

# Reform of Security over Moveables: Still a Longstanding Reform Agenda in Scots Law

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## Introduction

David Carey Miller made an immense contribution to property law in Scotland and South Africa. His prolific scholarship was of the highest quality. But, for many years, I felt that David's inherent modesty meant that he did not receive the full recognition which he deserved. Thus, the subject of my essay is reform of security over moveables. If one thought of academic lawyers in Scotland with expertise on security rights, David perhaps did not immediately come to mind. Yet in his classic *Corporeal Moveables in Scots Law*<sup>1</sup> and other writings to which I will refer, David made a profound contribution to this area. What also stood out for me about David was his collegiality and his distinguished service to academic law. He will always have a special place in my career because he was the external examiner of my doctoral thesis.<sup>2</sup> It was therefore a great privilege to deliver the paper on which this essay is based at the conference in David's honour in 2015 and in his presence. I am sad that he did not live to see the final version but his memory lives on.

The title of my essay comes from an article which David co-wrote in 1997.<sup>3</sup> It examined the difficulties with attempts to reform the law of security over moveables in Scotland and appeared shortly after the publication of a report prepared for the then Department of Trade and Industry in 1994 by a committee chaired by Professor John Murray. The article concluded: "There can be little doubt that Scots law requires urgent reform in the area of security

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<sup>1</sup> D. L. Carey Miller with D. Irvine, *Corporeal Moveables in Scots Law* (2<sup>nd</sup> edn, Edinburgh, 2005), chs 11 and 12.

<sup>2</sup> Subsequently published as A. J. M. Steven, *Pledge and Lien* (Edinburgh, 2008).

<sup>3</sup> D. O'Donnell and D. L. Carey Miller, 'Security over Moveables: A Longstanding Reform Agenda in Scots Law', *Zeitschrift für Europäisches Privatrecht*, 3 (1997), 807–22.

over moveables'.<sup>4</sup> This echoes a statement made by a previous generation exactly one hundred years before. In their *Law of Rights in Security*,<sup>5</sup> William Murray Gloag, who probably does not require introduction,<sup>6</sup> and James Mercer Irvine, a predecessor of David as a Professor of Law at the University of Aberdeen,<sup>7</sup> wrote:

The law on the subject of security-rights over corporeal moveables is beset with difficulties; and is not, perhaps, in a very satisfactory state, as the result of its rules is often to deprive the owner of such property of the power to make use of it as a security for his debts. It is open to question whether the rigidity of the law of Scotland on this subject should not now be relaxed by the adoption of a system analogous to the English bill of sale.<sup>8</sup>

120 years after that statement, there has been little reform. The principal exception has been the rather unhappy introduction of the floating charge in 1961.<sup>9</sup> This essay considers what therefore continues to be a longstanding reform agenda in Scots law. After this introduction, the second section provides an overview of the current law and the security rights which are currently available. The third section looks at past attempts at reform. The fourth section considers the Scottish Law Commission moveable transactions project and tests the proposed scheme against principles set out by David for reform of the law in this area. The final section is the conclusion.

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<sup>4</sup> *Ibid.*, 819.

<sup>5</sup> W. M. Gloag and J. M. Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (Edinburgh, 1897, reprinted 1987). See A. J. M. Steven, 'One Hundred Years of Gloag and Irvine', *Jur. Rev.*, (1997), 314–27.

<sup>6</sup> But see J. Chalmers, 'Resorting to Crime' in R. G. Anderson, J. Chalmers and J. MacLeod (eds), *Glasgow Tercentenary Essays* (Edinburgh, 2014), 70–100, 83–4.

<sup>7</sup> See M. C. Meston, 'The civilists of Aberdeen 1495–1995', *Jur. Rev.* (1995), 153–65, 164.

<sup>8</sup> Gloag and Irvine, *Law of Rights in Security*, 187–8. The bills of sale legislation is still part of English law, but is generally regarded as unsatisfactory. Its abolition and replacement was recommended by the Law Commission for England and Wales. See *Report on Bills of Sale* (Law Com. No. 369, 2016). A Bill to implement the Report was announced in the 2017 Queen's Speech.

<sup>9</sup> See the next section below, headed "Current Scots law of voluntary security over moveables", at (3).

## Current Scots law of voluntary security over moveables

### (1) General

Rights in security can be voluntary (express) or involuntary. Only the former are within the scope of this essay.<sup>10</sup> The following voluntary securities are currently possible under Scots law.

### (2) Pledge

At common law effectively the only express security right over corporeal moveable property is pledge,<sup>11</sup> a security which is recognised in most legal systems. In his *Corporeal Moveables in Scots Law*, David refers to my statement that the ‘modern law of pledge began in 1681 with the publication of Stair’s *Institutions of the Law of Scotland*. Indeed, it might be said that the law has hardly changed since 1681 in this area.’<sup>12</sup> Pledge requires the creditor to have possession of the asset. This publicises the security to third parties. While in principle a court order is required for pledge to be enforced, it is long-settled that the parties may agree on an extra-judicial power of sale.<sup>13</sup> Consumer pledges to pawnbrokers are regulated by legislation and there is a statutory power of sale.<sup>14</sup> Pledge is generally not a commercially practical security because businesses cannot afford to give up possession of their assets. It is only used in limited circumstances such as where assets are stored in a warehouse, or aboard a ship when the bill of lading is pledged. But such use relies on the belief that the decision of the Inner House of the Court of Session in *Hamilton v Western Bank* in 1856, which restricts pledge to actual delivery, would not be followed today.<sup>15</sup>

### (3) Floating charge

The unduly restrictive nature of the common law was considered in a Report

<sup>10</sup> The main examples of involuntary securities in Scotland are the possessory lien and the landlord’s hypothec. See further G. L. Gretton and A. J. M. Steven, *Property, Trusts and Succession* (3<sup>rd</sup> edn, Haywards Heath, 2017), paras 21.57–21.66.

