Accessoriness and Security over Land

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Abstract: This paper analyses the extent to which real security over land in Scotland complies with the accessoriness principle. It takes both a historical and a comparative approach and also considers accessoriness in the context of the proposed Euromortgage.

Keywords: security, heritable security, standard security, mortgage, Euromortgage, Eurohypothec

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A. INTRODUCTION

The purpose of a security right is to improve the chances of a creditor recovering a debt.[1] This may be by means of a cautionary obligation from a third party (personal security), or by encumbering an asset belonging to the debtor which can be sold if the debtor defaults (real security). In either case the right in security depends on there being a debt. This is the "accessoriness principle" of security rights. To use the language of the property law doctrine of accession,[2] the debt is the "principal" and the security is the "accessory".

The principle may at first sight seem to be a simple one. In reality the picture is more complicated. The subject has also had little research in Scotland. This can be appreciated from the terminology. The word "accessory" is familiar, but "accessoriness" is hardly a term that trips off the tongue. Nor is the adjective "accessorial". As the area has had more analysis by continental scholars for whom English is not their first language, terms have been used such as "accessority"[3] and "accessoriety",[4] which are not recognised by the Oxford English Dictionary. No criticism is intended. Rather, it shows that there is work to be done to catch up with the research of foreign colleagues. This article intends to make a start from a Scottish perspective, focussing on the extent

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[1] J 3.14.4. For a helpful modern discussion, see G McCormack, *Secured Credit under English and American Law* (2004) ch 1.
[2] See K G C Reid, *The Law of Property in Scotland* (1996) para 570.
[3] S van Erp, "Surety Agreements and the Principle of Accessority – Personal Security in the Light of a European Property Law Principle" (2005) 13 *European Review of Private Law* 309.
[4] S Nasarre-Aznar, "The Eurohypothec: A Common Mortgage for Europe" [2005] 69 *The Conveyancer and Property Lawyer* 32 at 37.

to which the law of heritable security[5] complies with the accessoriness principle. It begins by placing the subject in a historic and comparative context.

B. HISTORICAL AND COMPARATIVE CONTEXT

(1) Civil law

The accessoriness principle can be traced back to both the Roman law of personal security and real security. Ulpian states the general rule: "In omnibus speciebus liberationum etiam accessiones liberantur, puta adpromissores hypothecae pignora".[6] According to Kaser, the dependence of a pledge on the debt it secured had developed as early as the Republic: "Ohne die Forderung entsteht kein Pfandrecht; erlischt sie, geht auch das Pfandrecht unter."[7] The development of the accessoriness principle in Roman law is outlined generally by Habersack[8] and, in relation to personal security, by Zimmermann.[9] Both take the view that it was a flexible rather than a rigid principle. For example, a cautioner could guarantee a smaller amount than the principal debt or a pledge could secure a future debt. The dependency of the security on a particular debt was therefore not absolute.

It was the conceptual work of the German Pandectists in the nineteenth century which led to a more dogmatic and strict approach.[10] This is evidenced by various provisions in the German Civil

[5] "Heritable security" is the name used in Scotland to mean security over immoveable property (land).
[6] D 46.3.43 (In all cases of release of obligations, ancillary obligations are also released, for example, cautionary obligations, hypothecs and pledges). (Translation based on that of Watson et al, 1985).
[7] M Kaser, *Das Römisches Privatrecht* 2nd edn, vol 1 (1971) 465. (Without a debt, no pledge could exist; on the extinction of the debt the pledge ended too.)
[8] M Habersack, "Die Akzessorietät – Strukturprinzip des europäischen Zivilrechte und eines künftigen europäischen Grundpfandrechts" 1997 *Juristen Zeitung* 857 at 860.
[9] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 121-125.
[10] Habersack, "Die Akzessorietät" at 860. See further, W Mincke, *Die Akzessorietät des Pfandrechts: Eine Untersuchung zur Pfandrechtskonstruktion in Theorie und Gesetzbung des 19 Jahrhunderts* (1987).

Code.[11] The accessoriness principle is recognised by the civil codes of other European civil law jurisdictions, such as France, Italy, the Netherlands and Spain in relation to both personal and real security.[12] It is also adopted by the new Chinese Property Code for real securities.[13]

A number of systems have, however, adopted so-called *abstract* real securities. These eschew accessoriness. The best known are the German *Grundschuld*[14] and the Swiss *Schuldbrief*,[15] but similar concepts have been introduced in some Eastern European countries such as Estonia, Hungary and Slovenia.[16] Abstract securities do not require an underlying debt or even a future debt for the real right to be created.[17] The idea is that the holder has the right to be paid a certain amount out of a certain piece of land.[18] A subsequent agreement of the parties is then needed to use the security to secure a particular debt. If that debt is later discharged, the security does not end, but becomes available to be used to secure another debt owed to another creditor. An advantage to that creditor is that he obtains the same rank as the original creditor. Proposals for a uniform heritable security in Europe – a *Euromortgage* – have recommended that this should be an abstract rather than an accessory right. This is discussed further below.[19]

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[11] For example, §§ 767 and 1153 *BGB.* But security for future sums is nevertheless permitted by §§ 1113(2) and 1204(2) *BGB.*

[12] See generally Habersack, "Die Akzessorietät" at 860-861; C von Bar and U Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (2004) 354-356. On Italy, see further G Alpa and V Zeno-Zencovich, *Italian Private Law* (2007) 147-148. On the Netherlands, see further J H M van Erp and L P W van Vliet, "Real and Personal Security" vol 6.4 Electronic Journal of Comparative Law, (December 2002), http://www.ejcl.org/64/art64-7.html and L P W van Vliet, "Mortgages on Immovables in Dutch Law" (unpublished conference paper, 2007). See also S van Erp, "DCFR and Property Law: the need for consistency and coherence" in R Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (2008) 249 at 255.

[13] L Chen, "The New Chinese Property Code: A Giant Step Forward" vol 11.2 Electronic Journal of Comparative Law, (September 2007), http://www.ejcl.org/112/art112-2.pdf.

[14] §§ 1191-1198 BGB, in particular § 1192(1). See F Baur, *Sachenrecht*, 17th edn (by J F Baur and R Stürner, 1999) 504-553 and J Wihelm, *Sachenrecht*, 2nd edn (2002) 582-624.

[15] §§ 842-874 *ZGB.* See P Tuor, *Das Schweizerische Zivilgesetzbuch*, 12th edn (by B Schnyder, J Schmid and A Rumo-Jungo, 2002) 1025-1038.

[16] See C Schmid and C Hertel, *Real Property Law and Procedure in the European Union: General Report* (2005) 85 and 89 available at http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/ProjectRealPropertyLaw.shtml.

[17] See, for example § 1192(1) *BGB.*

[18] § 1191(1) *BGB*.

[19] See below at K.

(2) Common law

In English common law the accessoriness principle is found in sources on personal security,[20] but less visible in treatments of real security.[21] Sir Roy Goode's *Commercial Law*[22] is illustrative of this. He describes a guarantee by one party of another's debts as "an accessory engagement".[23] While his counterpart treatment of real security identifies "the subsistence of an obligation"[24] as one of the pre-requisites for attachment of the security interest, the word "accessory" is nowhere to be found. It is also difficult or impossible to find when the leading English treatments of mortgage law are scoured.[25] The same result is discovered with North American sources.[26] The principle is hidden away in the American Law Institute's *Restatement of the Law: Property: Mortgages* in the section on the effect of transferring the secured obligation upon the mortgage.[27] Here there is a reference to a statement from the Supreme Court that the debt is the principal and the mortgage is the accessory[28] and a case which quotes a colourful analogy attributed to Professor Chester Smith of the University of Arizona: "The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow".[29]

It may be legitimately asked why the principle is less easy to track in common law works on real security. A reason which presents itself is that a mortgage in its conventional sense means a

[20] For example, J O'Donovan and J Phillips, *The Modern Contract of Guarantee* (2003) para 1-20.
[21] In the words of P Sparkes, *European Land Law* (2007) 399: "Discussion of mortgages in English law makes little reference to accessoriness in principle". A notable exception is F H Lawson and B Rudden, *The Law of Property*, 3rd edn (2002) 129, but the authors, who both held the Chair of Comparative Law at Oxford, may have been influenced by foreign material. Another is *Banque Financière de la Cité* [1999] 1 AC 221 at 236 per Lord Hoffmann.
[22] Sir Roy Goode, *Commercial Law*, 3rd edn (2004).
[23] Goode, *Commercial Law* 799.
[24] Goode, *Commercial Law* 632.
[25] For example, in W Clark et al, *Fisher and Lightwood's Law of Mortgage*, 12th edn (2006) the application of the principle is eventually found at para 49.2: "By releasing the debt the security for the debt is released." Reference is made to *Cowper v Green* (1841) 7 M & W 633. But the situation of the creditor freeing the debtor from the debt is hardly a usual one. See generally also E F Cousins, *The Law of Mortgages,* 2nd edn (2000).
[26] For example, B Ziff, *Principles of Property Law*, 4th edn (2006) ch 11.
[27] American Law Institute, *Restatement of Law Third: Property: Mortgages* (1996) § 5.4.
[28] *Carpenter v Longan* 83 US (16 Wall) 271, 21 L Ed 313 (1872).
[29] *Best Fertilizers of Arizona Inc v Burns* 571 P 2d 675 (Ariz Ct App 1977) at 676.

transfer of the property to the creditor.[30] Hence payment of the debt by itself could not extinguish the security. It had to be reconveyed.[31] Another reason, suggested by Sparkes, is the division in English law between the common law and equitable rules relating to mortgage.[32] At common law the remedy for failure to pay the whole debt on the due date is forfeiture of the land. Accessoriness is irrelevant. The creditor gets the land, no matter whether it is worth more or less than the debt. Under equity the creditor is only entitled to the amount owed and the debtor is entitled to redemption of the property on payment of that sum.[33]

(3) Mixed legal systems

As the property law of mixed legal systems tends to have been influenced heavily by civilian concepts, the accessoriness principle is readily recognised. In Louisiana, Professor Yiannopoulos states that real rights are divided into two categories: principal real rights and accessory real rights.[34] The former relate to the substance of the property and its use. In that category can be found, for example, ownership and servitudes. The second category are accessory to obligations in respect of which they guarantee payment and therefore relate to the pecuniary value of the property. Examples are mortgages, pledges and privileges. Similarly, a security over land (hypothec) in Quebec is recognised by the Civil Code there as being an accessory right.[35] The accessoriness principle is well developed in South African law too, it having been influenced by

[30] See G Watt, "The Eurohypothec and the English Mortgage" (2006) 13 *Maastricht Journal of European and Comparative Law* 173 at 182 and 188. At 182 he quotes Lord Macnaghten in *Samuel v Jarrah Timber and Wood Paving* [1904] AC 323 at 326: "no one, I am sure, by the light of nature ever understood an English mortgage of real estate." See now the Land Registration Act 2002 s 23 under which a mortgage of registered in land requires to be effected by means of a charge on the land. On this see Clark et al, *Fisher and Lightwood's Law of Mortgage* paras 5.1-5.7.

[31] Clark et al, *Fisher and Lightwood's Law of Mortgage* paras 47.51-47.55. Of course this is the position as regards the civil law security of *fiducia cum creditore.* See below at D(2)(b).

[32] Sparkes, *European Land Law* 399.

[33] *Seton v Slade* (1802) 7 Ves 265 at 273, 32 ER 108 at 111 per Lord Eldon LC.

[34] A Yiannopoulos, *Louisiana Civil Law Treatise: Property*, 4th edn (2001) 427. See also art 3282 *Louisiana Civil Code* (accessory nature of mortgages).

[35] Art 2661 Quebec Civil Code. See J B Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Québec* (1994) 21.

earlier Roman Dutch law. Voet describes the position in general terms: "Est autem hypotheca accessio quaedum principalis obligationis, sine qua regulariter haud subsistit."[36] It is a principle which is recognised both in case law[37] and in the works of modern writers on both personal and real security.[38] In contrast, Scottish treatment has been relatively limited.[39] Why this is so is unclear, but it is probably part of a wider picture of security law lacking study here.[40]

C. FIVE RULES

From an analysis of the authorities that do exist it is possible to state five rules arising from the accessoriness principle in its strict or strong form. First, there must be a present debt for the security to be constituted. Secondly, that debt must be specific. Thirdly, if the debt is transferred, the security follows it. Fourthly, if the debt is extinguished, so too is the security. Finally, there must be actual indebtedness for the security to be enforced. While these rules have been developed from a study of the Scottish authorities, they are similar to those which have been

[36] Voet, *Commentarius ad Pandectas* 20.1.18. (A hypothec is a kind of accession to a principal obligation and as a general rule has no existence at all without one.) (Translation based on that of Gane, 1956).

