]

8-18. The only Roman-Dutch authority that did point towards a head-landlord having a direct action against a sub-tenant for unpaid sub-rent is Schorer, who wrote a commentary on Grotius in the second half of the eighteenth century. He said that, although the head-landlord had no personal action against the sub-tenant, "if the first lessee is insolvent, some say that the lessor is not to be denied a personal action against the second lessee . . . Another writer says that in every event the lessor may at pleasure proceed either against the first or the second lessee . . ."[50] The opinions recorded in Schorer's writings were, however, against several contrary opinions (discussed above) and they are not taken to be the established Roman-Dutch position.

8-19. This divergence between Roman-Dutch and French authorities sets the scene for Scots law, which was influenced by both. The early authorities appear to conform to the French rule. This is unsurprising since the law of hypothec was likely to have been introduced into Scots law by those who studied law in France.[51] In the seventeenth-century case of *The Town of Edinburgh v The*

[46] Voet, *Commentary* XIX.2.21(a).

[47] Voet, *Commentary* XIX.2.21(a) and XX.2.6.

[48] It was, therefore, a form of *negotiorum gestio*. This is the accepted position in South Africa, on which, see G Wille, *Landlord and Tenant in South Africa*, 5th edn (1956) 183.

[49] See paras 8-15 and 8-16 above.

[50] Taken from H Grotius, *The Jurisprudence of Holland* (transl R W Lee, 1926 and 1936) vol 2, III.19.10.

[51] See paras 3-33–3-35 above.

Creditors of Provan,[52] the Court of Session accepted that a head-landlord had a preference over sub-rents. Three reports of the case were recorded in Morison's *Dictionary* (one each from Gilmour, Newbyth and Stair), but they all contained roughly the same set of facts: a creditor of a tenant had arrested sub-rents in the hands of the sub-tenant and another party claimed to have received an assignation of the rents from the tenant. The Town of Edinburgh claimed a right to receive the sub-rents before both the arrester and assignee. According to Gilmour, the Town of Edinburgh alleged that they, as landlords, had "a tacit hypothec in the duties owing by the sub-tacksman to the principal tacksman, and upon that account are preferable to the other creditors who have no such privilege". Against this, it was argued that this was "not the case of a master or landlord, who has a hypothec in his tenants goods upon the ground".

8-20. The court favoured the Town of Edinburgh, and Newbyth reported that the Lords announced that their decision would stand "in all time coming". Stair provided additional details of the parties' submissions and the Lords' judgment. According to him, the Town of Edinburgh claimed that a landlord could choose to pursue either the head-tenant or sub-tenant without the requirement of an arrestment over the sub-rents. This was because head-landlords "were always preferable for their tack-duty to any other creditor of the principal tacksman". The Lords granted the Town of Edinburgh a preference over any sub-rents and even concluded that it had an "immediate action against the sub tacksman, unless he had made payment *bona fide* before . . ."[53]

8-21. This judgment was cited on numerous occasions as authority for the principle that a landlord had a right to the sub-rents, with Bankton writing in his *Institutes* that:

> A subtenant's rent is suppletory to the fruits, and therefore is subject on the hypothec to the rent due by the principal tacksman; for the heritor is thereupon preferable for the rent to all the creditors of the immediate tacksman: but this is without prejudice to the heritor's hypothec upon the corns and goods on the ground, which are equally subjected thereto, whether the lands are in the possession of a principal tacksman or subtenant.[54]

This granted a landlord a right of preference over the sub-rents and seemed to adopt the "civil fruits" argument for doing so. Bankton also stated that this right to the sub-rents was distinct from a right to the goods of a sub-tenant.[55] Whilst *The Town of Edinburgh* was cited by Bankton and Erskine as authority for the landlord's preference to the sub-rents, the case cannot be accepted as

[52] *The Town of Edinburgh v The Creditors of Provan* (1665) Mor 6235, (1665) Mor 15274.

[53] (1665) Mor 6235 at 6236.

[54] Bankton I.17.9 (vol I, 386). See also, for example: J Erskine, *The Principles of the Law of Scotland*, 4th edn (1769) II.6.14; Erskine II.6.63.

[55] This is against the view of Voet, who stated only that a head-landlord had a right to the goods of his sub-tenant but no right to the sub-rents themselves. On this, see para 8-17 above.

correct today, even if the Lords did state that their judgment would stand the test of time. Two reports of *The Town of Edinburgh* bring out the key aspect of the judgment that allows us to reach this conclusion: that the court based its decision on the belief that the landlord had a direct right against the sub-tenant for payment of the sub-rent.

8-22. Stair's report provides the clearest example of this. He reported that the Lords found the Town of Edinburgh to have "immediate action against the sub tacksman, unless he had made payment bona fide before . . ."[56] Newbyth wrote that the Town of Edinburgh was to be preferred to the arresters and assignees "*eodem modo* as a master may pursue his sub-tenant".[57] Only Gilmour's report contained the view that the head-landlord had a right of security over the sub-rents in the form of a "tacit hypothec in the duties owing by the sub-tacksman to the principal tacksman".[58] But this statement was recorded as the Town of Edinburgh's submission rather than the Lords' opinion.

8-23. Therefore, from the reports of Stair and Newbyth it can be said that the case was decided on the basis that a head-landlord had a direct action against the sub-tenant for his rents. Through this direct action, the head-landlord could pursue the sub-tenant for the sub-rents in preference to the head-tenant's other creditors. It is likely that this rule had come from France as it was also accepted by Domat and Pothier and remains in French law today.[59] The reports of *The Town of Edinburgh* by Stair and Newbyth were not the sole references to such an action in the early Scots sources. Forbes, in the early-eighteenth century, also accepted it, even holding that a head-landlord had a right against a sub-tenant for the entire value of the rent due by the head-tenant.[60] This right against a sub-tenant described by Forbes was clearly distinct from the landlord's right of hypothec in the sub-tenant's goods on the leased premises, which he went on to discuss in the next paragraph.

8-24. After Forbes, several commentaries appeared to adopt a theory that the sub-rents were actually owed to the head-landlord but with a power granted to the sub-tenant to pay the rent to the head-tenant. This theory was based on the decision in *The Town of Edinburgh*. Such a theory seemed to be present in the mind of Bankton, who wrote that "the allowing the tenant to subset, is a tacit liberty to the subtenant to pay the rent to the principal tacksman, who therefore, on payment *bona fide* to him, must be exonerated, and his goods freed of the hypothec *pro tanto*".[61] And it was also in the mind of Erskine, who wrote that

[56] (1665) Mor 6235 at 6236.
[57] (1665) Mor 6235 at 6235.
[58] (1665) Mor 6235 at 6235.
[59] See para 8-16 above.
[60] W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730, reprinted by the Edinburgh Legal Education Trust as Old Studies in Scots Law vol 3, 2012) 173.
[61] Bankton II.9.17 (vol II, 99).

the sub-tenant "may" pay his rent to the head-tenant.[62] Even Robert Bell and Hunter, in the nineteenth century, adopted a similar analysis of the law.[63] If the sub-rents were actually owed to the head-landlord but could be paid to the head-tenant, it was unsurprising that there was a view that a head-landlord had a preference in respect of the sub-rents. The head-landlord was, under this theory, the sub-tenant's landlord.

8-25. Under this analysis of the law, which gives a head-landlord a right to the sub-rents directly against the sub-tenant, a head-landlord would continue today to have a right of preference over the sub-rents due to his tenant. But the overwhelming balance of opinion is against a landlord having a direct action against the sub-tenant, with whom he has no contractual relationship.[64] Of course, the landlord can arrest the sums in the hands of the sub-tenant, but this would not, by itself, grant him a preference to the sub-rents over the other creditors of the head-tenant.[65] Once it is clear that a head-landlord has no "immediate action" against a sub-tenant, the decision of the Court of Session in *The Town of Edinburgh*, which is based on the belief that a head-landlord has a direct right against a sub-tenant, must be rejected.

8-26. Indeed, the fact that the head-landlord has no right directly against his sub-tenant had started to become clear in the nineteenth century. It was also in this century that the authorities rejected the decision reached in *The Town of Edinburgh*, albeit not explicitly. Hume did not cite *The Town of Edinburgh v The Creditors of Provan* and instead wrote that "[i]t is sufficiently obvious that even where the tack bears a power to subset, and much more where it bears no such power, the landlord can have no action against him, *ex contractu*, for payment of rent – There is no contract, express or implied, in that matter between them."[66] Bell, in his *Commentaries*, wrote that "[t]he unpaid rents will of course be available to the landlord",[67] but this appears to refer to the landlord's right to sequestrate

[62] J Erskine, *The Principles of the Law of Scotland*, 4th edn (1769) II.6.14. See also Hume, *Lectures* vol IV, 18; W Ross, *Lectures on the History and Practice of the Law of Scotland, Relative to Conveyancing and Legal Diligence,* 2nd edn (1822) II, 507.

[63] R Bell, *A Treatise on Leases: explaining the nature, form, and effect of the contract of lease, and the legal rights of the parties*, 4th edn (1825) I, 392; R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 174–75.

[64] Bankton II.9.17 (vol II, 98–99); Erskine II.6.63; J Erskine, *The Principles of the Law of Scotland*, 19th edn by J Rankine (1895) II.6.14; Stewart, *Diligence* 465; *MacLachlan v Sinclair & Co* (1897) 5 SLT 155, (1897) 13 Sh Ct Rep 362; *Douglas Shelf Seven Ltd v Co-operative Wholesale Society Ltd & Kwik Sale Group plc* [2007] CSOH 53, 2007 GWD 9-167 at para 577 per Lord Reed; L J MacFarlane, *Privity of Contract and its Exceptions* (Studies in Scots Law, forthcoming) paras 2-32 and 2-33.

[65] In England, a landlord has a right to receive the sub-rent due to the sub-tenant's immediate landlord. The landlord must serve a notice on the sub-tenant and this notice "transfers to the landlord the right to recover, receive and give a discharge for any rent payable by the sub-tenant under the sub-lease. . ." See Tribunals, Courts and Enforcement Act 2007 s 81.

[66] Hume, *Lectures* vol II, 95.

[67] Bell, *Commentaries* II, 31.

the sub-tenant's goods to the value of any unpaid rent.[68] Admittedly, Hunter, citing *The Town of Edinburgh,* was of the opinion that "[i]f the subrents have not been paid, the landlord may either claim them or enforce his hypothec."[69] This certainly suggested that a landlord had a right to the sub-rents but, if so, Hunter was the last to hold such a view.[70]

8-27. In his *Principles*, Bell rejected any right of a head-landlord to go directly against a sub-tenant for the payment of sub-rent. He wrote that "[b]y convention the sub-tenant may be directly liable to the landlord for the prestations in the lease . . . if there be no such convention, there seems to be no direct obligation by the sub-tenant to the landlord".[71] Bell was writing at roughly the same time that Lord Lyndhurst, in the House of Lords, stated that: "[t]he landlord has nothing to do with the under-tenant . . . The contract of the sub-tenants is, as I have already said, with the lessee. There is no privity of contract (to use an English expression) between the sub-tenant and the original landlord. He has nothing to do with the landlord."[72] The fact that the House of Lords, in reaching this decision, overturned a decision of the Inner House demonstrated that it was still a widely-held view in the early nineteenth century that there was a direct relationship between a head-landlord and sub-tenant. But, following the views of Bell and Lord Lyndhurst, it came to be accepted that a landlord had no right against his sub-tenant. Rankine, in his influential *A Treatise on the Law of Leases in Scotland*, did cite *The Town of Edinburgh*, but only in passing and he suggested that it was not sound.[73] No other text after Rankine mentioned the case, for it could no longer be regarded as a correct statement of the law. All the texts, however, stated that a head-landlord had a right against the sub-tenant's goods. It is to this right that we now turn.

(b) Sub-tenants' goods

8-28. The common law gave (i) a head-landlord a right of hypothec over the goods of his tenant, (ii) a head-tenant a right of hypothec over the goods of his sub-tenant,[74] and (iii) a head-landlord a right of hypothec over the goods of a sub-tenant up to the value of the sub-rent due to the head-tenant.[75] Only

[68] On this right, see paras 8-28–8-33 below.

[69] Hunter, *Landlord and Tenant* II, 411.

[70] On this, see also Hunter, *Landlord and Tenant* II, 174–75.

[71] Bell, *Principles* §1252.

[72] *Montgomerie v Maxwell* (1831) 5 Wilson & Shaw 771 at 784.

[73] Rankine, *Leases* 371 n 26.

[74] *Christie v MacPherson* 14 December 1814 FC; *Watson v Dobbie* (1910) 26 Sh Ct Rep 317.

[75] As with the hypothec's coverage of goods owned by a third party, the coverage of a sub-tenant's goods appears to have been introduced from French or Roman-Dutch Law. For France, see Pothier, *Lease* §235ff. For Roman-Dutch law, see Voet, *Commentaries* XX.2.6; U Huber, *The Jurisprudence of My Time* (transl P Gane, 1939) II.46.8. In Germany, a head-landlord is given no *Vermieterpfandrecht* over a sub-tenant's goods: V Emmerich, *Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (2018) BGB §562 para 19.

if the sub-tenancy was unauthorised would the head-landlord retain a right of hypothec over all goods brought into the premises to secure the rent due by the head-tenant.[76] In modern times, (iii) was abolished, by the Bankruptcy and Diligence etc (Scotland) Act 2007,[77] but there had been so much confusion about the theory behind this right of hypothec, and its connection with the head-tenant's own right of hypothec, that a brief discussion seems worthwhile.

8-29. There was no obvious doctrinal justification for a head-landlord's right in the goods of a sub-tenant. It may be that none can be found. The right cannot have been based on the same justification as for the hypothec burdening the goods of other third parties. Only goods that a tenant had a right to use could be burdened by the hypothec and a sub-tenant's goods did not come within this category.[78] Even if a third party took over the running of the entire premises and owned everything therein, his goods would not have been subject to the hypothec unless he became the tenant or a sub-tenant.[79] A landlord's right against a sub-tenant's goods must therefore constitute a distinct category of goods burdened by the hypothec.

8-30. Bell, Hume, Hunter, Rankine, and Paton and Cameron rationalised the relationship between the head-landlord's and head-tenant's rights of hypothec by stating that the former had a right of hypothec in all goods brought into the leased premises and that the latter received an assignation of this hypothec when he paid the rent to the head-landlord.[80] In other words, a head-tenant's right of hypothec over a sub-tenant's goods was, in reality, an assignation of the head-landlord's right of hypothec. Admittedly, the head-landlord's right of hypothec in a sub-tenant's goods was restricted to the value of any unpaid rent due by the sub-tenant to the head-tenant,[81] but this limitation was explained as an implied restriction on the head-landlord's right which took effect when he granted his consent to the sub-lease.[82]

8-31. Underlying this explanation seems to have been the theory that the landlord's right of hypothec was a relic of his former ownership in the crops grown on the leased land ("Kames' theory"),[83] or alternatively the belief that

[76] *Salton v Club* (1700) Mor 1821, (1700) Mor 6224; *Blane v Morison* (1785) Mor 6232.

[77] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4). See also L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 6.11; D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 439; also para 4-54 above.

[78] See paras 7-39 and 7-40 above.

[79] *Novacold v Fridge Freight (Fyvie) Ltd (in receivership)* 1999 SCLR 409.

[80] Bell, *Commentaries* II, 32; Hume, *Lectures* vol IV, 19; Hunter, *Landlord and Tenant* II, 178 and 412; Rankine, *Leases* 399; Paton and Cameron, *Landlord and Tenant* 209.

[81] *Blane v Morison* (1785) Mor 6232; Rankine, *Leases* 398. This was also the case in Roman law: see D.13.7.11.5 (Ulpian).

[82] Bankton II.9.17 (vol II, 98–99). See also Bankton I.17.9 (vol I, 386); Hunter, *Landlord and Tenant* II, 411.

[83] This is certainly seen in the landlord's pleadings in *Blane v Morison* (1785) Mor 6232. For more on this theory, see paras 3-04–3-16 above.

it was the head-landlord, and not the head-tenant, who was owed the sub-rent from the sub-tenant.[84] According to this latter theory, as the head-landlord was owed the sub-rent from the sub-tenant (and had a direct action against the sub-tenant for such rents) the head-landlord naturally had a right of hypothec over the sub-tenant's goods to secure that rent. This theory was discussed above and is still present in both French and Italian law.[85] In both of these jurisdictions, a head-landlord has a right against the goods of a sub-tenant up to the value of what can be claimed in a direct action against the sub-tenant. But the theory that a head-landlord has a direct action against a sub-tenant has been rejected already, and Kames' theory is also thought to be unsound.[86]

8-32. A contractual analysis is no more helpful. As discussed elsewhere in this book,[87] a right of hypothec is based on the contract of lease between the landlord and tenant rather than on the landlord's right of ownership of the land. But there is no contract between the head-landlord and the sub-tenant, and so this explanation is not available. An explanation based on legal policy is more plausible. Probably a landlord's right against the goods of a sub-tenant was based upon the need to protect the landlord. If a party took a sub-lease from a tenant but did not obtain authorisation from the head-landlord, the common law would not allow the head-landlord to be prejudiced as a result. Accordingly, the law gave the head-landlord a right in the goods of a sub-tenant in security of the rent due under the head-lease. If, however, authorisation had been obtained, there was not the same need to protect the head-landlord. He was aware of the sub-lease and, therefore, his right in the goods of a sub-tenant was restricted to the rent owed to the head-tenant under the sub-lease. Of course, this justification is rather weak, but this is not surprising. A sub-tenant is a third party to the head-landlord and, as the hypothec's coverage of third parties' goods lacked an adequate theoretical justification, it is unsurprising that the hypothec's coverage of sub-tenant's goods also lacked a satisfactory rationale.[88]

8-33. After the Bankruptcy and Diligence etc (Scotland) Act 2007, a landlord no longer has this protection and he is not given a right in a sub-tenant's goods whether he has authorised the sub-lease or not.

(4) Debts due to a tenant

8-34. In addition to a right against sub-rents, there is authority for the hypothec

[84] See, in particular, Bell, *Leases* I, 392.

[85] See paras 8-15–8-27 above.

[86] For Kames' theory, see paras 3-04–3-16 above. For the theory that the head-landlord was owed the sub-rent, see paras 8-15–8-27 above.

[87] See paras 5-02–5-04 above.

[88] For a discussion on the theory behind the hypothec's coverage of third parties' goods, see paras 4-46–4-48 above.

covering certain other debts due to a tenant. This appears to arise when a tenant has charged a third party for the latter's use of the leased premises. Bell provides two scenarios where the landlord is given a priority over sums charged by the tenant for allowing a third party to bring goods on to the leased premises. This is separate from the hypothec's coverage of the goods themselves, as Bell makes clear. In his account of the agricultural hypothec, Bell discusses the landlord's right over a third-party's cattle grazing on the leased land. The cattle, being owned by a third party and the tenant having no right to use them, are themselves exempt,[89] but the sums paid to the tenant to enable their grazing on the leased land are not. Citing Erskine,[90] he writes that: "[t]he only right of preference, as to such cattle, is over the grass-mail, or sums payable for grazing, with the benefit of the tenant's right of lien over those cattle in security of it."[91] Developing the analogy with cattle, Bell goes on to write that: "[g]oods of third parties in a warehouse will not be subject to hypothec; though, like cattle in a grazing farm, the hire (secured by lien) will be subject to it."[92]

8-35. Bell does not provide a common principle connecting the two examples, but it is possible to produce one. In relation to the debts due for the grazing of cattle, the landlord's right may have arisen because the cattle feed on the crops grown on the land. As a result of this interference with the subject-matter of the hypothec (crops), the landlord is given a right over the grass-mail due to the tenant. This theory, however, can be rejected for two reasons. First, if a third-party owner of the cattle were deemed to be liable for interfering with the subject-matter of the hypothec, we would expect the landlord to have a claim against him for the value of the crops interfered with. But, instead, the landlord has a claim for the value of the debt due to the tenant for permitting the cattle to graze on the land. Second, this theory cannot be applied to the storage of goods in a leased warehouse, which does not interfere with any goods burdened by the hypothec. An alternative rationale is that the grazing of cattle or storage of goods is functionally similar to the use of the premises by a sub-tenant. Hence the landlord is preferred to sums due to the tenant as "sub-rent".[93] This is similar to the theory that a head-landlord has a right over sub-rents due to the

[89] *Brown v Sinclair* (1724) Mor 6204; Erskine II.6.63; Bell, *Leases* I, 398; Hunter, *Landlord and Tenant* II, 368–69; *Report of Her Majesty's Commissioners Appointed to Consider the Law Relating to the Landlord's Right of Hypothec in Scotland, in so far as Regards Agricultural Subjects* (1865, 3546) ix. Cf Bankton I.17.10 (vol I, 387); Rankine, *Leases* 382. This common law position was changed by the Hypothec Amendment (Scotland) Act 1867 s 5, which stated that the cattle shall be burdened by the hypothec to the extent of the unpaid amount due to the tenant. For s 5 applied, see *Steuart v Stables* (1878) 5 R 1024. For the Hypothec Amendment (Scotland) Act 1867, see paras 4-18–4-20 above.

[90] Erskine II.6.63.

[91] Bell, *Commentaries* II, 29.

[92] Bell, *Commentaries* II, 31.

[93] This appears to be Erskine's view, for which see Erskine II.6.63.

head-tenant.[94] Under this theory, a third party using the premises is treated as a sub-tenant. The landlord's preference over sub-rents, however, has already been rejected above and this calls into question how sound Bell's statements, and the judgments that rest upon them, are. Nevertheless, the cases are of interest and a discussion of them remains worthwhile, especially as they have not been the subject of analysis elsewhere.

8-36. The first such case is found in an arbitration decision in respect of a dispute between a landlord and tenant. The Dean of the Faculty of Procurators in Glasgow gave the decision in the 1863 case of *Guild v Sudden's Trs*.[95] This involved a tenant, Mr Sudden, who had leased land for use as a livery-stable but had fallen into rent arrears. As a livery-stable keeper, Mr Sudden charged the owners of the horses he kept and attended to.[96] The question raised before the arbiter was:

> whether in lieu of an hypothec over the horses in Mr Sudden's stable, the landlord has not a preferable right over the livery charge, or charge for keep which was due at the date of his sequestration for rent, by the owners of the horses to Mr Sudden.[97]

The arbiter was not assisted by any directly-applicable case-law, but found an analogy in Bell's statements. First, there was the preference given to a rural landlord over the "rent payable by the owner of the cattle for the pasturage". Second, goods stored in a warehouse were permitted to be sold by a landlord under a sequestration for rent for the value of the sums due to the tenant. The tenant, as warehouse keeper, had a lien over the goods in security for the sums owed by their owner, and the arbiter took the view that the landlord was given the "benefit" of this security. The next stage of the argument was to say that sums due for storage in a warehouse and for grazing were closely analogous with the sums due to a stable keeper. Hence, the landlord's hypothec in this case covered sums due to the tenant for the maintenance of horses on the leased premises. The payments could be seen as functionally equivalent to sub-rent.

8-37. The arbiter's reasoning was not beyond reproach. When discussing how the hypothec might be enforced, he expressed the view that "the cattle are really liable to the hypothec, but to the limited effect only of enabling the landlord to recover payment of any grass mail then due to the tenant". This notion that cattle present on leased land for the purposes of grazing are subject to the hypothec was incorrect, the Court of Session having already decided to the contrary in

[94] Discussed at paras 8-15–8-27 above.

[95] *Guild v Sudden's Trs* (1863) 2 Guth Sh Cas 266. See the discussion in Gloag and Irvine, *Rights in Security* 418.

[96] And he had a lien over the horses in security of the sums due: see Steven, *Pledge and Lien* para 16-62.

[97] (1863) 2 Guth Sh Cas 266 at 267.

1724.[98] The landlord of grasslands had a preference over the grass-mail only and, according to Bell, the payment of this was secured by the tenant's lien over the cattle.[99] Despite this slight misunderstanding, the arbiter's decision that the hypothec should cover the sums due to a tenant for work as a livery-stable keeper might appear a logical extension of the examples given by Bell. The owners of the horses also share features with a sub-tenant and so fall within the theory that the landlord is given a preference over debts due to the tenant for use of the leased premises.

8-38. It is perhaps surprising that issues of this kind were not the subject of more frequent litigation, but the issue did finally arise again in 1902 in *Cuthbertson v The Brook Street Weaving Co*.[100] The Brook Street Weaving Company was the tenant of a factory owned by Cuthbertson. After it became insolvent and granted a trust deed for behoof of its creditors, the landlord raised an action of sequestration for rent. The sequestration covered cloths that, although manufactured by the tenant, were owned by their customers. Following an agreement between the trustee and landlord, the items were released to their owners and the sums owed to the tenant for their manufacture were then claimed by the landlord. It is clear from the report that the landlord was not claiming a hypothec over the cloths themselves, and that the sheriff-substitute was only concerned with whether the landlord had a preference over the sums due to the tenant for their manufacture. It was already settled law that the hypothec did not affect third parties' goods in the hands of a tenant for their manufacture.[101] The sheriff-substitute held that, "while the hypothec does not apply to the goods themselves, it affects the charges payable to the weavers for converting the goods into cloth, in the same way that the hypothec does not affect goods in a store or cattle grazing in a field, but it affects the store rent and the grazing charges".[102] Within the sheriff-substitute's reasoning there is a reference to Bell's *Commentaries*, in particular to the statement that the "[g]oods of third parties in a warehouse will not be subject to hypothec; though, like cattle in a grazing farm, the hire (secured by lien) will be subject to it".[103] There was also a statement that "[i]n like manner, in the case of a sub-lease, the property of a sub-tenant is liable to the hypothec *quoad* the sub-rents which are resting-owing".[104]

[98] *Brown v Sinclair* (1724) Mor 6204. This decision was followed in *Brown v Anderson* (1865) 4 Scottish Law Magazine & Sheriff Court Reporter 50. See also Erskine II.6.63; Bell, *Commentaries* II, 29; Hunter, *Landlord and Tenant* II, 369. Cf Bankton I.17.10 (vol I, 387); Hume, *Lectures* vol IV, 22.

[99] Bell, *Commentaries* II, 29.

[100] *Cuthbertson v The Brook Street Weaving Co* (1902) 18 Sh Ct Rep 281.

[101] Bell, *Commentaries* II, 31.

[102] (1902) 18 Sh Ct Rep 281 at 283 per Sheriff-Substitute Balfour.

[103] Bell, *Commentaries* II, 31.

[104] (1902) 18 Sh Ct Rep 281 at 283 per Sheriff-Substitute Balfour.

8-39. *Cuthbertson* seems to go beyond the principle that can be taken from Bell's two examples. Both of Bell's examples, cattle and storage, and also the example of a sub-lease, are concerned with the use of the leased land by a third party. The sums due under Bell's examples (and also in *Guild v Sudden's Trs*) are functionally similar to sub-rents. *Cuthbertson*, however, appears to provide a landlord with a preference over any debts that arise through work undertaken on the premises and so goes beyond what is accepted by Bell and the sub-rent theory adopted here.

8-40. This criticism of *Cuthbertson* involves drawing fine distinctions between cases that appear similar. It is not always clear when a third party is paying for the use of the premises and when a payment can be attributed to services provided by the tenant's labour. Indeed, a single payment could be for both, as brought out by the facts in *Guild v Sudden's Trs,* where the third-party debtor owed money to the tenant for the latter's work as a livery-stable keeper. Only part of the money charged by the tenant could be said to have been for keeping the horses on the land – the tenant also fed, exercised and cared for the animals. The arbiter picked up on this and said that:

> A distinction, however, is drawn between the charge for storage strictly so called and any charge that may be due to the storekeeper for conserving the goods, such as turning over grain &c. The storekeeper, it is believed, generally enters these charges separately in his books.[105]

In line with this distinction, the tenant's trustee believed that the livery charge could be separated into a charge for (1) the stable room, (2) feeding, and (3) grooming, with only the stable-room charge being caught by the hypothec. Although warehouse keepers divided their accounts to take note of the distinct services for which they charged, the arbiter concluded that this was not the case for livery-stable keepers. The arbiter focused on the single payment charged, and the fact that the keeper's lien secured the entire debt. Thus, the arbiter accepted that the charges for feeding and grooming would be subject to the hypothec alongside the stable-room charge. He concluded that:

> It is true that the feeding and grooming of the horses are paid for without aid from the landlord out of the trading capital of the tenant, and his other creditors may urge that the amount due in respect thereof represents a part of the general assets of the common debtor, but the arbiter is inclined to think that it is not inequitable to hold that the landlord has, through the operation of his hypothec, obtained a preference over what would otherwise certainly have formed part of the general assets.[106]

8-41. This rejected any distinction between debts arising from the use of the leased land and those for other services performed by the tenant, thereby supporting the later decision in *Cuthbertson*. This, however, cannot be correct.

[105] *Guild v Sudden's Trs* (1863) 2 Guth Sh Cas 266 at 268.
[106] (1863) 2 Guth Sh Cas 266 at 269.

The arbiter accepted that he might be wrong, and the sheriff's discussion in the subsequent case of *Cuthbertson* ran to a mere half page with no mention of the decision in *Guild*. Neither decision can be said to be strong. If no distinction is made between debts arising from the use of the leased premises and those from the work of the tenant, the landlord's preference (assuming it to exist) would have a wide application. For example, sums owed to a tenant for repairs carried out on a car could be subject to the hypothec.[107] Other examples might include tenants who run businesses repairing shoes, watches or computers. Admittedly, the right of a landlord to take preference over the sums owed to a tenant for repair does find support from Hume, who says that the landlord can detain a thing repaired until payment is made to him by the third-party owner.[108] There is, however, no evidence of Bell supporting such a far-reaching privilege, and it seems unlikely to be the law.

8-42. Based on the slim amount of authority available, it is possible to attempt a statement of the requirements for the hypothec to cover debts owed to a tenant (assuming Bell's statements to be a correct analysis of the law). In the first place, the tenant must permit the third party to use the leased premises, for example to store goods. According to *Cuthbertson* and *Guild* this includes any work performed by the tenant for the third party on the leased premises, but such an extension of the rule seems misplaced. Second, the tenant (the creditor) must be owed a sum of money for the performance rendered to the third party (the debtor). This is the subject-matter of the hypothec.

8-43. Satisfaction of these two requirements is likely to be sufficient, but the authorities may possibly require a third: that the services rendered by the tenant and for which payment is due must relate to goods that remain on the leased premises, with the result that the tenant has the benefit of a lien over such goods. In the two examples provided by Bell there is reference to a lien securing the debts owed to the tenant,[109] and both cases involve items of property that belong to a third party being present within the leased premises (horses and cloth). This, of course, raises the question of the landlord's preference if the tenant did not have a lien; for example, a third party may agree to pay for the use of

[107] This has some historical acceptance. See the position in the Hamburg City law from 1270 as discussed in T Repgen, "Die Sicherung der Mietzinsforderungen des Wohnungsvermieters im mittelalterlichen Hamburgischen Stadtrecht", in A Cordes (ed), *Hansisches und hansestädtisches Recht* (2008) 141 at 159. This, however, gave a landlord a right against the goods themselves. It was, in reality, a right to take advantage of the tenant's right to retain the goods until the third-party owner paid.

[108] Hume, *Lectures* vol IV, 27. Again, however, this view supposes that the landlord steps into the shoes of his tenant and takes advantage of the latter's right of lien. Hume states that "here, as in the case of cattle taken in to grase, the landlord cannot well carry his pretensions farther than to detain the things till payment of the hire due for the particular articles. In that respect the landlord may be held to come into the place of the tenant."

[109] Bell, *Commentaries* II, 29 and 31. Also see Hume, *Lectures* vol IV, 22, where it is said that the landlord takes the place of the tenant to detain the cattle owned by a third party.

a warehouse without actually storing anything there. In both of his examples, Bell is clear: the debts due to the tenant are secured by a right of lien over the goods on the premises. The lien connects the debt to an item of corporeal moveable property that is contained within the leased premises and this could be a key component of the rule espoused by Bell and the two reported cases discussed above. Nevertheless, it is not clear why the presence of the goods would make any substantive difference if neither the items themselves nor the right of lien are subject to the hypothec. As it is not the goods that are subject to the hypothec, it would appear possible for a landlord to obtain a preference over sums due to a tenant even in the absence of a lien over the third-party's goods in security of sums due to the tenant by the third party. This would retain the landlord's right even if the goods had been removed from the premises.[110] This would also grant to the landlord of a self-storage facility a priority over the sums due by a customer for the use of a storage locker even if no goods were stored in the facility.[111]

8-44. In keeping with the uncertain nature of this doctrine, it is unclear how the landlord enforces the preference over the debt. At common law, it would appear that, with the benefit of the tenant's lien, a landlord could prevent the removal of the goods from the premises, probably through a sequestration for rent. But after the Bankruptcy and Diligence etc (Scotland) Act 2007 the landlord will usually only enforce the preference in the event of the tenant's insolvency and so the insolvency practitioner would now have to attribute the sums to the landlord.[112]

8-45. Although the principle and requirements can be expressed fairly simply, the ability of debts to be liable to the hypothec raises difficulties. Roman law did not permit the tacit hypothecation of incorporeal moveable property and a brief examination of other jurisdictions brings no other examples of its presence. With respect to the authorities, they appear to be little more than expansions upon the writings of Erskine where he muses that a landlord "seems" to have a preference over the grass-rent due for pasturage.[113] Bell dedicates no more than a few lines to the topic in his *Commentaries*, and there remains only a single judgment from a sheriff and a decision by an arbiter, both of which extend Bell's statements without much in the way of justification. In addition to being

[110] See Hypothec Amendment (Scotland) Act 1867 s 5, which allowed the hypothec to cover cattle brought on to the leased land in security of the sums due to the tenant by the cattle's owner and continued this right even after the cattle were removed from the premises.

[111] It would also grant a landlord a right to sums due to his tenant from lodgers. This right would also be secured by any right of lien held by the tenant in the goods of the lodger. On this, see Steven, *Pledge and Lien* paras 16-93 and 16-94. In addition, it would grant a landlord a right to sums due to his tenant from a concessionaire. The concessionaire has a personal right to occupy an area of the premises, but the tenant has no right of hypothec or lien over the goods in security of such sums.

