



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Real security rights - time for Cinderella to go to the ball?

Citation for published version:

Steven, A 2010, 'Real security rights - time for Cinderella to go to the ball?'

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Publisher Rights Statement:

© Steven, A. (2010). Real security rights - time for Cinderella to go to the ball?.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



University of Edinburgh
School of Law

Working Paper Series

No 2011/13

**Real Security Rights:
Time for Cinderella to Go to the Ball?**

Andrew JM Steven LLB PhD DipLP NP WS
Senior Lecturer
School of Law, University of Edinburgh
andrew.steven@ed.ac.uk



This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

© 2011 Andrew JM Steven

Edinburgh School of Law Working Paper Series
University of Edinburgh

Abstract

A survey of the current state of real security rights with particular focus on Scotland and South Africa.

Keywords

Real Security Rights, Property Law

REAL SECURITY RIGHTS: TIME FOR CINDERELLA TO GO TO THE BALL?

Andrew J M Steven

LLB PhD DipLP NP WS

Senior Lecturer, University of Edinburgh

1 INTRODUCTION

The recent world economic downturn has had many consequences. The effects on secured lending have been palpable, not least because securities are more likely to have to be enforced. The purpose of this article is to explore some current themes affecting the law of real security rights, principally in Scotland and South Africa, but also to refer to developments elsewhere. For me it is a welcome opportunity to look again at the two legal systems following my earlier work with Professor Gerrit Pienaar.¹ It will be argued here that the law of real security rights is an important and fascinating legal area, but one in which there is a still much more scholarship needing to be done. A useful starting point therefore is an attempt to locate the wider legal umbrellas under which real security rights are situated.

2 LOCATING THE LAW OF REAL SECURITY

2 1 Property law and private law

Considering the use of the word “real” the natural place to start is to say that real security rights are part of property law. This is undoubtedly true. A cursory examination of property law textbooks will show a chapter or chapters devoted to the subject.² The reason of course is that a real security is a one of the subordinate real rights recognised in civilian and mixed jurisdictions. It is a right in a thing. In the orthodox words of Lord Jauncey of Tullichettle, whose legacy in property law elsewhere³ has proved more controversial:

¹ Pienaar and Steven, “Rights in Security” in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 758-786.

² For example, Van der Merwe, *Sakereg* (2nd edn, 1989) ch 14, Badenhorst, Pienaar and Mostert, *Silberberg and Schoeman’s The Law of Property* (5th edn, 2006); Mostert and Pope (eds), *The Principles of The Law of Property in South Africa* (2010) ch 12 and Gretton and Steven, *Property, Trusts and Succession* (2009) ch 20. A notable exception is Reid, *The Law of Property in Scotland* (1996) but that is because the work is part of vol 18 of *The Laws of Scotland: Stair Memorial Encyclopaedia* in which rights in security are treated elsewhere in vol 20.

³ See *Sharp v Thomson* 1997 SC (HL) 66, one of the most important Scottish cases of the twentieth century, dealing with transfer of ownership where his contribution has been described as “re-writing property law”. See

“A right in security is a right over property given by a debtor to a creditor whereby the latter in the event of the debtor’s failure, acquires priority over the property against the general body of creditors of the debtor.”⁴

Thus basic principles of property law should apply, for example those of certainty and publicity. It can be added that whilst strictly a real security right is a subordinate real right in property owned by another party, ownership itself can be used as a functional security, for example in hire purchase, or reservation of title in the sale of goods.⁵ The original Roman law security, *fiducia cum creditore*,⁶ involved title being transferred to the creditor. Therefore rules on the acquisition of ownership are also of importance.

We can, however, widen the categorisation and say that property law is part of private law and hence so too are real security rights. Under that broader heading can also be found contract law which is important, particularly for consensual securities. Pledge, the original real security, was one of the four real contracts recognised in Roman law.⁷ In modern times there is typically a security contract which sets out the rights and obligations of the parties subject to those conditions prescribed by law.⁸

2.2 Commercial law

Real security rights clearly also fall within commercial law. They form a staple part of textbooks on this subject.⁹ Similarly, they are a field within the activities of research centres devoted to commercial law.¹⁰ In Scotland and no doubt elsewhere they form part of the syllabi for both the undergraduate commercial law and property law courses. Legal systems

Reid, “Equity Triumphant: *Sharp v Thomson* (1997) 1 *Edin LR* 464 at 465. *Sharp* has now been reined in by *Burnett’s Trustee v Grainger* 2004 SC (HL) 19. And see also *Alvis v Harrison* 1991 SLT 64 a servitude case, criticised by Cusine and Paisley, *Servitudes and Rights of Way* (1998) paras 14-25-14-30.

⁴ *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891 at 895.

⁵ See eg Gretton and Steven (fn 2 above) paras 20.11-20.15.

⁶ See eg Thomas, *Textbook of Roman Law* (1976) 329-330.

⁷ See eg Zimmermann, *The Law of Obligations* (1990) 220-229.

⁸ Thus eg the opening words of von Bar and Clive, *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)* (2009) Book IX.-1:101(1) are “This Book applies to the following rights in movable property based upon contracts for proprietary security”.

⁹ For example, Gibson, *South African Mercantile and Company Law* (8th edn, by Visser, Pretorius, Sharrock and Van Jaarsveld, 2003) ch 12; Sharrock, *Business Transactions Law* (7th edn, 2007) ch 29 and Scott (ed), *The Law of Commerce in South Africa* (2009) ch 7.

¹⁰ For example the Edinburgh Centre for Commercial Law (<http://www.law.ed.ac.uk/centreforcommerciallaw/>) and the Business Law and Research Centre at the Radboud University Nijmegen (<http://www.ru.nl/oor/>).

REAL SECURITY RIGHTS: TIME FOR CINDERELLA TO GO TO THE BALL?

Andrew J M Steven

LLB PhD DipLP NP WS

Senior Lecturer, University of Edinburgh

1 INTRODUCTION

The recent world economic downturn has had many consequences. The effects on secured lending have been palpable, not least because securities are more likely to have to be enforced. The purpose of this article is to explore some current themes affecting the law of real security rights, principally in Scotland and South Africa, but also to refer to developments elsewhere. For me it is a welcome opportunity to look again at the two legal systems following my earlier work with Professor Gerrit Pienaar.¹ It will be argued here that the law of real security rights is an important and fascinating legal area, but one in which there is a still much more scholarship needing to be done. A useful starting point therefore is an attempt to locate the wider legal umbrellas under which real security rights are situated.

2 LOCATING THE LAW OF REAL SECURITY

2.1 Property law and private law

Considering the use of the word “real” the natural place to start is to say that real security rights are part of property law. This is undoubtedly true. A cursory examination of property law textbooks will show a chapter or chapters devoted to the subject.² The reason of course is that a real security is a one of the subordinate real rights recognised in civilian and mixed jurisdictions. It is a right in a thing. In the orthodox words of Lord Jauncey of Tullichettle, whose legacy in property law elsewhere³ has proved more controversial:

¹ Pienaar and Steven, “Rights in Security” in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 758-786.