[37] For example, *African Life Property Holdings v Score Food Holdings* 1995 (2) SA 230 (A) at 238F per Nienaber JA: "Guaranteeing a non-existent debt is as pointless as multiplying by nought." See also *Kilburn v Estate Kilburn* 1931 AD 501 at 506 per Wessels ACJ (notarial bond); *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 259 per van Wyk JA (mortgage) and *Thienhaus v Metje & Ziegler Ltd* 1965 (3) SA 25 (A) at 44 per Wessels JA (mortgage).

[38] For example, C F Forsyth and J T Pretorius, *Caney's The Law of Suretyship*, 4th edn (2002) 37; T J Scott and S Scott, *Wille's Mortgage and Pledge in South Africa*, 3rd edn (1987) 4; K M Kritzinger, *Principles of the Law of Mortgage, Pledge and Lien* (1999) 8-9 and P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property*, 5th edn (2006) 358-359.

[39] See W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897) 2, 134 and 644-654; G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 and W M Gloag and R C Henderson, *The Law of Scotland*, 12th edn (by Lord Coulsfield and H L MacQueen, 2007) para 37.04.

[40] In the words of R Zimmermann and J A Dieckmann, "The Literature of Scots Private Law" (1997) 8 *Stell LR* 3 at 10: "The largest hole in modern Scottish literature gapes in the area of security".

recognised in other jurisdictions.[41] The rules are now considered in detail with particular regard to Scottish heritable securities, both past and present.

D. RULE ONE: THERE MUST BE A PRESENT DEBT

(1) General

The rule is a seemingly intuitive one. Without a debt there is nothing for a security to secure. As Sir Neil MacCormick has noted: "[R]ights by of [sic] real security ('mortgages', 'hypothecs', 'pledges' of movables etc) . . . presuppose some obligation owed by a debtor *D* to a creditor *C.*"[42] Similarly, Sheriff Andrew Bell has described a security without an underlying debt as "a mere husk, empty of any content".[43] Most of the Scottish authorities approach the issue from the end rather than the beginning, stating that discharge of the debt means extinction of the security.[44] An old and a modern decision, however, make the point. In the 1791 case of *Nisbet's Creditors v Robertson*[45] a heritable security had been granted by a merchant in Scotland to his supplier in Holland for the price of smuggled goods. The contract was obviously a *pactum illicitum* and therefore void. The debtor's other creditors sought reduction of the security. The Court of Session duly reduced it.

[41] See D Medicus, "Durchblick: Die Akzessorietät im Zivilrecht" 1971 *Juristiche Schulung* 497. He refers to rule 1 as "accessoriness of origin"; rule 3 as "accessoriness of competency" (the holder of the claim is also entitled to the security); rule 4 as "accessoriness of extinguishment" and rule 5 as "accessoriness of enforcement". He also mentions "accessoriness of scope": the scope of the security is determined by the scope of the claim. See also O Stöcker, "The Eurohypothec – Accessoriness as legal dogma?" in A Drewicz-Tulodziecka (ed), *Mortgage Bulletin 21: Basic Guidelines for a Eurohypothec* (Mortgage Credit Foundation, 2005) 39 at 46 available at www.ehipoteka.pl/corporate_site/content/download/646/2521/file/zeszyt_21.pdf.

[42] N MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007) 144. See too *Dempster v Nevay* (1750) Mor 10290 at 10293 where the court held that "a security cannot be without a subsisting debt which is secured" and *McCutcheon v McWilliam* (1876) 3 R 565 at 569 per Lord Curriehill: "The debt must be regarded as the principal, and the lands merely accessory as security". More recently, see *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 at 52 per Lord Hamilton. See also Voet, *Commentarius ad Pandectas* 20.1.18.

[43] *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125 at 129 per Sheriff Principal C G B Nicholson QC quoting Sheriff Bell who heard the case at first instance.

[44] See below at G.

[45] (1791) Bell's Octavo Cases 349, (1791) Mor 9554.

Lord President Campbell stated: "What better is this debt for being heritably secured? It can be no better; and the only question is whether it was good originally?"[46]

The more recent decision is *Trotter v Trotter*.[47] This was a divorce action. The husband appealed to the sheriff principal, arguing that the sheriff had made too high an award of financial provision to the wife. He contended that this was to the extent of around £7000. An order from the court was sought requiring the wife to grant to him a standard security over the former matrimonial home, now hers, for the sum. The appeal was refused. In his judgment, the Sheriff Principal (C G B Nicholson QC) stated:

> When this matter came before myself in the course of the appeal hearing I raised a different, and more fundamental, difficulty which I have in relation to an order for the granting of a standard security in the present case. That difficulty arises from the fact that the defender's pleadings do not contain any crave for payment of a capital sum to him by the pursuer . . . [My difficulty] arises from the fact that, as I understand it, any security, and in particular a standard security, must of necessity involve a debt or obligation owed by a debtor to a creditor. But, if no order is pronounced against the pursuer for payment by her of a capital sum to the defender, there is, as I see it, no way in which the relationship of debtor and creditor can be constituted with the consequence that there can be no debt which can properly be secured by the grant of a standard security.[48]

This lucid statement underlines the importance of the constitution of the principal debt before there can be a valid grant of security. The need for such a debt is set out in the legislation which governs standard securities, the Conveyancing and Feudal Reform (Scotland) Act 1970. Section

[46] (1791) Bell's Octavo Cases 349 at 355.
[47] 2001 SLT (Sh Ct) 42. For discussion, see K G C Reid and G L Gretton, *Conveyancing 2001* (2002) 90-92.
[48] 2001 SLT (Sh Ct) 42 at 47.

9(3) of the 1970 Act provides that "A grant of any right over land or a real right in land *for the purpose of* securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security" (my emphasis). Thus, the reason for the security is to secure a debt. Without a debt it has no purpose.

The 1970 Act provides for two forms of standard security.[49] In Form A both the debt and the security are set out. It is normally used in residential transactions. In contrast, in Form B only the security element is present. It is more commonly used for commercial property. Nevertheless, the need for a debt is made clear by the wording of Form B which requires specification of the nature of the debt and the instrument constituting it.[50] The "debt" does not have to be monetary. The definition includes an obligation *ad factum praestandum.*[51]

It is worth stating that although the debtor is normally the owner of the subject matter of the security, this does not necessarily have to be the case. It is competent both in Scotland and many other jurisdictions for a third party to grant the security.[52] The point is exemplified by *Smith v Bank of Scotland*[53] and its subsequent stream of case law involving (usually) wives granting standard securities over their share of the matrimonial home in respect of the business debts of their husbands.[54] Thus while the accessoriness principle requires that the creditor in the debt and the creditor in the security are one and the same, it does not require that debtor and the owner of the

[49] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2) and Sch 2.
[50] 1970 Act Sch 2.
[51] 1970 Act s 9(8)(c). For discussion, see Gretton, "The Concept of Security" 128-129 and D J Cusine and R Rennie, *Standard Securities*, 2nd edn (2002) 28.
[52] Cusine and Rennie, *Standard Securities* para 3.07; D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual*, 7th edn (2004) para 21.8. See also, for example, art 2808 *Codice civile* (Italy); art 3295 *Louisiana Civil Code* and art 2681 *Quebec Civil Code*.
[53] 1997 SC (HL) 111.
[54] G L Gretton and K G C Reid, *Conveyancing*, 3rd edn (2004) para 1-11.

security subjects are identical.[55] The law on third party security is rather undeveloped in Scotland, but accessoriness is important to it. The effect is that a defence available to the debtor, such as that the debt does not actually exist or is voidable because of fraud, will be available to the security provider too.[56]

A fundamental issue is whether the debt must be in existence at the time that the security is constituted, in other words be a *present* debt. If it is possible for *future* debts, that is to say debts contracted after the security, to be covered then the accessoriness principle is weakened. To consider this fully necessitates a historical study.

(2) The old forms of heritable security

(a) Pre 1696

The history of heritable security in Scotland has never been authoritatively traced.[57] In medieval times the law on security made little distinction between moveable property and land. Both were pledged.[58] The old Scottish word for pledge was *wad.* The pledge of land by Stair's time had developed into the *wadset*.[59] The wadset required that the land be conveyed to the creditor, who, under the feudal system, had to be infeft.[60] The debtor was known as the *reverser* and his right to a reconveyance of the land upon payment of the debt was declared by statute in 1469 to be real and thus enforceable against singular successors of the creditor.[61] Following the establishment of the Register of Sasines in 1617 there had to be registration to achieve real effect. Where,

[55] R G Anderson, *Assignation* (2008) para 2-11.
[56] Analogous authority exists in respect of personal security. See Gloag and Irvine, *Rights in Security* 648-649.
[57] Reid, *Property* para 112 (G L Gretton).
[58] A J M Steven, *Pledge and Lien* (2008) paras 3-19-3-21.
[59] Stair, *Inst* II.10. See also Bankton, *Inst* II.10.4-42.
[60] Stair, *Inst* II.10.2. To be infeft, one had to be recognised by the feudal superior by "taking entry". See Reid, *Property* para 93 (G L Gretton).
[61] Reversion Act 1469 (c 3) (APS ii, 94). See Anderson, *Assignation* para 10-51.

however, the deed in favour of the creditor stated expressly that the land was being conveyed in security the debtor retained ownership and no reconveyance was required.[62]

The alternative form of early security which could be granted was the *annualrent*. Here the creditor was once again infeft in the land, but with the right to an annual payment from it.[63] Ownership of the land, however, remained with the debtor.[64] Originally, there was no personal obligation by the debtor to repay. This meant that the debtor could not discharge the annualrent by payment. Shortly before the Reformation it became practice to add a personal obligation and redemption clause, along with a conveyance of the land itself in security.[65] The annualrent then became known as the *heritable bond.* Despite the fact that the deed bore to convey the land, ownership remained with the debtor.[66]

The practice developed for both the wadset and the annualrent of having clauses declaring that all debts owed by the debtor had to be repaid before the security could be redeemed.[67] Towards the end of the seventeenth century it became in Bell's words, "exceedingly common with country gentlemen whose affairs were in confusion"[68] to convey their land to a trustee with instructions to pay various debts or to act as cautioner. The land then acted as security for all debts present and future. This put the trustee in a powerful position.

[62] Stair, *Inst* II.10.1.
[63] Bell, *Prin* § 908; Reid, *Property* para 112 (G L Gretton).
[64] Erskine, *Inst* II.8.31-32 and 34.
[65] Bell, *Prin* § 909.
[66] See W Ross, *Lectures on the Practice of the Law of Scotland in Two Volumes*, 2nd edn (1822) II, 389; Hume, *Lectures* IV, 394.
[67] Bell, *Prin* § 911.
[68] Bell, *Commentaries* II, 218. See also *Pickering v Smith, Wright & Gray* (1788) Mor 1155.