[112] For a detailed discussion on this, see chapters 10 and 11 below.

[113] Erskine II.6.63.

contrary to the doctrine that incorporeal property is not generally subject to the hypothec, the rule, if the above discussion is taken as correct, distinguishes between debts due for the use of the land and debts which are not. With the application of the rule (if such it is) also apparently unknown in practice, one has seriously to question its status in the modern law.

8-46. But perhaps the biggest problem with Bell's statements and the cases that rely on them is that, due to the rejection of the landlord's right of preference to sub-rents, there is no theoretical justification for the landlord's right to the debts owed to a tenant for the use of the premises. Erskine bases his view that a landlord has a preference over the grass-mail owed to his tenant on the decision in *The Town of Edinburgh v The Creditors of Provan*; for, immediately after discussing *The Town of Edinburgh*, he writes that the landlord "seems to have the like ground of preference on the grass-rent due to the tenant by strangers . . ."[114] If, however, the decision in *The Town of Edinburgh v The Creditors of Provan* is rejected, as is done above,[115] there is no basis on which Erskine could conclude that a landlord has a right to the grass-mail owed to his tenant. This then allows us to reject Bell's statements of the law, which are based on Erskine, and also the two cases, which are based on Bell. Following this logic, the landlord's preference over his tenant's other creditors must be restricted only to the value of the goods caught by the hypothec.

[114] Erskine II.6.63.
[115] See paras 8-15–8-27 above.

9 Extinction

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A. INTRODUCTION

9-01. If not excluded by agreement between the parties,[1] the right of hypothec arises in an item of moveable property if it has been brought into the leased premises and rent is due and unpaid.[2] A real right, once created, can be extinguished. When this occurs in the case of the hypothec is the subject of this chapter. It is clear that a right of hypothec survives the end of the lease (even if the landlord irritates) and continues to secure any rent still unpaid.[3] Equally clear is that a right of hypothec is extinguished when rent is no longer due and

[1] On this, see chapter 6 above.

[2] And the item needs to be owned by the tenant: Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4).

[3] *Christie v MacPherson* 14 December 1814 FC; *Wright v Morgan* (1897) 5 SLT 197 at 198–99 per Sheriff-Substitute Strachan.

unpaid,[4] or when the goods themselves are destroyed. Where the goods accede to the premises and become heritable property owned by the landlord, the right of hypothec is extinguished in respect of those goods.[5] Although each of these can be explained with relative clarity (and will not be returned to), other modes of extinction are more difficult, and more controversial.

B. DISCHARGE

9-02. Once the right of hypothec is created, it can be discharged by the secured creditor. Of course, any discharge granted by the landlord might be restricted to the current right of hypothec in the goods. If so restricted, the discharge will not prevent the goods from being subject to a new right of hypothec that would arise if the tenant falls behind the rental payments once again. An example illustrates this. If a tenant fails to pay rent that becomes due on 1 January 2022, a right of hypothec arises over all the goods within the leased premises. A landlord is free to extinguish this right through an express discharge and, if the goods are removed at this point, they will be forever unaffected by the hypothec. If, however, the tenant subsequently falls behind on the rent due on, for example, 1 January 2023, a new right of hypothec will arise over the goods on the premises at that date and there is no reason why this would be prevented by the previous discharge granted by the landlord.

9-03. This has consequences for the tenant if the landlord assigns his interest. An assignee of rents already due and unpaid will be bound by a discharge of a right of hypothec granted by the assignor.[6] Where future rents are assigned, these rents will be secured by a new right of hypothec that will arise when the rent becomes due and unpaid.[7] This new right is separate from the right of hypothec that may already have arisen to secure any rent due before the date of assignation. The assignee's hypothec will not be prevented from arising because the assignor had previously discharged his right of hypothec. Only where the hypothec has been excluded within the lease (or a subsequent variation of the lease) from ever arising will this prevent the hypothec from arising to secure the rent due to the assignee. If, however, a tenant requests a waiver of the hypothec, and the landlord notifies the tenant that he waives the right of hypothec over a particular category of goods (or all goods) for himself and his successors, this appears to be sufficient to amend the lease and prevent any future hypothec

[4] See paras 5-15–5-20 above.

[5] Neither destruction nor confusion is unique to the hypothec, being applicable to both pledge and lien: see A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) paras 8-29 and 15-11.

[6] See para 5-22 above.

[7] See para 5-25 above.

from arising over the goods in question. Any successors of the landlord would also be bound.[8]

9-04. A discharge does not need to be express; a right can be lost by implication. Where, for example, a landlord stands back and allows his tenant to breach the implied obligation not to invert the possession of the premises, he may be deemed to have accepted the new use of the premises and lost his right to object to the inverted possession.[9] Finding when implied discharge occurs in relation to the hypothec is more difficult, and the authorities do not provide much from which examples can be formed. Rankine writes only that "[a]cquiescence by the landlord in a state of matters plainly inconsistent with the existence of hypothec for the time being may . . . infer abandonment".[10] He provides no examples of such abandonment, only of those circumstances that are insufficient. Demonstrating that it is easier to describe when the right of hypothec is *not* lost, Rankine goes on to say that the hypothec is not lost by the landlord accepting a bill of exchange in payment of the rent,[11] or by allowing a poinding creditor to sell the tenant's items.[12] Where the landlord takes another security for the rent, such as a cautionary obligation, the hypothec is certainly not waived as a result.[13]

9-05. Perhaps the only clear form of implied abandonment is when goods are removed from the leased premises with the knowledge and acquiescence of the landlord. Robert Bell, in his treatise on the law of leases, writes that the landlord can be deemed to have impliedly abandoned the right of hypothec if, after sequestrating for rent, he allows the goods to be removed from one house to another.[14] This was also the decision of the sheriff court in *Thomson & Son v MacPherson*,[15] where a landlord, after sequestrating the goods within the leased premises, gave the tenant permission to remove and sell the items. If, however, a landlord was deemed to have lost his right of hypothec over goods by allowing their removal and sale *after* their sequestration, the same rule must surely apply – and continue to apply – to goods *before* they have been sequestrated. A landlord's position was strengthened, rather than weakened, after sequestration.

9-06. In *Christie v MacPherson*,[16] a case dealing with whether a head-tenant had given up his right of hypothec by allowing the goods to come under the

[8] For more on successors, see paras 6-06–6-13 above.

[9] J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 238.

[10] Rankine, *Leases* 411.

[11] This should be equally applicable to other negotiable instruments such as cheques.

[12] For the relationship between poinding (or attachment) and the hypothec, see paras 9-14–9-18 below.

[13] See para 6-15 above.

[14] R Bell, *A Treatise on Leases: explaining the nature, form, and effect of the contract of lease, and the legal rights of the parties*, 4th edn (1825) I, 392.

[15] *Thomson & Son v MacPherson* (1895) 11 Sh Ct Rep 108.

[16] *Christie v MacPherson* 14 December 1814 FC.

hypothec of another landlord, Lord Robertson argued that a landlord could be taken to have abandoned his right of hypothec. He said that:

> if, with the knowledge of his landlord, the tenant leaves the property, may it not be fairly said, that the landlord has abandoned that right which the law gave him? The landlord's right is clearly not lost by the *invecta et illata* being privately carried away from the property without his own knowledge, for, in such case, it is impossible to hold that there is any abandonment of the right on his part; but where it is done with his knowledge and consent, or under such circumstances as to imply his consent, then there is an abandonment of his privilege.

Although Lord Robertson was writing a dissenting judgment in this case, and the other judges did not agree with his overall argument, this general principle appears correct. The landlord, by permitting the removal of goods from the premises, whether expressly or by failing to object when aware, is deemed to have impliedly discharged any right of hypothec over the goods.

9-07. Finally, implied discharge can be viewed as the principle upon which the decision in *Gray v Weir*,[17] from 1891, was based. The judgment centred on whether a landlord had sufficient cause to obtain a warrant to carry back goods previously removed from the premises.[18] Gray had leased premises from Weir, who lived on the opposite side of the passage. After Gray took a lease of a farm, he made it clear to Weir that he would remove from the premises before the end of the term and would take the plenishings with him. After informing Weir of his intentions, Gray removed his goods, with this removal taking place openly and observed by Weir's mother, who made her son aware of what had happened. Soon after this, Weir obtained a warrant to carry back the items without any notice being given to Gray. It was later held that this warrant was illegal because it had been obtained without notice and cause. The lack of a good cause was the important aspect of the judgment and, although the court was not entirely clear on the point, it seems evident why the landlord lacked a good cause: he no longer had a right of hypothec over the goods. This was because the landlord had impliedly extinguished the hypothec when, aware that the goods were being removed, he had failed to object.

C. EFFLUX OF TIME

9-08. Although landlords, under the common law, were given a "right of hypothec in the most strict sense",[19] this was curbed by a combination of a short prescriptive period and a constraint on the rent that could be secured by the goods brought in. Taken together, these restrictions may have been based on

[17] *Gray v Weir* (1891) 19 R 25.
[18] For more on this, see paras 10-22–10-26 below.
[19] *Dalhousie v Dunlop* (1830) 4 Wilson & Shaw 420 at 429 per Lord Brougham.

a desire to prevent the hypothec following the goods for a long period of time after they had been removed from the leased premises.[20] Whether or not this was their purpose, the rules undoubtedly gave some degree of certainty to those dealing with the tenant. Nevertheless, they were confusing and their origin is unclear.

9-09. As the relevant rules were swept away by the Bankruptcy and Diligence etc (Scotland) Act 2007, they need only be described quite briefly here. When an item was brought into leased premises, it became subject to the hypothec, but the landlord's security was restricted to the current term's rent. This was because a single right of hypothec did not run throughout the full duration of the lease.[21] Instead, the lease was divided into terms – periods of possession – with the rent corresponding to each term being secured by its own right of hypothec. For an item to be subject to the right of hypothec in security of the rent for any particular term, the item had to be in the premises during the term in question. Where, for example, a lease was divided into year terms, it was said that "for the current rent of any given year – Whitsunday to Whitsunday – the landlord's right of hypothec only affects the furniture which was on the premises after 28th May [Whitsunday] of that year".[22] Thus, goods retained within the leased premises became subject to a series of hypothecs corresponding to each year's rent.[23] If an item was removed,[24] it remained subject to a right of hypothec, but only for the rent corresponding to the year or years in which it had been present within the leased premises.[25] An example was provided by the facts in *Thomson v Barclay*,[26] where a landlord brought a petition to sequestrate the furniture of a dwelling-house, leased from Whitsunday to Whitsunday, in security of the rent due for the period Whitsunday 1882 to Whitsunday 1883. The tenant had, however, removed his goods from the leased premises just before Whitsunday 1882. As a result, a petition seeking a warrant to carry back was refused: the items had been removed from the premises before the start of the current rental period (Whitsunday 1882 to Whitsunday 1883) and had not become subject to

[20] For this policy see, in particular, Stair IV.25.1, stating that "which hypothecations extend only to one year, that commerce be not thereby hindered . . ." For more on this passage, see para 3-14 above.

[21] Cf L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 6.7.

[22] *Sawers v Kinnair* (1897) 25 R 45 at 50 per Lord Moncreiff.

[23] H Home, Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1777) Art X.

[24] Or otherwise prevented from becoming subject to any future right of hypothec. This is crucial to understanding the decision in *Rossleigh Ltd v Leader Cars Ltd* 1987 SLT 355, where the landlord argued that he had a right of hypothec over certain goods to secure the rent for the year July 1981 to July 1982. But, as the goods had been transferred and handed over to a third party in January 1981, they could not have become subject to a new right of hypothec after January 1981.

[25] *Kufeke v Mason* (1898) 6 SLT 15; *McQueen v Armstrong* (1908) 24 Sh Ct Rep 377.

[26] *Thomson v Barclay* (1883) 10 R 694. See also *Hunter v North of England Banking Co* (1849) 12 D 65.

a right of hypothec for the rent of that period.[27] A similar time-limited rule can be found in relation to the crop grown on leased land. Any crop produced on the leased land was security only for the rent corresponding to the year in which it was grown and could not be used as security for any other year.[28]

9-10. Whilst most leases were let on yearly tenancies, the same principle applied to premises let for other periods. In *Ingram v Singer Sewing Machine Co Ltd,*[29] a landlord, who had leased premises on a monthly basis, brought an action against the Singer Sewing Machine Company for four months' arrears of rent because the Company had removed from the premises a sewing machine owned by them but hired out to the tenant. The Company agreed to pay only two months' rent, which was the period during which the machine was in the leased premises. They successfully defended the claim that the machines were security for the full four months' rent. Although the goods had become subject to the hypothec, they were only security for the rent of the two months during which they were on the premises. If the parties' agreement did not make clear the duration of lease terms, the terms were likely to have matched the arrangements for instalments of rent.[30] So, for example, a contract that provided that the lease was to run for six months and rent was to be paid every month would have had monthly terms.

9-11. In addition to this rule, the landlord lost the right of hypothec for any particular term's rent three months after that term had ended.[31] Precisely when this three-month period began was unclear. On one view, it commenced when the last payment (for example, the last quarterly instalment for the year) fell due.[32] On another view, the period started only at the end of the rental term, i.e. for leases with yearly terms, at the end of the year.[33] Today, a choice between

[27] (1883) 10 R 694 at 698 per Lord Rutherfurd Clark.

[28] See paras 4-02–4-03 above. This developed under the influence of Lord Kames' theory; for this, see paras 3-04–3-16 above.

[29] *Ingram v Singer Sewing Machine Co Ltd* (1910) 26 Sh Ct Rep 156.

[30] This, however, is pure speculation. On this, see G L Gretton, "Diligence and enforcement of judgments", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 383.

[31] It had initially been decided that a landlord lost the right of hypothec in security for a given year if it was not enforced within that year (see *Hay v Keith* (1623) Mor 6188 at 6193 per Lord Haddington), but this was later extended by three months: *Hepburn v Richardson* (1726) Mor 6205; *Crawfurd v Stewart* (1737) Mor 6193; *Cathcart v Mitchell* (1775) Mor 6212. In 1865, the Royal Commission recommended that the landlord's security for each instalment should end three months after the instalment in question fell due (*Report of Her Majesty's Commissioners Appointed to Consider the Law Relating to the Landlord's Right of Hypothec in Scotland, in so far as Regards Agricultural Subjects* (1865, 3546) xxiii), but this did not find its way into the Hypothec Amendment (Scotland) Act 1867 (as to which, see para 4-20 above).

[32] A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.62. Erskine *Institute* II.6.62 wrote that the three months began from the last conventional term of payment.

[33] This is the view expressed in G L Gretton, "Diligence and enforcement of judgments", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 383. Some writers give no indication of which view they believe to be correct. See, for example, G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 207.

the two is no longer required, but it seemed that the latter view was probably correct.[34]

9-12. This understanding meant that if property was let month-by-month there was a period of four months (i.e. the month term and the following three months) during which the landlord could enforce the right of hypothec.[35] If the goods remained on the premises, there was thus a period of three months where they were security for the rent of up to four separate terms.[36] The landlord also retained the right to demand the return of goods sold or otherwise removed from the premises for three months after the end of the rental term. This right remained even if the goods had become subject to the hypothec of another landlord.[37]

9-13. In 2007 the intention of the legislature was to sweep away these complex rules.[38] Instead of the hypothec being security for only one term's rent, it was to secure all rent arrears. Accordingly, section 208(8) of the Bankruptcy and Diligence etc (Scotland) Act 2007 provides that the hypothec is now security for "rent due and unpaid", without being restricted to one term's rent at a time, and there is no requirement to enforce the security within three months. Therefore, when goods are brought into the premises, and the rent is or becomes due and unpaid, the hypothec now attaches and remains attached until all rent arrears are paid, or the normal five-year prescriptive period for rent elapses.[39] Each rental instalment prescribes five years after it falls due because each quarter is taken as a distinct obligation.[40] Thus, if a lease expresses rent as a yearly sum divided into quarterly payments in advance, each quarter's rent prescribes five years after it falls due.

[34] This conclusion places significant weight on the view of Sheriff Shennan in *MacLeod v Deacon* (1901) 17 Sh Ct Rep 269, a case concerned with rent paid in advance. In general, the law on legal and conventional terms for the payment of rent is not capable of being stated with clarity or explained by any principle whatsoever: *Butter v Foster* 1912 SC 1218 at 1223 per Lord Johnston. It is therefore unsurprising that this area of the law was also uncertain.

[35] See R Macpherson, "Are preferences preferable?" 2002 SLT (News) 257 at 258. A landlord was required only to begin (rather than complete) sequestration proceedings within the three months: *McLeod v Creditors of Thomson* (1805) Hume 226.

[36] Cf Hume, *Lectures* vol IV, 21, who writes that "cattle are not hypothecated, at any time, for more than a year's rent" (it is assumed that the year is the term).

[37] *Christie v MacPherson* 14 December 1814 FC.

[38] *Explanatory Notes to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005 para 624; *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 1011.

[39] Prescription and Limitation (Scotland) Act 1973 s 6 and Sch 1 para 1(a)(v). See also D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 437.

[40] D Johnston, *Prescription and Limitation*, 2nd edn (2012) para 6.09.

D. DILIGENCE AGAINST THE GOODS

9-14. As a general rule, the right of hypothec does not end merely by the attachment of the goods by the diligence of another creditor,[41] even if the creditor is unaware of the landlord's right.[42] The creditor takes the goods *tantum et tale:* in the position of the tenant.

9-15. At common law, the landlord's right to prevent diligence over the goods subject to the hypothec was complex and perplexing. Before the lease term had ended the landlord could insist that all goods subject to the hypothec remained on the leased premises unless the competing creditor provided security for the rent.[43] This, it seems, was based on the fact that the hypothec was security for rent that was not yet due and would only be enforced by the landlord in the future. As there was no way of predicting the exact value of the *invecta et illata* when the term came to an end, the only action was to retain the goods until that point.[44] After the term ended, a creditor of the tenant was permitted to attach the goods as long as sufficient goods were left to cover the unpaid rent.[45] This was because the hypothec attached only to the value of the goods equivalent to the term's rent.[46] But, as Stewart noticed, with one term beginning as soon as the previous one ended, this latter rule was only of relevance when the lease had come to an end.[47]

9-16. If the term had ended, and the poinding creditor left enough goods to cover the unpaid rent, the hypothec over poinded goods was extinguished. If, however, the creditor removed goods in breach of the landlord's right, the landlord could require the return of the goods before they were sold;[48] if sold, the landlord could not follow the goods into the hands of the purchaser, but was entitled to receive their full value from the poinding creditor.[49] If the poinder

[41] *Ruthven v Arbuthnot* (1673) Mor 6222; *Selkrig v French* (1708) Mor 6224; *Macdowal v Jamieson* (1781) Mor 6215; *Small v Boyd* (1877) 1 Guth Sh Cas 307; *Miller v Rankin* (1881) 2 Guth Sh Cas 276; *Borthwick & Ingram v North British Railway* (1893) 9 Sh Ct Rep 60; *Skinner v Robertson & Wilson* (1910) 26 Sh Ct Rep 44; J G Stewart, *A Treatise on the Law of Diligence* (1898) 340 and 485; W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897) 424; R Macpherson, "Are preferences preferable?" 2002 SLT (News) 257 at 259.

[42] *Jack v McCaig* (1880) 7 R 465 at 467 per Lord President Inglis.

[43] *Dick v Lands* (1630) Mor 6243; *Pringle v Scot of Harden* (1736) Mor 6216; Erskine II.6.59. For a modern discussion, see L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 6.15.

[44] Erskine II.6.59.

[45] *Crawfurd v Stewart* (1737) Mor 10531.

[46] Stewart, *Diligence* 484.

[47] Stewart, *Diligence* 483.

[48] *Philips v Easson* (1807) Hume 228.

[49] *Hay v Keith* (1623) Mor 6188; *Jack v McCaig* (1880) 7 R 465 at 467 per Lord President Inglis; Bankton I.17.12 (vol I, 387); Hume, *Lectures* vol IV, 24; R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876)

could prove that the landlord's right was not prejudiced, i.e. if more goods were brought into the premises thereafter, this was held in one case to be a valid defence against any claim by the landlord.[50] This decision, however, proceeded on the mistaken view that a poinder who took goods subject to the hypothec during the term was not liable if he left sufficient goods to cover the rent.

9-17. Two major alterations have been made to this common law position: (1) poinding has been abolished and replaced by attachment,[51] and (2) the hypothec arises only when rent is due and unpaid, and no longer secures rent due in the future.[52] The first is not taken to have radically altered the relationship between diligence and the hypothec. Although attachment is not merely poinding with a different name,[53] it is thought to grant the attacher a real right in the goods attached.[54] As there are two real rights in the goods attached (the hypothec and the attachment right), there is a ranking competition, and the hypothec ranks first by virtue of being the real right created first.[55] In relation to the second alteration, unless or until the tenant fails to pay rent, the hypothec does not arise and the landlord cannot prevent the removal of goods from the premises. When rent is due and unpaid, the hypothec attaches but, as it no longer secures rent not yet due, it can be enforced immediately. Consequently, the landlord can require only that sufficient goods are left to satisfy the current rent arrears. Where insufficient goods are left, the landlord appears to remain able to bring the goods back (if they have not yet been sold), or claim against the attacher for the value of the goods removed (if they have been sold).[56] If they have been brought back, this gives the landlord time to attach the goods in payment of the

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II, 394ff. There were cases that decided that a poinder was liable for the entire year's rent (if the lease was let on a yearly basis) even if this was greater than the value of the poinded goods. This, however, was incorrect and the landlord could only claim the value of the loss, i.e. the value of the goods. See *Small v Boyd* (1877) 1 Guth Sh Cas 307; *Miller v Rankin* (1881) 2 Guth Sh Cas 276; *Millar v Ballingall & Ure* (1888) 4 Sh Ct Rep 87, rev in part (1889) 5 Sh Ct Rep 29; *Chalmers v Brown* (1890) 6 Sh Ct Rep 197; *Frame v Mills & Co* (1909) 25 Sh Ct Rep 236; *McNaughton v Underwood* (1911) 27 Sh Ct Rep 74; *MacKersy v Edinburgh Loan & Deposit Co Ltd* (1913) 29 Sh Ct Rep 28; *County Council of Lanark v Hamilton's Trs* 1934 SLT (Sh Ct) 51.

[50] *Walker's Trs v Younger & Younger* (1901) 17 Sh Ct Rep 66.

[51] Debt Arrangement and Attachment (Scotland) Act 2002 ss 10(1) and 58(1).

[52] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8), and paras 5-15–5-20 above.

[53] R Macpherson, "Some awkward questions about the Debt Arrangement and Attachment (Scotland) Act 2002" 2003 SLT (News) 93 at 93–94.

[54] L Macgregor et al, *Commercial Law in Scotland*, 6th edn (2020) para 9.8.1 n 78. Unfortunately, the Debt Arrangement and Attachment (Scotland) Act 2002 provides no guidance on the nature of an attachment.

[55] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(2).

[56] The sheriff-officer may be equally liable with the creditor attaching the goods. On this, see *Millar v Ballingall & Ure* (1888) 4 Sh Ct Rep 87, rev in part (1889) 5 Sh Ct Rep 29. A model for reform could be taken from German law, where, if a creditor of the tenant attaches the goods within the leased premises (under §808 ZPO), the landlord can demand that his right of preference over the goods is respected (under §805 ZPO) but this will only secure unpaid rent from the year before the attachment (§562d BGB).

rent. These rules are equally applicable to arrestment if a tenant's goods have become subject to the hypothec before possession is given to a third party.[57] As the hypothec can still affect a creditor of the tenant seeking to attach the tenant's goods, it is still advisable for the creditor to ensure that the rent has been paid or enough items are left to satisfy the landlord's claim.[58] It would also be for the creditor to prove that sufficient goods were left on the premises after the attachment.[59]

9-18. A final aspect is whether diligence on the part of the Crown can defeat the hypothec. The Crown's rights were once strong, with George Joseph Bell writing of the hypothec that "this general right of the landlord, however preferable to the diligence of subjects, is of no avail against the Crown".[60] The Crown had a right to poind the goods of a tenant, and defeat the hypothec until the point at which the landlord had sold the items and received the realised sums.[61] This right continued well into the twentieth century.[62] It has even been said that the Crown is to be preferred over the hypothec today.[63] But this is incorrect. The preference of the Crown was based on the historical enforcement procedure for the tax authorities (called the writ of extent),[64] which gave a right preferable to all other creditors in relation to the moveable property of the debtor.[65] When the writ of extent was abolished, and the Crown was to use poinding instead, this preference was expressly preserved.[66] It was, however, eventually abolished by the Debtors (Scotland) 1987.[67] This left the Crown with no preference over the landlord's right of hypothec.

[57] A third party could possess the goods as the tenant's depositee or pledgee.

[58] The lack of any duty on the poinding creditor or court officers to establish whether there is any right of hypothec is addressed in R Macpherson, "Are preferences preferable?" 2002 SLT (News) 257 at 259.

[59] *L Polwarth* (1642) Mor 6221; *Ruthven v Arbuthnot* (1673) Mor 6222; Hunter, *Landlord and Tenant* II, 392; Stewart, *Diligence* 484.

[60] Bell, *Commentaries* II, 53.

[61] *Robertson v Jardine* (1802) Mor 7891. See also Scottish Law Commission, Report on *Diligence and Debtor Protection* (Scot Law Com No 95, 1985) para 7.90.

[62] Paton and Cameron, *Landlord and Tenant* 211.

[63] D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 444.

[64] For a discussion on this, see Stewart, *Diligence* ch 22. Writ of extent was based on English law and introduced by statute into Scots law.

[65] *Ogilvie v Wingate* (1791) Mor 7884, rev (1792) 3 Pat 273; *Factor on Estate of Leslie v Tweedie* (1793) Mor 7889. The decision in *Ogilvie* can be criticised for the judges' failure to differentiate between the real right of hypothec and an English landlord's right to distress for rent.

[66] Exchequer Court (Scotland) Act 1856 (19 & 20 Vict c 56) s 42.

[67] Debtors (Scotland) Act 1987 ss 74(5)(a) and 108(3), following a recommendation in the Scottish Law Commission's Report on *Diligence and Debtor Protection* paras 7.90–7.92.

E. REMOVAL FROM THE PREMISES

9-19. Goods brought into premises can easily be removed. When this occurs, the law could choose to continue the landlord's right of hypothec in the goods. That is not the choice of South African law, where any item removed from the premises is immediately released from the hypothec regardless of the circumstances surrounding the removal.[68] This is the main justification for the South African view that the hypothec is not a real right until the landlord enforces the hypothec and attaches the goods.[69] The South African view does not come as a surprise considering the Roman-Dutch jurist Voet wrote that a hypothec has no effect unless attached by public authority on the leased premises.[70] Most jurisdictions, however, take an intermediate position, neither extinguishing the hypothec whenever an item is removed from the premises nor allowing the landlord to follow the goods indefinitely. Paragraph 562a of the German BGB is a clear example of this:

> Das Pfandrecht des Vermieters erlischt mit der Entfernung der Sachen von dem Grundstück, außer wenn diese ohne Wissen oder unter Widerspruch des Vermieters erfolgt.[71]

Whilst the first half of the sentence is consistent with South African law (goods are no longer subject to the hypothec when removed from the premises), this is heavily qualified by the second half, which retains the landlord's right if he is unaware of the removal of the goods or, if aware, he has objected to their removal. Only where the removal is in accordance with the usual practices (*gewöhnliche Lebensverhältnisse*) of a tenant or if it is clear that sufficient goods are left to provide for the landlord's security will the items always be released from the security.[72] If the removal is neither in accordance with the usual practices of the tenant nor known to the landlord, the landlord retains the right to require the return of the goods to the leased premises.[73] If the right survives the removal of the goods from the premises, it is extinguished at the end of one month after the landlord becomes aware of the removal.[74] This leaves open the possibility that goods can remain subject to the *Vermieterpfandrecht* for a significant length of time whilst outside the leased premises.

[68] G Wille, *Landlord and Tenant in South Africa*, 5th edn (1956) 207. This is subject to the limited right to bring the goods back if in transit to another place.

[69] Wille, *Landlord and Tenant in South Africa* 206–07; *Webster v Ellison* 1911 AD 73; R Brits, *Real Security Law* (2016) 469. Cf W A Joubert and J A Faris (eds), *The Law of South Africa* vol 14 part 2, 2nd edn (2007) para 32.

[70] Voet, *Commentary* XX.2.3.

[71] [The hypothec of the landlord is extinguished when the items are removed from the premises, except when this takes place without the knowledge or against the protest of the landlord.]

[72] §562a BGB.

[73] §562b(2) BGB.

[74] §562b(2) BGB.

9-20. Another solution altogether is adopted by France,[75] and consequently also by Louisiana,[76] and Italy.[77] The landlord retains a right to seize the goods for 15 days after their removal from the leased premises.[78] The removal does not need to be outside the tenant's ordinary practices, but this is balanced by the clock running despite the landlord being potentially unaware of the removal. Apparently a development unique to the French Customs,[79] this exceptionally short period found its way into the *Code civil*.

9-21. Leaving aside Roman law, it is clear that all the jurisdictions just discussed, although varying in their details, share a desire not to burden goods after their removal from the premises. They all start from the position that an item, once removed, ought not to be followed by the landlord. From this stance Scots law stands apart: when goods are taken from the leased premises, the general rule is that they remain subject to the hypothec.[80] At common law, all that is required for goods to be, and remain, subject to the hypothec is that they "have been on the premises during some part of the period for which the landlord has a right of hypothec".[81] Aside from the added requirement that the rent is due and unpaid,[82] this remains the case today.

9-22. The continuation of the right of hypothec after removal is made clear in *Milligan v Purdom*,[83] where a tenant had removed goods to other premises for the purpose of a future sale which had not yet taken place. Although the goods had been removed, the landlord successfully obtained a warrant to search for and bring them back to the premises. They were still subject to the hypothec. The other creditors of the tenant, who had arrested the goods in the hands of a third-party possessor, were defeated by the landlord, whose hypothec had arisen prior to the arrestment. It must follow from this that there can be two hypothecs in the same item if it is taken from one leased building to another. The landlord of the second premises will have a hypothec over the goods, but this will rank behind the hypothec of the first landlord.[84]

9-23. The right to obtain a warrant to carry back is a clear indication of the hypothec as a real right in the items of property in question. If the hypothec

[75] Art 2332(1) CC.

[76] Art 2710 Louisiana Civil Code.

[77] Art 2764 *Codice civile*.

[78] In French law, this period is 40 days if the premises are rural.

[79] See R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) (henceforth Pothier, *Lease*) §257, where the landlord's right ended eight days after being removed from urban premises or 40 days for a rural lease.

[80] Cf J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 299.

[81] Stewart, *Diligence* 465. See also R A Simpson, *Landlord and Tenant* (1927) 23.

[82] See paras 5-15–5-20 above.

[83] *Milligan v Purdom* (1901) 17 Sh Ct Rep 271. See also *Preston v Gregor* (1845) 7 D 942; *Owens v Henderson* (1909) 25 Sh Ct Rep 149; *Ross v Brady & Sons* (1914) 30 Sh Ct Rep 60; *Shearer v Nicoll* 1935 SLT 313.

[84] *Christie v MacPherson* 14 December 1814 FC.

were not a real right, the landlord would be unable to bring back specific items. Instead, a landlord would only be able to rely upon his general right to have the premises plenished.[85] As long, however, as the tenant leaves sufficient goods behind to satisfy the rent due and unpaid, the right of hypothec over goods removed is extinguished and the landlord cannot obtain a warrant to carry the goods back. For if a landlord cannot stop a creditor attaching goods when sufficient items are left on the premises,[86] the same principle must also apply to a tenant who wishes to remove his items.[87] It would seem that it is for the tenant to prove that sufficient goods were left on the premises.[88] If the tenant leaves a sufficient amount of goods to satisfy the unpaid rent, but the landlord is not satisfied, the landlord can obtain a plenishing order, which requires the tenant to restock the premises,[89] but he cannot oblige the tenant to bring back the specific goods that were removed.

9-24. A possible difficulty is created by section 208(2)(a) of the Bankruptcy and Diligence etc (Scotland) Act 2007. In providing for the continuation of the hypothec notwithstanding the abolition of sequestration for rent, this provision states that the hypothec continues "as a right in security over corporeal moveable property kept in or on the subjects let". The use of "kept" may seem to imply that the goods must remain on the premises if they are to continue to be subject to the hypothec. Yet it seems implausible that this was the legislative intention. Clearer wording would have been required to remove this well-established effect of the hypothec. Assuming that to be correct, the hypothec, after the 2007 Act as before, burdens goods that are brought into the premises and then removed; they only need to be "kept in or on" the premises for a short period of time to become subject to the hypothec.[90] This general rule is, however, subject to exceptions. In particular, the tenant has a limited power of selling goods to a third party who can then remove them without being burdened by the landlord's security. To that important subject we must now turn.

F. ACQUISITION BY THIRD PARTY

(1) The nature of the problem

9-25. The hypothec does not of itself prevent the tenant from transferring ownership of affected goods to a third party, but a conflict between the right of

[85] Compare with the law of Louisiana, which describes the landlord's right as a privilege with a right of retention: A N Yiannopoulos, *Louisiana Civil Law Treatise*, 2nd edn (2001) vol 2, §234.

[86] See para 9-17 above.

[87] Rankine, *Leases* 392.

[88] This is based on the rule that requires a poinding creditor to prove that sufficient goods were left on the premises: see para 9-17 above.

[89] On this, see paras 10-02–10-15 below.

[90] For the length of time needed, see paras 7-17–7-19 above.

the landlord and the right of the third party will potentially arise. Rights over corporeal moveables generally lack the publicity of a registration system, which means that the best way of notifying the world-at-large of a real right's existence is for possession of the property to be handed to the right-holder. The landlord's hypothec does not adhere to this principle. In many cases, purchasers of items from a tenant will be unaware of the existence of the right of hypothec, and their situation attracts sympathy. Nevertheless, the law has granted the landlord a real right, and the general rule is that real rights are effective against the world and can be insisted on in a question with a future owner of the property.