<sup>11</sup> See, generally, Carey Miller with Irvine, *Corporeal Moveables*, paras 11.04–11.12 and 11.15–11.17, and Steven, *Pledge and Lien*, chs 2 to 8.

<sup>12</sup> A. J. M. Steven, ‘Rights in Security over Moveables’ in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland, vol. 1* (Oxford, 2000), 333–62, 341. See also A. J. M. Steven, ‘Scottish Property Law 2017’, *Jur. Rev.* (2017), 21–31, 27.

<sup>13</sup> *Murray of Philiphauch v Cuninghame* (1668) 1 Br Sup 575.

<sup>14</sup> Consumer Credit Act 1974 ss 114–22.

<sup>15</sup> “(1856) 19 152.” See Carey Miller with Irvine, *Corporeal Moveables*, para. 11.07. The leading critique of *Hamilton* is A. F. Rodger, ‘Pledge of bills of lading in Scots law’, *Jur. Rev.* (1971), 193–213.

by the Law Reform Committee for Scotland in 1960.<sup>16</sup> Its solution was to recommend the introduction of the floating charge. Yet less than ten years before, Lord President Cooper<sup>17</sup> had famously said: ‘It is clear in principle and amply supported by authority that a floating charge is utterly repugnant to the principles of Scots law.’<sup>18</sup> In 1961 the recommendation was implemented and the floating charge was introduced to Scotland by statute followed by the enforcement procedure of receivership in 1972.<sup>19</sup>

As David himself noted, the floating charge is of course a legal transplant from England.<sup>20</sup> Only certain legal persons can grant this type of security, principally companies and limited liability partnerships. Registration of the security in the Companies Register is required.<sup>21</sup> While the floating charge has been welcomed by the banks,<sup>22</sup> given the shortcomings of pledge, it has proved problematic. Floating charges are creatures of equity. Scots law does not recognise equity in the way that it is recognised in England.<sup>23</sup> It has therefore been hard to make the floating charge fit into a civilian legal framework.<sup>24</sup> For example, the charge only becomes a real right on crystallisation<sup>25</sup> and its nature before that is unclear. Efforts to make it fit threatened the conceptual foundations of Scottish property law in the case of *Sharp v Thomson*.<sup>26</sup> David

<sup>16</sup> *Eighth Report of the Law Reform Committee for Scotland* (Cmnd 1017, 1960) para. 2.

<sup>17</sup> On Lord Cooper, see H. L. MacQueen, ‘Two Toms and an Ideology for Scots Law: T B Smith and Lord Cooper of Culross’ in E. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh, 2005), 44–72.

<sup>18</sup> *Carse v Coppen* 1951 SC 233, 239.

<sup>19</sup> Companies (Floating Charges) (Scotland) Act 1961 and the Companies (Floating Charges and Receivers) (Scotland) Act 1972. The current legislation is the Companies Act 1985 ss 462–6 and the Insolvency Act 1986 ss 50–71.

<sup>20</sup> See D. L. Carey Miller, ‘Scots and South African Property: Problem Transplants’ in E. Cooke (ed.), *Modern Studies in Property Law Volume 1: Property 2000* (Oxford, 2001), 293–308, 303–4.

<sup>21</sup> Within 21 days of its creation. See the Companies Act 2006 s. 859A.

<sup>22</sup> See e.g. R. B. Jack, ‘The Coming of the Floating Charge to Scotland: an Account and an Assessment’ in D. J. Cusine (ed.), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (Edinburgh, 1987), 33–46.

<sup>23</sup> See, for example, D. J. Carr, ‘Equity Stalling?’, *Edinburgh Law Review*, 18(3) (2014), 388–95 and D. J. Carr, *Ideas of Equity* (Edinburgh, 2017).

<sup>24</sup> See Carey Miller, ‘Scots and South African Property’, 303–4. And see now also *MacMillan v T Leith Developments Ltd (in receivership and liquidation)* [2017] CSIH 23, para. 121 per Lord Drummond Young.

<sup>25</sup> *National Commercial Bank of Scotland Ltd v Liquidators of Telford Grier Mackay & Co. Ltd* 1969 SC 181.

<sup>26</sup> 1997 SC (HL) 66. But a later House of Lords undid much of the damage in *Burnett’s Trustee v Grainger* 2004 SC (HL) 19. In the meantime the matter had been referred

and others have called for the floating charge to be abolished and replaced,<sup>27</sup> but attempts at reform have so far not succeeded.<sup>28</sup>

#### (4) Agricultural charges, aircraft mortgages and security over ships

It is possible by statute for an agricultural co-operative to grant a charge over its ‘stocks of merchandise’.<sup>29</sup> This security is like a floating charge and in practice appears not to be used. Rather, agricultural co-operatives grant floating charges instead.

Scotland has much the same statutory regime for aircraft mortgages and ship mortgages as the rest of the United Kingdom.<sup>30</sup> These are non-possessory but require registration in order to have third party effect.