(b) 1696-1970

The legislature viewed the effect of these "all debts" clauses as giving an unfair preference to the trustee if and when the debtor became insolvent. The Bankruptcy Act 1696 was therefore passed. It provided that "any disposition or other right that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infeftment following on the said disposition or right".[69] This Act was not aimed at *uncertain* debts, but at *future* debts.[70] What mattered was whether the debt was constituted after registration of the security. Where it was agreed to lend a specific sum before registration but the actual advance of money did not take place until afterwards, the Act did not apply.[71]

By the late eighteenth century the wadset and the heritable bond had become outmoded and were being replaced by the new bond and disposition in security. This in essence was a more sophisticated version of the older forms.[72] As its name suggests, it contained both the personal obligation and the grant of security in the same document.[73] Like its predecessor the heritable bond and despite the word "disposition", the bond and disposition in security only gave the creditor a subordinate real right. The debtor remained owner.[74] In the nineteenth century it

[69] Bankruptcy Act 1696 (c 5) (APS x, 33). See, for example, *Dempster v Nevay* (1750) Mor 10290.
[70] *Newnham, Everett & Co v Stuart* (1794) 3 Pat 345 at 347 per Lord President Campbell.
[71] *Fulton v Lead* (1826) 4 S 740.
[72] Reid, *Property* para 112 (G L Gretton). For a modern account of the bond and disposition in security, see W M Gordon, *Scottish Land Law,* 2nd edn (1999) paras 20-04-20-83.
[73] For a style, see J Burns, *Conveyancing Practice According to the Law of Scotland*, 4th edn (by F MacRitchie, 1957) 451-452.
[74] Bell, *Prin* § 909; *Campbell v Bertram* (1865) 4 M 23 at 27-29 per Lord Curriehill; Gretton, "Radical Rights and Radical Wrongs" at 204.

became regulated by statute.[75] The bond and disposition in security, like the earlier securities, was subject to the 1696 Act.[76]

To the rule that the debt must be in existence at the time the security was constituted, there were two exceptions. The first was the bond of cash credit and disposition in security.[77] It was the product of legislation first passed in 1793[78] and regulated latterly by the Debts Securities (Scotland) Act 1856. The reason for the statutory innovation was that the rules against a security for future advances (and uncertain sums, discussed below[79]) were felt to be inconvenient to commerce.[80] Security for a cash credit i.e. a bank account[81] was now permitted, provided that a maximum amount was stated in the constitutive deed. This amount could not exceed the value of the principal sum of the credit plus three years of interest at the rate of five per cent per annum.[82] The effect was that advances made after the registration of security were not subject to the 1696 Act.

The second exception was the *ex facie* absolute disposition,[83] which resembled the Roman *fiducia cum creditore.*[84] Here the land was transferred in absolute terms to the creditor, who became owner. There was, however, an unrecorded back letter which stated that the transfer was truly in

[75] Originally by the Heritable Securities (Scotland) Act 1845 and latterly by the Titles to Land Consolidation (Scotland) Act 1868, the Heritable Securities (Scotland) Act 1894 and the Conveyancing (Scotland) Act 1924.
[76] Gloag and Irvine, *Rights in Security* 69-73.
[77] See Bell, Commentaries I, 715; II, 220-226; Gloag and Irvine, *Rights in Security* 70-71; Gordon, *Scottish Land Law* paras 20-84-20-85.
[78] 33 Geo III, c 74 s 12. See subsequently 54 Geo III c 137 s 14.
[79] See below at E(2).
[80] *Campbell's Tr v De Lisle's Exrs* (1870) 9 M 252 at 256 per Lord Justice-Clerk Moncreiff. According to Bell, *Commentaries* II, 221, "[t]he greatest lawyers of the time were consulted" in relation to the problem.
[81] According to the Halliday Committee, *Conveyancing Legislation and Practice* Cmnd 3118 (1964) para 104 bankers regarded the need for the security to relate to a particular account to be "troublesome". In fact, the legislation seemed to permit the security to cover more than one account. See the Debts Securities (Scotland) Act 1856 s 7.
[82] Debts Securities (Scotland) Act 1856 s 7.
[83] See Bell, *Commentaries* II, 714; Bell, *Prin* § 912; A M Bell, *Lectures on Conveyancing* vol 2, 1173-1175; Gloag and Irvine, *Rights in Security* ch 4; Gordon, *Scottish Land Law* paras 20-86-20-102.
[84] See, for example, J A C Thomas, *Textbook of Roman Law* (1976) 329-330.

security. It set out also the debt secured. This could be any obligation. It was competent and typical for there to be a requirement that all sums owed be repaid before the creditor would reconvey the land to the debtor.[85] The *ex facie* absolute disposition was not a true real security because the creditor had ownership rather than a subordinate real right.[86] This left the debtor in a vulnerable position, as the creditor, in George Joseph Bell's words, had "the power to convey his estate from him for ever".[87] For this reason, according to Alexander Montgomerie Bell, writing in the second half of the nineteenth century, the security was little used other than where the creditor was a bank.[88] By the 1960s, however, with private money lending being replaced largely by institutional lending, it had become the typical form of heritable security because of its ability to cover all sums. The accessoriness principle had not only be weakened. It had been removed because the *ex facie* absolute disposition was not a true security.

(3) The standard security

The Halliday Committee considered the reform of heritable security between 1964 and 1966. It liked the fact that the *ex facie* absolute disposition could secure all sums, but not that it removed ownership from the debtor.[89] The bond and disposition in security and the bond of cash credit and disposition in security were also considered to have their problems.[90] The Committee therefore proposed the abolition of the existing forms of security which a debtor could grant[91] and their

[85] *Riddel v Creditors of Niblie* (1782) Mor 1154; *Nelson v Gordon* (1874) 1 R 1093; *Scottish & Newcastle Breweries Ltd v Liquidator of Rathburne Hotel Co Ltd* 1970 SC 215 at 217-218 per Lord Fraser.
[86] G L Gretton, "Radical Rights and Radical Wrongs" 1986 *JR* 51 and 192; *Sexton v Coia* 2004 GWD 17-376; 2004 GWD 38-781, discussed in K G C Reid and G L Gretton, *Conveyancing 2004* (2005) 117-121.
[87] Bell, *Commentaries* I, 714. Of course this would be to breach the terms of the back bond, but enforcing the back letter would be pointless against an insolvent creditor or one who had absconded.
[88] A M Bell, *Lectures in Conveyancing*, 3rd edn (1882), vol 2, 1175.
[89] *Conveyancing Legislation and Practice* para 105. This meant that the value of the Register of Sasines as a public record of landownership was reduced.
[90] *Conveyancing Legislation and Practice* paras 103 and 104.
[91] The pecuniary real burden which was *reserved* rather than granted was no longer used in practice but formally survived until its abolition by the Title Conditions (Scotland) Act 2003 s 117.

replacement with a new "statutory security".[92] This was given effect by the Conveyancing and Feudal Reform (Scotland) Act 1970,[93] which introduced the standard security. Like the bond and disposition in security, the standard security confers upon the creditor a subordinate real right.[94]

The debt which a standard security may secure includes "any obligation due, or which *will or may become* due, to repay or pay money".[95] The prohibition in the Bankruptcy Act 1696 against security for debts contracted after the registration of a heritable security was excluded.[96] The Halliday Committee considered that the general rules of the law of bankruptcy provided enough protection for other creditors.[97] Presumably it had in mind the rules on unfair preferences.

Thus a standard security may secure future debts. For example, in 2008 the Bearsden Bank agrees to provide Anne with loan finance. In return she must grant the bank a standard security in respect of all sums advanced. The security is duly granted and registered in the Land Register.[98] But no money is actually lent to Anne until 2010. The standard security nevertheless came into existence in 2008. Because it is capable of securing future debts, the accessoriness principle is suspended,[99] or, perhaps more accurately, modified. Rather than securing an actual debt, it secures a possible debt. It is accessory *in posse* rather than *in esse.*[100] Accessory securities elsewhere, for example

[92] *Conveyancing Legislation and Practice* paras 119-128.
[93] See J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970*, 2nd edn (1977) paras 1-20-1-30.
[94] Conveyancing and Feudal Reform (Scotland) Act 1970 s 11, as amended by the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 76 and Sch 12 para 30. The original wording left room for doubt on the nature of the right conferred.
[95] 1970 Act s 9(8)(c).
[96] 1970 Act s 9(6). The 1696 Act was later repealed by the Bankruptcy (Scotland) Act 1985 s 75 and Sch 8.
[97] *Conveyancing Legislation and Practice* para 119.
[98] Land Registration (Scotland) Act 1979 s 2(3)(i).
[99] See the South African case of *Kilburn v Estate Kilburn* 1931 AD 501 at 506 per Wessels ACJ.
[100] Reid and Gretton, *Conveyancing 2001* 91.

the Dutch *hypotheek* and the mortgage in Louisiana, are likewise capable of securing future debts.[101]

A useful parallel might be drawn with two other subordinate real rights in land law, the servitude and the real burden.[102] These require in principle a benefited property and a burdened property.[103] Take, however, the following example. Donna owns a piece of land. She builds two houses on it. She registers a deed of conditions in the Land Register creating servitudes and real burdens enforceable by the owner of each house against the other house. Until, however, ownership of the land is divided when Donna sells the houses, the rights cannot be enforced. They have a suspended form of existence, but it is accepted that they may be validly created by means of the deed of conditions. For servitudes, any doubt has recently been removed by statute.[104]

[101] Art 3:231 *BW*; art 3298 Louisiana Civil Code.
[102] For accuracy, only negative real burdens are 'real' in the sense of enforceable against the world, but both affirmative and negative real burdens are enforceable by singular successors. See the Title Conditions (Scotland) Act 2003 s 9.
[103] Except for personal real burdens, where there is no benefited property. See the 2003 Act ss 38-48 and R R M Paisley, "Personal Real Burdens" 2005 *JR* 2001.
[104] 2003 Act s 75(2).

E. RULE TWO: THERE MUST BE A SPECIFIC DEBT

(1) General

In their treatise on rights in security, Gloag and Irvine write:

> [A right in security] is *always necessarily accessory* in nature, being constituted for the merely subsidiary purpose of enabling the person entitled to it to make sure of receiving *a certain sum* which is due to him, if not otherwise, then at all events by means of the right in question [my emphasis].[105]

The need for a certain sum gives specificity to the security. The liability of the property (or cautioner) to pay the debt is limited. In the case of real security, other creditors can ascertain the extent to which the asset is encumbered and determine if a second or other subsequent security in their favour is viable. To ascertain the extent to which the Scottish law of heritable security adheres to this principle, it is necessary once more to look at the matter historically.

(2) The old forms of heritable security

The law took some time to develop. It did so originally in the context of the *pecuniary real burden.* This form of security can be traced back at least as far as Stair.[106] Unlike the wadset and annualrent, it was not granted by the debtor. It was *reserved*, normally by the creditor, in a conveyance. This was often done where only part of the purchase price had been paid and the burden secured the remainder.[107] However, in the early eighteenth century a practice developed

[105] Gloag and Irvine, *Rights in Security* 2. This is cited in *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 at 52 per Lord Hamilton.
[106] Stair, *Inst* II.3.54-55.
[107] Bell, *Lectures on Conveyancing,* vol 2, 1151.

of land being conveyed by the *debtor* under reservation of a burden securing all his debts.[108] The grantee tended to be another family member who had agreed to pay the creditors in due course.[109] Bell described this as "contrary to the principles of the common law",[110] but in a number of cases the arrangement was upheld by the Court of Session.[111] The House of Lords, however, decided it was invalid,[112] on the basis that "no perpetual unknown encumbrance ought to be created on land".[113] Erskine took the view, that the problem with a purported security for all debts was that the *identity* of the creditors could not be determined from the register.[114] But it was the wider view of Bell, "that securities granted for indefinite sums are unavailable"[115] that would prevail. Both the debt and the creditor's name had to be specified.[116] This effectively prevented the real burden from securing future debts. The rule against indefinite debts itself embedded itself generally with regard to heritable security.

Two cases are illustrative. In *Pickering v Smith, Wright and Gray*[117] James King granted an heritable bond to the defenders, who were bankers, for £2500. The bond was registered. By means of an unregistered deed the defenders stated that they had not yet advanced the £2500, but that the bond was intended as security for payments past and future made to King under a cash account which they had opened in his favour. King subsequently became insolvent and the bond was challenged under the 1696 Act. The defenders argued that the bond was valid. Their submission

[108] This bears a similarity to the practice which developed for wadsets and annualrents, discussed above at D(2)(a).
[109] For a later example, see *McDonald v Place* (1821) Hume 544.
[110] Bell, *Commentaries* II, 218.
[111] For example, *Creditors of Coxton v Duff* (1719) reported in Henry Home, Lord Kames, *The decisions of the Court of Session, from its first institution to the present time. Abridged, and digested under proper heads, in form of a Dictionary*, 2nd edn (1791) vol 2, 66-67.
[112] *Lovat v Lovat* (1721) Rob 355; *Duff v Gordon* (1721) Rob 372. The rule was accepted by the Court of Session in *Creditors of McLellan*, July 1734, unreported. See Bell, *Commentaries* I, 730.
[113] *Newnham, Everett & Co v Stuart* (1794) 3 Pat 345 at 347 per Lord President Campbell.
[114] Erskine, *Inst* II.3.50.
[115] Bell, *Commentaries* II, 218. See also Bell, *Commentaries* I, 730.
[116] *Stenhouse v Innes & Black* (1765) Mor 10264.
[117] (1788) Mor 1155.

was that the maximum amount secured could be seen from the register and therefore there was no prejudice to other creditors. The Court of Session held, however, that the bond was only good for the amount advanced prior to registration. It was observed by the judges:

> The loan of money was essential to the constitution of the right in question. But it is absurd to conceive this right continually fluctuating between existence and non existence, according as the money, during the currency of the cash account should have been paid repaid and paid again.[118]

In their view, a security for a debt which was not fixed was impermissible, even where the maximum extent of the security was specified.