(2) Some solutions elsewhere

9-26. There are various ways in which a legal system can balance the right of the landlord and that of the third party. On one side, the law can simply prefer the landlord, a position adopted by Roman law, which follows the maxim *mobilia habent sequelam* – rights over moveables continue against successors.[91] This is the traditional Civilian view which allows ownership to be transferred, but subjects this ownership to any subordinate real rights already in existence.[92] Yet, although the hypothec has its origins in Roman law, no modern Civilian legal system has followed its stance on the protection of third-party acquirers. It is instead accepted that third parties ought to be protected, albeit without any consistent solution across the jurisdictions.

9-27. Some jurisdictions take the opposite stance to Roman law and protect all those who purchase from a tenant. The clearest example is South African law, which ends the landlord's right of hypothec once the goods are transferred to a third party and taken from the leased premises, even if the third party is fully aware of the hypothec.[93] This is also the case in Louisiana, where the landlord's right ends when the goods are no longer owned by the tenant and are removed from the premises.[94] Other jurisdictions follow a path between Roman law, on the one side, and South Africa and Louisiana, on the other; attempts are made to safeguard third-party purchasers to a certain extent, whilst also protecting the landlord's real right of hypothec.

9-28. In Germany, if the landlord was unaware of the removal of the goods, he has the right to require their return, but this is possible only for a short period after he becomes aware of the removal.[95] Furthermore, if the sale was in the

[91] For a valuable discussion, see J H A Lokin, F Brandsma and C Jansen, *Roman-Frisian Law of the 17th and 18th Century* (2003) 103ff.

[92] This is an application of *nemo dat quod non habet. On this, s*ee K G C Reid, *The Law of Property in Scotland* (1996) para 669.

[93] *Webster v Ellison* 1911 AD 73; R Brits, *Real Security Law* (2016) 468ff; S Viljoen, *The Law of Landlord and Tenant* (2016) 335. South African law follows Voet, *Commentary* XX.2.3.

[94] Art 2710 Louisiana Civil Code.

[95] §562b(2) BGB.

usual course of dealing (*gewöhnliche Lebensverhältnisse*), such as a normal sale from a shop, the landlord cannot object and the *Vermieterpfandrecht* is extinguished when the goods are removed by the purchaser.[96] What is meant by *gewöhnliche Lebensverhältnisse* is not entirely settled, but it is thought not to include the sale of the entire plenishings.[97] It appears that any sale of goods for the purpose of shutting a business down or moving away, and any sale designed solely to reduce the quantity of the stock in the premises, would also not result in the extinction of the *Vermieterpfandrecht*.[98] If the *Vermieterpfandrecht* is not extinguished by these provisions, there is, in addition, the general protection for good-faith acquirers which applies to all acquisitions of moveables.[99] To be in good faith an acquirer must neither be aware of the landlord's right nor ought to have been aware. Taking this together with the provisions specific to the *Vermieterpfandrecht* just mentioned, the landlord's security right will be extinguished if goods are removed and sold in the tenant's ordinary course of dealing or, if the transaction does not meet that standard, if the purchaser is in good faith. But with the specific protections designed for the *Vermieterpfandrecht* being so strong, it is not clear when the good-faith provisions will be needed.

9-29. Third-party purchasers are afforded less protection in French law and are left in a precarious situation, if only for a short period of time. The landlord's right to follow the goods for 15 days after their removal from urban premises (or 40 days if the premises are a farm) applies against even a purchaser in good faith. Such a good-faith acquirer can be forced to return any item purchased from a tenant without the landlord's consent under the latter's right of return (*droit de suite*).[100] Although the *Code civil* contains an article that is designed to protect third-party purchasers who are in good faith[101] – functionally similar to the equivalent provision of the BGB[102] – this is apparently not applicable against the landlord's right.[103] A purchaser can, however, be protected if the landlord is deemed to have impliedly waived his right in cases where the removal is in the ordinary course of trading and the goods are expected to be replaced.[104]

[96] §562a BGB.

[97] F J Säcker (et al), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* 8th edn (2020) §562a para 11.

[98] V Emmerich, *Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (2018) BGB §562a paras 18 and 19.

[99] §936 BGB.

[100] Art 2332 CC.

[101] Art 2276 (previously Art 2279) CC. It has been mooted that a third-party purchaser will be partially protected by Art 2277 CC. For this, see M Planiol, *Treatise on the Civil Law* (transl Louisiana State Law Institute, 1939) §2480. See also Art 2710 Louisiana Civil Code for the position in Louisiana.

[102] §936 BGB.

[103] Planiol, *Civil Law* §2480.

[104] Planiol, *Civil Law* §2480(2). This seems to be the position in Scotland, for which see paras 9-37–9-40 below.

(3) The rule in Scotland

9-30. Despite being influenced by Roman-Dutch law,[105] Scots law has not adopted the same position as South Africa. The routes taken by the BGB and *Code civil* likewise find no parallel in the Scottish common law, which falls squarely on the side of the landlord. In the words of Lord Brougham in 1830, "[t]he Scotch landlord has a right of hypothec in the most strict sense. He can follow the crop wherever it goes".[106] The starting position is thus that the real right of hypothec continues even after the goods have been sold to a third party who is unaware of its existence. In the common law, which largely survives today, there is a noticeable absence of protection for good-faith acquirers, and for the landlord there is a right of recovery from those who carry off the *invecta et illata* during the life of the hypothec.[107] This right of recovery is enforced by the warrant to carry back,[108] although before the Bankruptcy and Diligence etc (Scotland) Act 2007 this was tempered by the short limitation period within which the landlord had to enforce the right of hypothec.[109]

9-31. Historically, a significant amount of the authority on this question concerned the hypothec's effect over crops grown on a leased farm, a subject which today is no longer of practical significance,[110] although the general principle laid down by these cases remains useful. It was consistently decided that the landlord's right was not lost when the crops were sold to a third party, and their return, or equivalent value, could be demanded from the purchaser (generally referred to as an "intromitter" or "intermeddler").[111] Whether the purchaser was in good faith was irrelevant. Even a significant length of time between the removal of the crops and the landlord's enforcement of the hypothec did not protect a third-party purchaser (other than by the general limitation period).[112] Although there are fewer cases that address the landlord's right of pursuit in relation to goods other than crops, it is clear that the landlord's right to follow goods was not restricted to rural leases (although with urban premises, as we have seen, the law developed the rule that the landlord's right to enforce

[105] See chapter 3 above.

[106] *Dalhousie v Dunlop* (1830) 4 Wilson & Shaw 420 at 429 per Lord Brougham. For an in-depth discussion of *Dalhousie v Dunlop*, see paras 4-04–4-07 above.

[107] Bankton I.17.12 (vol I, 387); Bell, *Commentaries* II, 34; Stewart, *Diligence* 483ff.

[108] On which, see paras 10-22–10-26 below.

[109] See paras 9-08–9-13 above.

[110] See paras 4-02–4-34 above.

[111] *Hay v Keith* (1623) Mor 6188, (1624) Mor 6217; *Lady Dun v Lord Dun* (1624) Mor 6217; *Swinton v Seton* (1627) Mor 6218; *Fowler v Cant, Gray & Lady Lawrieston* (1630) Mor 6219; *Scot of Ancrum* (1678) Mor 6223; *Smart v Ogilvie* (1796) 3 Pat App 490; *Dalhousie v Dunlop* (1828) 6 S 626, affd (1830) 4 Wilson & Shaw 420; *Barns v Allan* (1864) 2 M 1119; J Steuart, *Dirleton's Doubts and Questions in the Law of Scotland, Resolved and Answered* (1715) 158; Bankton I.17.8 (vol I, 386); Erskine II.6.58 and 60; Bell, *Commentaries* II, 28; Bell, *Leases* I, 380; Rankine, *Leases* 395.

[112] See paras 4-02–4-07 above.

the hypothec was limited to three months after the end of the term).[113] Indeed, Stair described the action as one which was available to a landlord against an intromitter of goods from both rural and urban premises,[114] and the reports of both *Ruthven v Arbuthnot* (1673) and *Commissary of St Andrews v Watson* (1677) make no distinction between crops and other goods of a tenant.[115] As the Lords held in the latter case, "all corns, cattle, and goods, possessed by the tenants for the last year's duty, were liable to the master *jure tacitae hypothecae*, and that he had *actionem hypothecarium* against all singular successors, by emption or assignation, albeit they were taken off the ground".[116]

9-32. Whilst, therefore, a third party can purchase goods held on the leased premises and remove them, the hypothec remains and the purchaser is deemed to be an intromitter who is "required to account to the landlords for the goods or their value".[117] Although it may appear that the third party becomes personally liable for damages to the landlord for the intromission,[118] it is better said that the goods remain subject to the hypothec despite being removed from the premises. This was Lord Brougham's view when, in *Dalhousie v Dunlop*, he said that "The Scotch landlord has a right of hypothec in the most strict sense. He can follow the crop wherever it goes, unless in one excepted case, where it is sold in bulk in market overt."[119] The purchaser's state of knowledge is irrelevant to the landlord's right.[120] In general, a third party can only be sure that the items acquired are no longer burdened by obtaining the consent of the landlord. A third-party purchaser is therefore in a rather vulnerable position, albeit with the right to bring an action against the tenant-seller or retain any as yet unpaid purchase price.[121]

9-33. When goods have been purchased and removed, the landlord's first option is to obtain a warrant to carry them back to the leased premises (from

[113] On this, see paras 9-08–9-13 above.

[114] Stair IV.25.5 and IV.25.7.

[115] *Ruthven v Arbuthnot* (1673) Mor 6222; *Commissary of St Andrews v Watson* (1677) Mor 6223. See also *Scot of Ancrum* (1678) Mor 6223.

[116] See also Bankton I.17.12 (vol I, 387).

[117] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36 at 41 per Sheriff Kelbie. See also *Menzies v Templeton* (1896) 12 Sh Ct Rep 323; *Fitzgerald v Simpson* (1922) 38 Sh Ct Rep 160; *McLachlan's Trs v Croal* (1928) SLT (Sh Ct) 42, (1928) 44 Sh Ct Rep 354; *Novacold v Fridge Freight (Fyvie) Ltd (in receivership)* 1999 SCLR 409 at 414 per Sheriff Principal Risk QC; Bankton I.17.8 (vol I, 386) and I.17.12 (vol I, 387); Stewart, *Diligence* 486; Rankine, *Leases* 395. It had previously been argued that a third-party purchaser was liable for the entire unpaid rent without reference to the value of the purchased goods (see *Steuart v Peddie* (1874) 2 R 94), but this was rejected in *McLachlan's Trs v Croal* (1928) 44 Sh Ct Rep 354 at 358 per Sheriff Menzies.

[118] G L Gretton, "Diligence and enforcement of judgments", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 378. This is also one reading of Bankton I.17.12 (vol I, 387).

[119] *Dalhousie v Dunlop* (1830) 4 Wilson & Shaw 420 at 429 per Lord Brougham.

[120] See, for example, Gloag and Irvine, *Rights in Security* 429.

[121] *Mitchell v Major* (1856) 19 D 30.

where they could, under the former law, be subject to an action of sequestration for rent), failing which he can receive the value of the goods. But now that sequestration for rent is abolished, it is unclear how a landlord can sell goods that have been transferred to a third party.[122]

(4) Exceptions

9-34. Despite the general rule just described, the common law does extinguish the right of hypothec in some circumstances in the interests of commerce. This may go against the view that the hypothec is a real right, but, as Hume writes, the landlord's right "has, in the course of time been reduced to a lower, but a more practicable and convenient standard".[123] A key example is the landlord's inability to follow goods into the hands of someone who has acquired them from the immediate purchaser in good faith.[124] In these circumstances, a landlord presumably has a right against the immediate purchaser for the value of the goods, although this cannot be a real right.[125]

(5) Sufficient goods left in the premises

9-35. If a purchaser leaves goods in the leased premises to the value of any unpaid rent, the right of hypothec over the goods removed is extinguished.[126] This follows the same principle as the landlord's right against a creditor attaching the goods, and against a tenant seeking to remove the goods.[127] And, again, it will be for the third-party purchaser to prove that sufficient goods were left on the premises.

(6) Certain sales

9-36. A purchaser can, under certain circumstances, be protected from the hypothec. At common law this applies to sales in the ordinary course of the tenant's business. There was no consideration of this exception by the Scottish Executive before the introduction of a new and parallel exception by the

[122] See paras 10-32–10-35 below.

[123] Hume, *Lectures* vol IV, 10.

[124] Cf Bankton I.17.12 (vol I, 387), which does not require good faith, but is outnumbered by the following authorities: Hume, *Lectures* vol IV, 10; Hunter, *Landlord and Tenant* II, 398; Gloag and Irvine, *Rights in Security* 429.

[125] On this, see para 10-34 below.

[126] *Lamington v Oswald* (1688) Mor 6224; *Rutherford v Scott* (1736) Mor 6226; Stair IV.25.6; Hunter, *Landlord and Tenant* II, 397; Stewart, *Diligence* 586; Rankine, *Leases* 395; Paton and Cameron, *Landlord and Tenant* 211. In French law, it is said that the landlord has no interest to pursue the goods: see Planiol, *Civil Law* §2480(2)

[127] See paras 9-17 and 9-23 above.

Bankruptcy and Diligence etc (Scotland) Act 2007 for good-faith acquirers. But, as there is nothing that would suggest that the legislation has impliedly abolished the common law exception, it is assumed here to be living law and may conveniently be dealt with before moving on to the statutory exception.

(a) The common law exception: sales in the ordinary course of business

9-37. Where premises are let as a commercial unit, a landlord cannot prevent the sale of stock-in-trade in the ordinary course of trading.[128] Although there is no discernible reason why this rule should not be extended to include the removal of items by the tenant without sale but in the usual course of business, Bankton, Erskine and Bell are clear that it covers only sales.[129] At common law a sale of household furniture, of which the tenant was permitted to dispose of small quantities,[130] could also be protected by this rule but, after the 2007 Act abolished the hypothec for leases of dwelling-houses,[131] this ceased to be relevant. A sale of cattle by a tenant farmer was also protected by this rule,[132] but the hypothec is now also abolished in relation to agricultural land.[133]

9-38. Selling, say, one-half of the stock-in-trade (or furniture) does not meet the test of "ordinary course of business"[134] (unless the tenant's business involved the entire sale of the plenishings),[135] but the exception does cover day-to-day transactions and allows the tenant to continue to trade freely. This feature of the hypothec is the main reason why it appears to float above the goods brought into the premises, rather than act as a fixed security in specific items. Nonetheless, the exception is best viewed as extinguishing a real right that has already arisen.

[128] Stair IV.25.3; Erskine VI.2.64; Bell, *Commentaries* II, 31; Hume, *Lectures* vol IV, 27; Hunter, *Landlord and Tenant* II, 380; Rankine, *Leases* 378–79; Gloag and Irvine, *Rights in Security* 418; Stewart, *Diligence* 470; R A Simpson, *Landlord and Tenant* (1927) 23; *Maguire v Hayes & Co* (1897) 5 SLT 9, (1897) 13 Sh Ct Rep 197; *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36 at 40 per Sheriff Kelbie; *Report of Her Majesty's Commissioners Appointed to Consider the Law Relating to the Landlord's Right of Hypothec in Scotland, in so far as Regards Agricultural Subjects* (1865, 3546) x.

[129] Bankton I.17.11 (vol I, 387) Erskine II.6.64; Bell, *Commentaries* II, 31.

[130] Although Bell discusses only the protection for purchasers from shops, there are strong authorities that accept that sales from dwelling-houses are protected: Hume, *Lectures* vol IV, 25; Hunter, *Landlord and Tenant* II, 375; *Anderson v Russell* (1886) 2 Sh Ct Rep 355 at 356 per Sheriff-Substitute Robertson.

[131] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(3)(a). On this, see paras 4-38–4-43 above.

[132] Erskine II.6.61; Hume, *Lectures* vol IV, 21; Bell, *Leases* I, 381.

[133] See paras 4-29–4-34 above for more discussion on the abolition of the hypothec in relation to agricultural land.

[134] *Anderson v Russell* (1886) 2 Sh Ct Rep 355; *Reid v MacGregor* (1902) 18 Sh Ct Rep 259.

[135] See Hume, *Lectures* vol IV, 27, where examples of the sale of the entire stock of tea or spirits would be acceptable if in the ordinary course of business. This would be expected if the leased premises consisted of a warehouse.

After all, if the goods are not removed in the ordinary course of trading, the hypothec continues to apply and the landlord has a right to require their return. Although far from certain, it appears that it is for the landlord to prove that a sale was not in the ordinary course of the tenant's business.[136]

9-39. If this exception has the appearance of an elementary form of good-faith protection, it needs to be emphasised that the acquirer does not, it appears, have to be in good faith. Admittedly, some writers do impose a requirement of good faith (whilst not defining what they mean by this),[137] but others do not even mention good faith,[138] including Bell, who writes that "the landlord's right never can prevent them [the goods] from being sold in the course of trade".[139] A sale in the ordinary course of the tenant's business is therefore protected from the hypothec even if the purchaser is aware of its existence.

9-40. A plausible explanation for this exception is that the landlord impliedly agrees to discharge its right of hypothec over goods that are sold in the ordinary course of business – an example of the implied discharge discussed earlier.[140] By letting commercial premises, the landlord is aware that goods will be removed in the ordinary course of business and is taken to have consented to the discharge of the right of hypothec over any items sold in such a manner. In the words of Hume, "since the tenement has been hyred as a place of sale,– so, until the landlord shall interfere and sequestrate, the tenant must have full latitude in that respect".[141] This theory concentrates on the relationship between landlord and tenant rather than the connection between tenant and third-party acquirer. Such an understanding finds strong support in other jurisdictions, particularly in France, with Planiol writing that a landlord is "considered as having tacitly consented to the removal of certain things: for example the merchandise of a merchant intended to be sold".[142] From a much earlier period, Pothier is to the same effect.[143] Crucially, this theory does not require any good faith on the part of the purchaser.

[136] This is taken from the rule that, for a sequestration for rent *currente termino* of goods in a shop, it was necessary for there to be "a distinct and positive statement that the tenant is doing something which he is not entitled to do in the fair and ordinary course of business": *Maguire v Hayes & Co* (1897) 5 SLT 9 at 11 per Sheriff-Substitute Strachan.

[137] Hunter, *Landlord and Tenant* II, 380; Gloag and Irvine, *Rights in Security* 418; Rankine, *Leases* 379.

[138] Bankton I.17.9 (vol I, 387); Erskine II.6.64; Bell, *Commentaries* II, 31; Bell, *Principles* §1276; Stewart, *Diligence* 470.

[139] Bell, *Commentaries* II, 31.

[140] See paras 9-04–9-07 above. This view has similarities to the "defeasible charge theory" of the English floating charge, which views a floating charge as a fixed charge in every asset held by the company and a discharge of this charge if the chargor deals with the item in a permitted way. On this, see S Worthington, *Proprietary Interests in Commercial Transactions* (1996) paras 4.3–4.7.

[141] Hume, *Lectures* vol IV, 27.

[142] Planiol, *Civil Law* §2480.

[143] Pothier, *Lease* §265.

(b) The statutory exception: sales to a good-faith purchaser

9-41. To this common law exception there is now added a further exception derived from statute. Section 208(4) and (5) of the Bankruptcy and Diligence etc (Scotland) Act 2007 provides that:

> (4) It [the hypothec] no longer arises in relation to property which is owned by a person other than the tenant.
> (5) Property which is acquired by a person from the tenant –
> (a) in good faith; or
> (b) where the property is acquired after an interdict prohibiting the tenant from disposing of or removing items secured by the hypothec has been granted in favour the landlord, in good faith and for value,
> ceases to be subject to the hypothec upon acquisition by the person.

Subsection (4) does not provide any protection for purchasers. Even if ownership passes to a third party, a hypothec that has already arisen in the item is not extinguished by that provision. The purchaser therefore must rely on subsection (5) to extinguish a right of hypothec already created. Only good-faith purchasers are protected here; goods acquired other than in good faith can presumably be brought back to the premises by the landlord (unless sold in the ordinary course of business or if sufficient goods are left to cover the unpaid rent), thus maintaining the general rule that the hypothec is not lost when ownership is transferred to a third party. Where goods are bought by a bad-faith acquirer and subsequently sold to an acquirer in good faith it appears that the hypothec would then be extinguished. This understanding comes not from the wording of the legislation but from what appears to be a principle of the common law, that a good-faith purchaser acquiring goods from an immediate purchaser is protected from the right of hypothec.[144]

9-42. Whilst the statutory exception is clear, at least in outline, the definition of good faith is not, and there is no general definition in Scots property law that can be easily adopted.[145] It is also not clear when the good faith of the acquirer is to be assessed. Before a purchaser can be protected the goods must have been removed from the leased premises, for the purchaser does not acquire ownership until that point.[146] From this it seems natural to conclude that the good faith of the purchaser must be assessed at the date when delivery has been completed. This means that a purchaser who is unaware of the hypothec when a sale contract was concluded but becomes aware of it before taking possession of the goods would not be protected by section 208(5). Of course, by this point the acquirer may have paid the purchase price. This creates a degree of

[144] Hume, *Lectures* vol IV, 10; Hunter, *Landlord and Tenant* II, 398; Gloag and Irvine, *Rights in Security* 429. Cf Bankton I.17.12 (vol I, 387), which does not require the purchaser to be in good faith. See also para 9-34 above.

[145] K G C Reid, *The Law of Property in Scotland* (1996) para 669.

[146] *Ryan v Little* 1910 SC 219. On this, see paras 9-51–9-60 below.

vulnerability for acquirers, but this is accepted elsewhere in the law: under the offside-goals rule, a purchaser, even after paying the price and taking delivery of a disposition, is liable to have his title struck down if he becomes aware of a prior right to acquire the property before registering the disposition in the Land Register.[147]

9-43. Where the burden of proof falls is also left untouched by the legislation. Useful comparisons can be found in the rules surrounding the protection for good-faith purchasers without notice of a defect in the seller's title under the Sale of Goods Act 1979, where the burden of proof falls on the purchaser.[148] This is a reasonable position: a purchaser is likely to be the party best-placed to prove that the sale was carried out in good faith and without notice. The Draft Common Frame of Reference also adopts this position in its equivalent rules concerning the good-faith acquisition of goods.[149] Additionally, in German law, it is for the tenant or third party purchasing goods to prove that the sale was in the course of the *gewöhnliche Lebensverhältnisse* (i.e. ordinary business);[150] but if a third party relies instead upon the general protection for purchasers in good faith, it is for the landlord to prove that the sale was not in good faith.[151]

9-44. The Scottish Law Commission, in their *Report on Moveable Transactions*, recommend placing the burden of proof on the party claiming that any transaction was not in good faith.[152] Applied to the hypothec, this would mean the landlord. The context for the Law Commission's recommendation was the protection of debtors who pay the original creditor in good faith after the debt has been assigned. It was also decided that it was best to have a uniform provision dealing

[147] *Burnett's Trs v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 142 per Lord Rodger of Earlsferry; *Alex Brewster & Sons v Caughey* 2002 GWD 10-318. In *Alex Brewster*, see in particular para 73 per Lord Eassie: "In my view the opinions in Rodger (Builders) are clear authority for the proposition that bad faith constituted by the acquisition of knowledge between the completion of a personal contractual obligation and the completion of the real right by the registration of a conveyance is sufficient to justify reduction of that conveyance." For a discussion on *Alex Brewster*, see S Wortley, "Double sales and the offside trap" 2002 JR 291.This view is not without its critics, for example, J MacLeod, "The offside goals rule and fraud on creditors", in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 115 at 138ff. The rule not extinguishing the hypothec when goods are sold to a third party in bad faith does not have the same conceptual difficulties as the offside goals rule. A landlord has a real right (the hypothec) in the goods in question and is not relying upon any prior personal right. For these difficulties, see Wortley's article above.

[148] M G Bridge (ed), *Benjamin's Sale of Goods*, 10th edn (2017) paras 7-029, 7-045, 7-068, and 7-086.

[149] C von Bar and E M Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) (2009) VIII: 3:102.

[150] F J Säcker (et al), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* 8th edn (2020) §562a para 13.

[151] *Münchener Kommentar zum Bürgerlichen Gesetzbuch* §936 para 20.

[152] Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017), Draft Bill s 120.

with the burden of proving good faith, which means this rule would apply to the proposed new statutory pledge over goods. It will, therefore, be for the secured creditor to prove the purchaser was not in good faith. This approach also has its attractions. In particular, it is difficult for a third party to prove that they did not know of anything – it is challenging to prove a negative. Furthermore, it coheres with the common law exception, where the burden of proving that a sale was not made in the ordinary course of business appears to fall on the landlord.[153] In the interests of consistency, therefore, the same position should be adopted for section 208(5). If this is correct, good faith is presumed and it is for the landlord to prove otherwise. This is in keeping with the rule that a warrant to carry back will not be granted as a matter of course but usually requires the landlord to prove the circumstances of the removal.[154]

9-45. As already mentioned, a definition of good faith is lacking. Although it might mean an absence of actual knowledge of the hypothec, it is likely that constructive knowledge applies, at least to some degree, so as to avoid protecting acquirers who have reason to be suspicious but choose to be ignorant. If that is correct, an acquirer cannot be in good faith if there are circumstances that ought to have caused him to be aware of the landlord's pre-existing right. This puts a duty of enquiry on the purchaser in certain circumstances. It is not always clear when such a duty should arise. One clear example where it seems reasonable to place a duty on the purchaser is when he seeks to purchase a tenant's entire business. As was made clear in *Grampian Regional Council v Drill Stem*,[155] a party who takes over the entire business of a tenant is "well aware of the existence of the lease and must have known that the contents of the premises they sought to take over would be subject to the landlord's hypothec".[156] It is also likely that such a purchaser will have obtained legal advice. Similarly, goods transferred to a third party as part of a "compromise or arrangement with the tenant", in which the debt of the tenant is discharged, do not appear to be protected under section 208(5): there is clearly no good faith on the part of the acquirer, unless he has been misinformed by the landlord as to whether the rent has been paid.[157]

9-46. A purchaser online would be protected by good faith if unaware of the hypothec. No duty of enquiry should be placed on such a purchaser. This is the case even if the purchaser gives no value for the goods for, despite value being a usual requirement for good-faith protection,[158] the legislation does not require

[153] See para 9-38 above.

[154] See paras 10-22–10-26 below.

[155] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36.

[156] 1994 SCLR 36 at 41 per Sheriff Kelbie.

[157] *Reid v MacGregor* (1902) 18 Sh Ct Rep 259.

[158] See, for example, C von Bar and E M Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) (2009) VIII - 3:102.

this.[159] This is one area where the legislation has increased the protection for purchasers, for the common law exception requires value to be given to come within the definition of ordinary course of trading.[160]

9-47. Certainly, where a purchaser is aware both that the premises are leased and also that the rent has not been paid, this is sufficient knowledge to create constructive knowledge of the hypothec and so prevent good faith. But where the purchaser is aware that the goods are contained in premises that are leased, but not that the rent is unpaid, this does not seem sufficient to place on him a duty of enquiry. It is true that a *dictum* of Lord Curriehill in *Barns v Allan*, in which a purchaser of meal was held liable to the landlord, would support the contrary view:

> [T]he purchaser was not in *bona fide* in making the purchase. I do not mean in bad faith, but that he was not in ignorance that this was a subject liable to hypothec. The mistake made was just this, and which was, perhaps, not unnatural, that the purchaser neglected to make inquiry as to whether this tenant-farmer paid his rent.[161]

This judgment, however, comes from a time when the hypothec could cover rent not yet due. Now that the hypothec cannot arise until rent is due and unpaid, a purchaser is not in bad faith until he is aware, or ought to have been aware, that the rent is unpaid. But even if this is wrong and a purchaser cannot be in good faith if aware that the premises are leased, the common law will step in to protect a purchaser who acquires goods in the ordinary course of the tenant's trading. This ensures that consumers purchasing from a company that is known to have failed to pay its rent will take the goods free from the hypothec.

9-48. Where a landlord has a right of hypothec over goods still owned by the tenant and also items that have been sold to a third party, the landlord must first exhaust the goods owned by the tenant. This is a simple application of the rules on catholic and secondary creditors.[162] But, in any case, as a landlord (or the tenant's insolvency practitioner) can only sell goods owned by the tenant,[163]

[159] If value was needed, the legislation would have referred to this, as it does in s 208(5)(b) of the Bankruptcy and Diligence etc (Scotland) Act 2007. It must be noted, however, that a transfer at undervalue by the tenant may be struck down as a gratuitous alienation if made within a period prior to insolvency: see Bankruptcy (Scotland) Act 2016 s 98, Insolvency Act 1986 s 242, and the common law of fraud on creditors. For the common law rule, see *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, 2020 SC (UKSC) 23 at paras 23–25 per Lord Hodge; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 22–35. For a discussion of the underlying common law and the statutory provisions, see J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) ch 4.

[160] It is not entirely unusual for the law to protect good-faith third parties who do not provide value. An example is s 86 of the Land Registration etc (Scotland) Act 2012. This provision protects a party acquiring land from a disponer who does not have a valid title: for discussion, see G L Gretton and K G C Reid, *Conveyancing*, 5th edn (2018) para 6-12.

[161] *Barns v Allan* (1864) 2 M 1119 at 1121. For more on this case, see para 4-16 above.

[162] Gloag and Irvine, *Rights in Security* 61–62.

[163] See paras 10-27–10-35 below.

it will always be in his best interest to make use of the security subjects still owned by the tenant first.

(c) The relationship between the two exceptions

9-49. From the few sources at present available it appears that, in preparing the Bill that would become the 2007 Act, the Scottish Executive did not consider the interaction between the common law and section 208(5), and was perhaps even unaware of the common law exception.[164] It is therefore not surprising that there is a great deal of overlap between the two protections for acquirers. Most purchasers who find protection under section 208(5) would also be shielded by the common law rule extinguishing the hypothec when the goods are sold in the ordinary course of business. Equally, those not protected by section 208(5) will probably not be protected by the common law. A sale of a tenant's entire business to a third party, for example, will be protected by neither. There will, however, not always be an overlap between the exceptions. In cases of bad faith, the common law might provide a protection that is lacking under section 208(5). Conversely, section 208(5) improves the protection for third parties in certain circumstances, notably where a sale is outside the ordinary course of business but the purchaser is unaware of any right of hypothec or that the tenant is in rent arrears. A sale at significant undervalue is likely to be outside the ordinary course of business and so unprotected at common law, but if the purchaser is unaware of the hypothec he will still be protected, for there is no requirement of value under section 208(5)(a). An acquirer of shop fittings would not be protected at common law – such a sale being clearly outside the tenant's ordinary course of business – but, if in good faith, will be protected by section 208(5).

9-50. The discussion so far has assumed that the common law rule has survived. But rules of common law are extinguished to the extent that they are inconsistent with rules introduced by statute. Was, therefore, the existing common law rule displaced by section 208(5)? That is unlikely. The pre-existing law is not inconsistent with section 208(5), but is in some respects broader than the legislation. The result of the legislation is to provide three routes for the protection of acquirers who remove and dispose of items from the leased premises without the consent of the landlord: (1) good-faith acquisition where the third party was neither aware nor ought to have been aware of the hypothec; (2) acquisition in a sale within the ordinary course of the tenant's business; and (3) removal of goods where there are sufficient items left in the premises to cover any rent due and unpaid. Where the burden of proof falls

[164] Consultation Paper on *Enforcement of Civil Obligations in Scotland* (available at https://webarchive.nrscotland.gov.uk/20200120121848/https://www2.gov.scot/Publications/2002/04/14590/3531) para 5.296; *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 1009.

depends on which ground the purchaser relies upon. If the landlord claims that the goods purchased are still burdened by the hypothec, it is for him to prove that the sale was not carried out in the ordinary course of business and that the purchaser was not in good faith. If the landlord proves this, it will then be for the purchaser to prove that he left sufficient goods in the premises to cover any rent arrears at the time the goods were removed.

(d) When are the goods "acquired"?

9-51. Although the hypothec can, in certain circumstances, be extinguished when goods are transferred to a third party, as has just been seen, it remains to be established when the items are regarded as being acquired by a third party. In other words, when is the tenant no longer the owner of the goods? Unexpectedly, the history of the hypothec has caused an alteration in the law of sale in respect of goods that are subject to the landlord's hypothec.

9-52. The background is as follows. At common law, delivery was required for the transfer of corporeal moveables.[165] In the second half of the nineteenth century, this rule came to be criticised for the lack of protection it gave to purchasers who had paid for but not yet taken delivery of goods. In 1855, the Royal Commission for Mercantile Law Assimilation recommended that Scots law be assimilated with that in England by preventing the seller's creditors from attaching goods that were sold but undelivered.[166] This was given effect to by section 1 of the Mercantile Law Amendment (Scotland) Act 1856.[167] Despite this, the Royal Commission did not suggest any alteration to the right of hypothec and section 4 of the 1856 Act made clear that such a right was unaffected by the reform.[168] As the common law position was thus preserved, a purchaser needed to take delivery before there could be a transfer of ownership of goods that were subject to the hypothec.

9-53. The law on the sale of goods was later substantially altered by the Sale of Goods Act 1893,[169] removing altogether the requirement of delivery to transfer ownership. Section 17(1) of the 1893 Act stated that:

> Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

[165] Stair I.14.2; Bell, *Commentaries* I, 177.

[166] *Second Report of the Commissioners Appointed to Inquire and Ascertain How Far the Mercantile Laws in the Different Parts of the United Kingdom of Great Britain and Ireland May Be Advantageously Assimilated* (1854–1855, 1977) 8.

[167] 19 & 20 Vict c 60.

[168] *Second Report of the Commissioners on Mercantile Laws* 53.

[169] 56 & 57 Vict c 71.