² For example, Van der Merwe, *Sakereg* (2nd edn, 1989) ch 14, Badenhorst, Pienaar and Mostert, *Silberberg and Schoeman’s The Law of Property* (5th edn, 2006); Mostert and Pope (eds), *The Principles of The Law of Property in South Africa* (2010) ch 12 and Gretton and Steven, *Property, Trusts and Succession* (2009) ch 20. A notable exception is Reid, *The Law of Property in Scotland* (1996) but that is because the work is part of vol 18 of *The Laws of Scotland: Stair Memorial Encyclopaedia* in which rights in security are treated elsewhere in vol 20.

³ See *Sharp v Thomson* 1997 SC (HL) 66, one of the most important Scottish cases of the twentieth century, dealing with transfer of ownership where his contribution has been described as “re-writing property law”. See

“A right in security is a right over property given by a debtor to a creditor whereby the latter in the event of the debtor’s failure, acquires priority over the property against the general body of creditors of the debtor.”⁴

Thus basic principles of property law should apply, for example those of certainty and publicity. It can be added that whilst strictly a real security right is a subordinate real right in property owned by another party, ownership itself can be used as a functional security, for example in hire purchase, or reservation of title in the sale of goods.⁵ The original Roman law security, *fiducia cum creditore*,⁶ involved title being transferred to the creditor. Therefore rules on the acquisition of ownership are also of importance.

We can, however, widen the categorisation and say that property law is part of private law and hence so too are real security rights. Under that broader heading can also be found contract law which is important, particularly for consensual securities. Pledge, the original real security, was one of the four real contracts recognised in Roman law.⁷ In modern times there is typically a security contract which sets out the rights and obligations of the parties subject to those conditions prescribed by law.⁸

2.2 Commercial law

Real security rights clearly also fall within commercial law. They form a staple part of textbooks on this subject.⁹ Similarly, they are a field within the activities of research centres devoted to commercial law.¹⁰ In Scotland and no doubt elsewhere they form part of the syllabi for both the undergraduate commercial law and property law courses. Legal systems

Reid, “Equity Triumphant: *Sharp v Thomson* (1997) 1 *Edin LR* 464 at 465. *Sharp* has now been reined in by *Burnett’s Trustee v Grainger* 2004 SC (HL) 19. And see also *Alvis v Harrison* 1991 SLT 64 a servitude case, criticised by Cusine and Paisley, *Servitudes and Rights of Way* (1998) paras 14-25-14-30.

⁴ *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891 at 895.

⁵ See eg Gretton and Steven (fn 2 above) paras 20.11-20.15.

⁶ See eg Thomas, *Textbook of Roman Law* (1976) 329-330.

⁷ See eg Zimmermann, *The Law of Obligations* (1990) 220-229.

⁸ Thus eg the opening words of von Bar and Clive, *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)* (2009) Book IX.-1:101(1) are “This Book applies to the following rights in movable property based upon contracts for proprietary security”.

⁹ For example, Gibson, *South African Mercantile and Company Law* (8th edn, by Visser, Pretorius, Sharrock and Van Jaarsveld, 2003) ch 12; Sharrock, *Business Transactions Law* (7th edn, 2007) ch 29 and Scott (ed), *The Law of Commerce in South Africa* (2009) ch 7.

¹⁰ For example the Edinburgh Centre for Commercial Law (<http://www.law.ed.ac.uk/centreforcommerciallaw/>) and the Business Law and Research Centre at the Radboud University Nijmegen (<http://www.ru.nl/oor/>).

which are codified typically have provisions on real security rights in both their civil and commercial codes.¹¹

Other topics within commercial law are closely related to or impact upon security. The obvious one is insolvency. The acid test of whether a security works is whether it is effective if the debtor becomes bankrupt and therefore gives a preference over other creditors.¹² Another related area is diligence i.e. levying execution. Some forms of diligence can be regarded as judicial security.¹³ Mention must also be made of consumer protection law which looks after the interests of private individuals transacting with business. For example, pledges of movables to pawnbrokers in the United Kingdom are regulated by the Consumer Protection Act 1974.¹⁴

The question may be asked legitimately whether commercial law is a subject in its own right, or rather a bundle of disparate areas relevant to businesses, which have their roots lying in contract law.¹⁵ The category is a contextual one, although it is arguably possible to find some unifying themes.¹⁶ Sir Roy Goode defines it as “that branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade.”¹⁷ The antennae of a property lawyer will immediately focus on the word “goods”. What about security over land? Whilst commercial lawyers would concede that land transactions can fall within commercial law’s remit,¹⁸ it would be fair to say that the emphasis is more on movables. The division here in Scotland has also been aided by the development of conveyancing as subject, which led to immovable property being hived off from the rest of private law. Thus in the first edition of Gloag and Henderson, the Scottish equivalent of

¹¹ Eg France. See Bourassin, Brémond and Jobard-Bachellier, *Droit des sûretés* (2nd edn, 2010) 1.

¹² See eg Wood, *Comparative Law of Security and Guarantees* (1995) 3 and Brinkmann, “The Position of Secured Creditors in Insolvency” in Eidenmüller and Kieninger (eds), *The Future of Secured Credit in Europe* (2008) 248-272.

¹³ Gretton, “The Concept of Security” in Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 at 141.

¹⁴ Consumer Protection Act 1974 ss 114-122. For South Africa note the Cape Act 36 of 1889 s 14 and the Second-hand Goods Act 23 of 1955, ss 4-7 and 9.

¹⁵ See Goode, *Commercial Law* (4th edn, by McKendrick, 2009) 9. See also Samuel, “Civil and Commercial Law: A Distinction Worth Making?” (1986) 102 *LQR* 569.

¹⁶ Goode (fn 15 above) 1347-1349.

¹⁷ *Idem* 8. This reflects the contention of Portalis, the draftsman of the French *Code civil* that movable property falls within commerce whilst immovable property is part of civil law. See Kozolchyk, “The Commercialization of Civil Law and the Civilization of Commercial Law” (1979) 40 *La L Rev* 3 at 35.

¹⁸ As Goode notes (fn 15 above) 8 fn 29.

Wille's *Principles*¹⁹ we find the statement that: "The rules with regard to heritable [immovable] securities are not within the scope of this work."²⁰ In more recent years, immovable property has happily returned to the fold with the re-establishment of property law as a unitary subject.²¹

2.3 Other areas of law

Outwith their natural home within private law and commercial law, real security rights come within other fields. Three will be mentioned, all of which will be looked at in more detail later. No doubt there are others. The first is what in Scotland is called human rights law and, in South Africa, constitutional rights law. The European Convention on Human Rights (ECHR) only became directly enforceable in the United Kingdom in 2000²² and in South Africa the post-apartheid constitutional settlement is only a few years older. Therefore in recent years property lawyers have had to consider how this area impacts upon their work.