The second decision is *Newnham, Everett & Co v Stuart,*[119] which reached the House of Lords. Robert Stein granted James Stein an heritable bond for £12,000. The latter sought credit for his business from Newnham, Everett & Co, who were bankers. They required the bond to be assigned to them. No definite sum was specified in the deed of transfer, but it was provided that James Stein was entitled to a credit account. The bankers advanced substantial amounts before the transfer of the bond was registered and a further sum of £16,253. James Stein became insolvent. Unsurprisingly, the bankers' security was held to be invalid as regards the £16,253 because of the 1696 Act. Additionally, it was found to be ineffective in securing the earlier sums because it was an indefinite security.

[118] (1788) Mor 1155 at 1156.
[119] (1794) 3 Pat 345.

The rule that there could not be a security for an indefinite sum was accepted to apply to the bond and disposition in security in the same way as for its predecessors.[120] In the words of Lord Rutherfurd Clark: "Nothing can be more fixed in our law that a real security cannot be given for an indefinite sum of money".[121]

The bond of cash credit and disposition in security and the *ex facie* absolute disposition once again did not follow the specific debt rule. In the latter no maximum amount had to be specified. As was seen above, however, in the former the requirement for a maximum amount meant that there was not a complete repudiation of specificity. Heritable securities for a fluctuating debt, but with a requirement that the maximum amount secured must be stated exist in a number of modern legal systems.[122] These include the Dutch *bankhypotheek,*[123] the French *hypothèque*,[124] the German *Höchstbetraghypothek*[125] and the South African covering bond.[126] Such securities emphasise a distinction between the *actual debt* (the sum owed by the debtor) and the *secured sum* (the maximum amount which can be secured). It is the second which is the most important to third parties who seek a subsequent security over the property. This is because it lets them know the surplus value, commonly referred to as the remaining *equity*.

[120] *Tod v Dunlop* (1838) 1 D 231; Bell, *Lectures on Conveyancing,* vol 2, 1159; Gloag and Irvine, *Rights in Security* 67; A Menzies, *Conveyancing according to the Law of Scotland* (1900) 870.
[121] *Smith Sligo v Dunlop & Co* (1885) 12 R 907 at 915.
[122] See generally C G van der Merwe and E Dirix, "A Comparative Law Review of Covering Bonds and Mortgages Securing Fluctuating Debts" 1997 *Stell LR* 17.
[123] Art 3:260 *BW.*
[124] Art 2422 *Code civil*.
[125] § 1190 *BGB.*
[126] See G Pienaar and A J M Steven, "Rights in Security" in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 758 at 771-772. But Scottish bankers informed the Halliday Committee that the need for a maximum amount "introduces an element of rigidity which is often inconvenient." See *Conveyancing Legislation and Practice* para 104. The expression "they would say that" comes to mind.

(3) The standard security

The 1970 Act also disapplied the common law requirement for the security to be for a specific amount,[127] it being viewed by the Halliday Committee as "unduly stringent and often quite unsuited to modern conditions".[128] How "modern conditions" differ from older conditions is not explained. The committee merely notes that the *ex facie* absolute disposition achieved this "without serious prejudice"[129] and English law apparently has no such restriction.[130] The result is that the standard security does not obey the rule that a security must be for a specific debt. Standard securities in practice are normally granted for "all sums".[131] In other words, the total indebtedness to the creditor is secured. In the United States of America, this type of provision is referred to as a *dragnet, anaconda, cross security* or *omnibus clause.*[132]

F. RULE THREE: THE SECURITY FOLLOWS THE DEBT

(1) Introduction

Where the debt is assigned, the general rule is that any accessory rights are automatically transferred.[133] This may be referred to by the maxim *accessorium sequitur principale* (the accessory follows the principal).[134] For example, where a debt is secured by a bond of caution, the

[127] 1970 Act s 9(6).
[128] *Conveyancing Legislation and Practice* para 119.
[129] *Conveyancing Legislation and Practice* para 119.
[130] On the modern English law, see the Land Registration Act 2002 s 49 and K Gray and S F Gray, *Elements of Land Law*, 4th edn (2005) paras 15.254-15.256.
[131] Gretton and Reid, *Conveyancing* para 19-09.
[132] Van der Merwe and Dirix, "A Comparative Law Review of Covering Bonds and Mortgages Securing Fluctuating Debts" at 21. *Anaconda* suggests the debtor being suffocated by the debts owed to the creditor from whatever cause in the same way as the snake suffocates its prey.
[133] Stair, *Inst* III.i.17; Bankton, *Inst* III.1.7; Erskine, *Inst* III.v.8; Anderson, *Assignation* para 2-01; Steven, *Pledge and Lien* para 4-18.
[134] See W Bell, *Dictionary and Digest of the Law of Scotland*, 7th edn (1890) sv '*Accessorium sequitur principale*'; *Trayner's Latin Maxims,* 4th edn (reprinted with an introduction by A G M Duncan, 1993) 8. See also *Comments by Scottish Law Commission on Consultation Paper by DTI on Security over Moveable Property in Scotland (November 1994)* (1995) 43. In fact the maxim can be used more widely to express the accessoriness principle in general.

cautioner remains liable where the debt is assigned.[135] The rule presents particular challenges for heritable security which depends on registration.[136] The transfer of a debt requires mere intimation to the creditor.[137] Take the following example.[138] Robert borrows £100,000 from Suzanne and grants a standard security in her favour which is duly registered. Suzanne subsequently assigns the debt to the Tom. The assignation of the debt is intimated to Robert on Monday, but the assignation of the security is not registered until the Friday. Does the *accessorium sequitur principale* rule mean that the security actually transfers on the Monday? The answer is important if Suzanne acts fraudulently and assigns the debt to Una as well as Tom. Is intimating first sufficient or is registration also required for Tom to prevail against Una? The *accessorium sequitur principale* rule is also problematic where the assignation of a standard security is registered but there is no intimation to the debtor. Before considering what the answers may be as regards a standard security, consideration is given to the rule in the context of the earlier heritable securities.

(2) The old forms of heritable security

The rule that the security followed the debt clearly did not apply to the older forms of security which involved the land being *conveyed* to the creditor, notably the wadset if the deed did not disclose that the transfer was in security and the *ex facie* absolute disposition. As regards those which were *true* securities, the position varied.

[135] *Lyell v Christie* (1823) 2 S 288 (NE 253).
[136] But see *Halifax plc v Gorman's Tr* 2000 SLT 1409, criticised by G L Gretton, "The Integrity of Property Law and the Property Registers" 2001 SLT (News) 135.
[137] *Drummond v Muschet* (1492) 1 Balfour 69, Mor 843; *A v B* (1540) Mor 843; Stair, *Inst* III.1.6; Reid, *Property* para 656; Anderson, *Assignation* ch 6. See also P Nienaber and G Gretton, "Assignation/Cession" in Zimmermann, Visser and Reid, *Mixed Legal Systems in Comparative Perspective* 787 at 792-804.
[138] For this and other problem cases, see Anderson, *Assignation* para 2-12.

The pecuniary real burden at common law was transferable by assignation of the secured debt and intimation to the debtor.[139] Registration of the assignation, although possible,[140] was not required. There are examples of the assignation expressly referring to the real burden as well as the debt.[141] Again, however, this was not mandatory. Bell wrote that: "A simple assignation intimated to the holder of the burdened infeftment is sufficient to transfer the right of the debt, and is followed by the real lien as an accessory".[142] The case of *Baillie v Laidlaw*,[143] where the assignation made no mention of the real burden confirms this. The pecuniary real burden therefore subscribed to the *accessorium sequitur principale* rule.

The law was changed by statute in 1874,[144] presumably because of a concern about fraud.[145] Recording of the assignation in the Register of Sasines was provided to be mandatory to make the deed effective against third parties.[146] Intimation was declared to be unnecessary where the assignation was recorded. As shall be seen, like other legislation on the assignation of heritable securities, there is silence on the question of the transfer of the debt. But it is clear that the statutory rule is a departure from *accessorium sequitur principale.* Assignation of the debt cannot itself transfer the burden.

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[139] *Lamont v Lamont's Creditors* (1789) 3 Ross LC 35; *Miller v Brown* (1820) Hume 540; *Baillie v Laidlaw* (1821) 1 S 108; Hume, *Lectures* IV, 405; Bell, *Commentaries* II, 731; Bell, *Lectures on Conveyancing* vol 2, 1154; Gloag and Irvine, *Rights in Security* 175; J P Wood, *Lectures on Conveyancing* (1903) 491.

[140] *Miller v Brown* (1820) Hume 540, 3 Ross LC 29.

[141] *Lamont v Lamont's Creditors* (1789) 3 Ross LC 35; *Miller v Brown* (1820) Hume 540, 3 Ross LC 29.

[142] Bell, *Commentaries* II, 731. "Real lien" was an alternative term for pecuniary real burden. See Steven, *Pledge and Lien* para 9-06.

[143] (1821) 1 S 108.

[144] Conveyancing (Scotland) Act 1874 s 30.

[145] George Ross, commenting on *Miller v Brown* (1820) 3 Ross LC 29, wrote in his report at 37: "It has been doubted whether the recording be essential, and perhaps without a special enactment it is not; but if so, it certainly ought to be required. Without such a publication a purchaser has no means of securing himself against the combined fraud of the seller and the creditor in the real burden".

[146] The wording of the provision is open to criticism, for either the assignation transfers the right or it does not. There cannot be a transfer simply between the parties, as opposed to a transfer having real effect. See, for example, K G C Reid, "Ownership on Registration" 1985 SLT (News) 280.

The starting point for the heritable bond, which developed later into the bond and disposition in security, is the 1626 decision in *Anstruther v Black*.[147] The creditor in a bond which had been recorded in the Register of Sasines assigned the secured debt. The assignation was intimated to the debtor. But there was no express transfer of the bond nor was the assignation recorded. This was held to be ineffective against a creditor of the cedent who adjudged the debt.[148] The court expressed the opinion that if the bond itself had not been recorded, the assignation of the debt would have been valid. Lord Curriehill, commenting on the decision, said that after recording, the debt "has been rendered heritable by being secured over land"[149] and it and the land are now "inseparably connected".[150] Prior to 1845 the bond and disposition in security and its predecessor, the heritable bond, were transferred by a deed known as a disposition and assignation, in terms of which the debt and bond were assigned and the relevant land conveyed.[151] Lord Curriehill's view was that the debt could only be assigned by a deed conveying both it and the land. His logic was surely that because both debt and security were set out together in the same public registered document they could only be transferred together. Thus registration, in implementing the publicity principle of property law, means that *accessorium sequitur principale* is not applied.

Walter Ross sets out the normal form of deed used to transfer a heritable bond where the creditor has not yet registered the security. The deed first transfers the bond and then the debt. Noting that the debt is accessory to the bond and not the other way round, he criticises the structure of

[147] (1626) Mor 829. See Gloag and Irvine, *Rights in Security* 123.
[148] On adjudication, see G L Gretton, *The Law of Inhibition and Adjudication*, 2nd edn (1996) ch 13. It will be replaced by land attachment when the relevant provisions of the Bankruptcy and Diligence etc (Scotland) Act 2007 come into force.
[149] *McCutcheon v McWilliam* (1876) 3 R 565 at 569. See also Reid, *Property* para 14(4).
[150] *McCutcheon v McWilliam* (1876) 3 R 565 at 569.
[151] It must be remembered, however, that while the land was "conveyed" the creditor did not have ownership, merely a subordinate real right.

the deed.[152] Ross considers that the assignation of an unrecorded bond followed by intimation transfers the debt, but that recording is needed to vest the assignee in the security.[153] He indicates that recording removes the requirement to intimate. The heritable bond therefore did not obey the *accessorium sequitur principale* rule.