There was, as in the 1856 Act, a saving provision for the right of hypothec, section 61(5) providing that: "[n]othing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland". This was almost identical to the provision in the 1856 Act and it was also later re-enacted in the Sale of Goods Act 1979.[170] Therefore, despite these legislative changes, the common law position was retained in relation to the hypothec: any goods sold but undelivered continued to be subject to the landlord's right regardless of what was otherwise stated in the Sale of Goods Act.

9-54. Section 61(5) was applied in *Ryan v Little*,[171] where a landlord was held to have a hypothec over goods that had been sold by the tenant but remained in the premises. James Ryan purchased and paid for various items of furniture in July 1909, and the goods were set aside in the seller's store with Ryan's name written on them. A week later, and whilst the goods remained in the store, the seller's landlord sequestrated for rent. If ownership had passed to Ryan, the hypothec would have been extinguished under the common law rule allowing a tenant to sell stock in the ordinary course of trading. But it was held that the hypothec was retained over goods, although they had been "sold" under a contract of sale, because section 61(5) of the Sale of Goods Act 1893 (now section 62(5) of the 1979 Act) stated that: "[n]othing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland".[172]

9-55. There are, however, two ways of interpreting this provision. The first is that the statutory provisions relating to the transfer of ownership are disapplied when they would affect the landlord's hypothec. This results in the fall-back position of the common law, meaning that delivery would be required to transfer ownership of goods that are burdened by a hypothec. On this interpretation, the hypothec would continue even today to cover undelivered goods because, so far as the hypothec is concerned, they remain the property of the tenant and would not be caught by section 208(5) of the 2007 Act or the protection at common law – the goods have not yet been "acquired" by anyone. This analysis is supported by Graham Stewart who, writing before *Ryan v Little*, stated that "[t]he Sale of Goods Act 1893, does not pass the property on the completion of the contract of sale where the landlord's hypothec is concerned".[173] Sheriff Millar in *Ryan v Little* was also supportive of this view, stating that:

[170] Sale of Goods Act 1979 s 62(5), as amended by the Bankruptcy and Diligence etc (Scotland) Act 2007 Sch 6 Part 1.

[171] *Ryan v Little* 1910 SC 219, (1909) 2 SLT 476.

[172] The current wording, in s 62(5) of the Sale of Goods Act 1979, is that: "Nothing in this Act prejudices or affects the landlord's right of hypothec in Scotland". The reference to sequestration for rent was removed by the Bankruptcy and Diligence etc (Scotland) Act 2007.

[173] Stewart, *Diligence* 466.

> The Mercantile Law Amendment Act and the Sale of Goods Act are excluded by their terms in any question of the landlord's hypothec. We must take it, therefore, that the sale was not completed until delivery had taken place.[174]

This also appears to be the view of Lord President Dunedin in the appeal in *Ryan* when he stated that "the landlord's hypothec was expressly reserved in both Acts; so we are here under the old law which provided that the property in goods did not pass until delivery".[175] The Inner House based its decision on the common law requirement of delivery to transfer ownership, this being necessary because the Sale of Goods Act provisions were disapplied. This view has since been followed in the sheriff court.[176] It does, however, involve accepting that ownership has not passed to the purchaser in relation to the landlord's right of hypothec but that it has done so in relation to other creditors.[177] Yet although this result seems odd, it need not create significant challenges in the event of the tenant's insolvency. An insolvency practitioner would sell the goods as part of the tenant's estate and remit the proceeds to the landlord. If there were any value left over after the rent had been paid, the purchaser would receive the remaining proceeds in priority to any other creditor of the tenant.

9-56. Although the unanimous Inner House judgment in *Ryan* supports this approach, it is not a view shared by all. This brings us to the second possible interpretation, namely that the ownership of the goods is transferred under the Sale of Goods Act and without delivery of the goods, but subject to the continuation of the hypothec. If this interpretation is correct, the hypothec would not, today, burden goods that have been acquired in good faith by a third party and remained, undelivered, on the leased premises. This is a result of section 208(5) of the Bankruptcy and Diligence etc (Scotland) Act 2007 (discussed above), which provides that the hypothec no longer burdens goods when they are acquired in good faith, goods being "acquired" when ownership passes.

9-57. This view is supported by Gow and by Paton and Cameron, who are clear that the Sale of Goods Act is not disapplied and that ownership of the goods passes subject to the hypothec.[178] Richard Brown, in his *Treatise on the Sale of Goods*, is of the opinion that the goods have passed to the buyer but that the landlord's right remains.[179] Gloag and Irvine are equivocal about whether

[174] *Ryan v Little* (1909) 2 SLT 476 at 478 per Sheriff Millar.

[175] 1910 SC 219 at 222 per Lord President Dunedin.

[176] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36 at 39–40 per Sheriff Kelbie.

[177] By contrast, the proposed new statutory pledge would end if the subject-matter is transferred to a good-faith purchaser who has paid the price; there is no need for the goods to be delivered: see Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017) para 24.33.

[178] Gow, *Mercantile Law* 300; Paton and Cameron, *Landlord and Tenant* 211.

[179] R Brown, *Treatise on the Sale of Goods with Special Reference to the Law of Scotland*, 2nd edn (1911) 421.

the Sale of Goods Act is actually disapplied, stating that "although the property in the goods sold might, under the provisions of the Act, pass to the purchaser without delivery, yet, if left in the possession of the tenant, they might still be subject to the hypothec of the landlord".[180] And Rankine merely states that the hypothec continues to cover "goods sold and paid for", but does not consider whether ownership has passed.[181]

9-58. With the support of the unambiguous Inner House judgment in *Ryan*, the first interpretation seems the stronger of the two. Although the policy memorandum for the 2007 Act demonstrates a desire to protect third-party purchasers who are yet to take delivery of the goods,[182] there is no evidence that there was a consideration of the interaction between the hypothec and the Sale of Goods Act. With the retention of the relevant section in that Act (only the reference to sequestration for rent was removed by the 2007 Act), the *Ryan v Little* interpretation remains authoritative with the result that the common law requirement of delivery must be fulfilled before property is removed from the scope of the hypothec. Although this may appear a strange result, the same position has been reached, by a different route, in Germany[183] and France.[184] In addition, it fits with the understanding that actual possession of an object should be acquired before a good-faith acquirer is protected.[185] And finally it is in keeping with the law which allows a seller of goods who retains possession to pledge them if the pledgee is in good faith and without notice of the sale.[186]

9-59. This situation may be amended in future for consumer sales. Currently, for all sales contracts, the Sale of Goods Act governs when the ownership of goods is transferred. This, however, may change. The Law Commission has proposed a different regime for consumer sales contracts that would see new rules introduced into the Consumer Rights Act 2015 to regulate when ownership

[180] Gloag and Irvine, *Rights in Security* 418.

[181] Rankine, *Leases* 379.

[182] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 1009.

[183] P Bruns, "Gegenwartsprobleme des Vermieterpfandrechts" 2019 *Neue Zeitschrift für Miet- und Wohnungsrecht* 46 at 50, stating that: "Gutgläubiger Erwerb von Sachen, die sich noch im Mietobjekt befinden, ist jedenfalls nicht möglich" [The good-faith acquisition of things which remain on the leased premises is not possible].

[184] In France, the short negative prescriptive period only begins when the goods are removed from the premises.

[185] See, for example, C von Bar and E M Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) (2009) VIII – 3:101.

[186] Sale of Goods Act 1979 s 24; Steven, *Pledge and Lien* para 6-39. There is, however, no equivalent rule to s 25 of the Sale of Goods Act 1979 (allowing a buyer in possession after sale to pledge the items) for the hypothec. This is because it would be against the rule that the hypothec cannot attach to goods until they are owned by the tenant. The restriction of the hypothec to goods owned by the tenant, and the pre-2007 Act law, are set out in paras 4-44–4-54 above.

transfers.[187] There is, however, no provision which corresponds to section 62(5) of the Sale of Goods Act within the recommendations and it can be assumed that there will be none. The special provisions for the hypothec would, therefore, cease to apply to consumer contracts if these proposals were introduced.

9-60. The foregoing discussion has been concerned with the sale of goods that are burdened by the hypothec at the time of sale. There is, however, another possibility, namely that the goods become subject to the hypothec in the period between their sale under the Sale of Goods Act and their delivery to the purchaser. This is perhaps not a likely scenario, but one worth discussing. It may be an issue if the tenant sells items within the leased premises to a purchaser on day 1, fails to pay rent on day 2, and enters insolvency proceedings on day 3. On one view, the same conclusion as above can be reached: the hypothec arises over the goods because, as far as the hypothec is concerned, they are still owned by the tenant. This would, however, be to stretch the interpretation of section 62(5) of the Sale of Goods Act 1979 too far. Section 62(5) merely states that "nothing in this Act prejudices or affects the landlord's right of hypothec in Scotland". In the scenario discussed here, when the sale takes place under the Sale of Goods Act on day 1 there is no right of hypothec in the goods. Therefore, the provisions of the Sale of Goods Act do not prejudice the landlord's right. And the hypothec cannot arise on day 2 because section 208(4) of the Bankruptcy and Diligence etc (Scotland) Act 2007 states that "It [the hypothec] no longer arises in relation to property which is owned by a person other than the tenant."

G. THE PLEDGING OF GOODS

9-61. It is very unusual to have more than two concurrent real rights in a corporeal moveable. Where, for example, an item is pledged, there is the right of ownership of the pledgor and the real right in security of the pledgee. If possession is given up to a second pledgee, the real right of the first pledgee ends.[188] The hypothec, however, does not require possession to be given to the creditor, and therefore can coexist with a right of pledge (or lien) under certain circumstances.

9-62. Admittedly, if the tenant has possession of the goods – a prerequisite of the creation of the hypothec – a right of pledge cannot be granted to another creditor. But once a right of hypothec has been created a pledge could be granted by delivery of the goods to a pledgee. Such delivery, it is sometimes suggested, would extinguish the earlier hypothec,[189] but this view seems contrary to the

[187] Law Commission, Consultation Paper on *Consumer Sales Contracts: Transfer of Ownership* (Law Com Consultation Paper No 246, 2020); Law Commission, Report on *Consumer Sales Contracts: Transfer of Ownership* (Law Com No 398, 2021) ch 3.

[188] Steven, *Pledge and Lien* para 8-20.

[189] Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017) para 26.29.

rule that the hypothec is not extinguished merely on removal of the goods from the premises.[190] Likewise, a pre-existing hypothec would not be extinguished by a grant of the statutory pledge proposed by the Scottish Law Commission.[191] The end result is two security rights in the same item, and their ranking needs to be determined. Under the proposed statutory pledge, the hypothec would always rank first,[192] even if the goods were only brought into the premises after the creation of the pledge. Where, however, there is a competition between a possessory pledge and a hypothec, there is no statutory rule and their ranking is presumably to be determined according to the maxim *prior tempore potior iure*.[193]

9-63. The only case that addresses the relationship between the hypothec and a pledge,[194] *Tennent v McBrayne*,[195] appears, at least at first sight, to go against this conclusion. The tenant of a quarry, Watson, had granted a pledge of four waggons to Tennent. These waggons had previously been on the leased premises and so had come under the hypothec in security of the rent due to the landlord, McBrayne. When the rent was not paid, McBrayne brought an action to have the waggons carried back to the quarry so that they could be sequestrated for rent. Although initially granted by the sheriff, a warrant to carry back was refused by the Outer House and this decision was adhered to by the Inner House. The judgment explains that the transaction was "perfectly fair and onerous" and that, even without the waggons, there were enough goods left on the premises to cover any rent due. The latter point may seem to suggest that *Tennent* is a simple application of the rule that, where the tenant leaves sufficient goods to cover the unpaid rent, the goods removed will be released from the hypothec. But the pledge took place during the term of the lease and so the landlord (at this time) had a right to retain everything on the leased premises.[196] In fact, the extinction of the hypothec in this case appears to be an extension of the rule that allows a sale of goods in the ordinary course of business. The pledge was "fair and onerous", for the tenant had received credit from the pledgee who was acting in good faith. To be protected by the common law, a purchaser did not need to be in good faith,[197] and so it is thought that the key part of this case could only have been the fact that the pledge was "fair and onerous".

[190] See paras 9-19–9-24 above.

[191] Report on *Moveable Transactions* para 26.30. Of course, under the new statutory pledge, the tenant will retain possession of the goods.

[192] Report on *Moveable Transactions* para 26.30.

[193] This is the view of the BGB under §1209 BGB. If, however, the third party is in good faith, the *Vermieterpfandrecht* will rank below that of the good-faith pledgee (§1208 BGB, applied to the *Vermieterpfandrecht* by §1257 BGB).

[194] Also see *McGlashan v The Duke of Atholl* 29 June 1819 FC, where one landlord argued that a pledgee in possession of crops was postponed to the landlord.

[195] *Tennent v McBrayne* (1833) 11 S 471.

[196] See para 9-15 above. Now, of course, this would be a valid defence against the hypothec.

[197] See paras 9-37–9-40 above.

9-64. Thus, if the pledge is fair and onerous, the landlord cannot strike it down. But, although the pledge cannot be challenged by the landlord, the decision leaves open the possibility that the hypothec still burdens the pledged goods. One interpretation of the case is that, if the taking of the pledge was in the ordinary course of business, the pledge does not extinguish the hypothec but rather grants the pledgee a priority of ranking. This would protect the pledgee, and also give some degree of protection to the landlord. It would resemble the rule in the DCFR, where the good-faith acquisition of a pledge results, not in the extinction of a pre-existing right, but in the creation of a ranking priority.[198] Such a rule can be described as "good-faith priority of ranking". The rule has some basis in Scots law. In *Mossgiel SS Co v AA Stewart & Others*,[199] goods had been taken from a leased house in Glasgow and loaded on to a ship owned by Mossgiel and destined for Naples.[200] Although the goods were owned by a third party and had been given to the tenant under a hire-purchase agreement, this did not (under the then law) prevent them from being subject to the hypothec.[201] The shipping company had taken possession of the items in good faith and had acquired a lien over the freight to secure the cost of transport. Although the case references the good faith of the lienee, it could, it is argued, be based on the fact that the lien was in the ordinary course of dealings. Despite the newly acquired lien, the landlord's pre-existing hypothec was held not to be extinguished. It was, however, ranked behind the lien. Although the decision concerns lien, it indicates a rule which seems equally applicable to pledge. If that is correct, the creation of a pledge would not extinguish a pre-existing hypothec, but would alter the ranking of the securities so that the hypothec ranked after the pledge.

9-65. Retaining the right of hypothec and postponing it to a subsequently granted pledge is supported neither by directly applicable authority nor by any clear legal policy.[202] But when a question of the relationship between a right of hypothec and a subsequently granted possessory security has come before the court, the opportunity has not been taken to find that the right of hypothec has been extinguished. It is also fully accepted that there can be two rights of hypothec in the same item,[203] and there appears to be no reason why this cannot be extended to allow a right of hypothec and either a pledge or a lien to coexist in the same item. Third parties are, of course, in need of protection and

[198] C von Bar and E M Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) (2009) IX – 2:109.

[199] *Mossgiel SS Co v AA Stewart & Others* (1900) 16 Sh Ct Rep 289.

[200] Here the tenant was not running a business, but the rule could be extended to dwelling-houses. Under this rule, a pledge of goods from a dwelling-house in the ordinary course of a tenant's life would be protected. This, of course, is no longer of relevance after the Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(3)(a).

[201] This is no longer possible: see paras 4-44–4-54 above.

[202] The topic is not covered by s 208(5) of the Bankruptcy and Diligence etc (Scotland) Act 2007 (a provision restricted to when "property" is "acquired" by a good-faith acquirer).

[203] *Christie v MacPherson* 14 December 1814 FC.

this comes in the form of the priority of ranking illustrated in *Mossgiel*. This suggested solution would not be unique to Scotland, with both the DCFR (as we have seen) and the BGB stating that a pledge will rank above any pre-existing security right if the pledgee is in good faith.[204]

H. CHANGE OF LANDLORD

9-66. A change in the party entitled to the rent from the tenant, whether by transfer of the landlord's right of ownership or by a freestanding assignation of rents, neither transfers nor extinguishes a pre-existing right of hypothec. This has been addressed elsewhere.[205]

I. CHANGE OF TENANT

9-67. A common occurrence, especially in respect to commercial leases, is the assignation of the tenant's interest to a third party. If the rent has been paid on time, any future rent that becomes due by the assignee tenant will be secured by a right of hypothec that arises after the tenant has changed and so only the goods owned by the successor tenant contained within the leased premises will be covered.[206] If, however, a right of hypothec has already arisen over the assignor's goods in security of rent due by the assignor, an assignation of the lease does not extinguish this right.[207] As a result, if the assignor, when moving out of the premises, leaves behind goods that are subject to an existing right of hypothec, it may be argued that they are also liable for the rent that becomes due by the successor tenant. A right of hypothec is, after all, security for all "rent due and unpaid".[208] But this uses the property of a third party (a previous tenant) to secure the rent due by the current tenant. Once a tenant has assigned a lease, he is not liable for the rent that falls due thereafter,[209] and a fairer view is that the goods of a previous tenant are not burdened for the rent of the new tenant. This issue is solved by viewing the assignation as the point at which the landlord becomes the creditor to a new debtor in relation to a new debt and, therefore, secured by a new right of hypothec. As discussed earlier,[210] whenever the landlord assigns his right, any pre-existing right of hypothec in security of rent due to the assignor remains and the assignee acquires a new right of

[204] C von Bar and E M Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) (2009) IX – 2:109; §1208 BGB.

[205] See paras 5-21–5-25 above.

[206] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4).

[207] See para 5-25 above, and Registration of Leases (Scotland) Act 1857 s 3(1).

[208] 2007 Act s 208(8)(a).

[209] Rankine, *Leases* 194.

[210] See paras 5-21–5-25 above.

hypothec to secure the rent due to him. This can also be applied when there is a change of tenant. So whenever there is a change of tenant, a new right of hypothec arises to secure the rent due from the assignee-tenant. Thus, if the assignor and assignee both have rent arrears, the landlord will have two rights of hypothec: (1) for the rent due before the assignation, and (2) for the rent due after the assignation. This may be called the "two-hypothec theory".

9-68. Under the two-hypothec theory, although the predecessor's goods are not released from the hypothec that already exists, they do not become subject to the new right of hypothec that arises in security of the rent that becomes due by the assignee.[211] Additionally, if the assignor brings in goods after the date of assignation, they will not become subject to the hypothec because a right of hypothec can only arise over goods owned by the tenant.[212] Even if an assignor-tenant agrees to remain liable to the landlord for the rent due by an assignee, this does not cause any of the assignor's goods left in the leased premises to be subject to a hypothec in security of that rent. The assignee is the sole tenant and, whilst the assignor may be under an obligation to pay a sum of money to the landlord if the assignee does not pay, this is not *rent* under the lease.[213]

9-69. A mirror rule applies to goods brought in by an assignee-tenant. Any goods brought in by the assignee will secure only the rent to be paid by the assignee, and goods brought in by the assignee before the lease is assigned cannot become subject to the hypothec until the lease is assigned and the rent he owes becomes due and unpaid.[214] But, in contrast to the position of an assignor, an assignee is liable for all unpaid rent, even if the rent fell due before the date of assignation.[215] There is nothing that would prevent an assignee excluding such liability, but, in the absence of such an exclusion, a successor tenant will find that, where rent from before the date of assignation remains due, any goods brought in by him will be subject to a hypothec for rent due both before and after the date of assignation.[216]

9-70. An assignee may also take over the entire business of the assignor, thereby acquiring ownership of the goods alongside an assignation of the lease.

[211] Before the Bankruptcy and Diligence etc (Scotland) Act 2007, the assignor's goods could become subject to the hypothec in security of the rent due by the assignee if they remained in the premises, unless one of the exceptions set out in chapter 7 was met.

[212] 2007 Act s 208(4).

[213] *Gray's Trs v The Benhar Coal Co Ltd* (1881) 9 R 225 at 229 per Lord President Inglis.

[214] 2007 Act s 208(4).

[215] *Ross v Monteith* (1786) Mor 15290; Bell, *Commentaries* II, 34; Rankine, *Leases* 194–95.

[216] Where there is an assignation of part of the leased premises, it seems that the assignee is liable for any pre-assignation rent due by the assignor for the use of the entire leased premises. This, however, is not clear. At common law, the goods of a sub-tenant of part of the premises appear not to have been liable for the entire rent due by the head-tenant: Bell, *Leases* I, 396–97. But if the sub-tenant was not authorised it appears that his goods were liable for the whole rent under the head-lease: Rankine, *Leases* 398.

If so, any existing right of hypothec in security of rent due by the assignor will remain because the assignee is not acquiring the goods in good faith.[217] And whilst the goods remain subject to any right of hypothec in security of rent due by the assignor, they can also become subject to the hypothec for rent due by the assignee.

9-71. Because of these rules, it is important to find out precisely when the tenant changes. As a lease is a personal right which can also be a real right, there can, theoretically, be a transfer of the personal right of lease but not of the real right. Although the personal right can be transferred by assignation and intimation to the landlord, this is insufficient to transfer the real right of lease.[218] In a long lease, the transferee needs to register his right in the Land Register before his right becomes real;[219] otherwise the tenant needs to take possession of the premises under the Leases Act 1449. As the hypothec arises in favour of the landlord from the creation of the contract of lease,[220] it is the assignation of the contractual rights,[221] rather than the transfer of the real right, that is decisive.

[217] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36 at 41–42 per Sheriff Kelbie.

[218] Rankine, *Leases* 181ff; L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 7.28; *Inglis v Paul* (1829) 7 S 469; *Brock v Cabbell & Co* (1830) 8 S 647; *Campbell v McLean* (1870) 8 M (HL) 40 in particular at 46 per Lord Westbury; *Clark v West Calder Oil Co* (1882) 9 R 1017 at 1024 per Lord President Inglis, and similar opinions by Lord Deas (at 1027) and Lord Mure (at 1028).

[219] Registration of Leases (Scotland) Act 1857 ss 20B(2) and 20C.

[220] See para 5-11 above.

[221] The contractual obligations are also transferred at the same time. On this, see para 11-70 below.

PART C
ENFORCEMENT

10 Enforcement (1): General Part

PARA

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A. INTRODUCTION

10-01. Before the Bankruptcy and Diligence etc (Scotland) Act 2007, almost all aspects of the enforcement of the hypothec were tied to sequestration for rent.[1] Despite its central role, however, sequestration for rent was no more than a mechanism through which the landlord could realise the goods subject to the hypothec. It was not a process that created the right of hypothec itself.[2] Nor was sequestration for rent a mechanism for ensuring there were sufficient goods within the premises or for preventing the removal of the goods. These other protection mechanisms, although often banded together with a sequestration for rent, were separate and distinct. When sequestration for rent was abolished, the 2007 Act said only that the hypothec was retained as a right in security and nothing about these other remedies.[3] They must therefore be taken to have survived. This chapter considers these remedies and takes account of any changes that may have been caused by the reforms of 2007.

[1] For a discussion on sequestration for rent, see paras 4-55–4-57 above.

[2] This was often misunderstood. See, for example, G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 199.

[3] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208.

B. PROTECTION MEASURES

(1) Plenishing order

10-02. As a right of hypothec can only be acquired over goods that have been brought into the leased premises, the landlord will be left as an unsecured creditor if his tenant chooses not to bring in goods, and as barely secured if the premises are inadequately stocked. To counter this possibility, a landlord has a right to order the tenant to plenish the premises, enforceable by means of a plenishing order.[4] This is said to consist of a right to require that the premises are plenished with sufficient goods to make the "full right of hypothec practically available".[5] Only where the premises are let with the understanding that the tenant is under no obligation to plenish the premises would this right not be open to the landlord.[6]

10-03. Before the Bankruptcy and Diligence etc (Scotland) Act 2007, plenishing orders were usually sought alongside an action of sequestration for rent;[7] by virtue of the sequestration, the premises would be displenished and immediately thereafter the tenant would be required by the plenishing order to replace the items that had been removed and sold. But although it was usual for the two actions to be coupled in this way, they were theoretically independent and so, with the abolition of sequestration for rent, the plenishing order remains.[8]

10-04. When a plenishing order is sought, the court must decide the extent of the tenant's obligation to bring goods into the premises. This question is of no difficulty if the matter is covered in the lease (as will normally be the case).[9] The current discussion is only of relevance if there is no express clause in the lease and the landlord must rely on the implied obligation.

10-05. Before the abolition of sequestration for rent, the widespread, and seemingly settled, understanding was that a landlord could require his tenant to plenish the premises with goods to the value of one year's rent (the "one-year rule").[10] It seems that this was applied only to those contracts of lease that were divided into annual terms.[11] Where premises were let with a monthly term, the plenishings that could be demanded could only have been to the value of one

[4] The right to have the premises plenished is likely to have come from France: see R J Pothier, *Treatise on the Contract of Letting and Hiring* (transl G A Mulligan, 1953) §204.

[5] J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 399. For a similar account, see Paton and Cameron, *Landlord and Tenant* 212.

[6] See para 6-16 above.

[7] A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 5.69.

[8] The plenishing order is also a stand-alone procedure in French law: Art 1752 CC.

[9] It is common for a commercial lease to oblige the tenant to stock the premises with "sufficient plenishings" to the value of one (or even two) years' rent throughout the duration of the lease.

[10] *Co-operative Insurance Society Ltd v Halfords Ltd* 1998 SLT 90 at 94 per Lord Hamilton; A McAllister, "The landlord's hypothec: down but is it out?" 2010 JR 65 at 71.

[11] For a discussion on lease "terms", see paras 9-08–9-13 above.

month's rent. Thus, it would have been better to formulate the rule as one that required the tenant to stock the premises to the value of one term's rent (the "one-term rule"). This understanding of the extent of a plenishing order appears to have been based on the tenant's underlying obligation (or perceived obligation) to stock the premises with goods that are sufficient to make the "full right of hypothec practically available".[12] The origin of this view is unclear, but it seems to stem from Rankine, whose writing clearly influenced Paton and Cameron when they wrote that the tenant's obligation was to make the hypothec "fully and practically available".[13] The obligation was met if the tenant stocked the premises with one term's rent because a right of hypothec secured only the current term's rent, regardless of whether this rent was already due, was to become due, or (the more likely scenario) partially due and partially to become due.

10-06. Against the background of this settled rule, the 2007 Act brought significant reforms. Their impact on the plenishing order is not altogether clear.[14] Whereas formerly a hypothec was created for each term's rent, it now only arises if and when rent is due and unpaid, and it does not secure rent yet to become due.[15] If it is still the case that a landlord's right is to require the hypothec to be "fully and practically available", strange results would follow. Where the tenant pays the rent on time, the rent that could be secured by a right of hypothec over any items brought into the premises is zero (indeed, there would be no right of hypothec). A landlord could therefore not require that any goods are brought in. Only where the tenant has failed to pay the rent would the landlord be able to demand that the premises are plenished to the current value of the unpaid rent.[16] Following this analysis, the extent of the plenishings that can be required of a tenant will increase as a tenant's rent arrears increase.[17] But, as this is when the tenant is least likely to be able to stock the premises, the right to have the premises plenished would be almost worthless.

10-07. This is indeed an odd result. Fortunately, it appears to be based on an incorrect understanding of the law before the 2007 Act. There was never a strict obligation to stock the premises with goods sufficient for one term's rent. Rather, for reasons explained below, it seems that the tenant was obliged to bring in "sufficient plenishings" according to the nature of the premises and that this rule came to be manifested in the general understanding that the tenant must bring in goods to the value of one year's rent. In other words, there was

[12] Rankine, *Leases* 399.

[13] Paton and Cameron, *Landlord and Tenant* 212.

[14] See the discussion in A McAllister, "The landlord's hypothec: down but is it out?" 2010 JR 65.

[15] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8). For more on this, see paras 5-15–5-20 above.

[16] McAllister, "The landlord's hypothec: down but is it out?" 72.

[17] A J M Steven and S Skea, "The landlord's hypothec: difficulties in practice" 2010 SLT (News) 120 at 123.

never any obligation on the tenant to make the "full right of hypothec practically available". This conclusion, which is based on the historical foundations of the plenishing order, has the merit of retaining a practical meaning for the right of a landlord to obtain a plenishing order today. It continues to allow a landlord to require his tenant to stock the premises notwithstanding the absence of rent arrears.

10-08. The view that landlords could require their tenants to stock the premises to make the "full right of hypothec practically available" is supported neither by the pre-2007 Act practice nor by the then state of the authorities. The practice is addressed first. As an example, we can take a commercial lease that began in January with rent stipulated as an annual sum to be paid quarterly. If the rent was paid at the first quarter, the landlord, under the common law hypothec, had security over the goods within the premises for the rent due at the following three quarters but no further. Despite this, it seems that the landlord could still require that the premises were plenished with goods up to the value of a year's rent.[18] This was far more than was needed to make the hypothec "fully and practically available", and so the one-term rule could not have been based on the principle that a tenant's obligation was to make the full right of hypothec practically available.

10-09. Equally, if the rule was that the tenant was obligated to make the hypothec "fully and practically available", there would have been periods of time in which the landlord could have demanded that the premises were stocked with goods to a value greater than a year's rent. There was, for example, a three-month period during which the goods that had remained on the premises were security for both the previous year's rent and the current year's rent.[19] Where all the goods were security for the previous year's rent, it would have been arguable that a landlord had the right to demand that the tenant amass a second set of goods in the premises to add to the goods that were already burdened by the hypothec in security of the rent for the previous year. There would then be goods to the value of two years' rent within the premises. Only then would the tenant have made the landlord's right of hypothec *fully available* within those three months. There is, however, no evidence of the landlord's right to require this, and it can be assumed that this would not have been permitted. There were also examples of where the premises did not need to be stocked with goods to the value of one year's rent. Where, for example, premises were subject to an "abnormally large rent", bringing sufficient goods in to cover that rent would not have been required from a tenant.[20] Instead, the tenant was required to stock

[18] As McAllister writes (in "The landlord's hypothec: down but is it out?" 71): "the tenant's obligation to plenish, whatever the time in the rental year and whether or not the tenant was in arrears, was quite straightforward: it was to provide *invecta et illata* up to the value of one year's rent".

[19] See paras 9-11–9-13 above.

[20] *Gardner v Anderson Bros* (1890) 6 Sh Ct Rep 57 at 58 per Sheriff Lees.

the premises with such plenishings as were expected in the ordinary occupation of the premises. This demonstrates that the one-term rule was never treated as hard and fast, but only as a guideline.

10-10. The authorities corroborate the practice just described. The first case to require a tenant to enter into possession and stock the premises, and upon which all the subsequent authorities were based, was *Randifuird v Crombie* (1623),[21] where the court:

> sustained the action against the tenant to cause him to enter to the occupation and labouring, of the room, that thereby the defender might enter and *plenish the same with goods and corns, whereby the ground might be more answerable to the master for payment of the duty of the tack*.[22]

Here there was no reference either to an obligation to make the hypothec fully available or to a year's rent being the value of the goods that had to be brought in by a tenant. In the second half of the same century, Stair wrote only that "[a]ll tenants are burdened with necessity to enter and labour the ground, that the master may have ready execution".[23] In the following century, Erskine stated merely that a tenant is "obliged to enter immediately into the possession, to furnish the grass-grounds with a *sufficient* stock of cattle, and to cultivate and manure the corn-grounds".[24] Robert Bell in 1825 wrote that "[t]he tenant must enter to the farm at the commencement of the lease, and *stock and labour it in a proper manner*."[25] Similarly, Hunter, who relied on *Randifuird*, did not require the plenishings to make the hypothec fully available or that they should be to the value of one year's rent.[26] The wording of each of these authors was different, but by the mid-nineteenth century it could safely be said that a landlord's right was to require the leased premises to be stocked with sufficient plenishings in conformity with the nature of the premises to make the landlord more secure.

10-11. By the end of the century, however, Rankine was stating that a tenant was obliged to plenish the premises to make the "full right of hypothec practically available". For this, he cited George Joseph Bell, but Bell wrote only that "[a]s a tenant in land is bound to enter and stock the farm, so is the tenant of a house bound to furnish it".[27] This was no basis upon which it could be said that a tenant was to bring in goods sufficient to make the full right of hypothec

[21] *Randifuird v Crombie* (1623) Mor 15256.

[22] Emphasis added.

[23] Stair II.9.31.

[24] Erskine II.6.39; emphasis added. See also Bankton II.9.21 (vol II, 100).

[25] R Bell, *A Treatise on Leases: explaining the nature, form, and effect of the contract of lease, and the legal rights of the parties*, 4th edn (1825) I, 323.

[26] R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 471–72.

[27] Bell, *Principles* §1273.

available. In turn, Bell referred to *Thomson v Handyside*.[28] There, however, Lord President Hope said only that a landlord was entitled to have "suitable stocking, conform to the nature of the subject, brought by the tenant into the premises, so as to secure him in payment of the rent".[29] This appeared to be the correct formulation of a tenant's obligation: to bring on suitable stocking to secure the landlord in payment of the rent. Again, there was no requirement that the goods make the full right of hypothec available. It is unclear what Rankine based his opinion on.

10-12. A decision prior to *Thomson*, but not cited by Bell, was *Adam v McDougall*,[30] the report of which, admittedly, contained the landlord's plea that a tenant was under an obligation to place goods within the premises that were at least sufficient in value to one year's rent. But this was a fragile basis for Rankine to state this as a rule, and, in any event, it was not cited by Bell as authority. In the second half of the nineteenth century, in *Whitelaw v Fulton*,[31] a landlord petitioned to have his tenant place sufficient furniture into a leased shop to cover a year's rent. The sheriff-substitute held that the tenant was obliged "to place furniture in the shop of the value of a year's rent" and, on appeal to the sheriff this decision was adhered to on the basis that the tenant was not entitled "to keep the premises unplenished, so as to deprive the pursuer of the security he is entitled to have at common law for his rent; but, on the contrary, is bound to place sufficient plenishings therein".[32] The sheriff's formulation thus applied the "one-year rule", but based this on the principle that the tenant was obliged to plenish the premises sufficiently and not on some notion of making available the full right of hypothec. The eventual interlocutor of the Court of Session, on appeal, did not require the tenant to plenish the premises with goods to the value of one year's rent. Instead, it stated that the tenant "was bound duly to occupy and possess the said premises, and to plenish the same and keep them habitable".[33] There is no reference in the report to requiring the tenant to make the right of hypothec fully available.

