UK: SCOTLAND

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1. Real Property Law – Introduction

1.1 General Features and Short History

The United Kingdom of Great Britain and Northern Ireland comprises one state, four countries and three jurisdictions. The jurisdictions are (i) England and Wales (ii) Scotland and (iii) Northern Ireland. Each jurisdiction has its own courts, its own lawyers, and its own law. The state has a common parliament (the House of Commons and House of Lords), a common executive, and a common supreme court (the House of Lords), all based in London. But in recent years there has been administrative and legislative devolution both to Scotland and to Northern Ireland. A separate parliament for Scotland was established in 1999, with power to legislate on most areas of private law.[2]

The union between Scotland and England took place in 1707.[3] Before then the countries were separate states. In the medieval period the laws of Scotland and England had many points in common. In particular the feudal system of land tenure, which reached England with the Norman Conquest in 1066, was introduced to Scotland in the course of the twelfth century. From the sixteenth century onwards, however, there was a substantial reception of Roman law in Scotland (but not, on the whole, in England). In Scotland, as in many other European countries, the jurists of the *ius commune* were studied, and their writings applied in the courts. National legal education did not begin properly in Scotland until the early eighteenth century, and before that time law students from Scotland often studied in the universities of Europe, at first mainly in France and, after the Reformation, in the Netherlands. And just as in the Netherlands a Roman-Dutch law was being fashioned from a combination of Roman and local law, so in Scotland a Roman-Scots law developed. Thus by the time of the Union with England, in 1707, Scots law was radically different from the law of England.

These differences have lessened over time. During the century after 1850, in particular, English law came to have an important influence on the law of Scotland, and a number of English rules were imported. Nonetheless the laws of Scotland and England remain different and distinct. Today Scotland is often classified as a mixed legal system – that is, a system which draws on both the civil (Roman) law and the common law traditions. It thus resembles the systems found in jurisdictions such as South Africa, Quebec, Louisiana and Sri Lanka.[4] In the field of private law Scotland is particularly close to South Africa, no doubt partly because of the shared influence of Roman-Dutch (or Roman-Scots) law.[5]

Land law,[6] as already mentioned, was feudal, but the law of movable property was Roman. Thus for

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1 I am indebted to the following for help given in various ways: Professor Stewart Brymer; Professor A D M Forte; Colin Graham; Professor George Gretton; Bruce Merchant; Registers of Scotland; Rhona Simpson.

2 Scotland Act 1998.

3 On the history of Scots law in general and of property law in particular, see Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* vol 1 (2000).

4 See in particular Vernon Valentine Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001).

5 Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004).

6 "Real property" is a term of English law but not of Scots. In general I have used the more neutral "land law".

centuries there were, in effect, two laws of property, one for immovable property and the other for movable property, although there was a tendency for feudal law to become Romanised. The experience in other European countries was often much the same. Indeed the feudal law was as much a common law for Europe as the civil law. The *Libri Feudorum,* glossed by Accursius and often included as an appendix to the *Corpus Iuris Civilis*, was studied in Scotland as elsewhere in Europe. Eventually, in the seventeenth century, it came to be replaced by Thomas Craig's *Ius Feudale*, a Scottish work but with a European reputation.[7]

In England the feudal system was dismantled, but not abolished, by Oliver Cromwell in the mid-seventeenth century. But long before then it had taken a different path from the feudalism of Scotland and of other European countries.[8] Insofar as the structure of English land law remains feudal, therefore, it is the product, not of European feudalism, but of a distinctive English variant. And in the development of its feudal law as of its civil law, Scotland looked to Continental Europe and not to England.

The feudal system was abolished in France in 1789, following the Revolution, and in a number of other countries by conquest of French arms. By 1850 it had virtually disappeared in Continental Europe. But it survived in Scotland until 2004.[9] For its final century, however, it was attenuated and, increasingly, of marginal significance. That it survived at all was due to its usefulness as a means of imposing real burdens (discussed below). Even before the abolition of the feudal system, land law in Scotland was largely civilian (Roman) in character. Abolition completed the victory of the civil law.

The influence of English law on Scottish land law has been correspondingly small. In particular, while Scotland has received both the trust and the floating charge, it does not recognise equity. Nonetheless English influence is not wholly absent. The new system of land registration, introduced to Scotland in 1981, is an approximate copy of the system used in England. The English law of easements, being based on the Roman law of servitudes, has had a certain influence on the Scottish law in this field. More importantly, at the beginning of the nineteenth century both Scotland and England came to recognise a second category of obligation which "ran with the land", binding successive owners. These *real burdens* (Scotland) or *freehold covenants* (England) set the UK jurisdictions apart from their Continental neighbours. Here the first developments seem to have occurred in Scotland, but whether England borrowed the idea or developed it independently is hard to say.