The Heritable Securities (Scotland) Act 1845 provided a statutory form for assignation of bonds and dispositions in security.[154] It was not mandatory, but when it was used the wording required to be "as nearly as may be"[155] in the terms of the form. Those terms included an assignation, disposition and conveyance by the granter of (1) the bond and disposition in security and (2) the land itself.[156] No mention was made of the debt itself, presumably because it was encompassed by the "bond". The assignation had to be recorded in the Register of Sasines for the security to be transferred.[157] The provisions in the 1845 Act were repealed and substantially re-enacted by the Title to Lands Consolidation (Scotland) Act 1868.[158] The Conveyancing (Scotland) Act 1924 provided for a shorter form which provided merely for the assignation of the security.[159] There was no disposition of the land. But once again the assignation did not take effect until recorded. It is doubtful that the removal of the disposition of the land changes the rule that recording was necessary to transfer the debt itself.[160] What is certain is that even if the debt can pass by mere

[152] Ross, *Lectures* II, 385-386.
[153] Ross, *Lectures* II, 386-387.
[154] Heritable Securities (Scotland) Act 1845 s 1 and Sch 1. There is an error in Sch 1. It refers to "a Bond or [sic] Disposition in Security". Gloag and Irvine, *Rights in Security* 124-125 in their treatment of assignation of bonds and dispositions in security refer erroneously to the Heritable Securities (Scotland) Act 1847, which was a separate piece of legislation.
[155] Heritable Securities (Scotland) Act 1845 s 1.
[156] Heritable Securities (Scotland) Act 1845 Sch 1.
[157] Heritable Securities (Scotland) Act 1845 ss 1 and 6.
[158] Titles to Land Consolidation (Scotland) Act 1868 s 124 and Sch GG.
[159] Conveyancing (Scotland) Act 1924 s 28 and Sch K Form 1.
[160] This is the view of Gloag and Irvine, *Rights in Security* 124.

intimation, the security cannot do so without recording. The *accessorium sequitur principale* rule once again does not apply. Rather, it is essentially the reverse. The debt follows the security.

(3) The standard security

(a) General

Assignation of standard securities is dealt with by section 14 of the Conveyancing and Feudal Reform (Scotland) Act 1970. This provides that recording in the Register of Sasines is necessary to vest the security in the assignee where the statutory forms of assignation set out in Schedule 4 to the Act are used.[161] Whilst the wording of section 14 is permissive – it states that a standard security "may" be transferred using the forms in Schedule 4 – it is not clear how it may be otherwise transferred and in practice this is the only method used.[162] The drafting of section 14 can be seen to be heavily influenced by the provisions for assignation of a bond and disposition in security discussed above. It can be immediately concluded that the *accessorium sequitur principale* rule is once again excluded. There is a difficulty, however, that is overlooked by the legislation. With the bond and disposition in security, the debt and security were always constituted in the same deed. This is not the case with the standard security because Form B standard securities are pure grants of security. The debt is constituted elsewhere. Before addressing this difficulty, it is necessary to say a little more about the forms used.

(b) Forms

Schedule 4 of the 1970 Act, mentioned above, provides for two forms of assignation. These are regrettably called Form A and Form B opening up the possibility for confusion with the Form A and

[161] For standard securities registered in the Land Register the assignation must be registered there. See the Land Registration (Scotland) Act 1979 ss 2(4)(a) and 29(2).
[162] Compare here the Bankruptcy and Diligence etc (Scotland) Act 2007 s 42(1) and (3) (not yet in force) (assignation of floating charges).

Form B of Schedule 2 used for constituting the standard security in the first place.[163] Form A is a stand-alone deed. Form B is used to endorse the assignation upon the deed which created the standard security. Either form can be used for either type of standard security, leading to four possibilities.

Possibility (1) is that a Form A standard security is assigned by a Form A assignation. The assignation should be in duplicate. One copy is intimated to the debtor. The other is registered in the Register of Sasines or Land Register as appropriate.[164] Possibility (2) is that a Form A standard security is assigned by a Form B assignation. Here the standard security now endorsed is re-registered and a separate instrument of intimation requires to be drawn up to inform the debtor. Possibility (3) is that a Form B standard security is assigned by a Form A assignation. The assignation is registered. The debt will need to be expressly assigned also, a point made clear by *Watson v Bogue (No 1).*[165] This may either be done in a separate deed or by adapting the wording of the Form A assignation style.[166] In either case there will require to be intimation to the debtor. Possibility (4) is that a Form B standard security is assigned by a Form B assignation. The standard security now endorsed will require to be re-registered. There will require once again to be assignation of the debt, either by adaptation of the endorsement or by separate deed, followed by intimation. The number of possibilities here create a level of complexity which makes error in achieving an effective assignation of both debt and security more likely.

[163] See generally Anderson, *Assignation* para 2-09.
[164] This depends on where the standard security itself is registered. Eventually, once all land is transferred to the Land Register all standard securities will be registered there.
[165] 2000 SLT (Sh Ct) 125. Otherwise, the assignation of the security will be worthless.
[166] 1970 Act Sch 4 Note 2. See *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125 at 129 per Sheriff Principal C G B Nicholson QC.

(c) Effective date of transfer

As discussed above, the fact that both debt and security are to be transferred causes difficulties. In particular the consequences of only intimating the assignation and not recording it, or conversely, recording but not intimating it, have to be worked out. Some legal systems follow the *accessorium sequitur principale* rule strictly. Examples include Germany, Louisiana and the Netherlands.[167] There the security transfers automatically with the debt. This is not the rule in Scotland because of the wording of the 1970 Act section 14. There is consequently the potential to breach the "unity principle" that the debt and security must be held by the same person.[168]

For a Form A standard security, following the case law on the bond and disposition in security, it is suggested that registration is needed to transfer both debt and security. Intimation is not required. Indeed intimation (without registration) will not transfer the debt because it is bound up with the security.[169] It will, however, be needed at a practical level to tell the debtor to pay the assignee rather than the cedent (the original creditor).[170] The Form B standard security, however, is not like the old bond and disposition because the debt is constituted in a separate document. It is suggested here that the debt must be transferred by intimation. The effect of section 14 is that the security will not transfer until registration. Again, this is a result reached in other systems, for example Austria, Belgium and South Africa.[171] Of course intimation and registration may well not

[167] § 1153 *BGB* (in relation to the accessory *Hypothek* and not the *Grundschuld*) and art 3312 *Louisiana Civil* Code. For the Netherlands, see arts 3:7, 3:82 and 6:142 in relation to accessory rights. These provisions do not expressly state that security rights are accessorial but they are accepted to be so by Dutch legal doctrine.

[168] Anderson, *Assignation* para 2-11.

[169] Possibly this rule could be excluded if the assignation expressly provides that the security is not being assigned.

[170] Anderson, *Assignation* para 2-13.

[171] On Austrian law, see von Bar and Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* at 356. On Belgium law, see Anderson, *Assignation* para 2-13 n 39. On South African law, see *Lief NO v Dettmann* 1964 (2) SA 252 (A); *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 (4) SA 174 (E) and P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property*, 5th edn (2006) 375-377. See also van der Merwe and Dirix, "A Comparative Law Review of Covering Bonds and Mortgages Securing Fluctuating Debts" at 26-27.

be simultaneous. There may be a period following intimation and before registration during which the security had a suspended existence during which strictly it secures nothing. That period may conceivably be a long one if the assignee forgets to register. But as has been seen, in other areas the accessoriness principle is not absolute, for example the ability of a standard security to cover future debts. This is another case. To be able to enforce the security, the assignee must eventually get round to registering. The cedent will not be able to enforce the security because the debtor will defend any proceedings on the basis that the debt has transferred.

The other possibility with the Form B standard security is that the assignation is registered prior to intimation. Registration may suffice to transfer the debt if the wording of the assignation is adapted to refer to the debt. If it does not, the security will once more have a suspended existence until the debt catches up. Of course if the debt is arrested in the meantime it will not catch up and the assignee is left in the position of holding a worthless security.[172] A stronger accessoriness approach would say that the security cannot transfer until the debt is transferred. But the result of this would be to undermine the reliability of the Register.[173] Say Edna assigns a Form B standard security to Fiona. Fiona registers. But the debt is not transferred. If the effect is that the security does not transfer, then Edna can fraudulently assign again to Gordon. If the debt is transferred to Gordon then he would obtain the standard security even although Fiona is registered as holder. It is preferable therefore to relax the accessoriness principle and say that the assignation does transfer the security to Fiona. At that point the debt which it secures is a *possible one*: the debt which Edna is to transfer to Fiona.

[172] See *Watson v Bogue (No 1)* 2000 SLT (Sh Ct) 125 at 129.
[173] It would also be incompatible with the curative effect of the Land Registration (Scotland) Act 1970 s 3(1)(a).

Ross Anderson criticises the current Scottish rules, with some justification, and favours the application of the *accessorium sequitur principale* rule.[174] He argues that while the publicity of registration is necessary for the creation of standard securities it is not necessary for their transfer. He points out that the Register is not necessarily accurate because the debt may have been paid but the security not formally discharged. Accordingly, it does not need to be accurate as to who holds the security. All that third parties require to know is that a security has been created. Persuasive as this argument it is, it does not address the value of the register to the potential assignee. He or she should be able to rely on the register to ascertain that the security is currently held by the cedent, rather than already assigned to a third party. Moreover, if the creditor has fraudulently assigned the security twice, there will be the classic race to the Register.[175]

It must be stressed the Register is *only* being relied on as to who holds the security. German law takes a very different approach. The *Grundbuch* (Land Register) can be relied on to the extent that the debt set out in the *Hypothek* (the accessory form of heritable security) *subsists*.[176] German law prefers the assignee in good faith over the debtor. If this approach was applied in Scotland, a debtor who paid the original creditor (cedent) where the assignation of the standard security had been registered but the transfer of the debt had not been intimated, would have to pay the assignee too.[177] In contrast in Scotland a defence that the debt has been repaid[178] or is invalid[179] is as good against as assignee of the security as against the original creditor.

[174] Anderson, *Assignation* paras 2-13-2-14.
[175] *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 141 per Lord Rodger of Earlsferry.
[176] §§ 892 and 1138 *BGB.* The rule is essentially the same for the non accessory *Grundschuld.* See generally van Vliet, "Mortgage on immovables in Dutch law" at para 3.8.
[177] Assuming it was a Form A standard security which stated the actual debt.
[178] *Rankin v Arnot* (1680) Mor 572 and *Cameron v Williamson* (1895) 22 R 293, both discussed below at G(2).
[179] *Nisbet's Creditors v Robertson* (1791) Mor 9554.

G. RULE FOUR: EXTINCTION OF THE DEBT ENDS THE SECURITY

(1) Introduction

The effect of the accessoriness principle is that if the debt is paid or otherwise discharged the security is automatically extinguished.[180] An early example is *Frenchmen v Leirmont*[181] a decision from 1555. It was held: "The principal debtour makand payment, his cautioner is releivit, and may not be persewit for the samin". It is also recognised as a general rule by Bankton. He discusses it in his "Rules of the Civil Law, illustrated and adapted to the Law of Scotland". Rule 50 provides "Cum principalis causa non consistit, plerumque ne ea quidem quae sequuntur locum habent".[182] Bankton states where a debt is satisfied any pledges or cautionary obligations are extinguished. He goes on to note that the same rule applies in criminal law. If the principal accused is acquitted any alleged accessories cannot be tried.[183] The application of this rule to the older forms of heritable security and the standard security is now considered.

(2) The old forms of heritable security

The rule did not apply in the securities where ownership of the land was transferred to the creditor. In such cases a reconveyance was necessary to end the security holder's real right. It did generally apply in cases where the creditor had a true security, in other words a subordinate real right in the land.[184]

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[180] The principle may be traced to Roman law and is also found in Roman Dutch law: see D 20.6.6pr (Ulpian); Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid* 2.48.44; Voet, *Commentarius ad Pandectas* 20.6.2; Huber, *Heedensdaegs Rechts-Geleerheyt* 2.51.7; Scott and Scott, *Wille's Law of Mortgage and Pledge in South Africa* 165-166.