In relation to ships, in the interests of completeness, mention should also be made of bonds of bottomry and respondentia. These are hypothecs which can be granted by the captain over the ship and the cargo respectively.<sup>31</sup> Nowadays due to the availability of modern communications they are obsolete.

#### (5) Functional securities

##### (a) *Introduction*

Given the limited range of true rights in security which are available over moveables, functional securities are widely used. What happens is that ownership of the asset is used for security purposes.<sup>32</sup> Usually the creditor will hold the property, except in the case of the trust, where ownership is vested in the debtor and the creditor is a beneficiary under the trust. In a functional security, as contrasted with a true right in security, the creditor does not hold a subordinate real right in the encumbered property.

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to the Scottish Law Commission. See Scottish Law Commission, *Report on Sharp v Thomson* (Scot. Law Com. No. 298, 2007).

<sup>27</sup> See O’Donnell and Carey Miller, ‘Security over Moveables’, 822; G. L. Gretton, ‘Should floating charges and receivership be abolished?’, *SLT (News)*, (1986), 325–8 and D. Cabrelli, ‘The Case Against the Floating Charge in Scotland’, *Edin. L. R.*, 9(3) (2005), 407–38.

<sup>28</sup> See below, in the section headed “Lack of Reform to Date”.

<sup>29</sup> Agricultural Credits (Scotland) Act 1929.

<sup>30</sup> Merchant Shipping Act 1995 s. 16 and Sch. 1; Civil Aviation Act 1982 s. 86 and The Mortgage of Aircraft Order 1972, SI 1972/1268. The UK acceded to the Cape Town Convention on International Interests in Mobile Equipment in 2015. See The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, SI 2015/912.

<sup>31</sup> Gloag and Irvine, *Rights in Security*, 297–302.

<sup>32</sup> But the subject of ownership of incorporeals is controversial. See G. L. Gretton, ‘Ownership and its Objects’, *Rebels Zeitschrift*, 71(4) (2007), 802–51.

(b) *Transfer*

True security<sup>33</sup> does not seem possible under Scots law in relation to incorporeal moveable property such as receivables, company shares and intellectual property. Security is effected by transferring the property to the creditor, either by assignation in security, or by complying with the transfer rules which apply in special cases.<sup>34</sup> An assignation in security can either state expressly that the purpose of the transfer is security or it can bear to be an absolute assignation but be qualified by a separate agreement between the parties.<sup>35</sup>

Where the asset that is being transferred is a claim, in other words the right to the performance of an obligation (typically payment of a monetary debt), an assignation is only completed by intimation to the obligant (the account debtor).<sup>36</sup> For example, Angela owes Barry £1000. Barry assigns his claim against Angela to Charles. The assignation must be intimated to Angela (in practice usually by the assignee, Charles) or it will be ineffective.

Transfer of company shares and registered intellectual property requires registration in the company's register of shareholders or the appropriate intellectual property register. Complex contractual arrangements must then be put in place to allow the provider of the security to continue to exercise rights which they would have but for the transfer, such as voting rights in the case of shares and licensing rights in the case of intellectual property. These difficulties arise because ownership is a greater right than a secured creditor actually needs.

Sale and leaseback arrangements are sometimes used for corporeal moveables. They make the delivery required in pledge unnecessary to 'secure' the purchaser/lessor, because under the Sale of Goods Act 1979 section 17, in contrast with the common law, delivery is not required to transfer ownership of the property. But this type of arrangement runs the risk of being struck down by another provision in the 1979 Act – section 62(4) – as a sham sale.<sup>37</sup>

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<sup>33</sup> Apart from the difficult case of the floating charge.

<sup>34</sup> Such as a transfer of shares in a company, which has to be registered in its register of members.

<sup>35</sup> Glog and Irvine, *Law of Rights in Security*, 490–4.

<sup>36</sup> See e.g. R. G. Anderson, *Assignation* (Edinburgh, 2008), ch. 6.

<sup>37</sup> See Carey Miller with Irvine, *Corporeal Moveables*, para. 12.06. See also G. L. Gretton, 'The Concept of Security' in Cusine (ed.), *A Scots Conveyancing Miscellany*, 126–51 and S. C. Styles, 'Debtor-to-Creditor Sales and the Sale of Goods Act', *Jur. Ren.*, (1995), 365–76.

(c) *Retention of ownership*

Retention of title in the sale of goods is widely used.<sup>38</sup> Commercial sales contracts have clauses under which the seller retains ownership until the price is paid. Often, however, title is retained until all sums due to the seller are paid, thus giving the seller a high level of protection in the event of the buyer's insolvency.<sup>39</sup> While valid, these clauses can be defeated by sub-sales to third parties in good faith,<sup>40</sup> as well as by forms of original acquisition (e.g. accession, such as where bricks used to build a house become owned by the landowner<sup>41</sup>). Another important example of ownership retention, in a consumer context, is hire purchase under which ownership of vehicles or other goods is kept until the final instalment is paid by the hiree/purchaser. The downside of hire purchase is that it can only be used for acquisition finance. It is no good for someone who already owns the vehicle, where the only security available, given the doubtful validity of sale and leaseback, is pledge.