The second area is European Union Law, although here of course there is no direct impact on South Africa. Forged after World War II, primarily to promote free trade, what is now the European Union is a group of twenty seven countries, with others such as Turkey seeking to join. The free movement of goods and capital are two of the main objectives of the Union.²³ This has consequences for security rights and property rights more generally. Different member states recognise different types of security. These may become unenforceable if the goods move across national boundaries.²⁴ In order to address such problems there has been much work carried out in recent years to harmonise European private law, culminating in the ground-breaking ten book *Draft Common Frame of Reference* published in 2009.²⁵ There are

¹⁹ Wille, *Principles of South African Law* (9th edn, by Du Bois et al, 2007).

²⁰ Gloag and Henderson, *Introduction to the Law of Scotland* (1927) 186. The preface to this book explains: "We have confined our work to those branches of the law which are usually dealt with in the classes of Scots and of Mercantile Law. Conveyancing . . . [is] therefore, only incidentally referred to."

²¹ The leading work is Reid, *Property*. Gloag and Henderson embraced this change in its 11th edn published in 2001 (edited by Dunlop et al) at paras 42.08-42.11.

²² The Human Rights Act 1998 made most of the ECHR directly enforceable in the UK on 2 October 2000. Some rights under the ECHR became directly enforceable in Scotland in 1999 by virtue of the Scotland Act 1998. See generally Gretton and Steven, *Property, Trusts and Succession* paras 31.2-31.4.

²³ See eg Kaczorowska, *European Union Law* (2009) 476-477 and Barnard, *The Substantive Law of the EU: The Four Freedoms* (2010).

²⁴ See eg Verstihlen, "General Aspects of Transfer and Creation of Property Rights" in Drobnig, Snijders and Zippro, *Divergences of Property Law, an Obstacle to the Internal Market?* (2006) 17 at 27.

²⁵ von Bar and Clive (eds), *DCFR*.

also moves to create a single form of mortgage for immovable property which could be used throughout the Union, to be known as the “Euromortgage”.²⁶

The third area is law and economics. This is a subject upon which there is a huge literature in the USA, but little elsewhere, in particular in Scotland and South Africa. Are security rights economically justified? We shall return to this later.

3 THE ACADEMIC DEFICIT

3 1 Scotland

It has been shown that real security rights have multiple legal aspects. Thus it might be thought that they would be the subject of considerable scholarship. In Scotland and South Africa, at least, this is not the case. In a valuable article published in 1994 reviewing published works on Scottish private law, Reinhard Zimmermann and Johann Dieckmann write that “The largest hole in modern Scottish literature gapes in the area of security.”²⁷ They go on to note that the leading book is W M Gloag and J M Irvine, *Law of Rights in Security*, which appeared as long ago as 1897.²⁸ There has been little published since. The main works are Cusine and Rennie on *Standard Securities*,²⁹ a title in the *Stair Memorial Encyclopaedia*³⁰ and the present writer’s monograph on pledge and lien.³¹ Mention must also be made of an important essay by Professor George Gretton on “The Concept of Security”.³²

The world has changed remarkably since 1897. There is, for example, now the possibility of security over aircraft. Yet texts remains in somewhat of a time warp, evidenced by discussions on the liens of factors and innkeepers,³³ when nowadays we normally speak of commercial agents and hoteliers. This matters. In a Scottish case from 2010, a party tried to claim a lien when he was not actually retaining any property.³⁴ If cases as flawed as this can be brought, it shows a lack of awareness of what the law is. The more literature that there is the better understanding there should be.

²⁶ See Steven, “Accessoriness and Security over Land” (2009) 13 *Edin LR* 387 at 419-426.

²⁷ Zimmermann and Dieckmann, “The Literature of Scots Private Law” (1997) 8 *Stell LR* 3 at 10.

²⁸ For a retrospective, see Steven, “One Hundred Years of Gloag and Irvine” 1997 *JR* 314.

²⁹ Cusine and Rennie, *Standard Securities* (2nd edn, 2002).

³⁰ *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 20 (1992).

³¹ Steven, *Pledge and Lien* (2008).

³² Gretton, “The Concept of Security” in Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* 126-151.

³³ Eg McBryde, *The Law of Contract in Scotland* (3rd edn, 2007) para 20-86.

³⁴ *Pattullo v Accountant in Bankruptcy* 2010 GWD 18-360.

Compared to the position in Scotland, much more academic work seems to have been carried out at a European level, particularly in the context of possible harmonisation.³⁵ Most of this has focussed on movable property, but security over immovables has been considered too.³⁶ My impression is that far less work has been done on tacit securities, as the main agenda is to create an express security which will be recognised throughout the continent.

3 2 South Africa

In South Africa too there has also been relatively little literature. The leading book devoted to real security rights is *Wille's Mortgage and Pledge*, first published in 1921³⁷ and now in its third edition (1987), under the editorship of Professor Johan Scott and Professor Susan Scott.³⁸ It has been described as “a pioneer work”.³⁹ Alas it has to be said that the coverage beyond it has been limited, with perhaps the most notable works being the titles in LAWSA⁴⁰ and Konrad Kritzinger's more modest *Principles of the Law of Mortgage, Pledge and Lien*.⁴¹

3 3 Analysis

Some reasons may be suggested for this academic deficit. First, private law and commercial law in general are subjects which historically have been under-researched. They are subjects dealt with by legal practitioners. Such people have less time to write books than full-time academics. In Scotland at least and no doubt elsewhere it is easier to recruit for posts in more theoretical areas such as jurisprudence than in private law and certainly in commercial law, because the rewards, particularly financial, of a career in practice are more tempting. Secondly, a number of areas relevant to real security rights have been identified. Perhaps, however, these rights have “fallen between stools” so to speak. Real security rights over land

³⁵ See eg Sauveplanne (ed), *Security over Corporeal Movables* (1974); Dickson, Rosener and Storm (eds), *Security on Movable Property and Receivables in Europe* (1988); Kieninger (ed), *Security Rights in Movable Property* (2004); Drobnič, Sniijders and Zippro (eds), *Divergences of Property Law, an Obstacle to the Internal Market?* (2006); Kieninger and Sigman (eds), *Cross-Border Security over Tangibles* (2007); Eidenmüller and Kieninger (eds), *The Future of Secured Credit in Europe* (2008); Kieninger and Sigman (eds), *Cross-Border Security over Receivables* (2009).

³⁶ See eg Hinteregger and Borić (eds), *Sicherungsrechte an Immobilien in Europa* (2009); Basedow, Remien and Wenckstern (eds), *Europäisches Kreditsicherungsrecht: Symposium im Max-Planck-Institut für ausländisches und internationales Privatrecht zu Ehren von Ulrich Drobnič am 12 Dezember 2008* (2010).

³⁷ Wille, *Mortgage and Pledge in South Africa* (1921).

³⁸ Scott and Scott (eds), *Wille's Law of Mortgage and Pledge in South Africa* (1987).

³⁹ Book review, 1921 SALJ 153 at 154.

⁴⁰ Lubbe, “Mortgage and Pledge” in *LAWSA* vol 17 (revised Scott, 1999) and Scott, “Lien” in *LAWSA* vol 15 (1999).