[181] (1555) Balfour, *Practicks* 192.

[182] Bankton, *Inst* IV.50 based on D 50.17.178. Bankton's translation is "When the principal obligation does not subsist, the accessary, for most part, cannot have place." The translation by Watson et al is "When the principal case does not stand, for the most part, those which follow do not have any standing either".

[183] In modern Scots criminal law, no distinction is admitted between principals and accessories: see Sir G H Gordon, *The Criminal Law of Scotland*, 3rd edn (by M G A Christie, 2000), vol 1 para 5.04.

[184] Stair, *Inst* II.10.1. See also Erskine, *Inst* II.8.34.

In the 1680 case of *Rankin v Arnot*[185] an heritable bond had been assigned to the pursuer who registered his right. He attempted to enforce it against the defender, who argued that the security was no longer valid. Payment of the secured debt had already been made to the previous holder of the bond. The pursuer argued that this was irrelevant unless the defender had received "a renunciation of the [bond] and the same had been duly registrate".[186] The Court disagreed holding that discharge of the debt led to the extinction of the security without the need for any registered deed to inform singular successors.[187] In the words of Ross the security is brought to an end "with as little ceremony as any other ordinary contraction".[188]

Likewise this rule applied to the bond and disposition in security. The leading case is *Cameron v Williamson.*[189] The creditor had a duly recorded security over certain land for £300. He assigned it to the extent of £200 declaring in the assignation that £100 had already been paid. The assignation was duly recorded. There were a number of further assignations and then the security was eventually discharged.[190] The discharge was recorded. A subsequent purchaser of the land objected to the title on the basis that there had not been a formal discharge for the £100 and sought to rescind the missives. The court held that he had no right to do so. The declaration that the £100 had been repaid had been recorded in the public register. In any event, the seller had offered to clear the record. For present purposes what is most important is that both Lord Kinnear

[185] (1680) Mor 572.
[186] (1680) Mor 572.
[187] See Ross, *Lectures* II, 378: "the debt once in any manner paid, the heritable security must have fallen". See also Hume, *Lectures* IV, 392.
[188] Ross, *Lectures* II, 379.
[189] (1895) 22 R 293.
[190] A style for the discharge was supplied by the Titles to Land Consolidation (Scotland) Act 1868 s 132 and Sch NN, and later by the Conveyancing (Scotland) Act 1924 s 29 and Sch K Form No 3. For any bonds and dispositions in security still in force today, the form of discharge for a standard security appropriately adapted should be used: see the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 69(1).

and Lord Adam stated that the repayment by itself was sufficient to extinguish the security.[191] Thus at a formal level the accessoriness principle is followed. At a practical level, the seller's obligation to produce a clear search means that a formal discharge is required before the land can be sold.[192] The position was the same for the pecuniary real burden, which was extinguished by payment, evidenced by a formal recorded discharge.[193]

(3) The standard security

The 1970 Act provides a form of discharge for a standard security which is recorded.[194] Like the bond and disposition, the extinction of the debt alone is all that is strictly required to extinguish the security.[195] This is the position in many other jurisdictions, for example Belgium,[196] France,[197] Italy[198] and Louisiana.[199] The discharge has the purpose of "tidying-up"[200] the matter. In *Albatown Ltd v Credential Group Ltd*[201] a purchaser of land was unable to pay the price on the agreed date. The seller was willing to proceed on the basis of the buyer granting a standard security over the land in respect of the amount due. The buyer's obligation, however, was constituted by the missives of sale. As is the usual practice, the missives contained a clause providing that they could only be enforceable for a period of two years after the date of entry. In an action between the parties after that time, it was held that the obligation no longer subsisted and neither did the standard security. No formal discharge had been granted. Another example is the so called

[191] (1895) 22 R 293 at 298. See also Gloag and Irvine, *Rights in Security* 134. The same rule had established itself in South African law: see A F S Maasdorp, "The Law of Mortgage" (1902) 19 *SALJ* 102 at 104.
[192] Brand, Steven and Wortley, *Professor McDonald's Conveyancing Manual* para 32.35.
[193] Bell, *Lectures on Conveyancing* vol 2, 1154-1155; Gloag and Irvine, *Rights in Security* 176.
[194] 1970 Act s 17.
[195] Cusine and Rennie, *Standard Securities* para 10.03; R Paisley, *Land Law* (2000) para 11.24.
[196] Loi hypothécaire art 108 no 1. See von Bar and Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* at 357.
[197] Art 2488(1) *Code civil.*
[198] Art 2878(3) *Codice civile.*
[199] Art 3319(7) *Louisiana Civil Code.*
[200] This is the expression used by the English work Lawson and Rudden, *The Law of Property* 129.
[201] 2001 GWD 27-1102.

"discount" standard security which secures the repayment of the discount given to tenants purchasing their local authority house if they resell the property within three years. Once the three years have expired so too does the security, without the need for a formal discharge.[202]

The extinction of the security by discharge of the debt raised the real possibility under the Bankruptcy (Scotland) Act 1985 that a heritable security holder who did not enforce prior to the eventual discharge of the bankrupt lost the security.[203] This is because the effect of the discharge was to release the bankrupt from all debts owed at the date of sequestration.[204] The legislation was subsequently amended to address this difficulty and prevent the secured creditor's right being extinguished.[205]

As with rule 1 above (the need for a debt to create the security in the first place), the position of all sums standard securities requires to be considered. Say a standard security secures the repayment of a bank overdraft. If the balance goes into credit, this will not extinguish the security. For there is the possibility that further sums may be debited and the account can have a negative balance on it once more. The standard security goes into suspension when there is no actual debt.[206] Once again, this amounts to a departure from the accessoriness principle in its strong form. As virtually all standard securities in practice are for all sums, rule 4 therefore rarely applies.

[202] See Cusine and Rennie, *Standard Securities* para 10.06.
[203] W W McBryde, "The Discharge of the Debtor and Securities" 1991 SLT (News) 195.
[204] Bankruptcy (Scotland) Act 1985 s 55(1).
[205] Bankruptcy (Scotland) Act 1993 Sch 1 para 23.
[206] This principle is recognised expressly by art 2797 of the Quebec Civil Code for the hypothec, the equivalent of the standard security. See Claxton, *Security on Property and the Rights of Secured Creditors under the Civil Code of Québec* 21-22.

H. RULE FIVE: ACTUAL INDEBTEDNESS IS REQUIRED FOR THE SECURITY TO BE ENFORCED

This is the most important rule of accessoriness. No matter how flexible an approach is taken to the other rules accessory securities cannot deviate from the requirement that there must be an actual debt for the security to be enforced against the property of the granter of the security.[207]

For securities which require an actual debt for constitution, such as the bond and disposition in security and the pecuniary real burden the point is a self-evident one. For the standard security which may secure future sums and thus does not depend on an actual debt for constitution, there is no doubt that such a debt is required for enforcement. This may be shown by the case of *J Sykes & Sons (Fish Merchants) Ltd v Grieve.*[208] A standard security was granted by Mr and Mrs Grieve to the pursuers for the sum of £20,000. The pursuers attempted to enforce the security. Their action was defended by the Grieves on the basis that the money had never been advanced to them despite what the security documentation said. Rather, it had been advanced to a company called Spurbranch Ltd. Mr and Mrs Grieve counterclaimed for the pursuers to be required to grant a discharge of the security. The court held that the terms of the standard security, acknowledging indebtedness, were not conclusive and that the matter should be determined by a proof before answer.[209] In another case, it was held that a statement in a calling up notice to enforce a standard security did not require to give the exact amount of debt owed.[210] The sum could be finalised at a later stage of the enforcement proceedings.

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[207] See for example, art 3292 *Louisiana Civil Code.*

[208] 2002 SLT (Sh Ct) 15. See K G C Reid and G L Gretton, *Conveyancing 2001* (2002) 96.

[209] See also *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 at 52 per Lord Hamilton: "The subsisting indebtedness, as ascertained by examination of the private state of affairs between debtor and creditor [may] impinge on the effective scope of the security." Another relevant case is *Gardiner v Jacques Vert plc* 2002 SLT 928 where there was an unsuccessful argument that no debt was due because of a counterclaim against the creditors.

[210] *The Royal Bank of Scotland plc v Shanks* 1998 SLT 355.

The position as regards the old *ex facie* absolute disposition, which of course could secure all sums, is a little more complicated. Normally, the creditor was limited to the actual indebtedness. Thus in *Lucas v Gardner*[211] the unrecorded minute of agreement between the parties stated that the disposition was granted for £6500 and all other sums advanced to the debtor. It provided that the creditor could give the debtor one month's notice to repay the debt owed failing which the property would be sold. Three years later the creditor duly gave notice, but the debtor disputed the amount due. He successfully obtained an interdict preventing the creditor from selling until the matter was resolved. But the minute of agreement was crucial to the action. What would have happened if the creditor had conveyed the subjects without assigning the debt and making the disponee bound by the unrecorded agreement? The rule was that if the disponee was in good faith and did not know that the creditor held only under an *ex facie* absolute disposition then he was unaffected by the debtor's rights.[212] This is not so much a defiance of accessoriness but a consequence of the security not being a true one. As mentioned earlier,[213] the debtor's vulnerability was the reason why this security was generally only used where the creditor was a bank. Similarly, it was one of the grounds behind the abolition of the *ex facie* absolute disposition and its replacement with the standard security.[214]

[211] (1876) 4 R 194.
[212] Gloag and Irvine, *Rights in Security* 151-152.
[213] See above at F(2)(b).
[214] *Conveyancing Legislation and Practice* para 105.

I. SUMMARY

Before considering the benefits and drawbacks of accessoriness, it is helpful to summarise the extent to which the heritable securities which were replaced by the standard security and that security itself obey the five rules set out above. Of the obsolete securities, the pecuniary real burden was the most compliant. It obeyed all the rules, at least until statute required that assignations required to be registered. The bond and disposition in security was not far behind. It, however, failed to comply with rule 3 as assignation of the secured debt and intimation alone were insufficient for transfer. The assignation had to be recorded in the Register of Sasines to be effective. The bond of cash credit and disposition in security strayed far from strict accessoriness. A specific debt was not required: a fluctuating amount up to a maximum figure was permissible. Further, the security could be created before any money was advanced and the debtor settling the present debt did not extinguish the security, because a subsequent advance would become secured. The *ex facie* absolute did not comply with accessoriness because it was not a true security. It could secure all sums. Moreover, because it was a conveyance rather than a true security, the discharge of the indebtedness did not automatically extinguish the security. A reconveyance was required and the debtor's protection was limited to what the unrecorded agreement provided.

The standard security was a development from the earlier forms of security and consequently departs to a significant extent from strong accessoriness. It can secure a future and contingent debt rather than a current one. It can secure all sums owed by the debtor. Transfer of the secured debt(s) alone will not transfer the security. The assignation requires to be registered in the appropriate property register. The standard security will be extinguished by payment of the debt

alone, but in the case of an all sums security it goes onto a state of suspension and will spring back into life if the creditor makes a further advance to the debtor. It is the ability of the standard security to cover all sums, present and future which means that it departs so much from strong accessoriness. It has been commented by German writers that the effect is to make it "a non-accessory mortgage for all practical purposes but for the name".[215] This, however, overstates the position. The standard security, like its true security predecessors complies with the rule that there must be actual indebtedness for enforcement to be allowed. It is conceptually different from abstract securities like the *Grundschuld.*

This summary can be set out in tabular form:

	Rule 1 Present indebtedness required to create security	**Rule 2** Specific debt	**Rule 3** Assignation of debt transfers security	**Rule 4** Security extinguished if debt discharged	**Rule 5** Actual indebtedness required to enforce security
Pecuniary real burden	Yes	Yes	Yes (at common law)	Yes	Yes
Bond and disposition in security	Yes	Yes	No	Yes	Yes
Bond of cash credit and disposition in security	No	No, but maximum debt must be stated	No	No, further advances will be secured up to maximum	Yes
Ex facie absolute disposition	No	No	No	No, reconveyance required	Yes, but only because of back letter
Standard security	No	No	No	Yes, if fixed debt; otherwise, no	Yes

[215] Schmid and Hertel, *Real Property Law and Procedure in the European Union: General Report* at 91.