(d) *Trusts*

Creditors may also take security by using trusts. Trusts are a common feature of securitisations and other transactions in which sums of money require to be ring-fenced. Under Scots law, ownership of trust property is held by the trustees as a 'special patrimony' and thus separately from their private assets, which are in their 'ordinary patrimony'.<sup>42</sup> Therefore, if a trustee becomes personally insolvent the trust assets cannot be touched by the trustee's personal creditors because they are ring-fenced in the special patrimony. The use of trusts for security purposes was condemned by the Inner House of the Court of Session in one case over thirty years ago.<sup>43</sup> Today, however, it seems unlikely that a similar approach would be taken given the considerable number of commercial transactions that are based on trust structures.<sup>44</sup>

<sup>38</sup> See generally Carey Miller with Irvine, *Corporeal Moveables*, ch. 12.

<sup>39</sup> *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891.

<sup>40</sup> The leading provision is the Sale of Goods Act 1979 s. 25 but the Hire Purchase Act 1964 s. 27 has particular rules on motor vehicles.

<sup>41</sup> See Carey Miller with Irvine, *Corporeal Moveables*, para. 12.14.

<sup>42</sup> See G. Gretton, 'Trusts without Equity', *International & Comparative Law Quarterly*, 49(3) (2000), 599–620; K. G. C. Reid, 'Patrimony not equity: the trust in Scotland', *Enr. Rev. Private L.*, 8(3) (2000), 427–37. See also *Ted Jacob Engineering Group Inc. v Johnston-Marshall and Partners* [2014] CSIH 18, para. 90 per Lord Drummond Young and *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76, paras 16 and 17 per Lord Malcolm.

<sup>43</sup> *Clark Taylor & Co. Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111.

<sup>44</sup> Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No. 239, 2014), para.

## Lack of Reform to Date

### (1) Previous reports

Over the last half century there have been several non-implemented (or only part-implemented) reports on reform of security over moveables. Some were written on a Scotland-only basis and others UK-wide.<sup>45</sup> The Crowther Report of 1971,<sup>46</sup> part of which was implemented by the Consumer Credit Act 1974, proposed a functional approach based on the notice-filing system under the Uniform Commercial Code article 9 of the USA.

In notice filing, as the name suggests, what is registered is not a security interest<sup>47</sup> itself but notice of a (possible) security interest.<sup>48</sup> The notice can be registered before any security interest is actually granted and the same notice can cover multiple interests. The functional approach, which is a hallmark of the system, is that any transaction for security purposes will not normally be ‘perfected’, in other words have third party effect unless a notice is registered by the secured creditor. Therefore, in the absence of registration, transactions such as retention of title or assignation in security will not be effective against third parties any more than a direct grant of a security over property in respect of which there is no registered notice. In such circumstances the security interest can nevertheless ‘attach’, that is to say be enforceable between the provider of the security and the secured creditor.<sup>49</sup> Moreover, where ownership is used for security purposes the transaction is ‘recharacterised’ so that the secured creditor is deemed to hold only a security interest. Thus, for example, the right of a seller who has retained title pending payment of the purchase price is regarded as only holding a security interest in the goods.

The Crowther Report recommended that its proposed notice filing scheme should apply in both England and Wales, and Scotland, but that the differences between the two legal systems made it advisable to have

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3.16. See also *Tay Valley Joinery Ltd v CF Financial Services Ltd* 1987 SLT 207.

<sup>45</sup> See Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot. Law Com. DP No. 151, 2011), ch. 10. On unimplemented reports south of the border, see J. de Lacy, ‘The evolution and regulation of security interests over personal property in English law’ in *idem* (ed.), *The Reform of UK Personal Property Security Law* (Abingdon, 2010), 3–82.

<sup>46</sup> *Report of the Committee on Consumer Credit* (Cmnd 4596, 1971).

<sup>47</sup> A “security interest” equates broadly with a security right.

<sup>48</sup> See Scottish Law Commission, *Discussion Paper on Moveable Transactions*, ch. 13.

<sup>49</sup> The attachment/perfection distinction is alien to Scottish property where a real right either exists and is enforceable against everyone, or does not exist.



separate legislation.<sup>50</sup> The Government of the day was not convinced.<sup>51</sup> A working party was later established under the auspices of the Scottish Law Commission to examine how a notice-filing scheme might work in Scotland. The chairman was Professor Jack Halliday and its report was published in 1986, but its recommendations were never implemented.<sup>52</sup> The Diamond Report of 1989, which proposed notice filing for both north and south of the border, suffered a similar fate.<sup>53</sup>

In 1994, the Department of Trade and Industry Report, mentioned at the start of this essay, was published.<sup>54</sup> It was restricted to Scotland only and, unlike the earlier reports, included a draft Bill. It rejected notice filing for several reasons, including the fact it ‘involved a radical departure from the current law, and [was] very complex’.<sup>55</sup> Instead it proposed a new fixed security over both corporeal and incorporeal moveable property which would be created by registration in a new ‘Register of Security Interests’ to be kept by the Registrar of Companies. Further, the floating charge was to be made available to non-company debtors but only for moveable property and not consumer goods. But once again the recommendations were not implemented.

The most recent case of non-implementation concerns the floating charge. The Scottish Law Commission was asked to consider this subject to see how the law could be improved. Its *Report on Registration of Rights in Security by Companies*<sup>56</sup> recommended a new legislative scheme, which included the establishment of a new Scottish Register of Floating Charges to be run by Registers of Scotland.<sup>57</sup> Floating charges over Scottish assets would require to be registered in that register and not in the Companies Register.

The recommendations were put into statute by Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. After the legislation was passed,

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<sup>50</sup> *Report of the Committee on Consumer Credit*, para. 5.2.21.