10-13. Despite being based on no clear authority, the idea that a landlord could demand one year's rent worth of goods to be brought in began to solidify in the minds of practitioners.[34] This could not, however, have been based on the theory that the tenant was to make the landlord's right of hypothec fully available. In *Gardner v Anderson Bros,*[35] for example, the facts and most legal questions were agreed between the parties, leaving the court to decide upon only one question:

[28] *Thomson v Handyside* (1833) 12 S 557.
[29] (1833) 12 S 557 at 559 per Lord President Hope.
[30] *Adam v McDougall* (1828) 6 S 978.
[31] *Whitelaw v Fulton* (1871) 10 M 27.
[32] (1871) 10 M 27 at 28 per Sheriff Glassford Bell.
[33] (1871) 10 M 27 at 29.
[34] See, for example, *Knowles v Clark* 1947 SLT (Sh Ct) 5 at 8 and 9.
[35] *Gardner v Anderson Bros* (1890) 6 Sh Ct Rep 57.

whether an auctioneer was bound to furnish the premises with sufficient goods to secure one year's rent. In the course of the decision, Sheriff Lees made several references to the landlord's right to have the premises stocked with the goods that will "in the ordinary course of things" be brought on to the premises. Particularly helpful for present purposes is his statement that:

> the plenishings which a tenant can be called on to provide is one which is conform to the nature of the subjects . . . [The landlord's] right is to have his tenant *ordained to plenish the premises where, in the ordinary state of things, the tenant should provide such plenishing*. He is not entitled to have the tenant ordained to find security for his rent.[36]

This was based on Lord President Hope's opinion (quoted above) that a landlord can require only "suitable stocking, conform to the nature of the subject". On appeal in *Gardner*, Sheriff Berry made reference to the apparent *general* rule that the tenant must supply sufficient stock for a year's rent,[37] but added that:

> if there were an office attached in which the tenant was to conduct part of his business, such as the keeping of accounts and the management of correspondence, there might be reasonably implied against him an obligation to furnish the office in the usual way, the furnishing put in being a security so far, at all events, for the landlord's rent.[38]

Here there is a reference to the requirement that the tenant should "furnish the office in the usual way", but not to a strict rule that goods to the value of one year's rent must be brought in, nor to an underlying obligation to stock the premises to make the full right of hypothec available. In contrast, as we have seen, there was ample basis for the rule that the tenant was obliged to stock the premises sufficiently with goods that conform to the nature of those premises.

10-14. One modern (although still pre-2007 Act) case on plenishing orders deals with the tenant's attempt to shut down stores. Most of the case-law on this issue concerns whether a keep-open clause in a lease can be enforced by specific implement, but there is also some brief consideration of plenishing orders. In *Co-operative Insurance Society Ltd v Halfords Ltd*,[39] a landlord requested an interdict against the displenishment of the premises by the tenant, Halfords, requiring it to retain sufficient stock to at least the value of the current annual rent. The court granted this. There was no discussion on whether the value of one year's rent was correct or whether this was based on the tenant's underlying obligation to make the hypothec fully and practically available. This case is, therefore, a continuation of the understanding that the obligation to plenish was given effect to in practice by requiring goods to the value of one term's rent to be brought into the premises.

[36] (1890) 6 Sh Ct Rep 57 at 58 per Sheriff Lees; emphasis added.
[37] (1890) 6 Sh Ct Rep 57 at 59 per Sheriff Berry.
[38] (1890) 6 Sh Ct Rep 57 at 60 per Sheriff Berry.
[39] *Co-operative Insurance Society Ltd v Halfords Ltd* 1998 SLT 90.

10-15. In summary, the yardstick of one year's rent was a useful measure of whether premises were sufficiently plenished. A landlord – before the 2007 Act – obtained a hypothec in security only to the extent of a term's rent.[40] There was, as a result, no incentive to have the tenant bring in plenishings that were of greater value than this. Hence, plenishings to the value of one-year's rent were what was routinely requested from tenants. But this was not a hard and fast rule and there is no evidence that it was based on an underlying obligation on a tenant to make the hypothec fully and practically available. Instead, the more general rule, as stated by Lord President Hope, was only that the premises had to be plenished with "suitable stocking, conform to the nature of the subject". This underlying obligation can still be used by landlords today. And with the continuation of the underlying obligation, there is no need to wait for a tenant to fail to pay rent before a plenishing order can be requested. The extent of this plenishing order will vary from case to case, as it always did in the past, and it will also depend on whether the parties have made express agreement on the subject.[41] As a general rule, however, one term's rent remains as a useful yardstick for a court and a landlord to ensure that the tenant is meeting its obligation to stock the premises sufficiently.

(2) Keep-open clause

10-16. A keep-open clause (which is found in most shop leases) protects a landlord by requiring the tenant to continue trading from the premises until the termination of the lease. Despite this, there is no obligation under the clause to stock the premises with goods owned by the tenant. Additionally, it cannot be guaranteed that specific implement will be granted if a tenant breaches (or threatens to breach) such a clause. Before a court will grant specific implement, the clause needs to be sufficiently precise.[42] But, if a lease contains a well-drafted keep-open clause, a landlord will be protected to a certain extent.

(3) Preventing the removal of goods

10-17. Where goods burdened by the hypothec are in danger of being removed, a landlord can obtain an interdict against their removal.[43] Traditionally this was called the right of "retention",[44] although the landlord did not actually possess the items. This right of retention is also enforceable against creditors who have

[40] Except for the three months following the end of the term. On this, see para 9-12 above.

[41] See, for example, the clause in *Rossleigh Ltd v Leader Cars Ltd* 1987 SLT 355.

[42] *Highland & Universal Properties Ltd v Safeway Properties Ltd* 2000 SC 297.

[43] *Crichton v Earl of Queensberry* (1672) Mor 6203; *Preston v Gregor* (1845) 7 D 942; J G Stewart, *A Treatise on the Law of Diligence* (1898) 478, Paton and Cameron, *Landlord and Tenant* 213; L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 6.15.

[44] Rankine, *Leases* 390.

attached goods subject to the hypothec, and against bad-faith purchasers.[45] Like so much of the law of hypothec after the Bankruptcy and Diligence etc (Scotland) Act 2007, the usefulness of this remedy today can be doubted. Some limitations had always existed. So, where premises are leased as a shop, the landlord cannot interdict the tenant from selling goods in the ordinary course of business as this would be against the purpose of the lease.[46] Further, even if a tenant is interdicted from removing goods, the 2007 Act extinguishes the hypothec over goods sold if the purchaser is in good faith and gives value.[47]

10-18. The central question is the extent to which the tenant can still be interdicted from removing items. At common law, the hypothec secured future rent and so a landlord could require that the entire plenishings remained on the premises; he was not restricted to requiring only the value of goods that would secure the unpaid rent of the current term.[48] Presumably this was because the entire plenishings were subject to the hypothec and the landlord could not be sure what the value of the goods would be if and when the hypothec was enforced. After the term of the lease had ended, only those goods up to the value of the rent due and unpaid were permitted to be retained by the landlord.[49] But as one term began immediately after the last one ended (unless the lease had come to an end), the landlord could always require that all the goods subject to the hypothec were retained on the premises.[50]

10-19. The position today is different. Now that a right of hypothec arises only after rent has become due and unpaid, and does not secure rent due in the future, it seems that a landlord can only require his tenant to retain goods that are sufficient in value to cover the rent unpaid at the relevant time.[51] Unless or until the rent is due and unpaid, the landlord has no right of hypothec over the goods and so cannot prevent their removal. But a landlord is not left without protection. A pre-emptive interdict could be sought on the basis of a keep-open clause, but a more likely possibility would be an interdict on the basis of an anticipated breach of the tenant's implied obligation to keep sufficient plenishings in the leased premises. An interdict brought because of an anticipated displenishing is based on a different foundation than an interdict preventing the tenant from removing goods subject to the hypothec. This has not been made clear by the authorities,[52] and was perhaps not so important before the 2007 Act, but it is now necessary to make a distinction.[53]

[45] See paras 9-17, 9-23 and 9-30–9-60 above.

[46] See paras 9-37–9-40 above.

[47] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(5)(b).

[48] Hunter, *Landlord and Tenant* II, 391; Rankine, *Leases* 391. If the third-party acquirer offered caution for the term's rent, the landlord had to accept this and extinguish the right of hypothec (Erskine II.6.59).

[49] Hunter, *Landlord and Tenant* II, 392–94.

[50] See para 9-15 above, and Stewart, *Diligence* 483.

[51] See paras 9-17, 9-23 and 9-30–9-60 above.

[52] Hunter, *Landlord and Tenant* II, 414–15; Rankine, *Leases* 391.

[53] See para 10-26 below.

10-20. Any interdict based on the right to "retain" the goods on the premises is built upon the right of hypothec that the landlord already has in the items. An interdict preventing the tenant from displenishing the premises stems from the landlord's right to have the premises plenished with suitable goods. This latter interdict will be an adequate measure that protects a landlord when his tenant threatens to displenish but no rent is due and unpaid. The wording of the interdict, however, must be sufficiently precise. An interdict preventing the tenant from displenishing the premises "of its present stocking" would be too vague.[54] Were an interdict sought to prevent the tenant from displenishing beyond the point where goods to the value of one-year's rent remained,[55] this would presumably be permitted.

10-21. In *Co-operative Insurance Society Ltd v Halfords Ltd*,[56] the landlords raised an action against their tenants seeking an interim interdict against the use of the premises for unpermitted purposes, against vacating the premises, and against displenishing. In particular, the interdict was sought to prevent the tenants from removing the fixtures and fittings or moveable property to the effect that the value of the goods remaining was less than £44,400 (the annual rent). It appears that it was understood that the tenant was always obliged to plenish the premises with one-year's rent worth of goods – a view that can be criticised, as we have seen[57] – but the court was correct to state that a landlord can obtain an interdict against the tenant removing goods to the extent that he will be in breach of his obligation to plenish the premises. If it is accepted that a tenant remains under an obligation to stock the premises with sufficient plenishings at all times (as argued above), it must follow that a landlord can obtain an interdict against his tenant if he anticipates its breach even if he is yet to obtain a right of hypothec in the goods.

(4) Warrant to carry back

10-22. As a general rule, a landlord's right of hypothec is not lost when goods are removed from the premises.[58] Before the Bankruptcy and Diligence etc (Scotland) Act 2007, a landlord wanting to realise the items through a sequestration for rent had to bring them back into the premises because a sequestration could only catch goods within the leased premises.[59] It was, therefore, usual for a warrant to carry back to be sought at the same time

[54] *Cathcart v Sloss* (1864) 3 M 76.

[55] Or, if there is an express obligation, the value of the goods expressed. For the value of plenishings to be retained, see paras 10-02–10-15 above.

[56] *Co-operative Insurance Society Ltd v Halfords Ltd* 1998 SLT 90.

[57] See paras 10-02–10-15 above.

[58] See paras 9-19–9-24 above.

[59] Stewart, *Diligence* 475; Rankine, *Leases* 402.

as a sequestration for rent.[60] Like the plenishing order, however, this was a distinct remedy from sequestration for rent and so, even after the abolition of sequestration, a landlord remains able to bring back the goods if they have been removed and remain subject to the hypothec.[61]

10-23. Despite this, the warrant to carry back has been stripped of much of its practical relevance. When an item has been removed from the premises and remains in the possession of the tenant, the landlord can simply use the diligence of attachment without the need to bring the item back into the premises. And if the item is in the hands of a third party, but remains owned by the tenant, an arrestment is possible. The only time it may be in the interests of the landlord to bring goods back into the premises is when this will preserve them, or if the items have been sold to a third party who acted in bad faith and the landlord wants to prevent them being sold onwards (thereby extinguishing the hypothec). If the tenant transferred goods outside the ordinary course of his trading to a third party in bad faith, and insufficient goods were left in the premises to cover the unpaid rent, the goods will remain subject to the hypothec and so a warrant to carry back would remain available.[62] That said, a landlord who brings any goods now owned by a third party back into the premises will find that there is now no way of realising them.[63]

10-24. Whilst a warrant to carry back goods is a useful remedy for a landlord, there are some special requirements that justify its description as a remedy whose use is "extraordinary",[64] or "extreme".[65] This might suggest that a landlord can enforce his right only in "extraordinary" (or special, unique) circumstances. In fact, it means merely that the landlord cannot usually obtain a warrant to carry back without the full circumstances of the case being established beforehand. In *Johnston v Young*,[66] Lord Adam stated:

> In short, the warrant is one which ought only to be granted with great care, and after deliberation and a full statement of the circumstances which are said to make it necessary.[67]

[60] W Wallace, *Sheriff Court Style Book* (1911) 609.

[61] *Novacold v Fridge Freight (Fyvie) Ltd (in receivership)* 1999 SCLR 409 at 411 per Sheriff Principal Risk QC; Stewart, *Diligence* 477. At one time, a landlord was even permitted to bring back goods removed from the premises by his own hand, i.e. without the help of "some sentence or authority". This self-help remedy was permitted only within a short period of the goods being removed. For this rule, see *Crichton v Earl of Queensberry* (1672) Mor 6203; Erskine II.6.60.

[62] See paras 9-30–9-50 above.

[63] This is discussed further at paras 10-32–10-35 below.

[64] *Jack v Black* (1911) 1 SLT 124 at 126 per Lord Johnston; E A Marshall, *Scots Mercantile Law*, 3rd edn (1997) para 7-57.

[65] Gloag and Irvine, *Rights in Security* 429.

[66] *Johnston v Young* (1890) 18 R (J) 6.

[67] (1890) 18 R (J) 6 at 7 per Lord Adam.

It has been said that the warrant is granted "causa cognita".[68] In other words, the landlord must show not only that the goods were on the leased premises, but that they had become subject to the hypothec, and were then removed without extinguishing the hypothec. It is not sufficient for the landlord simply to say that the goods have been removed from the premises. For such a full statement of the circumstances to be obtained, a notice is usually required to be given to the opposing party, who is the tenant (where the goods are still owned by the tenant) or otherwise a third party (who has acquired ownership of the goods).[69] This notice will normally come by the serving of a court writ. By receiving notice, the tenant or third party has the opportunity to pay the value of the goods (thereby removing the need for the goods to be brought back to the premises) or to prove that the goods have been released from the hypothec. As the right of hypothec is so often extinguished when goods are removed from the premises,[70] the full circumstances of the removal ought to be obtained to ensure that the rights of the owner are not infringed. All this is consistent with the principle that the landlord has the burden of proving that the goods were removed in circumstances outwith the ordinary course of the tenant's business and that the purchaser was in bad faith.[71] In some special cases, a court can move away from the requirement of notice to the defender. These include where the purpose of a warrant is likely to be defeated if notice were given, in particular if the tenant is secretly removing goods under the cover of night in an attempt to defeat the landlord's right.[72]

10-25. If notice is not given, the landlord may be liable in damages if the circumstances do not justify the grant of the warrant.[73] This would be the case where the goods never have been subject to the hypothec, were released from the hypothec when removed, or where the tenant would have paid the rent, and thereby extinguished the hypothec, if notice had been given. This is well described by Lord Adam:

> I do not doubt that the defender, as landlord, had the right, in the first place, to sequestrate the pursuer's furniture, and, in the second place, if it was removed to have it brought back, unless good cause were shewn why his right should not be enforced. No objection can be taken to his actings in respect of his having applied for a warrant to have the goods brought back, but then, when a landlord applies for such a warrant without notice to the tenant, he is bound to state the special circumstances in which it is craved, and I think no such circumstances were set forth in this case, and if he

[68] Rankine, *Leases* 393.

[69] *Gray v Weir* (1891) 19 R 25; *McLaughlin v Reilly* (1892) 20 R 41; *Jack v Black* (1911) 1 SLT 124.

[70] See chapter 9 for when the hypothec is extinguished.

[71] See para 9-50 above.

[72] *Gray v Weir* (1891) 19 R 25 at 28 and 29 per Lord President Robertson. The case itself is discussed at para 9-07 above.

[73] It is granted *periculo petentis*.

had set forth a true account of the circumstances in which the tenant had removed his furniture, a warrant would not have been granted.[74]

This is consistent with the law on interim interdict, which can be granted without notice to the defender, but, if the request for a permanent interdict is subsequently unsuccessful, there is an obligation on the pursuer to pay damages to the defender for any harm caused.[75] If, however, notice was given and the opposing party had the opportunity to be heard upon whether a warrant should be granted, there is no wrongful use of a warrant to carry back the goods unless the landlord has provided an "absolutely untrue statement".[76]

10-26. If the landlord is unable to prove that the goods are still burdened by the hypothec, he cannot bring them back under a warrant to carry back. A landlord could obtain a plenishing order if the premises are insufficiently stocked, but this will be of no practical use if the tenant is on the verge of insolvency: whilst the hypothec grants the landlord a right in specific items, which is preferred to the tenant's other creditors, the tenant's obligation to plenish is merely a personal obligation arising from the contract of lease.

C. SALE

(1) Goods owned by the tenant

10-27. Sequestration for rent was abolished without replacement by the Bankruptcy and Diligence etc (Scotland) Act 2007, leaving landlords without an enforcement procedure unique to the right of hypothec. Abolition was a significant practical change for those seeking to enforce the hypothec, with McAllister even writing that "[f]or hypothec to have any meaning as a real right there has to be a remedy that is independent of the tenant's insolvency, and which is unavailable to ordinary creditors".[77] Yet the removal of sequestration for rent did not change the underlying legal nature of the right of hypothec. By sequestrating the goods on the leased premises, the landlord was not creating a right over the goods; the landlord was only realising goods already subject to the hypothec. Following the abolition of sequestration for rent, a landlord is still able to place his tenant into insolvency so as to obtain a preference within the insolvency proceedings. But with most commercial leases enabling summary diligence, a cheaper and quicker route may be to use the diligence of attachment to realise the goods.

10-28. By requiring the landlord to attach the goods, the law has returned to the position before sequestration for rent first became available. As discussed

[74] (1891) 19 R 25 at 29 per Lord Adam. See also *Shearer v Nicoll* 1935 SLT 313.

[75] *Mirza v Salim* [2014] CSIH 51, 2015 SC 31 at para 56 per Lady Paton.

[76] *Jack v Black* (1911) 1 SLT 124 at 128 per Lord President Kinross.

[77] A McAllister, "The landlord's hypothec: down but is it out?" 2010 JR 65 at 69. See also L Richardson and C Anderson, *McAllister's Scottish Law of Leases*, 5th edn (2021) para 6.6.

earlier,[78] sequestration for rent was developed some time after the introduction of the hypothec into Scots law. Before sequestration was available, a landlord had to poind the goods like any other creditor and this option remained available to a landlord even after sequestration for rent became the common enforcement procedure.[79] There is a parallel here with the position of a pledgee who, before the mid-eighteenth century, and if a sale was being sought, could only poind the items subject to the pledge.[80] The fact that the landlord is now to enforce the hypothec by attachment, and that this was not made clear by the legislation, came as a surprise to some,[81] but in truth there was no need for the legislation to state that a creditor has the right to enforce a debt over the goods of his debtor.

10-29. Sequestration for rent had many practical benefits, especially in enabling the sale of goods owned by a third party, but if the goods remain owned and possessed by the tenant (whether in the premises or not) attachment is an efficient method of realising them. Equally, if the goods are owned by the tenant but possessed by a third party, arrestment can be used. As the goods do not need to remain in the leased premises to continue to be burdened by the hypothec,[82] their removal to an auction house for the purpose of a sale will not extinguish the landlord's right.

10-30. Of course, a landlord who attaches the goods burdened by the hypothec may later find that this is equalised by the diligence of another of the tenant's creditors or by the deemed diligence that takes place on the date of the tenant's insolvency.[83] Equalisation could also occur if the tenant is deemed to be in apparent insolvency.[84] Upon the apparent insolvency of a debtor, all attachments 60 days before that date and four months after are equalised and are taken to have been executed on the same day.[85] These equalisation rules are also applicable to an arrestment where the goods are in the possession of a third party after being removed from the leased premises. The possibility of the landlord's diligence being equalised has caused some to wonder whether diligence is a useful remedy.[86] Such concern, however, overlooks the fact that the landlord's right arises from the hypothec and only in a subsidiary sense from the attachment.

[78] See para 4-55 above.

[79] See, for example, the landlord's pleadings in *Cathcart v Mitchell* (1775) Mor 6212, where it was said that the landlord has the right to attach the goods by "a poinding or by a sequestration". See also *Caithness Flagstone Co v Threipland* (1907) 15 SLT 357; R Macpherson, "Are preferences preferable?" 2002 SLT (News) 257 at 259.

[80] A J M Steven, *Pledge and Lien* (Studies in Scots Law vol 2, 2008) paras 8-04–8-10.

[81] A J M Steven and S Skea, "The landlord's hypothec: difficulties in practice" 2010 SLT (News) 120 at 121.

[82] See paras 9-19–9-24 above.

[83] Bankruptcy (Scotland) Act 2016 s 24(6).

[84] For the meaning of apparent insolvency, see 2016 Act s 16.

[85] 2016 Act Sch 7 para 1.

[86] A McAllister, "The landlord's hypothec: down but is it out?" 2010 JR 65 at 69; A J M Steven and S Skea, "The landlord's hypothec: difficulties in practice" 2010 SLT (News) 120 at 121.

Whilst the diligence of the landlord may be equalised with a diligence brought by another creditor, his underlying right of hypothec is neither extinguished nor equalised with this other diligence. The equalised diligences merely create a ranking question. If both creditors were relying purely upon their respective diligences, they would rank equally. But, as a hypothec is a right in security, it is preferred to an unsecured creditor who has only completed a diligence over the goods after the hypothec has arisen. All of this is entirely in keeping with the provision in section 208 of the Bankruptcy and Diligence etc (Scotland) Act 2007 that the hypothec is to continue as a "right in security" that ranks in any "process in which there is ranking".[87]

10-31. Aside from realising the goods by diligence, a landlord might be able to persuade the tenant simply to hand over the items for the purposes of sale. In that event, the landlord probably acts as the agent of the tenant in selling the goods,[88] with any sums raised over the value of the unpaid rent to be handed back to the tenant. Allowing the landlord to sell in this way would not breach the rules on gratuitous alienations so long as the goods are sold at market value and the unpaid rent reduced accordingly.[89]

(2) Goods acquired by a third party

10-32. Before the abolition of sequestration for rent, a landlord could easily enforce his right against goods that had been removed by the tenant or sold to a third party but remained subject to the hypothec. Only goods that were in the leased premises could be subject to a sequestration for rent, so the landlord would obtain a warrant to carry the items back into the leased premises, from where they could be inventoried before being removed and sold. Although the 2007 Act has reduced the chances that the hypothec will continue to burden goods after they have been sold to a third party,[90] it still remains a possibility (i) if the third party was in bad faith, (ii) the goods were transferred outwith the tenant's ordinary course of business, and (iii) insufficient goods were left on the premises to cover the rent arrears.[91] But with the abolition of sequestration for rent, the landlord is left with the right to bring the goods back into the leased premises and no mechanism through which the goods can be sold. There is no

[87] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(2)(b).

[88] Steven, *Pledge and Lien* para 8-12.

[89] For the legislation on gratuitous alienation, see Bankruptcy (Scotland) Act 2016 s 98 and the equivalent rule for winding-up at Insolvency Act 1986 s 242. There is also a common law rule against fraud on creditors: see *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, 2020 SC (UKSC) 23 at paras 23–25 per Lord Hodge; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 22–35; J MacLeod, *Fraud and Voidable Transfer* (Studies in Scots Law vol 9, 2020) ch 4.

[90] See paras 9-25–9-60 above.

[91] See para 9-50 above.

diligence available to a creditor that permits him to sell goods not owned by his debtor.

10-33. If the goods have remained subject to the hypothec, a landlord may conclude that it is worth bringing the goods back into the premises in order to preserve their value. Although the third party might seek to vindicate his ownership of the goods and re-acquire possession, such an attempt would fail as rendering the right of hypothec worthless. After bringing the goods back into the premises, the landlord may look to place his tenant into insolvency proceedings, but an insolvency practitioner also cannot sell goods that are not owned by the insolvent debtor. A more promising approach is to seek the value of the goods from the purchaser whose property they now are. This may make the landlord's right seem a mere personal right against a bad-faith purchaser. But the litmus test for the effectiveness of a right in security is in the insolvency of the owner of the security-subject, i.e. the third-party acquirer, and if the acquirer becomes insolvent, the test for the landlord's right is whether he can obtain the value of the goods as a secured creditor. There is no case-law directly on this point, but taking the hypothec as a real right that can continue even after the sale of the goods to a third party, the landlord must be able to claim the right of hypothec in the insolvency of the third party. In this respect, the landlord's right of hypothec is of the same nature as a pledgee's right in goods after the pledgor has transferred their ownership to a third party under the Sale of Goods Act 1979. The right of pledge survives and is enforceable against the third-party purchaser. The enforcement procedure is also similar: a pledgee is able to retain the possession of the goods until payment from the insolvency practitioner. Equally, a landlord can bring the goods back into the premises, retain them in the premises, and claim in the insolvency of the third party.[92] If, however, the landlord in addition has a right of hypothec over goods still owned by the tenant, he will be required first to obtain payment from any goods still owned by his tenant.[93]

10-34. If the goods in which the landlord has a right of hypothec are sold by the immediate purchaser to a further acquirer who acts in good faith, the hypothec is extinguished.[94] Under these circumstances, the landlord presumably retains a right to receive the value from the immediate purchaser. This cannot be a real right and so, if the immediate purchaser is insolvent, the landlord only ranks as an ordinary creditor.[95] The same can be said for a creditor of the tenant who attaches goods that are subject to a right of hypothec. Once the goods are realised, the landlord can only demand their value from the attacher as an unsecured creditor.

[92] This right to bring the goods back into the premises may never be used, but the threat of it may be useful by itself.

[93] Under the rules for catholic and secondary creditors, on which see para 9-48 above.

[94] See para 9-34 above.

[95] Cf Hume, *Lectures* vol IV, 10, who gives a landlord a priority to sums still in the hands of the second purchaser. There is no authority for this, and it is thought to be incorrect.

10-35. Waiting for a third-party purchaser to become insolvent is clearly not the ideal solution for either the landlord or the third party. Whilst the landlord can use the warrant to carry back to preserve the goods and prevent them from being sold on again, if the landlord's hypothec is to remain as a real right and follow the goods even after they have been sold to a third party,[96] the law ought to provide a remedy for the landlord that is more effective than merely preserving the goods in the hope that the third party becomes insolvent. Sequestration for rent achieved this by allowing the landlord to sell goods that were not owned by the tenant but were subject to a right of hypothec, and there is much to be said for a return to that position. If not, it seems best for the law to extinguish the hypothec whenever goods have been sold to a third party.

[96] See chapter 9 above.

11 Enforcement (2): Tenant's Insolvency

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A. GENERAL PRINCIPLES

(1) Introduction

11-01. As with any right in security, the hypothec gives the secured creditor (the landlord) a right in the burdened goods that is preferable to the right of

the debtor's (tenant's) unsecured creditors. Unless or until the tenant enters into a formal insolvency process,[1] the hypothec allows the landlord to defeat the attachment of the tenant's goods by an unsecured creditor.[2] After the tenant enters an insolvency process, the right of hypothec remains of use to the landlord. Before the Bankruptcy and Diligence etc (Scotland) Act 2007, a landlord could bring an action of sequestration for rent after his tenant had entered formal insolvency proceedings, whether bankruptcy,[3] liquidation,[4] or receivership.[5] This was in accordance with the general rule that a secured creditor need not rely on the insolvency practitioner to realise the encumbered property but can instead use any enforcement procedure that would have been available but for the insolvency.[6] It was only in administration that a moratorium prevented the landlord from enforcing the hypothec through a sequestration for rent, or from using any other enforcement procedure such as a warrant to carry back or interdict.

11-02. It was indeed sometimes suggested that sequestration for rent was the *only* way a landlord could enforce a hypothec after insolvency;[7] but in fact a security-holder could, and can, always "sit" on his security and require the insolvency practitioner to transfer the value of the secured claim to him. This might be the most efficient route for the realisation of the debtor's estate and, after the 2007 Act, the only option still available to a landlord upon his tenant's insolvency.

11-03. A benefit of claiming on the insolvency of the tenant, rather than enforcing the hypothec through diligence, is that the landlord is preferred to the government. Previously, the government was provided with three preferences: (1) a preference over the competing diligences of other creditors (up to the point where the property in question had been transferred from the estate of the debtor); (2) a right under the Taxes Management Act 1970 to take advantage of the diligence of another creditor; and (3) a preference in insolvency. As discussed elsewhere, (1) has been removed.[8] The Taxes Management Act is still in force, but it requires the landlord to attach the goods by diligence

[1] This chapter is mainly concerned with formal insolvency processes.

[2] On this, see paras 9-14–9-18 above.

[3] Hume, *Lectures* vol IV, 16; J G Stewart, *A Treatise on the Law of Diligence* (1898) 487; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 210.

[4] Paton and Cameron, *Landlord and Tenant* 210.

[5] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36; A D J MacPherson, *The Floating Charge* (Studies in Scots Law vol 8, 2020) paras 8-58–8-63.

[6] For a discussion in relation to corporate insolvency, see K van Zwieten, *Goode on Principles of Corporate Insolvency Law*, 5th edn (2018) para 3-04.

[7] D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) paras 435 and 442.

[8] See para 9-18 above.

before the tax authorities can take a preference.[9] Formerly, the tax authorities were able to take advantage of a landlord's sequestration for rent brought after the tenant entered insolvency;[10] but now that the landlord has to rely on the insolvency practitioner to realise the goods, there is no diligence of which the tax authorities can take advantage. Finally, the preference provided by (3) did not grant the tax authorities a right over secured creditors, for it was a preference in the process of distribution amongst unsecured creditors.[11] Admittedly, it was often said that the landlord's right was postponed to the tax authorities in insolvency even if there had been no sequestration for rent.[12] This, however, was mistaken. The only preferences given to the tax authorities were through statute, and the bankruptcy statutes only provided preferences in the distribution of the insolvent estate after secured claims had been met.

11-04. The 2007 Act brought sweeping changes to this established position: sequestration for rent was abolished, and the hypothec no longer secured one term's rent but rather rent currently "due and unpaid only".[13] A reform option would have been to reduce the hypothec to a mere statutory preference over the items in the leased premises at the date of insolvency, for the rent due at that date. It is even conceivable that this was the intention of the Scottish Executive, whose policy memorandum contained the statement that "[t]he debt [rent] will no longer be enforceable by sequestration for rent, so the security will instead provide a preference. Since a preference is not an immediate remedy it can reasonably be wider in scope."[14] Such a preference would take effect at the date of insolvency and its scope would depend on the value of the goods that are caught at that date. But if it were the intention of the Scottish Executive to reduce the hypothec to a preference on insolvency, the 2007 Act does not achieve this. Instead, the legislation is clear that the hypothec is retained as "a right in security over corporeal moveable property kept in or on the subjects

[9] Taxes Management Act 1970 s 64.

[10] *Campbell v Edinburgh Parish Council* 1911 SC 280 at 290 per Lord President Dunedin. This was a case about poinding of the ground, but the same principle applies. See also J Gordon Dow, "Ranking of burgh rates in bankruptcy and in a competition" 1933 SLT (News) 57.

[11] 1911 SC 280 at 289 per Lord President Dunedin; *Boni v McIver* (1933) 49 Sh Ct Rep 191 at 207–08 per Sheriff Menzies and 213 per Sheriff Dickson. The Finance Act 2020 s 98 reintroduced the Crown preference. This gave the Crown a preferential right to be paid VAT, PAYE, and employee national insurance contributions retained by the insolvent company before unsecured creditors and floating-charge holders. This does not, however, grant the Crown a right of preference over the landlord's hypothec. The hypothec is a fixed security right.

[12] Stewart, *Diligence* 488; Paton and Cameron, *Landlord and Tenant* 210–11. In the years around 1900, it was common to say that the preferences for tax payments introduced by statute ranked above the hypothec: see the discussion in *McDougall & Sons v Abrahams* (1930) 46 Sh Ct Rep 117. This was incorrect (as shown by *Campbell v Edinburgh Parish Council* 1911 SC 280), and the only preference over the hypothec was granted by the Taxes Management Act 1970.

[13] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8)(a).

[14] *Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill*, introduced in the Scottish Parliament on 21 November 2005, para 1011.

let".[15] Thus, although the hypothec has lost its unique enforcement procedure (i.e. sequestration for rent), is no longer restricted to one term's rent,[16] and cannot secure rent due in the future, in other respects it remains intact.

11-05. Despite this clear legislative statement, it appears that there is much misunderstanding as to the post-insolvency position of the hypothec, arising, perhaps, from the abolition of sequestration for rent and a mistaken belief that the hypothec now only grants a preference on insolvency. This chapter seeks to address these misunderstandings.

(2) Pre-insolvency hypothecs

11-06. When the requirements for the creation of a hypothec are fulfilled before the tenant becomes insolvent,[17] what may be called a "pre-insolvency hypothec" is created. In the insolvency of a tenant, this pre-insolvency hypothec will be preserved, but it is then for the insolvency practitioner, not the landlord, to realise the assets and to transfer the funds raised to the landlord. This goes against the general principle that a secured creditor can enforce the security notwithstanding the debtor's insolvency. A landlord must rely on the insolvency practitioner to compile an inventory of the stock within the leased premises.[18] The landlord bears the cost of realising the goods,[19] but can deduct this amount from the sum received and rank for any leftover rent as an unsecured creditor.[20] Surprisingly, given the lack of any independent enforcement procedure, there is no formal obligation on landlords to notify the insolvency practitioner that they assert a right of hypothec over the insolvent tenant's goods. It will nevertheless be in a landlord's interests to inform the insolvency practitioner of the hypothec, to detail any unpaid rent, and to request an inventory of the stock.