⁴¹ Kritzinger, *Principles of Mortgage, Pledge and Lien* (1999).

are part of conveyancing. Rights over movables are for commercial law. A unified approach is a novelty. Thirdly, the impact of law reform or rather the lack of it may be relevant. The modern law of pledge would be easily recognised by Ulpian, so who needs a new book if one already has the Digest? Gloag and Irvine wrote:

“The law on security-rights over corporeal moveables is beset with difficulties; and is not, perhaps, in a very satisfactory state, as the result of its rules is often to deprive the owner of such property of the power to make use of it as a security for his debts. It is open to question whether the rigidity of the law of Scotland on this subject should not now be relaxed by the adoption of a system analogous to the English bill of sale.”⁴²

More than a century later little has changed in Scotland, with the exception of the introduction of the floating charge in 1961.⁴³ This, however, was not law reform’s finest hour. Making a creature of English equity fit into the civilian principles of Scottish property law has unfortunately, to borrow Gloag and Irvine’s phrase, been beset with difficulties and not one which should be commended to South Africa or elsewhere.⁴⁴ The Scottish Law Commission is currently working on a project to look at reform of security over movables.⁴⁵ In England there has been a long sorry story of seeking to introduce a functional approach to security over movables based on the famous Article 9 of the Uniform Commercial Code, which City of London lawyers seem to have managed to see off for the time being.⁴⁶ In South Africa the main modern legislative change has been the Security by Means of Movable Property Act 57 of 1993, which reformed the law on notarial bonds.⁴⁷ Of course the inter-relationship between law reform and academic scholarship is a multi-faceted one. Often scholarship can lead to reform. Academics regularly sit on law reform bodies. So perhaps the lack of scholarship is a reason for the lack of reform and not the other way round.

⁴² Gloag and Irvine, *Rights in Security* 187-188.

⁴³ The law of immovable security was overhauled in 1970 with the introduction of the standard security by the Conveyancing and Feudal Reform (Scotland) Act 1970. See Cusine and Rennie, *Standard Securities*.

⁴⁴ See Pienaar and Steven, “Rights in Security” in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems in Comparative Perspective* 758 at 770.

⁴⁵ See Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010) paras 2.4-2.6.

⁴⁶ See de Lacy, “The evolution and regulation of security interests over personal property in English law” in de Lacy (ed), *The Reform of UK Personal Property Law* (2010) 3-82. For a discussion of the (English) Law Commission’s proposals from a Scottish perspective, see Cabrelli, “Joined Up Thinking? An Analysis of the Scottish and English Law Commissions’ Proposals for the Reform of Rights in Security and Charges Granted by Companies” 2004 *Journal of Corporate Law Studies* 385.

⁴⁷ See Lubbe, “Mortgage and Pledge”, in *LAWSA* vol 17 (revised Scott, 1999) paras 511-517.

Fourthly, modern case law is slight. The last Scottish case on pledge was in 1977.⁴⁸ The relative lack of reported decisions on the landlord's hypothec was one of the reasons given by the Scottish Government for recent reform which effectively confined it to commercial leases.⁴⁹ Thus there are few new cases for the scholar to analyse. But again the relationship between scholarship and case law can work the other way. Undoubtedly, the growth in property law cases in Scotland in recent years has been aided by there being more academic writing on property law.⁵⁰ The lack of case law can, however, suggest that in broad terms the area of law is working at a practical level, at least as far as practitioners are concerned. Unless there is some development such as a new constitution which gives rights which may conflict with the established rules there is no need to litigate.⁵¹ Whatever the true reasons there is clearly much more work for the academic property lawyer to do.

4 LAW AND ECONOMICS

4 1 Introduction

“Pledge benefits both parties, the debtor because it helps him get credit, and the creditor because it helps him give credit safely”.⁵² This is the view expressed in Justinian's *Institutes*. Security is therefore a good thing. Or as Denis has put it “The precept of Shakespeare; ‘Neither a borrower or a lender be’ is only true when the loan is unsecured.”⁵³ In more modern times, however, mainly American scholarship has been critical of the economic effect of security rights, particularly on third parties.⁵⁴ The classic quotation is that of Professor Lynn LoPucki: “Security is an agreement between A and B that C take nothing.”⁵⁵ In many other countries, however, there has been a lack of both law and economics literature as well as empirical work on the benefits or otherwise of security.⁵⁶ This is the case, for

⁴⁸ *Wolifson v Harrison* 1977 SC 384.

⁴⁹ For criticism, see McAllister, “The Landlord's Hypothec: Down But Is It Out?” 2010 *JR* 65 at 66-68.

⁵⁰ See more generally, Reid, “The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland” in MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 39 at 49.

⁵¹ See para 5 below.

⁵² J 3.14.4.

⁵³ Denis, *A Treatise on the Law of the Contract of Pledge as governed by both the Common Law and the Civil Law* (1898) 4-5.

⁵⁴ The literature is enormous. For a helpful list, see McCormack, *Secured Credit under English and American Law* (2004) 3 fn 10.

⁵⁵ LoPucki, “The Unsecured Creditor's Bargain” (1994) 80 *Va LR* 1887 at 1899.

⁵⁶ For an important recent discussion referring to empirical work, see Armour, “The Law and Economics Debate About Secured Lending: Lessons for European Lawmaking” in Eidenmüller and Kieninger (eds), *The Future of Secured Credit in Europe* 3-29.

example, in Belgium, the Czech Republic, France, Germany, Hungary, Italy and the Netherlands.⁵⁷ Yet a number of these countries have reformed their law on real securities in the relatively recent past.

4.2 The Scottish experience

In Scotland, as already mentioned, the major change made in the twentieth century in the field of movable security was the introduction of the floating charge. The committee which proposed this change took evidence from interested parties such as bodies representing accountants, bankers and lawyers.⁵⁸ It was suggested that companies were being incorporated under English law where the floating charge was available even although the business was based in Scotland.⁵⁹ But no detailed research was carried out. To some extent the committee was obviously swayed by the argument that “in the field of commercial law, unless there is good reason to the contrary, it is desirable that the law of England and Scotland should be the same.”⁶⁰ Professor George Gretton has been a long standing critic of the decision to import the floating charge and the lack of economic evidence to justify it.⁶¹

In the last ten years detailed research on the impact of securities over movable property on the financing of SMEs has been carried out by the Scottish Executive Central Research Unit.⁶² SMEs, which are broadly businesses with fewer than 250 employees, amount to 99% of Scottish businesses and are a vital part of the Scottish economy.⁶³ The resulting report concludes:

“Anecdotally, there has been the suggestion that there are perceived deficiencies in the Scots law concerning the ability to provide security over moveable property which

⁵⁷ See Kortmann, McBryde, Faber, Vermunt and Steven (eds), *Security Rights in Europe* (forthcoming).

⁵⁸ Eighth Report of the Law Reform Committee for Scotland (Cmnd 1017, 1960) 1.

⁵⁹ *Idem* at 3.

⁶⁰ *Idem* at 6.