J. ADVANTAGES AND DISADVANTAGES OF ACCESSORINESS

(1) Advantages of accessoriness

The main advantage of accessoriness is that it *protects* debtors. The security can only be enforced if a debt is due. A security restricted to a fixed debt is extinguished by the payment of that debt. In the case of an unrestricted "all sums" security, repayment of the debt suspends the security. For either case, an actual debt must be in existence for the security to be enforced. The debtor is thus protected. In the words of Wachter:

> Si l'on examine les activités de législation au sein de la Communauté européenne au niveau du droit privé, l'on constate que la protection des consommateurs occupe une place prépondérante. Par le principe de l'accesoriété, le droit du créancier découlant du droit de gage immobilier et celui découlant de créance sont lies, ce qui assure que le créancier ne pourra utiliser la garantie que dans la mesure où il existe un besoin effectif de sûretés. Le principe de l'accessoriété comprend donc nécessairement la protection du donneur de garantie.[216]

This aspect of the accessoriness principle is most evident in Scottish heritable securities in the distinction between assignation and discharge. An assignation must be registered to transfer a standard security.[217] However, a restricted security is extinguished by payment of the debt alone without registration of a discharge.[218] This is because it is necessary that the debtor is immediately

[216] T Wachter, "La garantie de credit transfrontalier sur les immeubles au sein de l'Union européenne" *L'Eurohypothèque,* 1999 *Notarius International* 174 at 184. (On examining the legislative activity in the European Community in the area of private law, it is noticeable that consumer protection is paramount. By the accessoriness principle, the right of the creditor flowing from the immoveable security, and that flowing from the debt are linked, which ensures that the creditor will only use the guarantee to the degree that there exists an actual need for a security. Therefore, the accessoriness principle necessarily encompasses the protection of the debtor.)

[217] As was seen above, the rule was the same for its predecessors, although originally not for the pecuniary real burden.

[218] For example, *Albatown Ltd v Credential Group Ltd* 2001 GWD 27-1102 (discussed above).

protected if he pays the debt. He should not have to wait until notice is given on the Register by means of a discharge signed by the creditor. In contrast, suspending transfer of the security until registration does not adversely affect the debtor. Here it is only in the interests of the assignee that the registration takes place and the security transfers. The debtor may indeed be in a better position if the debt has been assigned but not the security, because until the security is transferred it can no longer be enforced.[219]

Secondly, the principle provides for *legal simplification.*[220] The law determines the fate of the debt and then applies this to the security. This removes the need to have recourse to other areas of law to give the debtor a remedy if the creditor attempts to enforce the security where there is no debt subsisting. Otherwise the law might have to provide for a mandatory contract prohibiting such action. This has been proposed for the Euromortgage.[221] Alternatively, a remedy in delict could be recognised. A third possibility would be to give the debtor a specific defence to such action. In German law, if the non accessory *Grundschuld* is enforced where there is no debt, the debtor can seek the transfer of the security to him (*Rückübertragungsanspruch*).[222] As Lars van Vliet has pointed out, the rule of accessoriness that the security lapses if the debt is paid is a more straightforward and elegant solution.[223]

[219] Unless it has been assigned in part. On this complicated issue, see Anderson, *Assignation* paras 2-22-2-24.
[220] Stöcker, "The Eurohypothec – Accessoriness as legal dogma?" at 45.
[221] See below at K.
[222] See Van Vliet, "Mortgages on immovables in Dutch law" para 3.4. In Germany, non accessory securities can be held by the owner and then subsequently transferred to a creditor. Often the purpose is to give the creditor a higher ranking because the security predates later securities.
[223] Van Vliet, "Mortgages on immovables in Dutch law" para 3.4.

Similarly, the tying of the security to the debt provides a straightforward rule (rule 3 above) that transfer of the debt means transfer of the security.[224] The two are not to be separated. So separate transfer rules are not required. A number of countries accept this.[225] However, as was seen above Scotland does not in the interests of protecting would-be acquirers of the security who will wish to rely on the Register.[226]

Thirdly, the principle is a *flexible* one. As has been seen above, the rules of strict accessoriness can be modified by allowing future and fluctuating sums to be secured. This is not just the position in Scotland, but in other countries too.[227] There is recognition that accessoriness in its pure form is unworkable. It has been observed of countries in the European Union that "accessoriness is the dogma, non-accessoriness the practice.[228] If this is a reference to strong accessoriness then it is correct, but in truth accessoriness does not have to be strong. Its acknowledgement means ultimately that the security can never be enforced unless there is an actual debt in existence. This fundamental rule is always preserved.

(2) Disadvantages

The disadvantages of accessoriness vary depending on how strict an approach is taken. If the security is entirely dependent on a specific sum, like the old bond and disposition in security, the creditor's right is restricted. If the debt is paid off the security is extinguished. It does not matter that the creditor has advanced a further sum to the debtor. A new security in respect of that new

[224] Habersack, "Die Akzessorietät – Strukturprinzip des europäischen Zivilrechts und eines künftigen europäischen Grundpfandrechts" at 862-863.
[225] See above at F(3)(c). See also the American Law Institute, *Restatement of Law Third: Property: Mortgages* § 5.4.
[226] Of course the value of the Register is limited to showing who holds the security. If the debt has been repaid, the security is worth nothing. See Anderson, *Assignation* para 2-14.
[227] Habersack, "Die Akzessorietät – Strukturprinzip des europäischen Zivilrechte und eines künftigen europäischen Grundpfandrechts" at 863-864; Van Erp, "Surety Agreements and the Principle of Accessority – Personal Security in the Light of a European Property Law Principle" at 316 n 17.
[228] Schmid and Hertel, *Real Property Law and Procedure in the European Union: General Report* at 89.

debt would need to be obtained. Similarly, variations to the nature of the debt, for example the repayment date, will require variation of the security. This leads to an increase in transaction costs because of the need to renegotiate the security.[229] However, as been seen, such difficulties are removed if the accessoriness principle is applied more flexibly so that security for future and fluctuating sums is permissible. The standard security takes an extremely flexible approach to accessoriness, but more rigid rules are found in other systems, such as specifying a maximum amount.

Accessoriness also has an arguable disadvantage in relation to ranking.[230] Say the debtor grants a first ranking standard security to bank A for £100,000 and a second ranking standard security to bank B for £70,000. C makes the debtor a competitive offer of a loan which the debtor will use to repay A. However, C insists on a first ranking security. The difficulty is that as soon as A is repaid its security is extinguished under the accessoriness principle. B then moves up to become the first ranked lender. A ranking agreement with B would be required for C to have priority. In practice B may be willing to agree to this because his original position was second ranked creditor and the agreement simply perpetuates this.[231] German law deals with this problem for its accessory *Hypothek* by vesting the security right in the owner if the debt is repaid.[232] The concept is known as the *Eigentümergrundschuld* (owner's mortgage). This is a non accessory right which can be passed on to the new lender who then obtains the old lender's ranking. In Scotland the doctrine of confusion prevents owners holding true security rights over their own property.[233] The benefit of the *Eigentümergrundschuld* was undermined by lower ranking creditors having a provision in their

[229] Van Erp, "Surety Agreements and the Principle of Accessority – Personal Security in the Light of a European Property Law Principle" at 316.
[230] I am indebted here to Van Vliet, "Mortgages on immovables in Dutch law" para 4.1.
[231] Although this would depend on the loans involved.
[232] § 1163 *BGB.*
[233] Gloag and Irvine, *Rights in Security* 137-139; Cusine and Rennie, *Standard Securities* para 10.11.

loan contract that the owner was required to discharge it and allow them to improve their rank. This practice was homologated in 1977 by an amendment to the German Civil Code.[234]

Another solution to the ranking conundrum, which works for accessory securities, is to get the original creditor (bank A) to assign the debt and security to the new creditor (bank B). Obviously this will require A's consent but A does not lose anything by giving this as the debt is repaid. Of course many properties, typically residential ones, will only be subject to the one security so the issue does not arise in the first place.

K. EUROPEAN HARMONISATION

(1) Initial efforts

Attempts to harmonise the laws on security over heritable (immoveable) property in Europe can be traced back to the Segré report of 1966.[235] It argued that harmonisation would help the integration of financial markets. This was followed much later in 1987 by a report by the International Union of Latin Notaries which used the term "Eurohypothec" for the first time and proposed a model based on the non-accessory German *Grundschuld* and Swiss *Schuldbrief.*[236] The

[234] § 1179a *BGB.*

[235] *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 S van Erp, "A Comparative Analysis of Mortgage Law: Searching for Principles" in M E S Jordán and A Gambaro (eds), *Land Law in Comparative Perspective* (2002) 69 at 7; H G Wehrens, "Real Security regarding Immovable Objects – Reflections on a Euro Mortgage" in A S Hartkamp et al (eds), *Towards a European Civil Code*, 3rd edn (2004) 769 at 770 and Watt, "The Eurohypothec and the English Mortgage" at 173-175.

[236] See Nasarre-Aznar, "The Eurohypothec: A Common Mortgage for Europe" at 33 and Wehrens, "Real Security regarding Immovable Objects – Reflections on a Euro Mortgage" at 773. See also J Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as Mixed Legal System* (2002) 247-248 and H G Wehrens, "Der schweizer Schuldbrief und die deutsche Briefgrundschuld: Ein Rechtsvergleich als Basis für eine zukünftige Eurohypothek" 1988 *Österreichische Notariatszeitung* 181.

"Euromortage" (the equivalent English law-friendly term for "Eurohypothec"[237]) would offer an alternative to the mortgages available under national laws. It would 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.[238] Once again the main influences were the *Grundschuld* 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.[239] It has further developed the VDH proposals in English and its suggestions include allowing the same Euromortgage to cover multiple properties in different countries.[240]

(2) The approach of the European Commission

Meanwhile the matter has been considered formally at European Union level. In 2003 the European Commission created the Forum Group on Mortgage Credit with a threefold mandate to (1) identify the barriers to the smooth functioning of the internal market for mortgage credit; (2) assess the impact of such barriers on the functioning of the internal market; and (3) make recommendations to the Commission to tackle these barriers. The group reported in 2004 and made forty eight recommendations.[241] It noted:

[237] See Wehrens "Real Security regarding Immovable Objects – Reflections on a Euro Mortgage" at 774. The French equivalent is *Eurohypothèque.*

[238] H Wolfsteiner and O Stöcker, "A Non-Accessory Security Right over Real Property for Central Europe" 2003 *Notarius International* 116.

[239] See http://www.eurohypothec.com/. See generally Nasarre-Aznar, "The Eurohypothec: A Common Mortgage for Europe". See also O Stöcker, "Die grundpfandrechliche Sicherung grenzüberschreitender Immobilienfinanzierungen – Die Eurohypothek – ein Sicherungsinstrument mit Realisierungchancen" 2006 *Wertpapier Mitteilungen: Zeitschrift für Wirtschafts und Bankrecht* 1941.

[240] See Drewicz-Tulodziecka (ed), *Mortgage Bulletin 21: Basic Guidelines for a Eurohypothec.*

[241] Forum Group on Mortgage Credit, *The Integration of the EU Mortgage Credit Markets* (2004), available at http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/2004-report-integration_en.pdf.

> In the majority of legal systems in Europe, the link between the principal debt and collateral is very strictly enforced. Any changes to one have a significant effect on the other. Such a strong link between the loan agreement and the security agreement (i.e. strong accessoriness), does not facilitate changes to either. The result is inflexibility, constituting limited economic freedom for the private customer, as well as an obstacle for lenders.[242]

The group recommended that the European Commission should take steps to make the links between mortgage debts and the collateral security more flexible.[243] It proposed that in countries where the law provides for strong accessoriness this should be replaced by an accessoriness agreement in the form of a contract between the lender and the owner of the property. The group also recommended that the Commission should investigate the concept of the Euromortgage, for example by way of a study, to analyse its potential to promote the integration of European Union mortgage credit markets.