<sup>51</sup> *Reform of the Law of Consumer Credit* (White Paper, Cmnd 5427, 1973).

<sup>52</sup> Scottish Law Commission, *Report by Working Party on Security over Moveable Property* (1986) (the ‘Halliday Report’).

<sup>53</sup> A. L. Diamond, *A Review of Security Interests in Property* (Department of Trade and Industry, 1989).

<sup>54</sup> *Security over Moveable Property in Scotland: A Consultation Paper* (Department of Trade and Industry, 1994) (the ‘Murray Report’). See H. Patrick, ‘Reform of Security over Moveable Property: Some General Comments’, *SLT (News)*, (1995), 42–6 and A. J. M. Steven, ‘Reform of Security over Moveable Property: Some Further Thoughts’, *SLT (News)*, (1995), 120–2.

<sup>55</sup> *Security over Moveable Property in Scotland: A Consultation Paper*, para. 2.5.

<sup>56</sup> Scot. Law Com. No. 197, 2004.

<sup>57</sup> The department responsible in Scotland for various registers, including the Land Register.

however, the Committee of Scottish Clearing Bankers wrote to the Scottish Government objecting to the provisions being brought into force on the basis that they would result in increased cost to business.<sup>58</sup> The principal argument was that whereas a UK company with property in Scotland and England only has to register a floating charge once at Companies House under the current law, under Part 2 of the 2007 Act two registrations would be required. The Scottish Government then established a technical working group led by Registers of Scotland to consider the issue.<sup>59</sup> Its report proposed three options: (1) implement Part 2 without amendment; (2) implement with amendments; and (3) do not implement. Members of the group were divided as to the way forward. The Scottish Government carried out a consultation on the report in 2012, but has taken no further action. The legislation is now unlikely ever to be brought into force.<sup>60</sup>

## (2) Analysis

What conclusions can be drawn from this catalogue of lack of reform? This is what David had to say in an essay on real and personal security published in 2002:

While the perceived need to escape from the requirement of possession by the creditor has long been a spur for reform of the law relating to security over movables, the development of commercial law, facilitating the purchase of consumer goods on credit, has tended to leave traditional security devices in the lurch. That review of the law [...] is not perceived as a matter of high priority is demonstrated by the succession of official proposals for reform which have come to nothing.<sup>61</sup>

Clearly it is true to say that the existence of functional security options, together with the floating charge, has reduced the pressure for reform. But then David, in 2005, in the second edition of his *Corporeal Moveables*, somewhat recanted

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<sup>58</sup> See Register of Floating Charges Technical Working Group, *Report to Scottish Government* (2011) Appendix 3, available online at <http://www.scotland.gov.uk/resource/doc/254430/0121799.pdf>.

<sup>59</sup> *Ibid.*

<sup>60</sup> For criticism, see K. G. C. Reid and G. L. Gretton, *Conveyancing 2013* (Edinburgh, 2014), 178.

<sup>61</sup> D. L. Carey Miller, 'Present and Future of Real and Personal Security: Scotland' in J. Bell (ed.), *Studies in UK Law* (London, 2002), 123–37, 136.

from his earlier view, mentioned at the start of this essay and expressed in 1997, that there was an “urgent” need for reform:

[D]espite the numerous reviews, it is questionable whether there is actually a need for legislative reform in this area. Despite the existence of a widespread perception that the law causes problems in practice, research commissioned to investigate this perception concluded that neither the ability of unincorporated businesses to grant a floating charge nor their inability to grant a fixed non-possessory security over moveable property was significantly impairing their ability to access finance. It would therefore seem that legislation to implement any of the suggested reforms is unlikely, at least in the foreseeable future.<sup>62</sup>

The research to which he refers is a report published by the Scottish Executive Central Research Unit in 2002.<sup>63</sup> It will not come as a surprise that I take the view that there is a need for legislative reform. This can be justified on several grounds.

In the first place, the 2002 Report noted that in practice the unsatisfactory state of Scots common law was overcome to some extent by recourse to functional securities and, where possible, writing contracts under English law.<sup>64</sup> Thus, metaphorically speaking, the back door is having to be used by parties to secured transactions because the front door is too narrow.<sup>65</sup> This is unsatisfactory. A parallel can be drawn with parties contracting under English law because of the doubts about the competence of execution in counterpart, something which the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 remedies.<sup>66</sup> In the second place, it is unclear that what was true in 2002 is true to the same extent today. As we shall see shortly, the calls for the Scottish Law Commission to look at this area subsequent to 2002 have been strong. In the third place, the last twenty years have seen numerous other jurisdictions introduce significant legislation on security over moveable

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<sup>62</sup> Carey Miller with Irvine, *Corporeal Moveables*, para. 11.18.

<sup>63</sup> *Report on Business Finance and Security over Moveable Property* (Scottish Executive Central Research Unit, Edinburgh, 2002).

<sup>64</sup> *Ibid.*, 10 and 66–8.

<sup>65</sup> In the words of the Scottish Law Commission, *Discussion Paper on Moveable Transactions*, para. 12.14.