11-07. The right of hypothec does not end merely because the tenant or insolvency practitioner has removed items from the premises, and in any case a warrant to carry the goods back remains available even when the tenant is

[15] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(2)(a).

[16] See paras 9-08–9-13 above.

[17] On these requirements to create a right of hypothec, see chapter 5 above.

[18] This seems possible with the use of Electronic Point of Sale equipment. On this, see I Bowie, "Landlord's hypothec in Scots law – a guide for IPs" (available at: https://www.scotlawcom.gov.uk/files/3215/0669/1279/06B.__Ian_Bowie_MacRoberts_-_Landlords__Hypothec_in_Scots_Law.pdf).

[19] J Clark, "The effect of landlord's hypothec on corporate insolvencies" 2012 International Corporate Rescue 124 at 125. This is in conformity with the general principle that the insolvency practitioner's costs for realising the assets are paid ahead of the secured creditor's claim over the assets. For a statement on this, albeit from the perspective of English law, see *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298 at para 19 per Lord Nicholls of Birkenhead and para 63 per Lord Millett.

[20] Insolvency (Scotland) (Receivership and Winding up) Rules 2018, SSI 2018/347, r 7.24(5) (for winding up); Insolvency (Scotland) (Company Voluntary Arrangement and Administration) Rules 2018, SSI 2018/1082, r 3.113(5) (for administration).

in insolvency proceedings (with the exception of administration).[21] If the insolvency practitioner, instead of removing the goods from the premises, sells the goods to a third party in a manner that extinguishes the hypothec,[22] the hypothec will indeed, on normal principles of law, be extinguished. Any money received from the sale is then payable to the landlord in satisfaction of the unpaid rent.

11-08. When, without the landlord's agreement, the insolvency practitioner transfers the entire business of the insolvent tenant to a third party, the third party's acquisition will not be in good faith and the goods will remain subject to the hypothec. This is because a purchaser of the tenant's entire business ought to be aware of the lease and any unpaid rent.[23] This becomes of particular importance in the event of a "pre-pack" administration.[24] There is, therefore, an obvious incentive for an insolvency practitioner to reach an agreement with a landlord who is owed rent arrears if a pre-pack sale of the tenant's business is proposed. If approached by the insolvency practitioner, the landlord has an opportunity to use one of the main benefits of the hypothec: as a negotiating tool. An acquirer of an entire business will need all the stock and furnishings to continue trading and this allows landlords to use their right over the goods to negotiate better conditions (for example, higher rent or enhanced repair obligations) from the purchaser. A failure to agree may lead to the landlord demanding that the goods are sold, or their value transferred to him, and this is likely to be harmful to the purchaser's ability to make a success of the business as well as awkward for an insolvency practitioner wishing to sell the business quickly.

(3) Post-insolvency hypothecs and related issues

11-09. When a tenant enters insolvency proceedings, the lease does not automatically come to an end. Most commercial leases contain a clause allowing the landlord to terminate the lease upon the tenant's insolvency,[25] but if this right is not exercised, the premises are likely to continue to be used, rent will continue to fall due, and goods will continue to be brought in and out. When a rent instalment falls due after the date of insolvency, a landlord may claim that a right of hypothec that arose before insolvency (a pre-insolvency hypothec)

[21] *Novacold v Fridge Freight (Fyvie) Ltd (in receivership)* 1999 SCLR 409.

[22] For the methods of extinguishing the hypothec, see chapter 9 above.

[23] See para 9-45 above.

[24] For a discussion on pre-packs, see K van Zwieten, *Goode on Principles of Corporate Insolvency Law*, 5th edn (2018) para 11-38.

[25] It is current practice for a commercial lease to contain a clause allowing an insolvency practitioner to prevent an irritancy of the lease by personally undertaking to perform the obligations under the contract. See, for example, the styles prepared by the Property Standardisation Group (http://www.psglegal.co.uk/leases.php).

secures that post-insolvency rent. Alternatively, if an insolvency practitioner brings goods into the leased premises, the landlord may argue that a right of hypothec arises over the goods (a post-insolvency hypothec).[26] Neither issue is addressed in the Bankruptcy and Diligence etc (Scotland) Act 2007 despite each posing a serious problem for an insolvency practitioner who wishes to sell or bring goods into the leased premises.

11-10. Before the 2007 Act, a landlord's hypothec secured the rent of the current term, regardless of whether some of this rent fell due after the date of the tenant's insolvency. For example, where a tenant of a lease that ran from Whitsunday to Whitsunday became insolvent one day after Whitsunday, his landlord was able to enforce the hypothec for all rent due for the possession of the premises until the following Whitsunday. It also appears that a post-insolvency hypothec was possible, if only because landlords could sequestrate for rent after the date of insolvency without any discussion about when the goods were brought into the premises.[27] The hypothec was not a floating charge that attached to certain goods at the date of insolvency, but rather was a fixed security that arose whenever the requirements for the creation of the hypothec were met.[28]

11-11. Since the 2007 Act, the hypothec is no longer restricted to one term's rent at a time, but rather secures all rent due and unpaid.[29] Nothing suggests that this rent must fall due before the date of insolvency. There is also no provision that requires the right of hypothec itself to have arisen before the date of insolvency. Nor is there anything that makes the hypothec attach only to the goods in the premises at the date of insolvency. If it had been intended to restrict the landlord's hypothec in these respects, this could easily have been achieved by express provision. As previously mentioned, one possibility would have been to reduce the hypothec to a preference over the value of the goods on the premises at the point of the tenant's insolvency for any rent then due and unpaid. South Africa provides an example of this technique, with only rent that has fallen due within a defined period before the sequestration being secured by the hypothec.[30] From case-law, it has also been decided that only those goods subject to the hypothec at the date of sequestration are caught by the preference.[31] The hypothec is also reduced to a preference on insolvency in

[26] K S Gerber, *Commercial Leases in Scotland*, 4th edn (2021) para 27-10.

[27] J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 403.

[28] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36 at 39 per Sheriff Kelbie. For the requirements of creating a right of hypothec, see chapter 5 above.

[29] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8).

[30] Insolvency Act 24 of 1936 s 85(2). Interestingly, the goods of third parties (which can still be burdened by the landlord's hypothec in South Africa) are excluded from the preference on insolvency. See G Glover, *Kerr's Law of Sale and Lease*, 4th edn (2014) 466 n 451.

[31] This is based on *Re BSA Asphalte & Manufacturing Co (in liquidation)* (1906) 23 South African Supreme Court Reports (SC) 624. This decision, however, merely states that the practice

both Jersey and Guernsey, with the latter restricting the landlord's preference to the rent that is due within a short period before the tenant's insolvency.[32]

11-12. Alternatively, it would have been possible to provide for the landlord's hypothec to act as a floating security – the existing legislative provisions on the floating charge could have been adopted for the hypothec with any necessary amendments. Upon the insolvency of the tenant, the hypothec would attach to the moveable property then in the premises to secure the rent then due.[33] But this would have required a fundamental reconceptualisation of the hypothec: the abolition of the common law hypothec and its replacement with a statutory "floating security hypothec". This was not done. The hypothec was deliberately preserved and so remains as a fixed security over the goods contained within the leased premises (and also those goods that have been removed or sold to a third party under certain circumstances).[34] And whilst the floating charge – as a creature of statute – needs a legislative provision for it to attach to the chargor's property upon insolvency, in respect of the hypothec the landlord acquires a real right whenever the common law requirements for its creation are met.[35]

11-13. As the hypothec remains as a real right in security over the attachable goods that have been brought into the leased premises, another possibility would have been to adopt a version of German law. In Germany, as in Scotland, the lease relationship does not necessarily end upon the tenant entering insolvency proceedings, and the landlord has a real right in those goods subject to the hypothec.[36] But, unlike in Scots law, the possibilities of a pre-insolvency hypothec securing rent that becomes due after insolvency, and the creation of a post-insolvency hypothec, are both explicitly addressed in the German Insolvency Code.[37] A *Vermieterpfandrecht* only secures rent that had become due within the 12 months *before* the date of insolvency,[38] and, as a general rule, no *Pfandrecht* can arise after the start of the insolvency proceedings.[39] Admittedly, there appear to be situations when a *Vermieterpfandrecht* could arise post-insolvency, but these securities would be restricted to debts of the insolvency proceedings, i.e. the rent that becomes due post-insolvency.[40] As

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at the time was to confine the preference to the goods on the premises at the date of insolvency. It does not directly address the question of whether goods brought on after the insolvency can be caught. Nevertheless, the case has been accepted as a correct statement of the law: see G Wille, *Landlord and Tenant in South Africa*, 5th edn (1956) 215.

[32] Bankruptcy (Desastre) (Jersey) Law 1990 s 32(1); G Dawes, *Laws of Guernsey* (2003) 224.

[33] The wording of the Companies Act 1985 s 463(1) could have been used with adaptations.

[34] For a discussion, see chapter 9 above.

[35] Detailed in chapter 5 above.

[36] J Baur and R Stürner, *Sachenrecht*, 18th edn (2009) §55.10.

[37] For a helpful in-depth commentary on the Code in English, see E Braun, *German Insolvency Code*, 2nd edn (2019).

[38] §50(2) InsO.

[39] §91(1) InsO.

[40] See the decision of the BGH (6 December 2017, XII ZR 95/16, para 12).

post-insolvency rent payments are also preferred debts of the insolvency estate, to be paid before all other debts,[41] there appears to be little need for such post-insolvency *Vermieterpfandrechte*. Overall, every possibility seems to be dealt with here.

11-14. Allowing a landlord to sequestrate for rent was a mechanism through which these questions could be answered in Scots law. It was also important, in the pre-2007 Act law, that a landlord had a right of hypothec only for the current term's rent. Cut loose from the law of sequestration for rent, and lacking clear rules such as those set out in the German Insolvency Code, Scots lawyers are left without certainty on whether a hypothec can arise post-insolvency or whether a pre-insolvency hypothec can secure post-insolvency rent. In practice, it appears that the hypothec is treated as covering only those goods in the premises at the point of insolvency, in security of rent then due and unpaid. This, however, seems incorrect as a matter of law. We will need to return to these questions as the hypothec is analysed in relation to the various types of insolvency proceedings.

B. LIQUIDATION

(1) Enforcement

11-15. Although it is usually best to reach an accommodation with the liquidator, landlords may wish to enforce their security outside of the liquidation proceedings. This was certainly possible before the abolition of sequestration for rent. When a company entered liquidation, it remained as tenant and there was no transfer of its assets to the liquidator. There was therefore no need to have a provision equivalent to that contained within the bankruptcy legislation that protected the rights of a landlord when the goods burdened by the hypothec were vested in the trustee.[42] Execution was available against the company's property in satisfaction of its debts. The only possible stumbling block for a landlord wishing to bring a sequestration for rent was section 163 of the Companies Act 1862 (now found, in a slightly amended version which does not apply to companies registered in Scotland, in section 128(1) of the Insolvency Act 1986),[43] which stated that "any attachment, sequestration, distress, or execution put in force against the estate or effects of the Company after the Commencement of winding-up shall be void to all intents". As we will see,

[41] §53 InsO.

[42] *Scottish Metropolitan Property Co Ltd v Sutherlands Ltd* (1934) 50 Sh Ct Rep 190 at 193 per Sheriff MacDonald. Indeed, there was no need to have it in the bankruptcy legislation either. On this, see paras 11-52–11-58 below.

[43] Section 128 of the Insolvency Act 1986 applies only to companies registered in England and Wales or, in case of a company registered in Scotland with goods in England and Wales, in relation to those goods.

however, it came to be held that this section did not prevent a sequestration for rent.

11-16. It was first decided that a poinding of the ground after the winding up of a company was permitted on the basis that the creditor was merely seeking to enforce a pre-existing right in security:

> On these grounds I think it is a misconception of the 163d section to suppose that it was intended to apply to proceedings such as that objected to here. What that section does apply to is, where a creditor attempts by diligence to acquire a preference, and that the creditor here is not endeavouring to do, and therefore I am of opinion that we should refuse this note.[44]

This rationale was later applied to sequestration for rent,[45] the clearest example being *The Holmes Oil Co (in liquidation), Noters*.[46] A tenant – the Holmes Oil Co Ltd – was the subject of a winding-up order by the court. The liquidator having refused to recognise the landlord's hypothec for the unpaid rent, the landlord sought leave to raise an action of sequestration for rent under section 87 of the Companies Act 1862 (now section 130(2) of the Insolvency Act 1986). Section 130(2) states that:

> When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.

On the basis of the wording of section 163 of the Companies Act 1862, the court initially doubted whether leave could be granted to bring an action of sequestration for rent, but it was then decided that the rationale applying to poinding of the ground was equally applicable to sequestration for rent. The landlord was permitted to bring a sequestration for rent after the tenant was in liquidation because the landlord was seeking only to "make effectual an already existing preference".

11-17. Although sequestration for rent is no longer possible, a secured creditor is still able to bring proceedings against a company in liquidation with the consent of the court.[47] On the basis of *The Holmes Oil Co*, it could be said

[44] *Athole Hydropathic Co Ltd v Scottish Provincial Assurance Co* (1886) 13 R 818 at 822–23 per Lord President Inglis. Whether a superior had a real right in, rather than a preferable right to do diligence against, the goods can be debated: see Bell, *Principles* §699.

[45] Also applied to a sequestration for feuduty in *Anderson's Trs v Donaldson & Co Ltd (in liquidation)* 1908 SC 38.

[46] *The Holmes Oil Co (in liquidation), Noters* (1901) 8 SLT 360. Although not cited in *Holmes Oil*, the Chancery Division of the English High Court had previously reached the same conclusion in *Re Wanzer Ltd* [1891] 1 Ch 305.

[47] Insolvency Act 1986 s 130(2); K van Zwieten, *Goode on Principles of Corporate Insolvency Law*, 5th edn (2018) para 8-51.

that this consent ought to be granted. A landlord wanting to attach the goods subject to the hypothec is not seeking to create a new preference, but only to enforce a pre-existing right. This was the crucial difference for the court in *The Holmes Oil Co,* and was also seen in the subsequent case of *Scottish Metropolitan Property Co Ltd v Sutherlands Ltd*,[48] where a liquidator attempted to prevent a landlord sequestrating for rent after the tenant had been placed into liquidation. One of the liquidator's key submissions was based on section 270 of the Companies Act 1929, which equalised all diligences executed 60 days before and all those after the date of winding up (now contained in section 185 of Insolvency Act 1986, which applies section 24 of the Bankruptcy (Scotland) Act 2016 to liquidation). The liquidator's argument was rejected by the sheriff, who observed that section 270:

> does not deal with sequestration by a landlord for payment of his rent. It strikes against preferences acquired by diligence. A landlord's sequestration for payment of rent is not a proceeding for the purpose of creating a security, but a proceeding for making effectual a security already existing.[49]

11-18. On one view, an attachment of goods subject to the hypothec after the winding up of a company ought to be permitted on the same basis: the landlord is not seeking to create a preference. But the legislation is also clear that any creditor who attaches goods post-insolvency (in this case, the landlord) must hand over any attached goods – or their value – to the liquidator.[50] Attaching the goods of the tenant after insolvency would therefore be a fruitless endeavour.[51]

11-19. A landlord is, of course, still left with the right of hypothec. This right is said to be preferable to the rights of the liquidator and unaffected by the order of distribution.[52] On one view, this merely preserves the right in security and allows the secured creditor to enforce the security outwith the insolvency regime. But, when his tenant is insolvent, the landlord cannot enforce the hypothec outwith the insolvency regime, for diligence is not permitted. This would leave the hypothec worthless in the tenant's insolvency, and so cannot be the correct interpretation. Instead, the liquidator must rank the hypothec, and the hypothec will rank before all other claims, including the liquidator's expenses. The same discussion as for bankruptcy, later in this chapter, can be applied here.[53] It has even been said that the liquidator is liable for all unpaid rent if the goods are sold without the agreement of the landlord.[54] Whilst this seems to go too far –

[48] *Scottish Metropolitan Property Co Ltd v Sutherlands Ltd* (1934) 50 Sh Ct Rep 190.

[49] (1934) 50 Sh Ct Rep 190 at 193 per Sheriff MacDonald.

[50] 1986 Act s 185(1)(a) applying Bankruptcy (Scotland) Act 2016 s 24(7) to winding up.

[51] See para 11-54 below for more on this. The bankruptcy principles are equally applicable to liquidation.

[52] Insolvency (Scotland) (Receivership and Winding Up) Rules 2018, SSI 2018/347, r 7.27(6)(a).

[53] See paras 11-55–11-58 below.

[54] G L Gretton, "Diligence and enforcement of judgments", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 388.

for a liquidator ought to be liable only for the landlord's loss, i.e. the value of the goods that were subject to the hypothec[55] – it demonstrates the liquidator's duty to rank the landlord's claim above all others as far as secured by the hypothec.

(2) Rent as a liquidation expense

11-20. If, after the tenant enters liquidation,[56] the company remains in occupation of the leased premises for the benefit of the company's creditors, the Court of Appeal in *Pillar Denton Ltd v Jervis*[57] has held that a liquidator must pay rent as a liquidation expense "for the duration of any period during which he retains possession of the demised property for the benefit of the winding up or administration (as the case may be). The rent will be treated as accruing from day to day."[58] Although this is an English case, it concerns the law of corporate insolvency throughout the UK.[59] It is likely that a Scottish court will apply the decision reached in *Pillar Denton*,[60] thereby greatly reducing the need for a landlord to rely on a hypothec to secure rent becoming due within the winding up of his tenant.

(3) Personal liability of liquidator

11-21. A trustee in sequestration who continues in possession of premises subject to a lease for purposes other than to wind up the bankrupt estate is said to have "adopted" the lease and will be personally bound to fulfil the obligations under the contract.[61] Whether a liquidator who wishes to continue a contract also becomes personally bound is far from clear.[62] If the same underlying rationale for finding a trustee in sequestration personally liable is applied to a liquidator adopting a contract – that the liquidator warrants that there are sufficient funds to satisfy the creditor – then the liquidator ought to be liable in the same manner

[55] This is the same as the liability of those attaching the goods subject to the hypothec. On this, see paras 9-16 and 9-17 above.

[56] Or administration.

[57] *Pillar Denton Ltd v Jervis* [2014] EWCA Civ 180, [2015] Ch 87.

[58] [2014] EWCA Civ 180 at para 101 per Lewison LJ.

[59] Although this rule has its origins in the law of distress for rent in England, it has long since moved away from those roots. A history can be found *in Re Toshoku Finance UK plc* [2002] UKHL 6, [2002] 1 WLR 671.

[60] That the law was the same in Scotland and England was assumed in *Cheshire West & Chester Borough Council, Ptrs* [2010] CSOH 115, 2010 GWD 33-684. The lack of discussion to the contrary is evidence that the law is accepted to be the same in both jurisdictions.

[61] See paras 11-76–11-79 below.

[62] Scottish Law Commission, Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot Law Com No 68, 1982) para 10.23. See also *Crown Estate Commissioners v Liquidators of Highland Engineering Ltd* 1975 SLT 58 at 60 per Lord Keith; *Smith v Lord Advocate (No 1)* 1978 SC 259 at 272–73 per Lord President Emslie.

as a trustee in sequestration. The analogy with a trustee in sequestration ought not to be taken too far, however. A trustee is an assignee of the right of lease,[63] whereas a liquidator merely takes control of the company, which itself remains the tenant.[64] The law of adoption is a unique feature of the law of bankruptcy and the wider law of trusts.[65] If this is incorrect, a liquidator is said to avoid personal liability by making it clear that it is the company entering or continuing a contract.[66]

(4) Post-liquidation rent

11-22. A lease is likely to be terminated when the tenant enters liquidation: if a landlord does not irritate or rescind, the liquidator may repudiate the contract and leave the landlord with a claim for damages in the winding up.[67] Even if the lease is not terminated, a right of hypothec is unlikely to be relied upon by a landlord to secure rent that becomes due after the commencement of the winding-up. Since rent is treated as a liquidation expense, as already mentioned,[68] this is likely to be security enough for the landlord. Nevertheless, the possibility of a right of hypothec securing rent due post-liquidation is discussed here, if only for the sake of completeness.

11-23. There is no legislative provision which states that the hypothec "attaches" at the date of liquidation to secure the rent then due. The Bankruptcy and Diligence etc (Scotland) Act 2007 says that the hypothec secures rent "due and unpaid only",[69] and this is not restricted to the rent due pre-liquidation. Despite this, one practitioner text dealing with corporate insolvency treats a pre-liquidation hypothec as a form of floating security which attaches (or crystallises) upon the winding-up of the company. It is said to attach only over the goods on the leased premises at the date of liquidation and only in security for pre-liquidation arrears of rent.[70] For rent that arises after the date of liquidation, it is said that a second (post-liquidation) right of hypothec comes into being:

> Where the liquidator fails to pay the rent due as at the first rent payment date after the company has gone into liquidation, for the purposes of ranking there may be, as at that rent payment date, effectively three fixed securities:

[63] See paras 11-64–11-71 below on the trustee as an assignee of the lease.

[64] *Gray's Trs v The Benhar Coal Co Ltd* (1881) 9 R 225 at 231 per Lord Shand.

[65] See paras 11-76–11-79 below.

[66] J St Clair and J Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (2011) para 4-43.

[67] A landlord cannot require the liquidator to perform the obligations under the lease. On this, see *Joint Administrators of Rangers Football Club plc, Noters* [2012] CSOH 55, 2012 SLT 599 at para 47 per Lord Hodge.

[68] See para 11-20 above.

[69] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8)(a).

[70] D Flint, *Scottish Liquidation Handbook*, 4th edn (2010) para 28.9.2.

(i) the "hypothec fixed security" which has arisen pre-liquidation in respect of pre-liquidation arrears of rent;
(ii) the "deemed fixed security", i.e. the floating charge attaching on liquidation; and
(iii) the "hypothec fixed security" which arises on that first rent payment date.

Of course, if there are no pre-liquidation arrears, only securities (ii) and (iii) will exist.[71]

11-24. The issue of the floating charge can be left until later.[72] In other respects, the position set out above lacks any legislative or common law foundation. Admittedly, it is tempting to adopt this position because it solves the problem of ranking between a right of hypothec and an attached floating charge, but there is nothing to justify the view that there are two rights of hypothec, one before liquidation (securing rent due before) and one after liquidation (securing rent due after). The landlord's hypothec is not reduced to a right of preference upon insolvency, the tenant is not relieved from the obligations under the lease when it enters liquidation, and the tenant also remains the owner of the goods that are subject to the hypothec.

11-25. There is therefore nothing to prevent a pre-insolvency right of hypothec from continuing to secure rent that becomes due during the winding up of the tenant.[73] If rent due on 1 January is unpaid, a right of hypothec will arise on 2 January over the goods in the premises. Following a liquidation on 3 January, if the rent due on 1 February is unpaid, there is no basis for supposing that a new right of hypothec will arise over the goods on the premises on 2 February. Instead, the right of hypothec that arose over the goods on 2 January will now secure the additional rent due on 1 February. The common law rule that would have restricted a pre-insolvency hypothec to the current term's rent has been abolished and now all rent due and unpaid is secured, regardless of when this rent became due.[74] Of course, in practice, as already mentioned, a landlord is not likely to rely upon a pre-insolvency hypothec to secure rent that becomes due after the date of liquidation, but will instead receive the amount due as an insolvency expense in priority to other creditors.

(5) Post-liquidation hypothec

11-26. A more important question is whether a right of hypothec can arise after the commencement of the winding-up of a company (i.e. a post-liquidation hypothec). This possibility may arise because the rent only becomes due, and so potentially unpaid, after the date of liquidation. Yet this particular example is

[71] Flint, *Scottish Liquidation Handbook* para 28.9.2.

[72] See paras 11-29–11-31 below.

[73] A tenant will, however, cease to exist when the winding-up is complete. On this, see K van Zwieten, *Goode on Principles of Corporate Insolvency Law*, 5th edn (2018) para 6-46.

[74] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8).

unlikely to occur. Commercial leases almost universally require rent to be paid in advance. If the rent only becomes due and unpaid after the date of insolvency, the landlord will receive the rent for the period after the liquidation as an expense of the liquidation. A better example is where a landlord claims a post-liquidation hypothec in respect of goods that are only brought into the premises after the date of liquidation. A landlord may then claim these goods as security for rent that was due and unpaid before the date of liquidation. Recognising a right of hypothec under these circumstances has doctrinal consistency: whenever the requirements for the creation of the hypothec are fulfilled, the right ought to arise to secure all rent due and unpaid under the lease.[75]

11-27. A liquidator may respond that only a right of hypothec created before the date of liquidation has a preference.[76] On one view of the law, the hypothec fixes at the date of liquidation as a fixed security.[77] If true, this would protect a liquidator from the concern that goods brought into leased premises could be claimed by a landlord in security of any unpaid rent. It is, however, founded on the understanding that the hypothec is not a fixed security until insolvency, and there is no basis for such a proposition. Before the Bankruptcy and Diligence etc (Scotland) Act 2007, the hypothec did not "crystallise" when the tenant went into liquidation – as is the case for a floating charge.[78] *Anderson's Trs v Donaldson & Co Ltd (in liquidation)* is an illustration of this, although it related to a superior's hypothec.[79] On 1 June 1907 a winding-up order for the vassal was pronounced and three days later the superior raised an action of sequestration for feu-duty. This was to sequestrate the "whole moveables" that were on the premises on 4 June, rather than only such items as were on the premises when the winding-up order was pronounced. To resist the superior's sequestration, the liquidator argued that "[n]o good reason could be suggested for putting a heritable creditor or a superior [or a landlord] in a more favourable position than a creditor with a statutory preference". This (and their other) submissions were not accepted, with the Inner House holding that a superior could bring a sequestration for feu-duty after a winding-up order. With the exception of the abolition of sequestration for feu-duty, the position adopted by the Inner House does not appear to have been changed by the 2007 Act. The tenant remains the company, and if the company owns the goods that are brought into the leased premises, and there is also rent due and unpaid, the goods become subject to a right of hypothec. This is an obvious risk for a liquidator.

[75] For the requirements of creating a right of hypothec in an item, see chapter 5 above.

[76] This is the argument in D Flint, *Scottish Liquidation Handbook*, 4th edn (2010) para 28.9.2(3)(g).

[77] This is the view in D Bain, C Bury and M Skilling, "Landlord and tenant", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2nd Reissue (2021) para 442; R Roxburgh, "Landlord's hypothec in formal insolvencies" 2009 SLT (News) 227.

[78] G L Gretton, "Receivership and sequestration for rent" 1983 SLT (News) 277.

[79] *Anderson's Trs v Donaldson & Co Ltd (in liquidation)* 1908 SC 38.

11-28. The law would undoubtedly benefit from a provision which stated that a right of hypothec created whilst the tenant is in liquidation could secure only the rent that became due during liquidation. This would follow the German rule.[80] It certainly appears to be against the purpose of liquidation if a landlord were to receive a windfall benefit by virtue of the tenant's liquidator bringing into the premises items that then became subject to a right of hypothec. But until this possibility is removed – or the hypothec is abolished altogether – a liquidator runs the risk of a right of hypothec being created post-liquidation for all rent "due and unpaid", whether before or after liquidation.

(6) Competition with an attached floating charge

11-29. When a company enters liquidation, any floating charge automatically attaches to the property subject to the charge as if it were a fixed security.[81] Such an attachment is very likely to catch goods that are also subject to a right of hypothec. The floating charge attaches subject to the rights of "any person who holds a fixed security over the property or any part of it ranking in priority to the floating charge".[82] If there is a pre-attachment right of hypothec, the underlying common law would give priority to the hypothec on the basis that it was created before the floating charge attached – *prior tempore potior iure*. The ranking is not, however, governed by the common law. Section 464(2) of the Companies Act 1985 provides a ranking rule that states that a fixed security arising by operation of law "has priority over the floating charge", and it is well settled that a hypothec comes within the definition of a fixed security arising by operation of law.[83] These ranking rules cannot be amended by the inclusion of a negative pledge clause in the floating charge.[84] Therefore, in relation to a pre-attachment right of hypothec, the legislative ranking rules match the common law rule.

11-30. When a liquidator continues to run a business from the leased premises, new goods may be brought into the premises.[85] These items are likely to be already subject to the fixed security right that was created by the attachment of the floating charge. There will then be a competition between the attached floating charge and the hypothec. If the *prior tempore potior iure* rule were to be followed here, the attached floating charge would have priority by virtue of being

[80] Discussed at para 11-13 above.

[81] Companies Act 1985 s 463. For discussion, see A D J MacPherson, *The Floating Charge* (Studies in Scots Law vol 8, 2020) para 5-32.

[82] 1985 Act s 463(1)(b).

[83] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36; MacPherson, *The Floating Charge* paras 8-61 and 8-62.

[84] Companies Act 1985 s 464(1).

[85] The question of whether a floating charge attaches to post-liquidation *acquirenda* has not been addressed here. For discussion, see MacPherson, *The Floating Charge* paras 3-23–3-49.

the earliest fixed security. This could not have been the aim of the legislature, however, for there was no intention that the underlying law of property would govern the relationship between an attached floating charge and another right in security, such as a right of hypothec. As stated above in relation to a right of hypothec that has arisen pre-attachment, section 464 of the Companies Act 1985 provides rules on the ranking between competing rights in security. These statutory provisions have been described as a "self-contained code", designed to organise the priority between the floating charge and diligences, fixed rights in security, and other floating charges.[86] And, as also mentioned earlier, section 464(2) governs the relationship between a floating charge and a hypothec. It states with clarity that:

> Where all or any part of the property of a company is subject both to a floating charge and to a fixed security arising by operation of law, the fixed security has priority over the floating charge.

This does not restrict the priority in ranking of fixed securities arising by operation of law to those that were constituted as a real right before the floating charge attached. It rather states that, when there is a competition between a floating charge and a fixed charge arising by operation of law, the latter has priority. If it had been intended that a floating charge would only rank behind a fixed security arising by operation of law that became a real right before the floating charge attached, wording similar to section 464(4)(a) could have been used. Section 464(4)(a) deals with the competition between an attached floating charge and a fixed security, and it states that "a fixed security, *the right to which has been constituted as a real right before a floating charge has attached* to all or any part of the property of the company, has priority of ranking over the floating charge".[87] This, however, was not done. We are left with the clear wording of section 464(2), which states that a hypothec (whenever created) has priority.

11-31. A floating-charge holder might seek to argue that section 464(2) grants priority to the landlord only if the hypothec is created when the floating charge is still "floating". As section 464(2) envisages a competition between a "floating charge" and a "fixed security arising by operation of law", it could be said that a hypothec is only given priority at a time when the floating charge "floats". But this would misunderstand the use of the term "floating charge" in the legislation. Whenever "floating charge" is used, it is intended to include

[86] *MacMillan v T Leith Developments Ltd (in receivership & liquidation)* [2017] CSIH 23, 2017 SC 642 at para 128 per Lord Malcolm. Admittedly, it cannot be correctly described as a complete code, for it is often necessary to fall back on the underlying law to find out what the rights of particular parties are. On this, see [2017] CSIH 23 at para 70 per Lord President Carloway; A D J MacPherson, "The circle squared? Floating charges and diligence after *MacMillan v T Leith Developments Ltd*" 2018 JR 230 at 238.

[87] Emphasis added.

both before and after the charge's attachment. The interpretation section in the Insolvency Act 1986 is clear that a floating charge "means a charge which, *as created*, was a floating charge and includes a floating charge within section 462 of the Companies Act (Scottish floating charges)".[88] So whenever the term "floating charge" is used, it is intended to mean those charges that are "floating charges, *as created*" even if they have subsequently attached. As Lord Millett has stated: "[o]nce a floating charge, always a floating charge".[89]

C. RECEIVERSHIP

11-32. As a result of the Enterprise Act 2002, the use of administrative receivership has been restricted for floating charges granted after 15 September 2003.[90] Despite this, addressing the relationship between receivership and a right of hypothec remains worthwhile.

11-33. Prior to the Bankruptcy and Diligence etc (Scotland) Act 2007, a landlord was able to bring an action of sequestration for rent even after the appointment of a receiver to the tenant.[91] This was because the receiver's powers were – and still are – subject to the "rights of any person who holds over all or any part of the property of the company a fixed security or floating charge having priority over, or ranking pari passu with, the floating charge by virtue of which the receiver was appointed".[92]

11-34. As the hypothec ranks above the floating charge, by virtue of section 464 of the 1985 Act (as previously discussed), the right of a landlord to bring a sequestration for rent trumped the rights of the receiver. Initially, however, the courts had gone in a different, and incorrect, direction – in *Cumbernauld Development Corporation v Mustone Ltd*[93] – when it was decided that a landlord had no remedy in a tenant's receivership because the landlord was neither a creditor with an effectually executed diligence before the appointment of the receiver nor the holder of a fixed security ranking in priority to the floating charge. There were several reasons to take issue with the court's reasoning here. First, the court overlooked the fact that the right of hypothec does not arise from

[88] Insolvency Act 1986 s 251, emphasis added.

[89] *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298 at para 83 per Lord Millett.

[90] Insolvency Act 1986 s 72A, as inserted by Enterprise Act 2002 s 250(1). There are exceptions for those that come under 1986 Act ss 72B–72GA. Receivership was introduced into Scots law by the Companies (Floating Charges and Receivers) (Scotland) Act 1972. The floating charge had been introduced into Scots law by the Companies (Floating Charges) (Scotland) Act 1961 and the floating charge was deemed a fixed security upon a chargor's liquidation.

[91] *Grampian Regional Council v Drill Stem (Inspection Services) Ltd (in receivership)* 1994 SCLR 36.

[92] Insolvency Act 1986 s 55(3)(b). The previous iteration can be seen in the Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 15(2)(b).