On practical matters the systems in Scotland and England are sometimes close. The transfer of land (*conveyancing*) is undertaken by ordinary lawyers (solicitors), and no special role is given to notaries public. Conveyancing in both countries is relatively informal and relatively cheap. A uniform tax system applies.

Unlike other *ius commune* systems, Scotland did not codify; and in the absence of a civil code, the continuing development of the *ius commune* has been unbroken. During the period 1680 to 1840 the private law of Scotland was systematically restated in several "institutional" works.[10] The name acknowledges the fact that the works were often modelled on the *Institutes* of Justinian. These works remain important today, but have often been absorbed into and adopted by case law. Statute is also important, particularly in modern times. In the case of two important doctrines – mortgages (*standard securities*) and real bur-

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7 An edition was published in Leipzig in 1716.

8 C D Farran, *The Principles of Scots and English Land Law* (1958); C F Kolbert and N A M Mackay, *History of Scots and English Land Law* (1977).

9 It was abolished on 28 November 2004 by the Abolition of Feudal Tenure etc (Scotland) Act 2004. See Kenneth G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003).

10 The main works are: James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (1681, reprinted 1981); Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights* (1751-3, reprinted by the Stair Society, vols 41-43, 1993-5); John Erskine of Carnock, *An Institute of the Law of Scotland* (1754; 8th edn reprinted 1989); George Joseph Bell, *Principles of the Law of Scotland* (1829; 10th edn reprinted 1989).

dens – the statute amounts virtually to a code.[11] But, more typically, statute operates only fitfully, tending to alter the case law on points of detail but otherwise leave it undisturbed.

A uniform law applies throughout Scotland. But in seven counties in the north a special form of tenure, known as *crofting*, is recognised. Crofting tenure was introduced in the late nineteenth century as a recognition, and rationalisation, of customary landholdings.[12] A croft is a, generally small, area of land held on a perpetual lease and with virtual security of tenure. With some qualifications, a person holding on this tenure is entitled to buy the land at any time.

The United Kingdom joined the European Economic Community in 1972, and the European Convention on Human Rights became part of UK domestic law following the Human Rights Act 1998. Nonetheless the impact both of EU law and of the ECHR has been relatively slight in the field of land law.

1.2 Property and Estates

The feudal system of land tenure, which was abolished in 2004, operated rather in the manner of a perpetual lease. Thus if A, the owner of land, granted a feu of the land to B, the result was that B held the land of A – in the same way that a tenant holds from his landlord. Like a tenant, B had the right to possess the land, but in exchange had to pay a rent (*feuduty*) to A. In feudal terminology, A was the *superior* and B the *vassal* or *feuar*. In feudal theory all land was ultimately held of the Crown, so that in our example B held of A who held in turn of the Crown. In England the Statute Quia Emptores of 1290 prohibited subinfeudation altogether: thus the Crown can feu to A, but A cannot feu in turn to B. In Scotland, however, there was no prohibition on subinfeudation and it was common in practice. The result is that most land was held on a feudal chain. In our example the chain has three links: B, A, and the Crown. Sometimes it was longer, with four or even five links.

Following the rediscovery of Roman law, jurists in Europe were troubled as to the proper attribution of feudal rights. B (the vassal) was the person in possession. But was he the owner of the land? Or was the owner A, his feudal superior, or the Crown? In the late medieval period it came to be accepted that ownership (in Latin, *dominium*) was divided. B (the vassal in possession) held *dominium utile*. A (B's superior) held *dominium directum*. In some countries, but not in Scotland, these terms were rendered in the vernacular. Thus the Allgemeines Landrecht für die Preussichen Staaten of 1794 offers "nutzbare Eigenthum" and "Obereigenthum".[13] Over many hundreds of years the position of the vassal strengthened and that of the superior weakened. By the twentieth century the vassal was, in economic terms, the full owner of the land, and the superior's entitlement was reduced to the right to collect small amounts of feuduty (typically £2 or £3 each year) and to enforce real burdens. But the language of divided ownership remained.

The feudal system was abolished by the Abolition of Feudal Tenure etc (Scotland) Act 2000, one of the first statutes of the new Scottish Parliament. Section 2 provides that:

> "(1) An estate of *dominium utile* of land shall, on the appointed day,[14] cease to exist as a feudal estate but shall forthwith become the ownership of the land and, in so far as is consistent with the provisions of this Act, the land shall be subject to the same subordinate real rights and other encumbrances as was the estate of *dominium utile*.
>
> (2) Every other feudal estate in land shall, on that day, cease to exist.