<sup>66</sup> This followed on from Scottish Law Commission, *Report on Formation of Contract: Execution in Counterpart* (Scot. Law Com. No. 231, 2013).

property.<sup>67</sup> Mention can be made of New Zealand,<sup>68</sup> Louisiana,<sup>69</sup> France,<sup>70</sup> Australia,<sup>71</sup> Papua New Guinea,<sup>72</sup> Jersey,<sup>73</sup> Belgium,<sup>74</sup> and Malawi.<sup>75</sup> Further, in 2009 the Draft Common Frame of Reference was published.<sup>76</sup> Book IX of that work provides an important new reform model.<sup>77</sup> And in 2016 the UNCITRAL Model Law on Secured Transactions was released.<sup>78</sup> The degree to which there have been developments elsewhere such as these highlight the extent to which Scots law requires reform. This is the task of the Scottish Law Commission.

## Scottish Law Commission Project on Moveable Transactions

### (1) General

As is relatively well-known, the Scottish Law Commission primarily carries out its work under ongoing programmes of law reform, which are agreed with the Scottish Government.<sup>79</sup> The present practice is for a new programme

<sup>67</sup> See further the website of the Secured Transactions Law Reform Project, <http://securedtransactionslawreformproject.org/>.

<sup>68</sup> Personal Property Securities Act 1999. See M. Gedye, R. C. C. Cuming and R. J. Wood, *Personal Property Securities in New Zealand* (Wellington, 2002).

<sup>69</sup> 2001 La Acts No. 128. See J. A. Stuckey, 'Louisiana's Non-Uniform Variations in UCC Chapter 9', *Louisiana Law Review*, 62(3) (2002), 793–878.

<sup>70</sup> *Ordonnance n° 2006-346 du 23 mars 2006 relative aux sûretés*. See M. Renaudin, 'The Modernisation of French Secured Credit Law: Law as a Competitive Tool in Global Markets', *International Company and Commercial Law Review*, 24(11) (2013), 385–92.

<sup>71</sup> Personal Property Securities Act 2009. See J. Harris and N. Mirzai, *Annotated Personal Property Securities Act 2009 (Cth)* (Sydney, 2011).

<sup>72</sup> Personal Property Securities Act 2011.

<sup>73</sup> Security Interests (Jersey) Law 2012.

<sup>74</sup> Pledge Act of 11 July 2013. See E. Dirix, 'The New Belgian Act on Security Interests in Movable Property', *International Insolvency Review*, 23(3) (2014), 171–80.

<sup>75</sup> Personal Property Security Act 2013. See M. Dubovec and C. Kambili, 'Using the UNCITRAL Legislative Guide as a tool for a secured transaction reform in Sub-Saharan Africa: the case of Malawi', *Arizona Journal of International and Comparative Law*, 30(2) (2013), 163–86.

<sup>76</sup> See C. von Bar and E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Oxford, 2009).

<sup>77</sup> See U. Drobnig and O. Böger, *Proprietary Security in Movable Assets* (Oxford, 2015).

<sup>78</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2016Model\\_secured.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html).

<sup>79</sup> For discussion in a property law context, see A. J. M. Steven, 'A Golden Era? The Impact of the Scottish Law Commission on Property Law' in W. Barr (ed.), *Modern Studies in Property Law*, vol. 8 (Oxford, 2015), 13–30.

to be agreed every few years, following wide-ranging consultation by the Commission as to the areas that it should examine, using the criteria of importance, suitability and resources.<sup>80</sup>

When the Commission published its *Seventh Programme of Law Reform* in 2005 it announced its intention 'to review the law of assignation of, and security over, incorporeal moveables.'<sup>81</sup> The project had originally been suggested by the Law Society of Scotland and had the support of a number of other legal bodies.<sup>82</sup> There were several justifications for the project, in particular the importance of incorporeal moveables as a source of wealth and potential source of security for credit, and the fact that the current Scottish rules generally date back to before the industrial revolution and are not fit for modern commerce.<sup>83</sup> The requirement of intimation (notification) to the account debtor for there to be an assignation is cumbersome. As there is no equivalent to the English fixed charge, the only way to use incorporeal moveable property for security purposes is to assign it.<sup>84</sup>

While the Seventh Programme ran from 2005 to 2009 limited progress was made by the Commission due to its work on land registration.<sup>85</sup> When it published its *Eighth Programme of Law Reform* in 2010 it set out its decision to widen the project to include security over corporeal moveable property on the basis that that area of law was also 'outmoded'.<sup>86</sup> This had the support of a number of consultees to the Eighth Programme. Lord Hamilton, who was then the Lord President of the Court of Session, stated that the topic 'appears to be in urgent need of consideration.'<sup>87</sup> The Society of Writers to Her Majesty's Signet said that this should be the first priority for the Commission in its Eighth Programme as there is 'no workable fixed security in Scots law.'<sup>88</sup>

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<sup>80</sup> See Scottish Law Commission, 'Law Reform Projects', <http://www.scotlawcom.gov.uk/law-reform-projects/ninth-programme-of-law-reform/>. See e.g. Scottish Law Commission, *Ninth Programme of Law Reform* (Scot. Law Com. No. 242, 2015).

<sup>81</sup> Scottish Law Commission, *Seventh Programme of Law Reform* (Scot. Law Com. No. 198, 2005), para. 2.31.

<sup>82</sup> *Ibid.*, para. 2.32.

<sup>83</sup> *Ibid.*, paras 2.33–2.34.

<sup>84</sup> *Ibid.*, paras 2.31–2.38.

<sup>85</sup> This project led to Scottish Law Commission, *Report on Land Registration* (Scot. Law Com. No. 222, 2010), which was implemented by the Land Registration etc. (Scotland) Act 2012.