[93] *Cumbernauld Development Corporation v Mustone Ltd* 1983 SLT (Sh Ct) 55.

the diligence of sequestration for rent, but rather from the real right in security that is created *ipso jure* whenever the conditions for the creation of the hypothec are met.[94] Second, the hypothec is a fixed security, giving the landlord a directly enforceable right against individual items from when the hypothec is created. It is not a floating charge. Finally, there was no consideration of the provision that a floating charge will always rank below a fixed security arising by operation of law.[95] In view of these factors, there was no need to consider the more general rule that a fixed security has priority over the floating charge if the former has been "constituted as a real right" before the floating charge attaches,[96] but the court took more notice of this provision. More on this last point will be said below.

11-35. These principles remain in place despite the abolition of sequestration for rent. A landlord may still interdict the sale, or removal from the leased premises, of goods subject to a right of hypothec.[97] If, however, the landlord does not do so, the receiver would be able to sell the goods,[98] and such a sale will extinguish both the hypothec and the deemed fixed charge that was created by an attached floating charge. But, when such a sale does take place, the receiver is under a statutory obligation to pay "the holder of any fixed security which is over property subject to the floating charge and which ranks prior to, or pari passu with, the floating charge" before the holder of a floating charge.[99] The landlord's hypothec is a fixed security arising by operation of law, which has priority over the floating charge.[100] This is clearly set by section 464(2) of

[94] For the conditions of creation, see chapter 5 above. The pursuer's solicitor had conceded the defender's argument that the hypothec was not a fixed security that had become a real right before the receiver's appointment. The court, therefore, had to accept the defender's submissions on this issue.

[95] Companies (Floating Charges and Receivers) (Scotland) 1972 s 5(2) (now Companies Act 1985 s 464(2)).

[96] Companies (Floating Charges and Receivers) (Scotland) 1972 s 5(4)(a) (now Companies Act 1985 s 464(4)(a)).

[97] A receiver's powers are subject to the "rights of any person who holds over all or any part of the property of the company a fixed security … having priority, over, or ranking pari passu with, the floating charge…" (Insolvency Act 1986 s 55(3)(b)). A landlord's right of hypothec ranks above the floating charge and, therefore, a landlord with a right of hypothec can prevent the removal of the goods. If the receiver removes the goods from the premises and the hypothec is not extinguished, a warrant to carry the goods back may still be available. For more on interdict and the warrant to carry back, see chapter 10 above. A receiver who is subject to an interdict will need to apply to the court under Insolvency Act 1986 s 61 for the power to sell the goods free of the hypothec. Any sale authorised by the court under s 61 will be conditional upon the receiver distributing the net proceeds of sale to the landlord (1986 Act s 61(4)).

[98] Insolvency Act 1986 s 61(1) could be read as requiring a receiver to obtain the consent of the security-holder, or the court before selling property subject to a right in security. This, however, cannot be the case. The same rationale as paras 11-43–11-46 below can be applied here.

[99] 1986 Act s 60(1)(a).

[100] Companies Act 1985 s 464(2). The history of section 464(2) of the 1985 Act is set out in A D J MacPherson, *The Floating Charge* (Studies in Scots Law vol 8, 2020) para 8-62.

the Companies Act 1985, which provides the legislative basis for the creation of a floating charge.

11-36. If a landlord does not irritate the lease upon the tenant going into receivership, any right of hypothec that has already arisen will also secure rent that arises after the appointment of the receiver.[101] This is a simple application of the rule that the hypothec secures all rent "due and unpaid", and follows the result seen above in relation to liquidation.[102]

11-37. Where the premises continue to be occupied by the company, a right of hypothec can arise even after the appointment of the receiver (on attachment of the floating charge) if the rent is due and unpaid. This could be either because new goods are brought in or because the rent only becomes due and unpaid after the receiver's appointment. The possibility of goods being brought in by a receiver is much greater than in the case of a liquidator (discussed above) and so it may be more problematic here.[103] So far as ranking is concerned, the result should be no different from when the floating charge attaches in liquidation: a post-attachment hypothec will have priority.[104] In practice, however, it again appears to be assumed that a hypothec arising post-attachment will rank below the floating charge. The argument appears to be the following. Upon the attachment of the floating charge, there is deemed to be a fixed security created over the property subject to the charge.[105] If the goods caught by this deemed fixed security are subsequently brought into the leased premises, there will then be two fixed securities: (i) the floating-charge fixed security, and (ii) the hypothec fixed security. And, according to the *prior tempore potior iure* principle, the floating-charge fixed security, by virtue of being created first, has priority.

11-38. Although this interpretation has certain attractions, it fails to take proper account of section 464 of the Companies Act 1985, which, even in receivership, governs the ranking of a floating charge.[106] The starting point is section 60 of the Insolvency Act 1986, which regulates the order of priority that a receiver must follow when distributing money received from the sale of the company's assets. This states that a floating-charge holder is to be paid after the "holder of any

[101] The hypothec secures "rent due and unpaid": Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8)(a). This is against the view that "crystallisation subordinates the hypothec to the floating charge in respect of arrears post-insolvency appointment": A Burrow, "Uncertain Security" (2010) 55(1) JLSS (online edition).

[102] See paras 11-22–11-25 above.

[103] For a liquidator, see paras 11-26–11-28 above.

[104] As to which see paras 11-29–11-31 above.

[105] Companies Act 1985 s 463(2) (for winding up); Insolvency Act 1986 ss 53(7) and 54(6) (for receivership).

[106] If section 464 of the Companies Act 1985 did not govern the ranking of floating charges in receivership, a negative pledge clause could create no preference in receivership for a floating-charge holder: see 1985 Act s 464(1). This would be incorrect.

fixed security which is over property subject to the floating charge and which ranks prior to, or pari passu with, the floating charge".[107] The only question to be answered is then whether a hypothec that is created after the attachment of the floating charge ranks prior to the floating charge. Common law would apply the principle of *prior tempore potior iure* and give priority to the floating-charge fixed security. But the floating charge is governed by the rules set out in section 464 of the 1985 Act, and section 464(2) states that, where there is a competition between a "floating charge and a fixed security arising by operation of law, the fixed security has priority over the floating charge".[108]

11-39. Again, if it had been intended that a floating charge should be postponed only to hypothecs that arose before the attachment of the charge, appropriate wording could have been used in the legislation. The example of the ranking between a floating charge and diligence in receivership can be taken. A receiver's powers are only subject to "the rights of any person who has effectually executed diligence on all or any part of the property of the company *prior to the appointment of the receiver*".[109] This option was not taken, however. The interpretation adopted here may result in a receiver deciding not to bring goods on to the premises unless they are owned by someone other than the tenant.

D. ADMINISTRATION

(1) Self-enforcement

11-40. The moratorium period that arises when a company is placed in administration prevents the landlord from enforcing the hypothec by attachment.[110] It also prevents the landlord from obtaining an interdict to stop the removal of goods from the premises, a warrant to carry goods back, or a plenishing order requiring the premises to be stocked with sufficient items.

[107] Insolvency Act 1986 s 60(1)(a).

[108] Companies Act 1985 s 464(2).

[109] Insolvency Act 1986 s 55(3)(a).

[110] 1986 Act Sch B1 paras 43(2) and 43(6). A tenant may also be subject to a Part A1 moratorium, which will likewise prevent the landlord attaching the tenant's goods. This moratorium was introduced into Part A1 of the Insolvency Act 1986 by the Corporate Insolvency and Governance Act 2020. A Part A1 moratorium lasts for only 20 business days, with the possibility of an extension for a further 20 business days without creditor consent. During a Part A1 moratorium, the company's directors remain in control of the company. But a tenant must pay the rent for the possession of the premises during the moratorium. Any right of hypothec securing the rent due for the period before the moratorium could be extinguished by the sale of goods during the moratorium period. A landlord cannot institute, carry out or continue a legal process (including legal proceedings, execution, distress or diligence) during the moratorium except with the permission of the court, and permission will not be granted to enforce a pre-moratorium debt for which the tenant had a payment holiday during the moratorium.

Irritancy of the lease is also forbidden.[111] Before the Bankruptcy and Diligence (Scotland) Act 2007, this moratorium could have been fatal to the landlord's security. As the right of hypothec ended three months after the end of the rental term,[112] an administrator could remove the goods from the premises and wait until the landlord's right was lost.[113] Now, however, the landlord's right of hypothec continues until all rent due is paid, even if the goods are removed from the premises.

(2) Sale by administrator

11-41. When the law of hypothec was reformed by the Bankruptcy and Diligence etc (Scotland) Act 2007,[114] the opportunity was taken to re-affirm the common law principle that, as a right in security, the hypothec "ranks accordingly" in any "insolvency proceedings".[115] "Insolvency proceedings" includes administration.[116] This was declaratory of the existing law, but under that law it was not entirely clear how the hypothec interacted with the administration legislation contained in Schedule B1 of the Insolvency Act 1986.[117] This confusion continues.

11-42. An administrator, in order to fulfil the purpose of the administration process,[118] is likely to continue trading for a period of time.[119] This will often involve the sale,[120] or removal from the premises,[121] of items that are subject to the hypothec. An administrator could also bring in items and so risk the creation of a new right of hypothec over them. The position of a landlord is best secured by coming to an agreement with the administrator that the price of any goods sold will be paid to the landlord in satisfaction of any unpaid rent.[122] Such an agreement may not be possible, however, and a conflict may then arise between the landlord and the administrator.

11-43. Without the agreement of the landlord, it might appear that an administrator is restricted in disposing of assets that are subject to the

[111] 1986 Act Sch B1 para 43(5).

[112] See paras 9-11–9-13 above.

[113] G L Gretton, "Diligence and enforcement of judgments", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 390.

[114] Section 208 of the 2007 Act came into force on 1 April 2008.

[115] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(2)(b).

[116] 2007 Act s 208(12)(c).

[117] The Scottish Parliament could not have amended the rules on administration because "procedures giving protection from creditors" are reserved to the UK Parliament. For this, see Scotland Act 1998 Sch 5 para C2.

[118] Insolvency Act 1986 Sch B1 para 3(1).

[119] As is permitted under 1986 Act Sch 1 para 14.

[120] 1986 Act Sch 1 para 2.

[121] 1986 Act Sch 1 paras 1, 12 and 14.

[122] See R Roxburgh, "Landlord's hypothec in formal insolvencies" 2009 SLT (News) 227 at 228.

hypothec.[123] This is based on the wording of paragraph 71 of Schedule B1: "The court may by order enable the administrator of a company to dispose of property which is subject to a security (other than a floating charge) as if it were not subject to the security." On one reading of this provision, no sale can take place without the court's consent. After all, if it had been intended that an administrator could dispose of property unburdened by a landlord's hypothec (or other fixed security), an express stipulation to this effect could have been enacted. Paragraph 70 could have been used as a model. It deals with property that is subject to a floating charge, and it states that "the administrator of a company may dispose of or take action relating to property which is subject to a floating charge *as if it were not subject to the charge*." Yet it would appear strange for an administrator to be prevented (without the agreement of the landlord or permission from the court) from selling stock and equipment when this is necessary to fulfil the primary aim of administration: to rescue the company as a going concern.[124] This interpretation of paragraph 71 therefore appears to be incorrect. Instead, the default rule is that an administrator can sell property that is subject to a right in security, but the security will be unaffected unless the secured creditor agrees to discharge it. If such an agreement is not forthcoming, paragraph 71 steps in to provide an administrator with a route to sell items unburdened by a fixed security.[125]

11-44. This interpretation is in conformity both with the wording of the paragraph and also the underlying property law. Property can always be sold by its owner, but the ownership acquired by the transferee is subject to any fixed security that burdens the transferor's ownership. In general, a subordinate real right cannot be interfered with unilaterally by the owner of the burdened property. An administrator, for example, is able to sell the heritable property of the company but this will be subject to any pre-existing standard security. Only where an administrator wishes to sell the items unburdened from the standard security would a paragraph 71 order be required. The same principle can be applied to pledge.

11-45. The examples of standard security and pledge are clear, but the hypothec does not fit well with other fixed-security rights. Other securities generally cannot be extinguished by the actions of the debtor-owner alone; a pledge is not extinguished by the sale of the pledged goods to a third party,[126] and a standard security is not affected by the sale of the heritable property. Hypothecs are

[123] *Davey v Money* [2018] EWHC 766 (Ch), [2018] Bus LR 1903 at para 593 per Snowden J.

[124] 1986 Act Sch B1 para 3(1)(a).

[125] *Re Capitol Films Ltd (in administration)* [2010] EWHC 3223 (Ch), [2011] 2 BCLC 359 at para 35 per Richard Snowden QC.

[126] The new statutory pledge recommended by the Scottish Law Commission will be extinguished if the encumbered property is sold in the ordinary course of the seller's business and the purchaser is in good faith: see Scottish Law Commission, Report on *Moveable Transactions* (Scot Law Com No 249, 2017) ch 24. This is because the proposed new security is, in reality, a hypothec.

different. Before the appointment of an administrator, a tenant can extinguish the hypothec by his own actions (notably the sale of the affected items), as explained in detail in chapter 9 above. The consent of the landlord is not required, and the proceeds of sale do not need to be handed over to the landlord. This is equally the position when the tenant is in administration. Section 208(5) of the 2007 Act is available to protect a good-faith purchaser buying from an administrator,[127] and paragraph 59(3) of Schedule B1 to the 1986 Act states that "[a] person who deals with the administrator of a company in good faith and for value need not inquire whether the administrator is acting within his powers".[128] Where the purchaser from an administrator is in good faith, the hypothec is extinguished and the landlord cannot claim back the goods. In addition, it appears that an administrator is under no obligation to hand over to the landlord the sums received from the sale. The same principle applies if the sale is in the ordinary course of business or if sufficient goods are left on the premises. A landlord is therefore in a rather vulnerable position when his tenant is placed into administration. But if the administrator makes a distribution to the creditors, which he has the power to do,[129] he must follow the order of distribution and give effect to the security of the landlord.[130] The distribution rules for an administrator mirror the rules for a liquidator.[131] If the administrator does not make a distribution but is selling off the assets or removing them from the premises for the sole purpose of defeating the landlord's right of hypothec, the landlord may have an action against the administrator for acting so as "unfairly to harm the interests of the applicant".[132] It is, however, unclear how productive such an action is likely to be.

11-46. One important exception applies. A purchaser in a pre-pack administration cannot be in good faith, for the acquirer of an entire business cannot claim to be unaware of the existence of the lease and unpaid rent. This is addressed elsewhere.[133]

[127] For a detailed discussion on this sub-section, see paras 9-41–9-48 above.

[128] Insolvency Act 1986 Sch B1 para 59(3).

[129] 1986 Act Sch B1 para 65(1). When an administrator makes a distribution is unclear. An administrator may continue to trade, which can be contrasted with a liquidator, whose primary duty is to wind up the company. A distribution to secured creditors is permitted only if the administrator believes that it is not reasonably practicable for the company to be rescued as a going concern and that trading would not result in a better result for the company's creditors as a whole (1986 Act Sch B1 para 3). An administrator must give a notice of a proposed distribution in the statement of proposals before making a distribution to secured or preferential creditors or, where the administrator has the permission of the court, to unsecured creditors (Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules, SSI 2018/1082, r 3.117(4)).

[130] Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules, SSI 2018/1082, r 3.115.

[131] For the rules in liquidation, see Insolvency (Scotland) (Receivership and Winding up) Rules 2018, SSI 2018/347, r 7.27.

[132] 1986 Act Sch B1 para 74.

[133] See paras 9-45 and 11-08 above.

(3) Competition with a floating charge

11-47. Whereas the winding-up of a company causes floating charges to attach, a floating charge does not attach automatically upon the appointment of an administrator. An administrator, if he "thinks that the company has insufficient property to enable a distribution to be made to unsecured creditors", "may file a notice to that effect with the registrar of companies".[134] When such a notice is delivered, any unattached floating charge attaches as if it were a fixed security over the property.[135] Thereafter, an administrator who makes payments from the property subject to an attached floating charge must first pay "the holder of any fixed security which is over property subject to the floating charge and which ranks prior to, or pari passu with, the floating charge".[136] And, as section 464(2) of the Companies Act 1985 tells us, a fixed security arising by operation of law has priority over the floating charge.[137]

E. COMPANY VOLUNTARY ARRANGEMENT

11-48. As a result of recent challenges to CVAs by landlords,[138] there has been some discussion of whether a CVA can affect a landlord's right of hypothec. It is therefore worthwhile discussing briefly the operation of the hypothec in a CVA. It must be said, however, that the law is unclear and there is a lack of authority on the issue.

11-49. A CVA is an agreement with a company's creditors whereby the company's debt is compromised (i.e. altered) in an effort to save the business. In relation to the law of hypothec, the difficulty is that the tenant company will often seek to include rent arrears within the CVA, but a CVA cannot affect the rights of a secured creditor. A preliminary question is therefore whether a landlord is a "secured creditor" for the purposes of a CVA. The Insolvency Act 1986 defines "security" as "in relation to Scotland, any security (whether heritable or moveable), any floating charge and any right of lien or preference and any right of retention (other than a right of compensation or set off)".[139] A right of hypothec is undoubtedly included within this definition. Consequently, if a tenant has failed to pay rent as it falls due before the CVA, the landlord will have a right of hypothec over the goods in the leased premises and will be a secured creditor

[134] 1986 Act Sch B1 para 115(2).

[135] 1986 Act Sch B1 para 115(3) and (4). A floating charge can also attach if the court gives permission for an administrator to make a payment to a creditor who is neither secured nor preferential (1986 Act Sch B1 para 115(1A)–(1B) read alongside Sch B1 para 65(3)(b)).

[136] 1986 Act Sch B1 para 116.

[137] See the discussion at paras 11-29–11-39 above.

[138] See, for example, *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 1209 (Ch); *Carraway Guildford (Nominee A) Ltd v Regis UK Ltd* [2021] EWHC 1294 (Ch).

[139] Insolvency Act 1986 s 248.

for the purposes of the CVA. But the hypothec will not secure rent falling due after the CVA as the hypothec secures only rent that has already fallen due and is unpaid.[140] As the landlord would be an unsecured creditor in relation to any future rent, such rent is capable of being compromised by the CVA.[141]

11-50. As a CVA cannot affect the right of a secured creditor to enforce its security without the creditor's consent,[142] a landlord with a right of hypothec retains its right to attach the goods, interdict the removal of the goods, and obtain a warrant to carry the goods back to the premises.[143] And it appears that a landlord with a right of hypothec in security of rent that became due and unpaid before the CVA cannot lose the right to enforce this security for payment of the full, uncompromised rent that became due and unpaid before the CVA. Therefore, the landlord would retain its right to receive the uncompromised (i.e. unreduced) rent from the sale through attachment of any goods which were subject to a right of hypothec.[144] But a landlord can, of course, still lose its right of hypothec according to the general rules relating to the extinction of hypothecs,[145] for example through the sale of the goods to a third party in good faith.[146] This means that, although a landlord retains a right of hypothec in security of any rent due and unpaid before any CVA, the landlord's security may be extinguished after the implementation of the CVA. A landlord seeking to obtain the full, uncompromised rent from the goods subject to the hypothec must take action to interdict the removal of the goods or use attachment before the tenant sells the subject-matter of the hypothec to a third party.

11-51. The landlord's status as a secured creditor also means that its vote is valued only to the extent that any rent arrears are not covered by the value of the goods subject to the hypothec (i.e. to the extent that the rent is unsecured).[147] A

[140] See paras 5-15–5-20 above.

[141] Future rent, i.e. falling due after a CVA, is not necessarily included in a CVA: see *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] BusLR 429 at para 34 per Neuberger LJ. It is, however, now accepted that future rent can be compromised in a CVA: see *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch), [2020] BCC 9; *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 1209 (Ch) at paras 60 and 203–226 per Zacaroli J.

[142] 1986 Act s 4(3); *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] BusLR 429 at para 43 per Neuberger LJ; K van Zwieten, *Goode on Principles of Corporate Insolvency Law*, 5th edn (2018) para 12-41.

[143] For the landlord's enforcement rights, see chapter 10 above.

[144] See the discussion on secured creditors in *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] BusLR 429 at para 35 per Neuberger LJ.

[145] See chapter 9 above.

[146] See paras 9-41–9-48 above.

[147] Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018, SSI 2018/1082, r 5.28(4), (5); K van Zwieten, *Goode on Principles of Corporate Insolvency Law*, 5th edn (2018) para 12-42. A landlord who is secured can still vote (Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 r 5.26(4)), but the vote will be valued to the extent only that the landlord is an unsecured creditor.

landlord who wishes to have its vote valued to the full extent of any rent arrears can discharge its right of hypothec and vote as an unsecured creditor. It is also arguable that a landlord whose vote in a CVA is valued at the full extent of rent arrears despite this rent being secured by a right of hypothec will be deemed to have waived its right of hypothec. The legislation, however, requires the "concurrence" of the secured creditor to affect the right of the secured creditor to enforce his security. On the basis of the wording used in the legislation, it has been argued that the "open and positive assent of the creditor concerned", rather than "merely tacit or passive acquiescence", is required before any security right can be affected.[148] But, whilst the legislation may require the open and positive assent of the landlord to affect its right to enforce any right of hypothec, the underlying common law would not require such open assent. A CVA is an agreement between the company and its creditors. If a landlord votes as an unsecured creditor, despite having a right of hypothec, it is a strong indication to the company (its tenant) that it will not enforce its security. Therefore, a landlord who votes as an unsecured creditor despite having a right of hypothec is likely to be deemed to have waived its security.[149]

F. BANKRUPTCY

(1) Enforcement

11-52. Where the tenant is a natural person rather than a body corporate, any goods the tenant owns will, on bankruptcy, vest in the trustee in sequestration for the benefit of his or her creditors.[150] Although this is different from the position of corporate insolvency, where the insolvent tenant company remains the owner of the goods and the management of the company is taken over by the liquidator, the vesting of the tenant's goods in the trustee does not extinguish any subsisting right of hypothec. This much is made clear by section 88(2) of the Bankruptcy (Scotland) Act 2016, which states that: "The vesting of the debtor's estate in the trustee in the sequestration does not affect the right of hypothec of a landlord." It has been said that, but for this subsection, the right of hypothec would be extinguished because the tenant is no longer the owner of the goods.[151] This is not correct. As we have seen, a right of hypothec continues to burden goods after they have been transferred to a third party unless the third party has either acted in good faith, purchased in the ordinary course of the tenant's business, or left sufficient goods in the premises,[152] and a trustee fits into none of these categories.

[148] I F Fletcher, *The Law of Insolvency*, 5th edn (2017) para 15-034.
[149] For the discharge of the hypothec, see paras 9-02–9-07 above.
[150] Bankruptcy (Scotland) Act 2016 s 78(1).
[151] R Roxburgh, "Landlord's hypothec: the permutations" (2010) 55(4) JLSS (online edition).
[152] See paras 9-25–9-60 above.

11-53. Before its abolition, an action of sequestration for rent could have been brought after the tenant's bankruptcy, and this was used to obtain the payment of rent due both before and after the bankruptcy (as the hypothec secured rent due in the future). The preservation of the landlord's right of hypothec, including the right to raise an action of sequestration for rent, was an important aspect of all the Bankruptcy Acts.[153] Aside from allowing the landlord to sell the goods without relying upon the bankruptcy process, a sequestration for rent was useful to a landlord who wished to sell goods that would not have vested in the trustee for distribution among the creditors, i.e. those items that were not owned by the tenant at the point of insolvency.

11-54. Although sequestration for rent has been abolished, a subsisting right of hypothec is not affected by the tenant's bankruptcy.[154] But what does this right of hypothec give to the landlord? Up until the bankruptcy, the landlord could have sold the goods by attachment but (consistent with the position for liquidations discussed above) an attachment (or arrestment) is not possible after the bankruptcy as a result of section 24(6) of 2016 Act.[155] Admittedly, the wording of the current legislation does not totally prohibit the use of diligence after a debtor's bankruptcy. This contrasts with Bankruptcy Acts prior to 1985 which were clear that poinding and arrestment were not permitted and were not "effectual".[156] The different wording adopted for the 2016 Act merely prevents an attachment or arrestment from being "effectual to create a preference for the arrester or attacher".[157] A landlord, it could be argued, is not seeking to create a preference, for he already has one; he could therefore, on this view, bring an arrestment or attachment in order to sell the goods without relying upon the trustee. Even if this argument is correct, however, a landlord who does attach the goods of his bankrupt tenant will find that, under section 24(7) of the 2016 Act, any funds arrested or attached must be handed over to the trustee. It would therefore be a fruitless endeavour.

11-55. Despite the effective loss of the right to sell the goods outside the insolvency proceedings, a landlord still has a right in security that is preferred to the right of the trustee.[158] The trustee takes the goods subject to the landlord's right, which must be given effect in the ranking of the claims in the distribution of the estate.[159] In the bankruptcy of his tenant, a landlord can be looked upon as

[153] For nineteenth-century authorities, see *Earl of Wemyss v Hewat* (1818) Hume 233; Hume, *Lectures* vol IV, 16; R Hunter, *A Treatise on the Law of Landlord and Tenant, with an appendix containing Forms of Leases*, 4th edn by W Guthrie (1876) II, 588.

[154] Bankruptcy (Scotland) Act 2016 s 88(2).

[155] See paras 11-15–11-19 above.

[156] Bankruptcy (Scotland) Act 1856 (19 & 20 Vict c 79) s 108; Bankruptcy (Scotland) Act 1913 (3 & 4 Geo V c 20) s 104.

[157] Bankruptcy (Scotland) Act 2016 s 24(6).

[158] 2016 Act s 129(9)(a) read with Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(2)(b).

[159] H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by TA Fyfe (1914) 330.

being in the same position as a creditor who has attached or arrested the goods of the tenant more than 60 days before the bankruptcy.[160] They both have an effective non-possessory security over the bankrupt's property and, as Goudy sets out:

> In the case of those secured creditors, on the other hand, whose security is a mere nexus without possession, the trustee realises the particular security subjects and ranks the creditors preferably on the realised funds, according to the order of their preferences.[161]

Where the goods are subject to a right of hypothec, the trustee is to give the landlord a preferable ranking to the extent of that right.[162] This was always possible before the abolition of sequestration for rent, but now a landlord is left with no choice but to rely upon the trustee's obligation to give effect to security rights.[163]

11-56. Where a trustee sells the goods without the agreement of the landlord, it has been suggested that he becomes liable for the entire unpaid rent.[164] This cannot be correct. Instead, the liability of the trustee can only be to the value of the goods that were subject to the hypothec, to the extent of the unpaid rent.[165]

11-57. A trustee appointed to realise the bankrupt estate (or indeed any other creditor of the tenant) may challenge a tenant's transfer of goods as a gratuitous alienation.[166] If this challenge is successful, the goods are brought back for the benefit of all creditors and not just for the landlord. A landlord will not be able to claim a right of hypothec over the goods solely on the basis that they were subject to a hypothec before their alienation but can do so if the act of alienation did not extinguish the hypothec. If the hypothec still exists in the goods, their value can then be claimed by the landlord despite the goods having been brought back by the trustee on the basis of a gratuitous alienation.

11-58. If items that were subject to the hypothec were attached by another creditor of the tenant within 60 days before the date of bankruptcy, the attachment will

[160] Goudy, *A Treatise on the Law of Bankruptcy in Scotland* 252–54; W Wallace, *The Law of Bankruptcy in Scotland*, 2nd edn (1914) 235; *Gordon v Millar* (1842) 4 D 352 at 354 per Lord President Boyle.

[161] Goudy, *A Treatise on the Law of Bankruptcy in Scotland* 330. See also *The Cleland Trs v Dalrymple's Trs* (1903) 6 F 262 at 267 per Lord President Kinross.

[162] Hunter, *Landlord and Tenant* II, 591; Rankine, *Leases* 704; Goudy, *A Treatise on the Law of Bankruptcy in Scotland* 252; D W McKenzie Skene, *Bankruptcy* (2018) para 11-78.

[163] Bell does state that the hypothec is to be "followed by sequestration and warrant to sell" (Bell, *Commentaries* II, 406), but he is referring to what must be done before a landlord is to rank above the Crown. He states elsewhere (Bell, *Commentaries* II, 29 and 33) that a landlord has a preferential right against other creditors in his tenant's bankruptcy without a sequestration for rent.

[164] G L Gretton, "Diligence and enforcement of judgments", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1991) para 388.

[165] *Porter v Taylor* (1901) 17 Sh Ct Rep 125. This is consistent with the rights of a landlord against a creditor who attaches the goods, on which, see paras 9-14–9-18 above.

[166] For gratuitous alienations, see D W McKenzie Skene, *Bankruptcy* (2018) paras 14-15ff.

be struck down and the goods or their value handed to the trustee. Although the rules on the equalisation of diligence are usually for the benefit of all creditors, if the hypothec in the goods was not extinguished by the attachment,[167] the goods will remain burdened and the landlord can claim their value.

(2) Ranking with deathbed and funeral expenses

11-59. When a tenant dies, a common law rule may jostle with the landlord's hypothec. It is settled, if old, law that deathbed and funeral expenses are preferred to the landlord's hypothec.[168] This is a clear rule, but it needs to be squared with section 129 of the Bankruptcy (Scotland) Act 2016 which contains the order of distribution to be made by a trustee in sequestration. Under section 129, "where the debtor has died" the "deathbed and funeral expenses reasonably incurred" are paid after the "outlays and remuneration" of a trustee but before all other debts. It is provided that this order of distribution is made without prejudice to the rights of secured creditors,[169] which usually means that the security is not included within the statutory order of ranking. In other words, only any value left after the secured creditors have been satisfied will be distributed according to the section 129 order of distribution. If the statutory order is followed, the deathbed and funeral expenses come after the trustee's expenses, and therefore after the hypothec. But, as already mentioned, the common law gave the deathbed and funeral expenses priority over the hypothec.

11-60. There are three possible ways to resolve this conflict. One is to say that the hypothec, following the clear case-law, must be postponed to the deathbed and funeral expenses. And since the legislation puts the funeral expenses below the trustee's expenses, it might then follow that the hypothec must come below both. In that case, the trustee's expenses will be preferred to the hypothec, but only when the tenant happens to have died. This is a rather absurd position. On a second interpretation, the hypothec does not come into the section 129 order of distribution. The hypothec – as a right in security – removes the goods from the order of ranking until the unpaid rent is satisfied, and any leftover assets can then be divided according to section 129 of the 2016 Act. Under this reading of the legislation, the common law preference is abolished. This brings some clarity, and would be the only solution if the legislation is seen as inconsistent with the common law preference. The legislation can, however, be reconciled with the common law. The legislation merely preserves the rights of a secured creditor.

[167] See paras 9-14–9-18 above.

[168] *Rowan v Bar* (1742) Mor 11852; *Drysdale v Kennedy* (1835) 14 S 159; Hunter, *Landlord and Tenant* II, 409; Stewart, *Diligence* 490; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 513; Paton and Cameron, *Landlord and Tenant* 212. This is likely to have been brought to Scots law through the *ius commune*, see, for example, J Domat, *The Civil Law in its Natural Order* (transl W Strahan, 1722) I, 376.

[169] Bankruptcy (Scotland) Act 2016 s 129(9)(a).

To find what rights a landlord has – as a creditor secured by the hypothec – we must look to the common law, which gives the landlord a right over the security subjects that is preferable to all other debts with the exception of the tenant's deathbed and funeral expenses. This brings us to the third position, which preserves both the landlord's right of hypothec and the common law preference for funeral expenses. This can be proposed as the fairest solution.

11-61. As the landlord's right is to be paid before the trustee and not in priority to any funeral or deathbed expenses, the trustee must pay the funeral and deathbed costs from the assets subject to the right of hypothec before transferring any sums to the landlord. If the goods subject to the hypothec are exhausted before the funeral and deathbed costs are fully paid, the outstanding sums are ranked below the outlays and remuneration of the trustee in relation to the assets not subject to the hypothec. In such a scenario, the landlord will receive nothing from the goods burdened by the hypothec. On this basis, the following order of priority for goods subject to the hypothec is proposed: (1) funeral and deathbed expenses are paid first, then (2) the landlord takes any leftover value in the goods, and finally (3) any remaining sums are distributed according to section 129. If this order is not followed – and the value of the goods subject to the hypothec is transferred to the landlord – the preferred creditor can claim directly from the landlord on the basis of the common law rule that the funeral expenses rank above the hypothec.[170]

(3) Ranking with unpaid wages

11-62. Like funeral and deathbed expenses, wages are preferred debts that come before ordinary creditors. There is also authority that wages are preferred to the hypothec, but this is less clearcut than the authority for funeral and deathbed expenses. Although it has been held that workers in general are preferred to the right of hypothec,[171] this case-law is of doubtful authority. Bell writes only that "farm-servants have a preferable claim for their term or year's wages over the landlord's hypothec",[172] Hunter can give no concrete answer on whether workers other than agricultural labourers are preferred,[173] and Goudy, in his treatise on *Bankruptcy*, doubts whether the preference given to farm labourers over the hypothec by the common law can be extended to other workers.[174] The preference for farm workers may have been based on the theory that the

[170] Hunter, *Landlord and Tenant* II, 409; Stewart, *Diligence* 490.

[171] *Boag v McLaine, Brown & McCall* (1880) 2 Guth Sh Cas 360; *Dobbie v Thomson* (1880) 7 R 983.

[172] Bell, *Commentaries* II, 34. See *McGlashan v The Duke of Atholl* 29 June 1819 FC, and, for a longer discussion, R Bell, *A Treatise on Leases: explaining the nature, form, and effect of the contract of lease, and the legal rights of the parties*, 4th edn (1825) I, 411–18.

[173] Hunter, *Landlord and Tenant* II, 408.