⁶¹ Gretton, “What Went Wrong with Floating Charges?” 1984 *SLT (News)* 172; Gretton, “Floating Charges: The Scottish Experience” 1984 *JBL* 255; Gretton, “Should Floating Charges and Receivership be Abolished?” 1986 *SLT (News)* 325; Gretton, “Floating Charges in Scots law: the saga continues” 1995 *JBL* 212; Gretton, “Reception Without Integration? Floating Charges and Mixed Systems” (2003) 78 *Tul LR* 307. Similar views are expressed in Cabrelli, “The Case against the Floating Charge in Scotland” (2005) 9 *Edin LR* 407. These views are not shared by everyone. See, for example, Jack, “The Coming of the Floating Charge to Scotland: an Account and an Assessment” in Cusine (ed), *A Scots Conveyancing Miscellany* 33-46; Lord Rodger of Earlsferry, ““Say Not the Struggle Naught Availeth”: The Costs and Benefits of Mixed Legal Systems” (2003) 78 *Tul LR* 419 at 423-425.

⁶² Scottish Executive Central Research Unit, *Business Finance and Security over Moveable Property* (2002) 6.

⁶³ Department for Business Enterprise and Regulatory Reform Press Release 4 February 2009, quoting the then Secretary of State for Scotland, Mr Jim Murphy MP.

impinge upon the ability of Scottish SMEs to raise loan finance. In researching this issue we looked at bank lending policy and practices concerning security; the role and views of business advisers and intermediaries; and surveyed the financing arrangements of Scottish SMEs. We found little substantive evidence to support this perceived deficiency. Neither the inability of unincorporated businesses to offer the floating charge nor the inability of Scottish SMEs to offer a non-possessory security over moveable property appear significantly to affect the ability of Scottish SMEs to access finance.”

The researchers felt that the difference between perceptions and reality arose largely because security is only a minor factor which is taken into account in the decision of a bank to lend. SMEs also obtain finance by other means such as trade credit. The conclusion was that improving the way in which a lender could take security over movables would have a minimal impact on the availability or cost of finance.

It need hardly be said that there have been huge economic changes since 2002 and it is therefore helpful to refer to a more recent report published by the Scottish Government last year on SME Access to Finance.⁶⁴ This resulted from a survey of 1000 businesses. The results are interesting. In particular, credit cards and overdraft facilities are the main sources of finance, ahead of ones involving security such as commercial loans/mortgages and asset based finance.⁶⁵ Thus the most used financing methods are those which do not depend on security. Moreover, while lack of security or insufficient security are reasons for not granting overdraft facilities, the general economic climate is a more significant cause.⁶⁶

When the report as a whole is read it is clear that security is one of a number of factors in the granting of loan finance. Reform of the law to make security available more easily is not advanced as the way forward. Nevertheless, as it clearly is a factor, there is no doubt that security is here to stay. It has been used since even before Justinian. To give a North African as opposed to a South African example, there is evidence for the pledging of mummies in ancient Egypt.⁶⁷ It is doubtful whether a definitive answer will ever be reached as to the

⁶⁴ Scottish Government, SME Access to Finance (2009) available at <http://www.scotland.gov.uk/Resource/Doc/919/0084113.pdf>.

⁶⁵ *Idem* paras 3.3-3.5.

⁶⁶ *Idem* paras 3.19-3.221.

⁶⁷ Pufendorf, *De Jure Naturae et Gentium* (1672) V.10.13.

economic efficiency or otherwise of security, but nevertheless there is clearly more work to do. Even although there has been more empirical work done recently in the USA, there are too many uncertainties in comparing the current world with a world in which security does not exist. The general acceptance of the importance of security to lending is also underlined by the attempts to harmonise the law.

5 HARMONISATION

5.1 General

As mentioned earlier, harmonisation of private law is an important subject in Europe at the moment in particular because of the recent publication of the Draft Common Frame of Reference. But harmonisation projects in the area of security rights are not confined to that continent. It was in South Africa that one of most successful modern initiatives was signed in 2001, namely the Cape Town Convention, or to give it its full title, the Convention on International Interests in Mobile Equipment. The Convention has a Protocol on Matters specific to Aircraft Equipment.⁶⁸ The Convention and Protocol have been ratified by more than 25 states with nearly 100,000 registrations in the International Registry based in Dublin.⁶⁹ More recently the Luxembourg Protocol on Matters specific to Railway Rolling Stock was added in 2007.

Elsewhere in Africa there has been important work carried out by OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*).⁷⁰ It was created by a treaty signed in Port-Louis in Mauritius in 1993 by 14 African countries, most of which are former French colonies.⁷¹ One of the main aims of the organisation is to unify business law throughout its members states.⁷² To that end, it has issued a series of Uniform Acts which are directly effective in these states and supersede previous national legislation. Its Uniform Act on Securities came into force in 1998 and deals with both land and movable property.⁷³ Mention must also be made of the important UNCITRAL Legislative Guide on Secured Transactions

⁶⁸ See Goode, "The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing" (2002) 7 *Uniform Law Review* 3.

⁶⁹ Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment: Official Commentary* (Revised edn, 2008).

⁷⁰ Organisation for the Harmonization of Business Law in Africa. Its website is <http://www.ohada.org>.

⁷¹ See Martor, Pilkington, Sellers and Thouvenot, *Business Law in Africa: OHADA and the Harmonization Process* (2nd edn, 2007) 1-2. See also MacQueen, "The Common Frame of Reference in Europe" (2010) 25 *Tulane European & Civil Law Forum* 1 at 16 and Ferreira-Snyman and Ferreira, "The harmonisation of laws within the African Union and the viability of legal pluralism as an alternative" 2010 *THRHR* 608 at 618-620.

⁷² OHADA Treaty article 1.

⁷³ Martor, Pilkington, Seller and Thouvenot, *Business Law in Africa* ch 8.

of 2007.⁷⁴ It can be seen therefore that harmonisation of security rights is a subject of interest beyond Europe, but it is to developments in that continent that we now turn.

In 1994 the European Bank for Reconstruction and Development published a Model Law on Secured Transactions for use by the former Communist countries of the Eastern bloc.⁷⁵ In 2002 the Directive on Financial Collateral Arrangements was issued by the European Union. It has the aim of harmonising and simplifying the rules on security rights over financial collateral among member states, but is somewhat technically impenetrable.⁷⁶

5 2 DCFR

As mentioned earlier, 2009 saw the publication of the Draft Common Frame of Reference. Book IX is devoted to security rights over movable property and covers both corporeal and incorporeal assets. In keeping with the project as a whole, immovable property is outwith its scope. This is defensible. Arguments in favour of harmonising property law appear stronger when they relate to property that is capable of moving over national boundaries.⁷⁷ The approach taken by Book IX is a functional one, rooted in Article 9 of the Uniform Commercial Code of the USA and having similarities with the Personal Property Security Acts of the Canadian provinces, Australia and New Zealand.⁷⁸ Thus its provisions apply to what may be viewed as true security, for example, pledge, where the debtor/security provider has ownership and the creditor has a subordinate real right. They also apply to functional security such as retention of title in the sale of goods. There is also a fundamental and, for those from a civilian background, strange distinction between a security right being “created” and made “effective” i.e. perfected. The former essentially requires the agreement of the parties and for the security provider to have the right to grant the security. The latter normally requires registration, but delivery to the creditor is an alternative. There is to be a European register of proprietary security.