The European Commission issued a Green Paper entitled *Mortgage Credit in the European Union* in 2005.[244] It noted that the concept of a Euromortgage was not new, having been the subject of various projects by lenders and academics.[245] It commented that the supporters of the Euromortgage believed that its central aspect was the weakening of the accessoriness principle. These supporters argued that this would help the creation and transfer of mortgages and therefore have a positive effect on the whole mortgage credit market, particularly on its funding. The Commission stated that it would review the work carried out on the Euromortgage. The issue

[242] Forum Group on Mortgage Credit, *The Integration of the EU Mortgage Credit Markets* at 30.
[243] Forum Group on Mortgage Credit, *The Integration of the EU Mortgage Credit Markets* at 32.
[244] European Commission, *Green Paper: Mortgage Credit in the European Union* (COM (2005) 327 final) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0327:FIN:EN:PDF.
[245] European Commission, *Green Paper: Mortgage Credit in the European Union* at paras 47-48.

was a "complex"[246] one because it involved related areas including contract law and property law. The Commission undertook to await the outcome of ongoing initiatives, but in the meantime sought views on the feasibility and desirability of the Euromortgage.

In 2006 the Commission published a document assessing the feedback on the Green Paper.[247] Only a minority of responses had supported the Euromortgage: 19% of financial institutions and intermediaries; 31% of member states and 43% of other stakeholders.[248] Most respondents, including all those representing consumers, wanted further clarification of the concept and therefore neither supported nor opposed it. Many of the responses stressed that further evidence was required to justify the introduction of the Euromortgage and that there was a need to assess the impact on national laws and consumers. A number of the responses, including some from member states, stated that the Commission "should consider carefully the principle of subsidiarity in this context".[249] This suggests an opposition to the harmonisation of mortgage law and a departure from separate national laws unless it can be fully justified. Those respondents, however, who were in favour of the Euromortgage urged the Commission to get on and produce basic legal and economic guidelines.

The accessoriness issue attracted much comment by respondents.[250] Opponents of the Euromortgage regarded the weakening of the link between debt and security as one of the main problems with it. On the other hand, its supporters said that this was an important factor for there to be an integrated and competitive market. Respondents who were less sure wondered whether

[246] European Commission, *Green Paper: Mortgage Credit in the European Union* at para 48.
[247] European Commission, *Feedback on the Consultation on the Green Paper on Mortgage Credit* (2006) available at http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/feedback_gp-en.pdf.
[248] European Commission, *Feedback on the Consultation on the Green Paper on Mortgage Credit* at 45.
[249] European Commission, *Feedback on the Consultation on the Green Paper on Mortgage Credit* at 45.
[250] European Commission, *Feedback on the Consultation on the Green Paper on Mortgage Credit* at 46.

a non-accessory model was the right one, given the need to protect debtors. They suggested that a comparative analysis of accessory and non-accessory mortgages should be undertaken.

In its *White Paper on the Integration of EU Mortgage Credit Markets*[251] issued at the end of 2007 the Commission makes no mention of the Euromortgage. Instead it has less ambitious proposals which it hopes will promote cross border mortgage lending. It will present a Recommendation during the course of 2008. This will invite member states to take certain steps[252] including (a) ensuring that their mortgage enforcement procedures are completed within a reasonable time and that there is online access to their land registers; (b) adhering to the EULIS project[253] and (c) introducing more transparency into their land registers, in particular as regards hidden charges.[254] No doubt the Commission will continue to monitor developments, but for the moment the introduction of the Euromortgage seems to be on hold.

(3) Accessoriness and the Euromortgage

As has been mentioned, it has been proposed that the Euromortgage should be a non accessory security based on the *Grundschuld* and *Schuldbrief*. The case, however, for abandoning accessoriness is not convincing. It has been shown that the main purpose of the principle is to protect debtors. As consumer protection is one of the European Union's aims, the Euromortgage must subscribe to this. The suggestion that accessoriness be replaced with a mandatory form of contract between lender and borrower requiring that indebtedness is needed for the security to

[251] European Commission, *White Paper on the Integration of EU Mortgage Credit Markets* (COM (2007) 807 final) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0807:FIN:EN:PDF.
[252] European Commission, *White Paper on the Integration of EU Mortgage Credit Markets* at 8.
[253] European Land Information Service. This is a consortium of European land registers which aims to provide easy access to information about land ownership and other rights in land by means of the internet. See http://www.eulis.org/index.html.
[254] That is to say securities or preferences which do not appear on the Register. To what extent this treads into insolvency law is unclear.

be enforced seems to add an unnecessary level of complexity. Moreover, there is the problematic issue of making this contract bind third parties. It has recently been reported that consumers in Germany are being adversely affected by the non-accessory nature of the *Grundschuld.* German banks sold mortgage credit to foreign hedge funds. The *Grundschulden* were then transferred to the hedge funds without an assignation of the contracts connecting the loans with the security right. The hedge funds were therefore then not bound by the contracts and could enforce the security based on what was stated in document creating the *Grundschulden*.[255] Hedge funds have started enforcement actions against the borrowers, stating that they are not bound by the contractual agreement.[256] Clearly consumers should not be prejudiced in this way. With the accessoriness principle they are protected.

It can be accepted that strong accessoriness increases transaction costs because the security is tied rigidly to a specific debt and the payment of that debt will necessitate the granting of a new security if a further sum is to be advanced. However, a more flexible approach to accessoriness, such as that taken by the standard security which is capable of securing future and fluctuating sums, meets these criticisms.[257] If there is ever to be a Euromortgage, the benefits of accessoriness should be reconsidered.[258] Sparkes, perhaps too forcefully, expresses the view that to proceed with a non-accessory model would be "suicidal".[259] He continues: "Any pan-European

[255] German law allows assignees of *Grundschulden* to rely on the amount in the document creating the security. See above at F(c).
[256] S van Erp, "Editorial", vol 11.4 *Electronic Journal of Comparative Law* (December 2007). See also C Clemente, "Verwertung der nicht akzessorischen Grundschuld im Rahmen eines Forderungsverkaufs" (2007) 11 *Zeitschrift für Immobilienrecht* 737 and Van Erp, "DCFR and Property Law" at 260.
[257] E van den Haute, "Harmonisation européenne du credit hypothécaire: perspectives de droit compare, de droit international privé et de droit européen" (Unpublished doctoral thesis, Free University of Brussels, 2008) para 435.
[258] In this connection, a third way approach has been suggested of the Euromortgage being non-accessory when it is created but accessory when it is enforced. See Stöcker, "The Eurohypothec – Accessoriness as legal dogma?" at 52 and Watt, "The Eurohypothec and the English Mortgage" at 191.
[259] Sparkes, *European Land Law* 401.

mortgage instrument should be accessory and impose a formal linkage between the loan and the security; only in that way are domestic borrowers properly protected."[260]

(4) Wider considerations

It may be doubted on a wider level whether there is a compelling case for the Euromortgage. In its 2007 White Paper, the European Commission stated:

> 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.[261]

This is a realistic approach. Other arguments against the Euromortgage may be mentioned. First, the need for harmonisation of security rights in respect of assets which move across national boundaries is far more justifiable than for land which by its nature is immoveable.[262] Secondly, to make the Euromortgage a success other related areas such as land law, contract law and insolvency law would have to be harmonised too.[263] This seems to be appreciated – amongst

[260] Sparkes, *European Land Law* 401.
[261] European Commission, *White Paper on the Integration of EU Mortgage Credit Markets* at 3.
[262] See A J M Steven "The Effect of Security Rights *Inter Partes*" in U Drobnig, H J Snijders and E-J Zippro (eds), *Divergences of Property Law, an Obstacle to the Single Market* (2006) 47 at 58-59; G L Gretton, "Review of Gerard McCormack, *Secured Lending under English and American Law*" (2006) 10 *EdinLR* 172 at 173; and Watt, "The Eurohypothec and the English Mortgage" at 179-180.
[263] It is telling that land law is outwith the scope of the Common Frame of Reference Project. See C von Bar, E Clive and H Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Interim Outline Edition* (2008) DCFR Model Rule I.-1:101(2)(f). Compare, Van Erp "DCFR and Property Law" at 254-261. As to whether security rights in general should be in the DCFR, see G McCormack, "The CFR and Credit Securities – A Suitable Case for Treatment?" in A Vaquer (ed), *European Private Law Beyond the Common Frame of Reference: Essays in Honour of Reinhard Zimmermann* (2008) 97-129.

others by the Commission – to a limited extent. Thus reform of land registration laws has been mentioned.[264] But harmonisation would need to go far deeper.[265] Take the following example. David owns a flat in Dundee. He is offered mortgage funding by the Bank of Bulgaria in Sofia. How does the bank ensure that it gets a good security? It needs to examine David's title. To examine a title requires more than a knowledge of the rules of land registration. It requires an ability to understand real burdens, servitudes, the law of the tenement and so on and so forth. Unless property law as a whole is harmonised, the Bank of Bulgaria will have to use local agents in Scotland to check the title. These agents may as well be asked to prepare a standard security rather than a Euromortgage. The cost may be little different.[266]

This is borne out by a third argument. If there are two countries in the European Union which have property laws based on fundamentally different principles, these are England and Scotland.[267] Yet a substantial number of Scottish standard securities are granted in favour of English based lenders and many English mortgages have Scottish lenders as the creditor.[268] It has been argued, however, that:

> The British experience . . . cannot be considered a good mirror of the European situation. Firstly, whilst English and Scottish legal institutions remain distinct, the difference is not radical, compared to other European legal systems, and both English and Scottish law can be considered rather

[264] European Commission, *White Paper on the Integration of EU Mortgage Credit Markets* at 8; Van Erp, "A Comparative Analysis of Mortgage Law: Searching for Principles" at 86.
[265] See Van den Haute, "Harmonisation européenne du credit hypothécaire: perspectives de droit compare, de droit international privé et de droit européen" paras 436-437.
[266] Although, the fact that the Euromortgage is a familiar concept may still make it appeal more to lenders in other countries than local securities which are obscure to them.
[267] See the unfortunate comments of Lord Hobhouse of Woodborough in *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 53: "But what does surprise me is that Scotland, now a highly developed economy, should have a land law which is still based on the judicial development, albeit sophisticated, of the laws of Rome and the mediaeval Feudal system."
[268] In 2006 the largest mortgage lender in the UK was HBOS plc, which was formed in 2001 by the amalgamation of the Bank of Scotland and Halifax plc, the latter being an English lender. The registered office of HBOS is in Edinburgh. Source: Council of Mortgage Lenders. See http://www.cml.org.uk/cml/statistics.

> creditor friendly (for instance, both countries have rather agile and swift procedures for the enforcement). On the other hand, English and Scottish lenders are in general among the most enterprising in Europe. This is widely confirmed by anecdotical [sic] evidence . . . at the moment there is an ad-campaign on the radio that encourages people who have a house in The Netherlands to borrow money from the Bank of Scotland, the loan to be secured by a Dutch mortgage.[269]

If these are arguments in favour of the Euromortgage, then they do not convince. There are radical differences between the fabric of English and Scottish mortgage law. For example, Scotland does not divide between law and equity.[270] Secondly, if enforcement procedures in other countries are considered too slow then the matter can be addressed at national level, as the European Commission is now proposing in its White Paper.[271] Thirdly, Adam Smith would have been delighted by the praise for entrepreneurial Scottish and English lenders. No doubt there are lessons for banks in other countries, without the need to introduce a Euromortgage. In truth, however, the multiplicity of Scottish-English cross-border lending is encouraged by a common language, close geographical proximity and being part of a unified state. These are factors which are not replicated in Europe as a whole. As was seen above, the Commission in its White Paper seems to have some appreciation of this.

[269] von Bar and Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* at 361 responding to comments made by Professor George Gretton. I understand from Professor Gretton that he was actually referring to banking institutions rather than legal institutions.
[270] See, for example, G L Gretton, "Equitable Ownership in Scots Law?" (2001) 5 *EdinLR* 73.
[271] European Commission, *White Paper on the Integration of EU Mortgage Credit Markets* at 8.

L. CONCLUSIONS

The accessoriness principle, which may be traced to Roman law, has established itself as a persistent and pervasive part of the laws of both personal and real security in Europe. In Scotland, it is recognised to varying extents in the old forms of heritable security. The approach taken to the principle by the standard security is a flexible one, as both future and fluctuating debts may be secured. Flexibility is an aspect of the principle which has been recognised by writers elsewhere. The most important rule of accessoriness, that there can only be enforcement where there is actual indebtedness is obeyed by the standard security and its predecessors. This leads to the protection of debtors. Thus accessoriness has a notable advantage over abstract securities such as the German *Grundschuld*. If there is to be harmonisation of European mortgage laws then account needs to be taken of this, but the case for the introduction of a Euromortage has yet to be convincingly made.