[174] H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 514.

hypothec evolved from the landlord's ownership of the goods.[175] If so, it lacks a suitable justification,[176] and it is unsurprising that three sheriff court cases from the 1880s held that the same principle could not be applied to other workers.[177] These decisions can be taken to have settled the issue – unpaid wages have no preference over the landlord's hypothec.[178]

(4) Post-bankruptcy hypothec – an introduction

11-63. In some cases, a landlord may only be able to claim that the requirements for the creation of a right of hypothec are met after the bankrupt's estate is vested in the trustee. For example, rent may become due and unpaid only after the date of bankruptcy, or attachable goods (i.e. those that can be caught by the hypothec) could be brought on to the leased premises by the trustee after the bankruptcy. Earlier it was argued that goods owned by a company in liquidation and brought into the premises by the liquidator become subject to a right of hypothec.[179] The same logic cannot necessarily be applied to personal insolvency. Upon bankruptcy, unlike in liquidation, the bankrupt's estate vests – is transferred – to a trustee for distribution among the creditors. Unless, therefore, the trustee is the tenant under the lease, no right of hypothec can arise in the goods.[180] This is one of the reasons why it might be important to determine whether the trustee has become the tenant.

(5) Transfer of the lease to the trustee

11-64. A person is no longer the tenant under a lease when either the contract is terminated, or the right of lease is assigned. When a lease is terminated, there is no longer a tenant, but when a lease is assigned, one tenant is replaced with another.[181] By virtue of the statutory vesting provision in the Bankruptcy (Scotland) Act 2016,[182] upon the bankruptcy of the tenant, the tenant's entire estate vests in the trustee. As the right of lease vests in the trustee,[183] this must necessarily involve a transfer – or assignation – of the lease; in the words of Lord President Inglis, "[i]f the tenant has an existing lease it belongs to his

[175] *McGlashan v The Duke of Atholl* 29 June 1819 FC.

[176] See paras 3-04–3-16 above.

[177] *Grant v Chalk & Falconer* (1880) 2 Guth Sh Cas 364; *Tait v Neilson* (1881) 2 Guth Sh Cas 366; *Weddell v Thom & Reid* (1886) 2 Sh Ct Rep 384.

[178] W W McBryde, *Bankruptcy*, 2nd edn (1995) paras 16-82–16-87; D W McKenzie Skene, *Bankruptcy* (2018) para 16-104.

[179] See paras 11-26–11-28 above.

[180] Only goods owned by the tenant can become subject to a right of hypothec: see Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4), and paras 4-44–4-54 above.

[181] Rankine, *Leases* 171.

[182] Bankruptcy (Scotland) Act 2016 s 78(1).

[183] R Rennie et al, *Leases* (2015) para 20-18.

trustee".[184] The trustee, after the vesting of the bankrupt's estate in him, must therefore be the tenant, from which it follows that any goods vested in him and brought into the leased premises will become subject to the hypothec if there are arrears of rent.

11-65. Despite the logic of this position, there is (or perhaps was) a view that the trustee does not become the tenant immediately upon the bankruptcy of the tenant. This view is based on a theory, once current in the general law of trusts, that a transfer of assets from a truster to a trustee does not divest the truster but, instead, grants the trustee a mere security right.[185] Lord Deas, in *Dobie v Marquis of Lothian*, provides a typical example of this view, which was pervasive in the mid-to-late nineteenth century:

> But it is essential to observe that, as in a question with the bankrupt, the right of the trustee was not an absolute right to any part of the bankrupt estate, but a right in security merely. The trustee was entitled to convert the estate, so far as saleable, into cash, and so to give an absolute right to purchasers, unless enough had been previously realised to pay the debts. To the effect of enabling him to do this, his right was absolute, but, as in a question between him and the bankrupt, the trustee's own right was still a mere right in security.[186]

This was the "radical right" doctrine which infiltrated the entire law of trusts,[187] but was felt particularly strongly in relation to trusts for the benefit of creditors, which included those under the Bankruptcy Acts. Of course, if a trust does not divest the truster of his rights, whether they be ownership of property or a right of lease, a trustee in sequestration cannot become the tenant under a lease by virtue of the right of lease being part of the sequestration. Although this view prevented the trustee from being viewed as the tenant upon the vesting of the bankrupt's estate, it was nevertheless accepted by some that the trustee did become the tenant if he "adopted" the lease. If, however, the trustee chose not to adopt the lease, there was no transfer and the bankrupt remained the tenant. An example of this theory comes from Lord President Inglis, who, in *Fraser v Robertson*, said that:

> [T]he right to the lease, not being taken up by the trustee, remains in the bankrupt; he remains as tenant, and the landlord has the ordinary remedies at common law and under the Act of Sederunt. He may use his right of hypothec, or raise an action for his rent, or remove the tenant if he is in arrear with his rent, but nothing else.[188]

[184] *Fraser v Robertson* (1881) 8 R 347 at 349 per Lord President Inglis.

[185] For a full discussion of this concept, see G L Gretton, "Radical rights and radical wrongs: a study in the law of trusts, securities and insolvency" 1986 JR 51 and 192.

[186] *Dobie v Marquis of Lothian* (1864) 2 M 788 at 800 per Lord Deas. See also J McLaren, *The Law of Wills and Succession as Administered in Scotland*, 3rd edn (1894) para 1768; A J P Menzies, *The Law of Scotland Affecting Trustees*, 2nd edn (1913) paras 144 and 1061.

[187] McLaren, *The Law of Wills and Succession* para 1766.

[188] *Fraser v Robertson* (1881) 8 R 347 at 349–50 per Lord President Inglis. The decision in *Fraser v Robertson* (that a bankrupt could not be sued for rent of a year that began before the date

In similar vein, Lord Shand in *Air v Royal Bank of Scotland* said that, "[n]o doubt the creditors and the trustee may decline to take advantage of the vesting clause – to do so might involve a risk of loss – and in that case the title of the part of the estate so abandoned is not taken out of the bankrupt, and his radical right is intact".[189] These quotations demonstrate two crucial aspects of the theory that the trustee does not become the tenant upon the vesting of the bankrupt's estate. First, the vesting of the lease does not, by itself, divest the truster – the bankrupt – of the right of lease. Second, the trustee becomes personally liable for all future and past unfulfilled obligations when he "takes up" or "adopts" the lease. Both Lord Deas and Lord Shand appear to think that the trustee receives an assignation of the lease upon adoption, but Goudy writes that the trustee is only "treated" as the tenant when he adopts the lease.[190] On Goudy's view, the bankrupt is "undivested" of the lease despite the trustee adopting the contract. As the radical right theory is unsound and not now accepted, as will be shown below, it is unnecessary to discuss the difference between these views.

11-66. The theory that the bankrupt remains the tenant does have certain attractions. It provides a neat doctrinal justification for the view, shared by Bell, Lord President Inglis, and Rankine,[191] that a bankrupt can remain in possession of leased premises if he continues to pay rent and perform the other obligations under the lease. The "radical right" theory rationalises this view by holding that the bankrupt remains the tenant and so is liable for future rent. Also, if the bankrupt remains the tenant, there would be no need to receive a retrocession of the lease when the trustee no longer wishes to make use of it, and there is authority for this proposition.[192]

11-67. The "radical right" theory, however, cannot be accepted. It is clear that a right of lease is included in the entire estate of the bankrupt that vests in the trustee. The wording of the Bankruptcy (Scotland) Act 2016 is unambiguous: "The whole estate of the debtor vests for the benefit of the creditors in the trustee in the sequestration".[193] As was always the position under various

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of sequestration but for which the rent did not become due until after the sequestration) has also been doubted: see H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 368.

[189] *Air v Royal Bank of Scotland* (1886) 13 R 734 at 737 per Lord Shand.

[190] Goudy, *A Treatise on the Law of Bankruptcy in Scotland* 282.

[191] Bell, *Commentaries* I, 76; *Fraser v Robertson* (1881) 8 R 347 at 349–50 per Lord President Inglis; Rankine, *Leases* 694.

[192] *Whyte v Northern Heritable Securities Investment Co Ltd* (1891) 18 R (HL) 37 at 39 per Lord Watson. See also *Smith v Stuart* (1894) 22 R 130 at 136 per Lord McLaren. This view is also found in J McLaren, *The Law of Wills and Succession as Administered in Scotland*, 3rd edn (1894) para 1772; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 371; A J P Menzies, *The Law of Scotland Affecting Trustees*, 2nd edn (1913) para 1061; W Wallace, *The Law of Bankruptcy in Scotland*, 2nd edn (1914) 180–81.

[193] Bankruptcy (Scotland) Act 2016 s 78(1).

iterations of the Bankruptcy Act,[194] there is no exception for a debtor's right of lease. Even in *Whyte v Northern Heritable Securities Investment Co Ltd,* Lord Watson, before writing that the bankrupt does not require a retrocession of any right that has vested in the trustee, introduced his speech with the statement that bankruptcy "strip[s] the bankrupt of the whole property of every description which is vested in him at the date of the sequestration".[195]

11-68. If there was any lingering support for the theory that a bankrupt is not divested of his property at sequestration, this was put to bed in *White v Stevenson* in 1956.[196] In this case, White, the trustee in bankruptcy, brought an action against Stevenson, the bankrupt, to have the latter ejected from a house he occupied. The bankrupt's defence was based solely on the effect of bankruptcy. He argued that bankruptcy did not divest him of the ownership of the house but only granted the trustee a real security and, hence, that he was entitled to continue to occupy the premises. This was rejected. The court favoured the trustee's argument that the right of ownership had passed to the trustee, leaving the bankrupt with only a right to any surplus from the estate (if any) rather than a right against any particular asset.[197] By continuing to occupy the premises, the bankrupt was now in "the position of a squatter in that property without any right or title to remain there".[198] This follows the wider law of trusts, where it is accepted that a truster is divested of the trust estate.[199] This view of the law is also accepted by the Keeper of Registers of Scotland, who registers a trustee in sequestration in the proprietorship section of the Land Register and requires a reconveyance to the bankrupt at the end of the sequestration – the discharge of the trustee being insufficient to re-vest the bankrupt with ownership of the property.[200]

11-69. This inevitably leads to the conclusion that any authority to the effect that the bankrupt does not require a reconveyance of property which is unwanted by the trustee must be incorrect.[201] Even the bankrupt's right to retain possession of the premises if the lease is abandoned by the trustee and all rent is paid can be explained without the need to say that the bankrupt remains vested in

[194] Bankruptcy (Scotland) Act 1856 s 102; Bankruptcy (Scotland) Act 1913 s 97; Bankruptcy (Scotland) Act 1985 s 31(1). See also Lord Wynford's views in *Kirkland v Gibson* (1833) 6 Wilson & Shaw 340 at 350.

[195] *Whyte v Northern Heritable Securities Investment Co Ltd* (1891) 18 R (HL) 37 at 39 per Lord Watson.

[196] *White v Stevenson* 1956 SC 84.

[197] This follows the view of Lord President Clyde in *Inland Revenue v Fleming* 1928 SC 759.

[198] *White v Stevenson* 1956 SC 84 at 89 per Lord President Clyde.

[199] G L Gretton, "Trusts", in K Reid and R Zimmermann, *A History of Private Law in Scotland* (2000) vol 1, 480 at 482ff.

[200] See Registers of Scotland, *Registration Manual* at: https://rosdev.atlassian.net/wiki/spaces/2ARM/pages/193331201/Insolvency+-+Personal+and+Corporate.

[201] We have returned to the position stated in Bell, *Commentaries* II, 324–25.

the right of lease.[202] The bankrupt's right to require the landlord to perform his obligations under the lease arises from the title to sue which the bankrupt has, provided the litigation does not compete with the rights of the trustee for any assets in the bankruptcy. Clearly, if the trustee has abandoned the lease, the bankrupt is not competing with him. This principle comes from the wider law of trusts,[203] and does not depend on whether the bankrupt has been re-vested in the lease. Although the view is sometimes expressed that the bankrupt's title to sue is based on his "radical right",[204] this is unhelpful since it harks back to the theory that the bankrupt is not divested of the sequestrated estate.

11-70. Today it is clear that the personal right of lease (whether in relation to a short or long lease) vests in the trustee at the point of bankruptcy, the usual requirement of intimation to the landlord being dispensed with for a trustee in sequestration.[205] Whenever a right of lease is assigned – as, in this case, to the trustee in sequestration – the obligations under the lease are also transferred to the assignee. This goes against the general rule that, whilst rights can be assigned, obligations cannot,[206] and can only be "delegated" to a third party with the creditor's consent.[207] Whenever a right of lease is assigned, both the rights and the obligations are transferred to the assignee.[208] Thus, from the point of the statutory vesting onwards, the trustee takes, as an assignee, the right of lease and becomes liable for all rents (whether future or past) and other obligations –"[t]he trustee is no other than the legal assignee, who cannot stand in a better situation than a voluntary assignee, who becomes liable, by accepting it, to pay all by-gone arrears".[209] But although the trustee is vested with the right of lease from the date of bankruptcy, both this right and the corresponding obligations under the lease are held, not in his personal patrimony, but rather in the trust patrimony which holds the bankrupt's assets for the benefit of the tenant's creditors.[210]

11-71. Even an exclusion of assignation in the lease would not prevent the right of lease being transferred because the Bankruptcy (Scotland) Act 2016

[202] For background, see para 11-66 above.

[203] *Dickson v United Dominions Trust Ltd* 1988 SLT 19 at 22 per Lord McCluskey; *Chiswell v Chiswell* [2016] CSOH 45, 2017 SCLR 49 at paras 42 and 43 per Lady Wolffe. The trustee is bound by any acts of the bankrupt in relation to property abandoned: Bankruptcy (Scotland) Act 2016 s 87(5)(a).

[204] *White v Stevenson* 1956 SC 84; D W McKenzie Skene, *Bankruptcy* (2018) para 18-18; W W McBryde, *Bankruptcy*, 2nd edn (1995) paras 9-11 and 18-57; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 367; W Wallace, *The Law of Bankruptcy in Scotland*, 2nd edn (1914) 180.

[205] Goudy, *A Treatise on the Law of Bankruptcy in Scotland* 256. We are only concerned with the trustee becoming vested in the personal right of lease. On this, see para 9-71 above.

[206] R G Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) para 1-04.

[207] G L Gretton and K G C Reid, *Conveyancing*, 5th edn (2018) para 24-02.

[208] Rankine, *Leases* 171; Gretton and Reid, *Conveyancing* para 24-02 n 6.

[209] *Nisbet & Co Trs, Ptrs* (1802) Mor 15268.

[210] For a discussion on the two-patrimony theory, see for example K G C Reid, "Patrimony not equity: the trust in Scotland" (2000) 8 European Review of Private Law 427.

transfers the whole estate of the bankrupt to the trustee.[211] Previous iterations of the bankruptcy legislation stated that the bankrupt's estate vested in the trustee only in so far as it was capable of voluntary alienation. This may have prevented leases with *delectus personae* from being transferred to the trustee, and it was initially so held.[212] Soon after, however, this position was reversed. A clause preventing assignation did not, it was held,[213] prevent the right of lease being assigned to the trustee, but rather gave the landlord a right to object, and any such objection would operate retrospectively, i.e. the law would deem the assignation to have been of no effect. In other words, the assignation was voidable at the instance of the landlord and, if avoided, the right of lease would revert back to the bankrupt as if the assignation had never taken place. The fiction of an automatic retrocession is, however, unnecessary. A more convincing analysis is to say that a clause preventing assignation, whilst not preventing the lease from being assigned to the trustee, allows the landlord to refuse to perform the obligations under the lease. This theory transfers the lease to the trustee upon the tenant's bankruptcy, in conformity with the legislation, and also protects the landlord. If a landlord wishes to use the right to prevent an assignation, the trustee would be required to vacate possession and would be prevented from adopting the contract (on which more is written below).[214]

(6) Abandonment

11-72. If the right of lease and its obligations are vested in the trustee, why is the trustee not required to perform the obligations? In principle, a trustee vested with a right of lease is in the same position as any other person taking an assignation of the tenant's right, and the trustee – to the extent of the bankrupt estate vested in him – is liable for all rent arrears and future obligations.[215] Importantly, a trustee is in no better a situation than the bankrupt or any other contracting party.[216] Like any other contracting party, therefore, the trustee can choose not to perform the obligations under the contract, and he will refuse to perform the obligations under the lease if that is in the creditors' interest. This refusal of a trustee to perform is commonly called "abandonment", but it is more accurately described as repudiation.[217] Repudiation, or anticipatory

[211] Bankruptcy (Scotland) Act 2016 s 78(1). See also W W McBryde, *Bankruptcy*, 2nd edn (1995) para 9-113.

[212] *Fleming v MacDonald* (1860) 22 D 1025 at 1030 per Lord Justice-Clerk Inglis.

[213] *Dobie v Marquis of Lothian* (1864) 2 M 788. See also *Crawfurd v Maxwell* (1758) Mor 15307; *McCoag v McSporan* (1803) Hume 813.

[214] W W McBryde, *Bankruptcy*, 2nd edn (1995) para 9-113; and see also paras 11-76–11-79 below.

[215] See para 9-69 above.

[216] *Earl of Wemyss v Hewat* (1818) Hume 233.

[217] Indeed, repudiation is used to describe the trustee's act of abandoning a contract in T Burns, "Bankruptcy", in *The Laws of Scotland: Stair Memorial Encyclopaedia* Reissue (1998) para 75.

non-performance, occurs when one contracting party notifies the other of his intention not to perform.[218] Such a usage makes clear that the trustee is merely acting as any other contracting party could act. Abandonment has been a confusing term because a trustee cannot abandon rights that are vested in him; the right of lease, and the corresponding obligations, still exist even after the trustee chooses not to perform.

11-73. When a party repudiates a contract, the other party can either accept the repudiation and claim damages or reject the repudiation and demand performance.[219] But, due to the nature of bankruptcy, specific implement against the trustee requiring him to perform a contract entered into by the bankrupt will not be granted by the court.[220] This is because allowing specific implement would be inconsistent with the purpose of winding up an insolvent estate.[221] The inability to enforce performance is the main point of difference between an ordinary assignation of a lease and a statutory vesting in a trustee in sequestration. As the trustee cannot be compelled to perform, a court can only award damages for the breach of the lease. These damages will be quantified by the difference between any rent received by the landlord and the rent that would have been received but for the repudiation. Any award of damages, alongside all past unpaid rent, can only be claimed against the bankrupt estate, i.e. the trust patrimony.[222] Unlike the unpaid rent, these damages are not secured by any right of hypothec.[223]

11-74. A trustee who does not immediately abandon the right of lease but continues in possession of the premises for the purpose of realising the estate will be required to pay the rent that is due for the period of possession.[224] This is because he is the tenant and so liable for all obligations under the lease. As the trustee is tenant in his capacity as trustee, these sums will come out of the bankrupt estate, and they do so in preference to all other claims,[225] as a bankruptcy expense. Once the purposes of retaining the premises to realise the estate have been fulfilled, the trustee is likely to repudiate the lease, and the

[218] W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) paras 20-26ff.

[219] McBryde, *The Law of Contract in Scotland* para 20-32.

[220] H Goudy, *A Treatise on the Law of Bankruptcy in Scotland*, 4th edn by T A Fyfe (1914) 282; W W McBryde, *Bankruptcy*, 2nd edn (1995) para 9-116.

[221] W M Gloag, *The Law of Contract*, 2nd edn (1929) 426; *Joint Administrators of Rangers Football Club plc, Noters* [2012] CSOH 55, 2012 SLT 599 at para 47 per Lord Hodge.

[222] A trust creditor can only take from the trust patrimony. On this, see K G C Reid, "Patrimony not equity: the trust in Scotland" (2000) 8 European Review of Private Law 427 at 432.

[223] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8)(a).

[224] It has been said that this is based on damages for the improper and unjustified possession of the premises by the trustee and so cannot always be equated to the rental value: *Stead v Cox* (1835) 13 S 280. This view appears to be based on the theory that the trustee has not received an assignation of the lease. As this theory is incorrect, the sums due to the landlord will be equal to the rent under the lease.

[225] *Nisbet & Co Trs, Ptrs* (1802) Mor 15268; Bankruptcy (Scotland) Act 2016 s 129(1)(b).

landlord will then rank for damages. For policy reasons, the law will not impose on the counterparty a prolonged wait before the trustee makes a decision on whether he will continue to perform the obligations, and so the legislation steps in to require a decision from the trustee within 28 days of receipt of a request from the landlord.[226]

11-75. This position is typically augmented by a provision in the lease granting the landlord a right to irritate upon the tenant being sequestrated, but with a right in the trustee to prevent irritancy if he accepts personal liability for all rent (whether due before or after the sequestration) and other obligations for six months after the tenant's bankruptcy.

(7) Adoption

11-76. A trustee who sees benefit in retaining possession of the premises for longer than is needed to wind up the estate may choose to "adopt" the lease. A trustee adopts the lease by indicating that he requires the landlord to perform the obligations and will continue to perform his obligations as tenant. Adoption cannot be equated with an assignation,[227] not least because the trustee has already received a statutory assignation of the right of lease. Rather it is a principle that comes, not from the law of contract, but from the law of bankruptcy. The trust estate is already bound by virtue of the statutory vesting, but by adopting the lease the trustee binds his personal estate as well, subject to a right of relief out of the trust assets. This right of relief allows the trustee to use the trust assets before his personal patrimony, which means the trustee is only required to step in and provide funds from his personal patrimony when the trust assets have been exhausted.[228] In effect, the trustee in his personal capacity acts as cautioner for the obligations under the lease for when the trust assets are exhausted.

11-77. Adoption is not readily inferred. As an example, a trustee who retained possession of the premises whilst awaiting a decision on the ownership of certain items of machinery contained within the premises was held not to have adopted the lease.[229] Crucially, the premises were not being used for the purpose of continuing the tenant's business. But a trustee who takes possession of the premises for a lengthy period of time for something other than winding up the estate will be deemed to have adopted the lease.[230]

[226] Bankruptcy (Scotland) Act 2016 s 110(3).

[227] R G Anderson, *Assignation* (Studies in Scots Law vol 1, 2008) para 2-36; W W McBryde, *Bankruptcy*, 2nd edn (1995) paras 9-104ff.

[228] Scottish Law Commission, Discussion Paper on *Liability of Trustees to Third Parties* (Scot Law Com DP 138, 2008) para 2.10.

[229] *Stead v Cox* (1835) 13 S 280.

[230] *Kirkland v Gibson* (1833) 6 Wilson & Shaw 340 at 351 per Lord Wynford. Whether the trustee has adopted the lease is dependent upon the facts. For a discussion, see Rankine, *Leases* 698–700; Paton and Cameron, *Landlord and Tenant* 196.

11-78. It has been said that the personal liability of the trustee is based on the policy that, if the trustee (and the creditors) wish to take the benefit of the lease, they must also be willing to perform the obligations due under it.[231] But it seems better to say that the trustee, by requiring the continuing performance of the contract by the landlord, warrants that there are sufficient resources to perform the tenant's obligations.[232] This matches the justification for a trustee's personal liability under a contract entered into by the trustee if it has not been made clear to the counterparty that only the trust patrimony is bound.[233]

11-79. As the trustee is vested in both the bankrupt's goods and the right of lease, items brought into the premises by the trustee become subject to a right of hypothec (if rent is due and unpaid). Such a hypothec would secure all rent due by the trustee, i.e. all rent due and unpaid under the lease whether it fell due before or after the date of bankruptcy. A trustee seeking to prevent a right of hypothec arising post-bankruptcy will thus need to rely on something other than the transfer of the goods to him upon bankruptcy.

(8) Legislative prevention of post-bankruptcy hypothec?

11-80. One effect of sequestration is to rank the rights of the various creditors as at the date of bankruptcy:

> Under the sequestration, the state of the parties, at the date of the sequestration, must be the rule. The possession of the judicial factor, or of the trustee, must be held as the possession of all and each of the creditors according to their rights at the time; and the general adjudication which follows can give no right, or even a title of possession, which would alter or diminish the rights of any of the creditors.[234]

If this is a clear objective, the legislation seems to fail to implement it. It could be argued that the vesting of the bankrupt's estate in the trustee ought to be subject only to those rights of hypothec that burden the estate *at the date of sequestration*. The legislation states that the trustee takes the bankrupt's whole estate "as at the date of sequestration", but subject to "the right of any secured creditor which is preferable to the rights of the trustee".[235] This means that the trust estate vests subject to those rights of a secured creditor as exist "at the date of sequestration". What this does not do, however, is to prevent a right of

[231] *Nisbet & Co Trs, Ptrs* (1802) Mor 15268; *Kirkland v Gibson* (1833) 6 Wilson & Shaw 340 at 351 per Lord Wynford.

[232] *Smith v Lord Advocate (No 1)* 1978 SC 259 at 272–73 per Lord President Emslie.

[233] A J P Menzies, *The Law of Scotland Affecting Trustees*, 2nd edn (1913) para 1249; R G Anderson, "Contractual liability of trustees to third parties" 2003 JR 45.

[234] *Brock v Cabbell & Co* (1830) 8 S 647 at 659 per Lord Craigie.

[235] Bankruptcy (Scotland) Act 2016 ss 78(1), 88(3). See also the wording of the Bankruptcy (Scotland) Act 1856 s 102(1), and, in a slightly amended version, of the Bankruptcy (Scotland) Act 1913 s 97(1).

hypothec from arising after the estate vests in the trustee. The only way such a right can be created post-bankruptcy is through the actions of the trustee (who can bring items into the leased premises), and there is nothing in the legislation that prevents this.

11-81. In response, a trustee may look towards the effect of bankruptcy on diligence. As bankruptcy has the effect of diligence over the bankrupt's entire estate, for the benefit of all creditors, one consequence is to equalise the bankruptcy with any diligence that has occurred within a certain period beforehand. But there might be other consequences too. In particular, might the deemed diligence not give the general body of creditors a right that was preferable to any right of hypothec created after the vesting of the estate in the trustee? For any right of hypothec that arose post-bankruptcy must – by virtue of having been created afterwards – rank below the deemed diligence on behalf of the creditors that occurred upon bankruptcy. But whilst this theory may have been plausible under the previous iterations of the Bankruptcy Acts, the wording of the Bankruptcy (Scotland) Act 2016, and its predecessor from 1985, restricts the effect of bankruptcy as a deemed diligence to cases when the bankruptcy comes into ranking with other diligences.[236] The hypothec is not a diligence.

(9) Post-bankruptcy rent

11-82. When a tenant fails to pay rent due on, say, 1 June, the goods within the premises will become subject to the hypothec. If the tenant then becomes bankrupt on 31 August and the lease is not irritated, the rent will continue to fall due and the landlord may seek to argue that the right of hypothec that had already been created before bankruptcy will also secure the rent that falls due post-bankruptcy. Admittedly, the point is largely academic because any rent that falls due whilst the trustee is winding up the estate will be paid as an expense of the sequestration.[237] The question is only briefly discussed here for the sake of completeness.

11-83. Before the Bankruptcy and Diligence etc (Scotland) Act 2007, the law – whilst complex – allowed the hypothec to secure rent that became due for a short period after the date of bankruptcy. This was because a right of hypothec secured a term's rent, even if part (or all) of this rent fell due after the vesting of the estate in the trustee in sequestration. By contrast, under the 2007 Act the right of hypothec secures "rent due and unpaid".[238] Whilst the hypothec

[236] Bankruptcy (Scotland) Act 2016 s 24(1) (previously Bankruptcy (Scotland) Act 1985 s 37(1)).

[237] See also the discussion on the adoption of the lease at paras 11-76–11-79 above.

[238] Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(8)(a).

thus only comes into existence when the rent is unpaid,[239] there is nothing that restricts the secured rent to that which became due before the sequestration. If the landlord did want to rely upon a hypothec to secure post-bankruptcy rent, this would be acceptable but only if the goods were still on the leased premises at the date of sequestration. This latter point can be explained by returning to the two-hypothec theory discussed earlier.[240] The two-hypothec theory prevents a right of hypothec over goods brought in by an assignor securing rent that becomes due by an assignee. When a lease is assigned, the landlord's right of hypothec over goods brought in and owned by the assignor secures only the rent due by the assignor. To secure rent due by the assignee, the landlord has a new right of hypothec over the goods owned by the assignee and present on the premises after the date of the assignation. When a tenant is sequestrated, he becomes the (involuntary) assignor, and the trustee becomes the assignee. Any right of hypothec that has arisen over goods by being brought into the premises by the assignor (the bankrupt tenant) will survive bankruptcy but secure only the rent due by the assignor.[241] Under the two-hypothec theory, a second right of hypothec will arise over the goods in the premises after the date of assignation (i.e. the date of bankruptcy) in security of the rent due by the assignee (i.e. the trustee).

[239] See paras 5-15–5-20 above.
[240] See paras 5-25 and 9-66–9-71 above.
[241] Bankruptcy (Scotland) Act 2016 s 88(2).

12 The Future of the Hypothec

12-01. Ever since the Hypothec Amendment (Scotland) Act 1867, the ambit of the landlord's hypothec has been gradually restricted. The last such restriction, by the Bankruptcy and Diligence etc (Scotland) Act 2007, removed the hypothec's effect over third parties' goods, prevented enforcement unless or until the tenant fails to pay rent, and abolished the unique enforcement procedure of sequestration for rent.

12-02. When the law was reformed in 2007, little attention was given as to how the provisions would interact with the underlying common law. The result has been a degree of uncertainty. What, however, is clear is that the hypothec lives on and can still have a significant effect in a tenant's insolvency. In some respects, indeed, the abolition of sequestration for rent has even increased the hypothec's importance. The possibility of a right of hypothec arising post-insolvency is an example.[1]

12-03. Of course, it may be that, in the end, the commercial landlord's hypothec will go the same way as the hypothec of a residential and rural landlord: abolition. This, however, is far from being an inescapable conclusion. The abolition of the rural and residential landlord's hypothec was based on strong policy grounds. The near-complete abolition of the agricultural hypothec by the Hypothec Abolition (Scotland) Act 1880 came after a long campaign that involved several Bills in Parliament, a Royal Commission, and an intervention by Gladstone.[2] And section 208 of the Bankruptcy and Diligence etc (Scotland) Act 2007, which abolished the hypothec in relation to dwelling-houses, must be viewed in the context of the then recent abolition of poinding and the overarching policy aim to prevent the attachment of goods within residential premises. In the case of the commercial landlord's hypothec, the same policy justifications are not present.

12-04. The hypothec survives today in several jurisdictions, including Germany, France, Italy, Belgium, South Africa, and Louisiana. In none is there an appetite for abolition. This may be because the law protects purchasers from the effects of hypothec, as Scots law now does too. In Scotland a person who buys goods unaware of the landlord's right of hypothec is not required to give the goods up or

[1] See chapter 11 above for the effect of the hypothec in the tenant's insolvency.
[2] All of which can be found in chapter 4 above.

to pay their value to the landlord.[3] In another significant reform, the hypothec's effect on goods owned by a third party – the most contentious aspect of common law – was abolished by the 2007 Act. And landlords can no longer enforce a right of hypothec before the rent falls due and is unpaid. With these reforms, the hypothec's main criticisms have been removed.

12-05. Of course, there is the question of whether a landlord should have a right to be paid before the other creditors of the tenant. Here the argument has advanced since the abolition of the agricultural landlord's hypothec was debated in Parliament in the second half of the nineteenth century.[4] The view that a landlord is more vital to the workings of the country than other business people is unlikely to be advanced today. It might still be argued, however, that a landlord is exposed to more risk than other creditors and so is deserving of an implied right in security. This argument is straightforward: a landlord cannot immediately remove a defaulting tenant from the premises (and so becomes an unwilling creditor), whereas a supplier of goods can simply refuse to deliver when the next delivery becomes due. Yet whilst this argument could perhaps be used for the reintroduction of the hypothec for residential landlords,[5] it is not applicable to commercial leases, which almost universally contain an irritancy clause. Such clauses allow a landlord to irritate the lease 14 days after giving notice of a missed rent instalment.[6] This prevents a commercial landlord being an unwilling creditor deserving of preferential treatment.

12-06. In addition to the normative question of whether the landlord should be a preferred creditor, the hypothec can also be criticised for its apparent lack of utility. It is sometimes said by those in legal practice that the hypothec is ineffective without a unique enforcement procedure such as sequestration for rent,[7] and that the only way of enforcing the landlord's right is by putting the tenant into insolvency proceedings. But, as chapter 10 of this book has shown, there is also the possibility of using attachment, a procedure which is similar to any unique enforcement process that might be introduced to replace sequestration for rent. Any concerns about the equalisation of this attachment with other creditors who attach the same goods can be assuaged by the fact that the underlying right of hypothec would still grant the landlord a right preferred

[3] See chapter 9 above for an in-depth discussion on the extinction of a right of hypothec.

[4] For a discussion, see paras 4-02–4-34 above.

[5] Something that is not likely to happen. On the abolition of the residential landlord's hypothec, see paras 4-38–4-43 above.

[6] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 4. This period was temporarily extended to 14 weeks by the Coronavirus (Scotland) Act 2020 Sch 7 para 7.

[7] See the *2016 Diligence Consultation* from the Accountant in Bankruptcy (https://www.aib.gov.uk/sites/default/files/accountant_in_bankruptcy_aib_-_diligence_review_2016_consultation_response_0.pdf) 40-41. For sequestration for rent, see paras 4-55–4-57 above.

to other creditors.[8] Of course, the Taxes Management Act 1970 poses a risk to the landlord,[9] but this was also a risk for a landlord sequestrating for rent.

12-07. The difficulties with the current law are most apparent when the tenant enters insolvency proceedings. The hypothec's effects then depend on the type of proceedings used (whether bankruptcy, liquidation, receivership or administration), and the rights of the insolvency practitioner to sell the goods, subject to the hypothec, are often unclear. Some solutions are proposed in chapter 11. Admittedly, these solutions favour landlords (with the possible exception of administration) and could prevent an insolvency practitioner from bringing goods into the leased premises. The latter is so clearly against the purpose of insolvency proceedings as to be a potential trigger for reform. Simple reforms, such as those set out in chapter 11,[10] would solve these issues and prevent a windfall benefit falling on a commercial landlord.

12-08. Overall, the hypothec can still be a very useful tool in a commercial landlord's armoury. Although often forgotten, it grants rights to a landlord (especially in the tenant's insolvency) that greatly improve his position in relation to the tenant's other creditors and insolvency practitioner.

[8] See para 10-30 above.
[9] Taxes Management Act 1970 s 64: see para 11-03 above.
[10] See paras 11-09–11-14 above.

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