⁷⁴ Available at http://www.uncitral.org/pdf/english/texts/security-1g/e/09-82670_Ebook-Guide_09-04-10English.pdf. See Bazinas, “Key objectives and fundamental policies of the UNCITRAL Legislative Guide on Secured Transactions” in de Lacy (ed), *The Reform of UK Personal Property Security Law* 456-475.

⁷⁵ Available at <http://www.ebrd.com/downloads/research/guides/secured.pdf>.

⁷⁶ See Gretton, “Financial Collateral and the Fundamentals of Secured Transactions” (2006) 10 *Edin LR* 209.

⁷⁷ But not everyone shares this view. See eg S van Erp, “Editorial: (D)CFR, Consumer Acquis, Property Law and Euromortgage: The Benefits of Unification, the Dangers of Fragmentation and the Unwanted Effect of Legal Transplants” vol 11.4 *Electronic Journal of Comparative Law* (December 2007).

⁷⁸ See Brown, “The New Zealand Personal Property Securities Act 1999” in de Lacy (ed), *The Reform of Personal Property Security Law: Comparative Perspectives* 328-365.

This is not the place to give a detailed critique of Book 9. Only a few comments may be made. The first is that the arguments for a security right over movable property that is enforceable throughout the European Union have some appeal given that the member states form a single economic area.⁷⁹ On the other hand, the idea of a unitary law of real security over movables is, at least to the present writer, less attractive as it could not take account of local or national policy choices.⁸⁰ My second comment is that there is some attractiveness in functionalism. At the moment in Scotland functional securities are recognised which do not require publicity. One example is extended reservation of title, where it can be agreed that any debts whatsoever owed to the seller by the buyer must be paid before ownership can transfer.⁸¹ Likewise trusts can be used as securities.⁸² A functional system would arguably make the law more coherent and even-handed. On the other hand, changing to this would be a large step which would be very difficult to sell to lawyers working in practice. As already noted, attempts to introduce such a system in England recently foundered for this very reason.⁸³ At a theoretical level too, functionalism is not without its critics.⁸⁴ Thirdly, the move to a creation/effectiveness dichotomy is not immediately attractive for the reason alluded to already, namely that it is not a good fit with the rest of Scottish property law. The experience of the floating charge should not be repeated. It is possible to have a functional system which is not based on this dichotomy, as the ERBD Model Law on Secured Transactions shows.⁸⁵ Fourthly, no security right works unless it is effective in insolvency and work will therefore need to be done on national insolvency laws too. Professor Hugh Beale makes a powerful argument when he states that it would be difficult for a European

⁷⁹ See eg the arguments made by many of the contributors to Drobnig, Snijders and Zippro (eds), *Divergences of Property Law, an Obstacle to the Internal Market?* The present writer's own contribution to that volume was more sceptical.

⁸⁰ See McCormack, "Convergence, path-dependency and credit securities: the case against Europe-wide harmonisation" 2010 *Global Jurist* art 2. See also generally Juutilainen, "Secured Transactions Laws: Centralized or Spontaneous Harmonization", 2010 *Edinburgh Student Law Review* 14. More generally on unification of the law in Europe, see Lord Rodger of Earlsferry in "The Costs and Benefits of Mixed Legal Systems", at 430-431.

⁸¹ *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891 at 895. The position in other European countries eg Germany and the Netherlands is more restrictive.

⁸² *Tay Valley Joinery Ltd v CF Financial Services Ltd* 1987 SLT 207. But compare *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111. For discussion, see Wilson and Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) ch 4.

⁸³ See para 3.3 above.

⁸⁴ See eg Bridge, Macdonald, Simmonds and Walsh, "Formalism, functionalism and understanding the law of secured transactions" (1999) 44 *McGill Law Journal* 567.

⁸⁵ Gretton, "Security over moveables in Scots law" in de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* 270 at 278.

security right to co-exist with national security rights as creditors would naturally want to use the one that gave them higher priority.⁸⁶

5.3 Euromortgage

The other main harmonisation project going on in Europe faces similar but not identical challenges. As mentioned earlier, this is the “Euromortgage”: a common security right over immovable property. Its origins can be traced back as far as the 1960s and the Segré report, which concluded that the integration of financial markets would be aided by mortgage harmonisation.⁸⁷ In 1987 a report was published by the International Union of Latin Notaries. This introduced the term “*Eurohypothec*” for the first time. Use of the English-law friendly term, “Euromortgage”, followed. The report proposed a model based on the non-accessory German *Grundschild* and Swiss *Schuldbrief*.⁸⁸ The Euromortgage would offer an alternative to the mortgages available under national laws, but not replace them. In 1998 the *Verband Deutscher Hypothekenbanken (VDH)* (the Association of German Mortgage Banks) set up a working group of academics and practitioners which produced a discussion paper including basic guidelines and a draft code.⁸⁹ Once again the main influences were the *Grundschild* and the *Schuldbrief*. In 2004 a group working under the heading “The Eurohypothec: A Common Mortgage for Europe” was established in Spain of experts on mortgage law.⁹⁰ It has further developed the VDH proposals in English and its suggestions include allowing the same Euromortgage to cover several properties in different countries.⁹¹ The work of the VDH, now known as the VDP,⁹² remains ongoing and it has recently published a report

⁸⁶ Beale, “The Future of Secured Credit in Europe: Concluding Remarks” in Eidenmüller and Kieninger (eds), *The Future of Secured Credit in Europe* 376 at 379-381.

⁸⁷ *Het tot stand brengen van een Europese Kapitaalmarkt: Rapport van een door de Commissie van de EEG ingestelde groep deskundigen* (1966) (Report on the Building of a European Capital Market by an expert committee chaired by Professor Claudio Segré). See Van Erp, “A Comparative Analysis of Mortgage Law: Searching for Principles” in Jordán and Gambaro (eds), *Land Law in Comparative Perspective* (2002) 69 at 70 and Wehrens, “Real Security regarding Immovable Objects – Reflections on a Euro Mortgage” in Hartkamp et al (eds), *Towards a European Civil Code*, 3rd edn (2004) 769 at 770.

⁸⁸ See Nasarre-Aznar, “The Eurohypothec: A Common Mortgage for Europe” [2005] 69 *Conveyancing and Property Lawyer* at 33 and Wehrens, “Real Security regarding Immovable Objects – Reflections on a Euro Mortgage” at 773. See also Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as Mixed Legal System* (2002) 247-248. See generally Stöcker, *Die Eurohypothek* (1992).

⁸⁹ Wolfsteiner and Stöcker, “A Non-Accessory Security Right over Real Property for Central Europe” 2003 *Notarius International* 116.

⁹⁰ See <http://www.eurohypothec.com/>. See generally Nasarre-Aznar, “The Eurohypothec: A Common Mortgage for Europe”.