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11 See respectively the Conveyancing and Feudal Reform (Scotland) Act 1970 part II, and the Title Conditions (Scotland) Act 2003 part 1.

12 The current legislation is the Crofters (Scotland) Act 1993.

13 Part 1, title 18.

14 28 November 2004.

(3) It shall, on that day, cease to be possible to create a feudal estate in land."

This provision abolished estates in land and, with them, divided ownership. *Dominium utile* became absolute *dominium* (ie ownership). *Dominium directum* – in practice by then largely valueless – was abolished. And no new feudal estate in land can be created.

In Scotland, unlike in England, estates in land were confined to ownership. Other, lesser rights – leases for example – were, and are, treated as real rights burdening the land directly.

In the common law world, the trust is also characterised as involving divided ownership. Thus the "legal ownership" of the trustee is matched by the "equitable ownership" of the beneficiary. That analysis has never been accepted in Scotland. Rather the trustee has full ownership, and the right of the beneficiary is merely a personal right against the trustee. But instead of division of ownership there is division of patrimony. Thus in addition to his private patrimony a trustee is considered to have a trust patrimony which, quite separately, contains all the assets of the trust. And since the beneficiary's right is against the trust patrimony only it is unaffected by the insolvency of the private patrimony.[15]

Following feudal abolition, therefore, Scotland no longer recognises the possibility of divided ownership.

Ownership of a piece of land will, in general, comprise also the ownership of the buildings erected on that land. The only exception – and an important one – is for apartment ownership. If a building is divided into apartments in separate ownership, none of the apartments is treated as acceding to the land. Instead each is owned independently from the land. In practice, however, matters are usually arranged so that the land belongs to the owners of one or more of the apartments. Sometimes this is the owner of the lowest apartment in the building, and sometimes this is the owner of all the apartments, so that the land is held jointly. The matter is discussed further at 1.4.

1.3 Interests in Land

Numerus clausus

In Scotland "real right" is used in preference to "interest in land".

There is a *numerus clausus* of real rights in land. But within each real right there is some flexibility as to content. The content of ownership and usufruct are, however, fixed.

Real rights are divided into (i) ownership and (ii) subordinate (or limited) real rights, which are treated as a right in the land of another (*iurae in re aliena*) and hence as a burden on that person's ownership.

Rights of use

Three subordinate real rights confer a right to use the property of another. These are usufruct, praedial servitude, and lease.

Usufruct (*proper liferent*) is largely identical to its Roman counterpart. But since the same effect can be achieved more flexibly by use of a trust (*improper liferent* or *trust liferent*), usufruct is not often encountered in practice. Unlike in some other countries, Scotland does not recognise derivatives of usufruct such as *usus* and *habitatio*.

Like other countries, Scotland recognises praedial servitudes. The terminology is *servitude* and not, as in

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15 For a much fuller account, see George L Gretton, "Trusts without Equity" (2000) 49 *International and Comparative Law Quarterly* 599. This approach is found in some other mixed legal systems. See J M Milo and J M Smits (eds), *Trusts in Mixed Legal Systems* (2001; this reproduces (2000) 8 *European Review of Private Law* 421 ff).

England, easement. Again, the modern law is based on Roman law. A praedial servitude must have a "praedium", ie a dominant tenement. Servitudes "in gross" (ie without a dominant tenement) are not permitted. Until recently there was a virtual *numerus clausus* of servitudes – a fixed list of some 15 rights which the law recognised as servitudes. But the closed list is now abolished for servitudes created by registration,[16] although it remains for servitudes created by prescription.

Unlike most other countries in Europe, Scotland views a lease not merely as a contract which is capable of affecting successors but as a full real right. For the most part, however, this is a matter of classification rather than of substance.

Mortgages

"Mortgage" is a term of English law. In Scotland the correct term is "right in security".

The only important right in security in respect of land is the *standard security*. This is an accessory security: non-accessory securities are unknown.

The *floating charge*, an invention of English law, was introduced to Scotland by statute in 1961.[17] It can be granted over property of any kind, including land, but it remains a personal right (ie it "floats") until an event occurs which causes it to attach to the property in question. Only companies or limited liability partnerships can grant floating charges, and attachment occurs when a receiver or liquidator is appointed to the company or partnership.