<sup>86</sup> Scottish Law Commission, *Eighth Programme of Law Reform* (Scot. Law Com. No. 220, 2010), para. 2.5.

<sup>87</sup> Submission of Lord Hamilton to the *Eighth Programme of Law Reform* (on file at Scottish Law Commission).

<sup>88</sup> Submission of WS Society to the *Eighth Programme of Law Reform* (on file at Scottish

There was also support from the Committee of Scottish Clearing Bankers, CBI Scotland and the Law Society of Scotland. Thus began the moveable transactions project,<sup>89</sup> comprising three strands: (a) assignation (transfer) of incorporeal moveable property; (b) security over incorporeal moveable property; and (c) security over corporeal moveable property.

There is a missing fourth strand: transfer of corporeal moveable property is excluded. The reason for this is that most cases of transfer of this type of property are governed by the Sale of Goods Act 1979.<sup>90</sup> This is a UK-wide statute and therefore consideration of the subject on a Scotland-only basis would not be sensible.

## (2) Discussion Paper

The Commission published a lengthy Discussion Paper in relation to the project in May 2011.<sup>91</sup> The paper's principal author was my predecessor, Professor George Gretton. There followed consultation.<sup>92</sup> A seminar was held on the security aspects of the project at the University of Edinburgh in October 2011.<sup>93</sup>

The scheme proposed in the Discussion Paper was as follows. There would be a new electronic register, to be known as the Register of Moveable Transactions (RMT) and administered by Registers of Scotland. A new security over both corporeal and incorporeal moveable property would be introduced, which would be created by registration in the RMT. In relation to corporeal moveables there would be no requirement for the creditor to have possession. As regards incorporeal moveables, such as intellectual property, because the new security would be a true security, the property would not be transferred to the creditor. It would therefore be possible for more than one new security to be granted over the same property. The new security could be granted by any person and not just companies and certain other bodies. Thus private individuals could use it, for example, to raise finance against

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Law Commission).

<sup>89</sup> The project was continued into the Ninth Programme of Law Reform. See Scottish Law Commission, *Ninth Programme of Law Reform*, paras 2.4–2.5.

<sup>90</sup> On which see Carey Miller, 'Scots and South African Property', 293.

<sup>91</sup> Scottish Law Commission, *Discussion Paper on Moveable Transactions*.

<sup>92</sup> Forty consultation responses were eventually received. One of these was from the Centre for Property Law of the University of Aberdeen, written by David Carey Miller and Malcolm Combe.

<sup>93</sup> The papers are published at *Edinburgh Law Review*, 16(2) (2012), 261–82. The speakers were Professor Gretton, Dr Hamish Patrick, Dr Ross Anderson and Professor Hugh Beale.

their motor vehicle. Secured loans may well incur lower interest rates than unsecured loans.<sup>94</sup> However, there would be special protections for consumer granters. Floating charges would be retained, at least for the foreseeable future.

Assignations of claims (including assignations in security) would be registrable as an alternative to intimation to the account debtor. Bulk assignations of claims under Scots law would be made far more commercially practical as there would only need to be the one simple registration rather than multiple individual intimations.

### (3) The way forward

The scheme proposed in the Discussion Paper was generally supported by consultees. At the time of writing, the Commission is working on a report and draft Bill, the content of which is yet to be finally approved by Commissioners. In due course, the draft Bill could, if the Scottish Government chose to implement the report, then form the basis of a Bill to be considered by the Scottish Parliament, as rights in security is an area of devolved law.<sup>95</sup>

In the course of this work it has been helpful for me to test what is being proposed against two benchmarks set down by David in his writings. First, the new security would be created by registration. In his 1997 article David argued that the 'requirement of registration to create a real right should be essential in whatever system of security over moveable property is eventually arrived at.'<sup>96</sup> The logic is clear. Third parties require to be alerted to the fact that a security right is in place and react accordingly. This is the publicity principle of property law.<sup>97</sup>

Secondly, the new scheme would address the shortcomings in the current law which hinder commerce, but would fit so far as possible with the underlying principles of Scots law. The difficulties caused by the incompatibility of the floating charge with Scots law have been recognised and the experience would not be repeated. In his aforementioned 2002 essay, on real and personal security, David wrote:

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<sup>94</sup> See e.g. D. J. Y. Hamwijk, *Publicity in Secured Transactions Law* (Amsterdam, 2014), 103.

<sup>95</sup> But some aspects of the scheme, e.g. any provisions relating specifically to companies, may require legislation from Westminster as the law of business associations is currently a reserved matter.

<sup>96</sup> O'Donnell and Carey Miller, 'Security over Moveables', 822.

<sup>97</sup> See e.g. D. L. Carey Miller and others, 'National Report on the Transfer of Movables in Scotland' in W. Faber and B. Lurger (eds), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Munich, 2009), 297–470, 315.