⁹¹ See Drewicz-Tulodziecka (ed), *Mortgage Bulletin 21: Basic Guidelines for a Eurohypothec* (2005). See also Drobnig, “Choosing the Right Approach for European Law Making – Commentary” in Eidenmüller and Kieninger (eds), *The Future of Secured Credit in Europe* 102 at 107-108.

⁹² *Verband Deutscher Pfandbriefbanken*.

which compares and contrasts most of the national mortgage rights currently available in Europe⁹³ and makes the case for harmonisation.⁹⁴

Does it make sense to harmonise European mortgage law? The European Commission has been supportive of this project, but more recently has accepted the practicalities of the situation:

“Limits to the potential for integration should however be acknowledged. The influence of factors such as language, distance, consumer preferences, or lender business strategies cannot be underestimated . . . The Commission recognises that consumers predominantly shop locally for mortgage credit and that the majority will probably continue to do so for the foreseeable future. The integration of the EU mortgage markets will therefore be essentially supply-driven, in particular through various forms of establishment in the Member State of the consumer.”⁹⁵

The academic work that has been carried out on the Euromortgage is of the utmost value. Having the one security right for the whole of the EU is undoubtedly attractive to banks. Nevertheless, the present writer remains sceptical.⁹⁶ In the first place and as already mentioned, the arguments for harmonisation appear stronger for movable property that is capable of going over national borders. Secondly, to make the project work there would have to be harmonisation of related areas such as insolvency law and land law more generally.⁹⁷ That may simply be too ambitious. Thirdly, there is the difficult technical question of whether a Euromortgage should be an accessory or non-accessory (abstract) security i.e. whether the existence of a debt should be a pre-requisite to its constitution. Many countries do not presently recognise abstract securities and as recent events in Germany have demonstrated such securities may not offer adequate protection to debtors.⁹⁸ Finally, the different laws on

⁹³ But not the UK.

⁹⁴ Stöcker and Stürner (eds), *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe Volume III* (2nd revised and extended edn, 2010). This was originally published in German.

⁹⁵ European Commission, *White Paper on the Integration of EU Mortgage Credit Markets* (COM (2007) 807 final) at 3.

⁹⁶ These arguments are developed more fully in Steven, “Accessories and Security over Land” at 422-426.

⁹⁷ See eg Van den Haute, “Harmonisation européenne du crédit hypothécaire: perspectives de droit comparé, de droit international privé et de droit européen” (Unpublished doctoral thesis, Free University of Brussels, 2008) paras 436-437.

⁹⁸ The issue arises in particular when the security is transferred because the assignee is not a party to the loan contract. The German Civil Code was recently amended to deal with this difficulty in relation to the non-accessory *Grundschuld*. See Van Vliet, “Mortgages on immovables in Dutch law in comparison to the German

mortgages in England and Scotland has not been a barrier to lending across that border.⁹⁹ There is surely something to be learned from that.

6 CONSTITUTIONAL RIGHTS

6.1 Introduction

“I was a farmer on the rocks of Bruce County.
I was plowing when the letter came.
Some . . . banker, down in Toronto,
Money or the farm: to him ‘twas all the same.”¹⁰⁰

The enforcement of securities cannot be described as pleasant business. A person is not able to pay debts that are owed and a secured creditor takes recourse to the person’s property instead. Human rights needs to be protected in that situation and this is especially true where the debtor is a natural person and particularly where the property is his or her home. Several constitutional protections may be engaged, notably the right not to be deprived of property, the right to a fair hearing, the right to a private and family right and the right to housing. As mentioned earlier, the application of such rights in a private law context has been a relatively new challenge for those working in the field in both Scotland and South Africa.

The landmark Scottish property law case is *Karl Construction Ltd v Palisade Properties plc*,¹⁰¹ which involved unsecured rather unsecured creditors. The common law allowed those raising an action for payment to use an automatic procedure known as diligence on the dependence to freeze assets belonging to the debtor. No judicial process was required. The procedure was found to contravene the property protection clause in the European Convention on Human Rights and there had to be reform.¹⁰² There has been very similar case

mortgage and land charge”, in Hinteregger and Borić (eds), *Sicherungsrechte an Immobilien in Europa* 285 at 293-297.

⁹⁹ Compare von Bar and Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (2004) 361.

¹⁰⁰ McArthur, “Breaking the Law” quoted in Ziff, *Principles of Property Law* (3rd edn, 2000) 383.

¹⁰¹ 2002 SC 270.

¹⁰² In particular there had to be a hearing before a judge. This requirement was diluted by the subsequent case of *Advocate General for Scotland v Taylor* 2003 SLT 1340 which held that it was sufficient for the matter to be considered by a judge without an actual hearing. And see now the Bankruptcy and Diligence etc (Scotland) Act 2007 s 169, which amends the Debtors (Scotland) Act 1987.

law in South Africa. In *Chief Lesapo v North West Agricultural Bank*¹⁰³ it was held that a number of provisions in the Land Bank Act were unconstitutional, including those which allowed the bank to attach and sell property in execution itself with no supervision by the court. This breached the right to have a court hearing.¹⁰⁴ These cases are fairly clear ones. A more difficult question in South Africa has been the validity or otherwise of *parate executie* clauses where there have been a number of cases and some vigorous academic debate.¹⁰⁵ Matters seemed to have settled a little to allow such agreement in the case of moveable property but not for land.

6 2 Assessment

What assessment can be offered as to the current position as regards real security rights and human rights? First, when considering relevant cases clearly a balance must be struck as between the interests of the creditor and the debtor. Creditors have human rights too.¹⁰⁶ They can invoke property protection clauses to guard their securities and they have a right to be heard by the court. Thus in *Wood v UK*,¹⁰⁷ the applicant invoked the property protection clause in the ECHR when she defaulted on her mortgage and her home was repossessed. The European Commission on Human Rights dismissed the case:

“In so far as the repossession constituted an interference with the applicant’s home, the Commission finds that this was in accordance with the terms of the loan and the domestic law and was necessary for the protection of the rights and freedoms of others, namely the lender. To the extent that the applicant is deprived of her possessions by the repossession, the Commission considers that this deprivation is in

¹⁰³ 2000 (1) SA 409 (CC). See also *First National Bank of South Africa v Land and Agricultural Bank of South Africa*; *Sheard v Land and Agricultural Bank of South Africa* 2000 (3) SA 62 (CC).

¹⁰⁴ Constitution of the Republic of South Africa Act 108 of 1996 s 34.

¹⁰⁵ *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E); *Senwes v Muller* 2002 (4) SA 134 (T); *Bock v Dubororo Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA); *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA). See Scott, “Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds” 2002 *THRHR* 656; Cook and Quixley, “*Parate Executie* Clauses: Is the Debate Dead?” 2004 *SALJ* 719; Schulze, “*Parate Executie*, *Pacta Commisoria*, Banks and Mortgage Bonds” 2004 37 *De Jure* 256; Schulze, “*Parate Executie* and Public Policy. The Supreme Court of Appeal Provides Further Guidelines” 2005 *Obiter* 710; Scott, “A Private-Law Dinosaur’s Evaluation of Summary Execution Clauses in Light of the Constitution” 2007 *THRHR* 289.

¹⁰⁶ See eg *Wilson v First County Trust Ltd (No 2)* [2002] QB 74 revd [2004] 1 AC 816. Cf Gretton, “The Protection of Property Rights” in Boyle, Himsworth, Loux and MacQueen (eds), *Human Rights and Scots Law* (2002) 274 at 284-285.

¹⁰⁷ (1997) 24 EHRR CD 69.

the public interest, that is the public interest in ensuring payment of contractual debts, and is also in accordance with the rules provided for by law.”¹⁰⁸

Of course this is not to give the creditor *carte blanche*. The procedures for enforcing a security need to take account of the debtor’s constitutional rights, particularly where the secured property is his or her home. The South African case of *Standard Bank of South Africa Ltd v Saunderson*¹⁰⁹ in its application of the earlier important case of *Jaftha v Schoeman*¹¹⁰ demonstrates the point. *Jaftha* concerned the legislation on levying execution and its compatibility with the constitutional right to adequate housing. It was held that for execution sales of residential properties that a requirement for “judicial oversight” had to be read into the legislation, meaning that a court had to determine whether the procedure was justified in the circumstances of the case. In *Jaftha* the creditor was unsecured whereas in *Saunderson* it had a mortgage bond. While following *Jaftha*, the court in the latter case was at pains to stress the value of a mortgage as “an indispensable tool for spreading home ownership”¹¹¹. Thus the interests of the creditor require to be protected, but constitutional rights mean that for residential mortgages the balance is shifted in the direction of the debtor in ensuring appropriate procedures and the possibility of enforcement being delayed if the facts require this.¹¹²

Secondly, the traditional private lawyer may find it difficult to cope with constitutional rights. She may regard herself as a dinosaur. Susan Scott has argued that some commentators and courts have been over-enthusiastic in their application of constitutional rights in particular in relation to summary execution clauses.¹¹³ She makes the case that the common law and the doctrine of public policy can be developed in such a way as to protect debtors adequately. This argument has merit and it is echoed albeit indirectly by recent developments in Scotland. The legislation for our equivalent of the mortgage bond, the standard security, dates from 1970. There was no requirement under it for a creditor to obtain a court order in order to enforce the security. Such an order was only actually required if the debtor was in residence

¹⁰⁸ *Idem* 70-71.

¹⁰⁹ 2006 2 SA 264 (SCA).

¹¹⁰ *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC).

¹¹¹ *Standard Bank of South Africa Ltd v Saunderson* at para 1.

¹¹² See Fox, *Conceptualising Home: Theories, Laws and Policies* (2006) 96. See also Van der Walt, “Property, Social Justice and Citizenship: Property Law in Post-Apartheid South Africa” 2008 *Stell LR* 325 at 328-333.

¹¹³ Scott, “A Private-Law Dinosaur’s Evaluation of Summary Execution Clauses in Light of the Constitution” 2007 *THRHR* 289.

and refused to move. The position was ameliorated by the Mortgage Rights (Scotland) Act 2001 which allowed debtors in the case of their home to apply to the court seeking suspension of enforcement. The judge had discretion to do so having regard to certain prescribed factors, including the debtor's ability to find alternative accommodation. This, however, necessitated the debtor raising proceedings. As a matter of public policy, not least because of the economic downturn, this was felt to offer insufficient protection for debtors and the Scottish Parliament recently passed the Home Owner and Debtor Protection (Scotland) Act 2010.¹¹⁴ It now requires an enforcing creditor in the case of residential property to obtain a court order.¹¹⁵ Moreover, that party must consider reasonable alternatives to enforcement¹¹⁶ and the court must have regard to the extent to which that obligation has been fulfilled before authorising enforcement.¹¹⁷ This is all rather reminiscent of *Jaftha*. The difference is that in the policy papers which led the way to the legislation the notion of human rights is implicit rather than explicit.¹¹⁸ Scottish legislators felt it was right to change the law as a matter of public policy and not because the ECHR required it. The different approaches in Scotland and South Africa are interesting and undoubtedly we have things to learn from each other in this area. One other example which may be given is the abolition by the Bankruptcy and Diligence etc (Scotland) Act 2007 of the ability of the landlord's hypothec's ability to attach to goods not belonging to the tenant.¹¹⁹ The main reason for this was a fear that it breached the property protection clause in the ECHR.¹²⁰ The South African lessor's hypothec, which can attach to third party property, may also be vulnerable to a constitutional rights challenge.¹²¹

A third and final point is that human rights jurisprudence seems to be less discussed in other countries in Europe in the field of security. This impression was informed while editing a

¹¹⁴ See generally Higgins, "An orchestra of instruments" 2010 *Journal of the Law Society of Scotland* Oct/22.

¹¹⁵ Conveyancing and Feudal Reform (Scotland) Act 1970 ss 20(2A), 23(4) and 24 (as amended by the 2010 Act).

¹¹⁶ 1970 Act s 24A and the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 SSI 2010/317.

¹¹⁷ 1970 Act s 24(7). There is also the new possibility of approved lay representation for the debtor at the hearing. See 1970 Act s 24E and the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 SSI 2010/264.

¹¹⁸ Scottish Government, Home Owner and Debtor Protection (Scotland) Bill Policy Memorandum (2009) available at <http://www.scottish.parliament.uk/s3/bills/32-homeOwner/b32s3-introd-pm.pdf>; Debt Action Forum Final Report (2009) available at <http://www.aib.gov.uk/About/DAF/DebtActionForumFinalRepo>. The latter includes a Report by a Repossession Sub-Group in Annex B.

¹¹⁹ Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4).

¹²⁰ Scottish Executive, Bankruptcy and Diligence etc (Scotland) Bill Policy Memorandum (2005) para 1010.

¹²¹ Steven, "The Landlord's Hypothec in Comparative Perspective" 2008 *Stell LR* 278 at 295.

forthcoming collection of National Reports on Security Rights in Europe.¹²² The reason for that if indeed it is true may be the fact that many of the countries seem to have more heavily judicially regulated procedures for enforcement of securities.¹²³

7 CONCLUSION

In considering real security rights, it has been shown that these are of wide-ranging interest, not just in property law and private law but within other legal areas and also beyond law to economics. Academically, more work is needed particularly in Scotland and South Africa to exposit the principles which underlie real security rights and to offer possibilities for future development in a world of ever increasing cross-border trade. When beginning to research this article, the present writer wondered whether real security rights might be classified as an academic Cinderella subject. The metaphor, however, is not particularly accurate. There has been a good amount of valuable work already done. But there is more to do. Cinderella is into her party clothes, but she has not yet arrived at the ball.

¹²² See Kortmann, McBryde, Faber, Vermunt and Steven (fn 57 above).

¹²³ See eg Scott, "A comparison between Belgian, Dutch and South African law dealing with pledge and execution measures" 2010 *CILSA* 93.