[T]here is a continuing tension between, on the one hand, a reform agenda driven by commercial utility, and, on the other, pressure to adhere to fundamental principles of private law. In this regard, the priority should be a legal regime which best serves the relevant interests of Scotland, achieved by reform which is functionally compatible with Scots law.<sup>98</sup>

He expressed the same idea in a slightly different way in *Corporeal Moveables*:

The better view is that while the system of property may need to adapt to accommodate the needs of commerce, for it to retain its structural integrity and coherence any development should come from within and show sufficient respect for, and consideration of, the traditions of the system.<sup>99</sup>

With regard to accommodating the needs of commerce, it is notable that while the scheme, if implemented, would amount to the most significant statutory reform of security over moveables in Scotland ever, it is not particularly radical. The plan would not be to introduce the functional notice-filing approach to security exemplified by the Uniform Commercial Code article 9 in the USA and now also the Personal Property Securities Acts in Canada, Australia and New Zealand. As was seen earlier in this essay previous attempts to introduce such a scheme in Scotland failed. One of the main reasons for not attempting to take such an approach now is the desire for commercial law north and south of the border to be broadly similar.<sup>100</sup> The Law Commission for England and Wales, in papers published in 2002<sup>101</sup> and 2004,<sup>102</sup> proposed wholesale reform of personal property security law based on a functional notice-filing approach. In a subsequent report of 2005, after significant opposition from

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<sup>98</sup> Carey Miller, 'Present and Future of Real and Personal Security: Scotland', 137.

<sup>99</sup> Carey Miller with Irvine, *Corporeal Moveables*, para. 11.18. In a similar vein, see Lord Hodge, 'Does Scotland need its own Commercial Law?', *Edinburgh Law Review*, 19(3) (2015), 299–310, 307.

<sup>100</sup> Several areas of law which are relevant to the moveable transactions project, including consumer credit law, corporate insolvency law and intellectual property law operate currently on a UK-wide basis and are reserved to the Westminster Parliament.

<sup>101</sup> Law Commission, *Registration of Security Interests: Company Charges and Property other than Land* (Law Com. CP No. 164, 2002).

<sup>102</sup> Law Commission, *Company Security Interests: A Consultative Report* (Law Com. CP No. 176, 2004).



stakeholders, it recommended a significantly more limited set of proposals.<sup>103</sup> But even these were largely not implemented.<sup>104</sup> While that Commission's work was on security rights granted by companies, whereas the moveable transactions project is not so restricted, the English experience remains highly relevant to north of the border. Banks and other financial institutions would not accept a functionalist approach in Scotland requiring retention of title clauses, hire purchase, trusts and the like to be registered when there was no such requirement in the rest of the United Kingdom.

At some point in the future England and Wales may yet embrace notice filing. It has long been supported by the doyen of English commercial law, Professor Sir Roy Goode.<sup>105</sup> The Secured Transactions Law Reform Project, currently chaired by Lord Savile and under the executive directorship of Professor Louise Gullifer of the University of Oxford, is working on a possible notice-filing scheme.<sup>106</sup> But the City of London Law Society, an influential interest group in this area, favours far more limited reforms.<sup>107</sup> There are strong arguments for taking a functional approach to security rights. As the late Professor William Gordon pointed out, Scots law is incoherent in taking an ultra-strict approach by not allowing a true security right over corporeal moveables without the creditor having possession (pledge) but admitting functional security without possession in the cases of hire purchase and retention of title.<sup>108</sup> The subject remains deeply controversial.<sup>109</sup> Realistically, English law, which also presently takes a formal rather than functional approach, would have to move first.

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<sup>103</sup> Law Commission, *Company Security Interests* (Law Com. No. 296, 2005).

<sup>104</sup> See H. Beale, 'The exportability of North American chattel security regimes: the fate of the English Law Commission's proposals', *Canadian Business L. J.*, 43(2) (2006), 177–99.

<sup>105</sup> See e.g. R. M. Goode, 'Insularity or leadership? The role of the United Kingdom in the harmonisation of commercial law', *International & Comparative Law Quarterly*, 50(4) (2001), 751–65, 759–60.

<sup>106</sup> See the project website: Secured Transactions Law Reform Project, <http://securedtransactionslawreformproject.org/>. See also L. Gullifer and O. Akseli (eds), *Secured Transactions Law Reform* (Oxford, 2016). Some of the material in this essay draws on my chapter with Hamish Patrick on Scotland in that volume.

<sup>107</sup> See A. J. M. Steven, 'Secured Transactions Reform', *Edinburgh Law Review*, 17(2) (2013), 251–6.

<sup>108</sup> See W. M. Gordon, 'Roman Influence on the Scots Law of Real Security' in R. Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995), 157–75, 167–75.

<sup>109</sup> For trenchant criticism of functionalism, see J. MacLeod, 'Thirty Years After: The Concept of Security Revisited' in A. J. M. Steven, R. G. Anderson and J. MacLeod (eds), *Nothing So Practical as a Good Theory: Festschrift for George L. Gretton* (Edinburgh, 2017), 177–93.

Whether a functional system would meet David's test of showing respect for the traditions of our property law is debateable, but that debate is for the future. The priority for the present is to effect the level of change that stakeholders in the area will support.

## **Conclusion**

Twenty years after David's important article, reform of security over moveables remains a longstanding reform agenda in Scotland. It is clearer than ever that the shortcomings in this area of our law need to be addressed. The project by the Scottish Law Commission on moveable transactions provides the impetus for action. The recommendations which the Commission eventually makes should be tested against the principles set out by David. Hopefully, there should then not be too long to wait for reform to be finally achieved.<sup>110</sup>

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<sup>110</sup> This essay was revised and updated some months before the Scottish Law Commission, *Report on Moveable Transactions* (Scot. Law Com. No. 249, 2017) was published on 19 December 2017. For an overview of the Report see A. J. M. Steven, 'Asset Finance: Time for Reform', *Journal of the Law Society of Scotland* (January 2018), 22–3.