Pre-emptions

An option to acquire land (*pre-emption*) can be constituted as a real burden (see below) and hence as a real right in favour of a private person. But in the modern law the option only arises once.[18] At the time of sale the owner must offer the property to the holder of the pre-emption. Even if the offer is refused, the pre-emption is extinguished.

Other real rights

The most important real right not yet mentioned is the *real burden*. A real burden is an encumbrance on land in favour of the owner of other land. As with servitudes, therefore, there must usually be both a servient tenement (*burdened property*) and a dominant tenement *(benefited property*); and enforcement is by the owner for the time being of the benefited property against the owner for the time being of the burdened property. But unlike servitudes a real burden does not usually confer a right of use. Either it is a restriction on the burdened property (eg that nothing further is to be built on the property or that the property is not to be used for business purposes), or it imposes an affirmative obligation on its owner (eg to build a house or to maintain a wall). The availability of affirmative obligations distinguishes real burdens from the freehold covenant of English law, and seems to have no direct counterpart in any other EU country. It may reflect the origins of real burden, at the end of the eighteenth century, as a device used in feudal grants.

Real burdens are extremely common and few properties are unaffected by them. A typical set of real burdens can be found in the burdens section of the land certificate reproduced in Appendix A. In practice, real burdens are used mainly in two situations.

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16 Title Conditions (Scotland) Act 2003 s 76.

17 The current legislation is Companies Act 1985 ss 462 – 466.

18 Title Conditions (Scotland) Act 2003 s 84.

One is where land is being divided. So if A divides his land and sells part of it to B, it would be normal for the registered deed of transfer (*disposition*) to B to contain real burdens. B's land is then the burdened property and A's land the benefited property. The burdens might, for example, prevent B and his successors from building more than one house, or from using the property for commercial purposes. They might also impose affirmative obligations, such as an obligation to erect and maintain a fence between the two properties.

The other situation is a development of houses or other properties. If, for example, a building company builds 100 houses and then sells them, it is invariable practice to impose real burdens at the time of the sale. These burdens are set out in a single registered deed (*deed of conditions*) which applies to all of the houses. Every owner can enforce the burdens against every other owner. In effect they are the rules and regulations for the development. They ensure that amenity is preserved, and that any shared items are properly maintained.

In considering real rights it is common to overlook the role of statute. In fact many rights created by statute can be regarded as real, or at least quasi-real. For example, one modern statute gives everyone the right to take access over open countryside in private ownership.[19] Another provides that, where the family home is owned by one spouse only, the other spouse has a right of occupancy which, in certain circumstances, continues to affect the property even after it has been transferred.[20] These examples could be multiplied. One point of distinction from "normal" real rights is that the right in question generally arises automatically and not by the voluntary act of the parties.

1.4 Apartment Ownership (Condominiums)

Apartment blocks (*tenements*) have been a familiar feature of life in Scotland since the late medieval period. Today around 30% of the population live in apartments (*flats*).The law provides model rules on three main topics: (i) division of ownership within the building (ii) maintenance and (iii) management. But these are default rules only and can be altered in the registered title of individual buildings. In relation to (ii) and (iii) this is done by real burdens. In practice the default rules are usually altered, and supplemented, at least to some extent. Until recently the default rules had developed by a combination of case law and juristic writing; but these rules are now replaced by the *Tenement Management Scheme* contained in the Tenements (Scotland) Act 2004.[21]

Ownership

Under the default rules each person owns his own apartment, and has in addition a right of common property to certain other parts of the building, most notably the entrance hallway and stairs. Ownership of an apartment includes ownership of all the walls. If a wall forms the boundary between two flats, it is owned on each side to the halfway point. The owner of the highest flat owns the roof, and the owner of the lowest flat the land on which the building is built.

Apartment ownership has no special juridical status. Ownership of an apartment is the same as ownership of anything else. This means for example that an apartment can be freely mortgaged, without the consent of other owners.

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19 Land Reform (Scotland) Act 2003 s 1.

20 Matrimonial Homes (Family Protection) (Scotland) Act 1981 ss 1 and 6.

21 The Scheme itself is set out in schedule 1. The rules as to division of ownership are contained in ss 2 and 3. The legislation derives from the Scottish Law Commission's Report on *The Law of the Tenement* (Scot Law Com No 162, 1998; available on www.scotlaw.gov.uk).

An owner of an apartment is under a statutory obligation to insure it.[22] Thus if the building is destroyed by fire, the insurance company will compensate for the loss. Sometimes a real burden affecting the building requires that it then be re-built. Otherwise any owner can insist on having the vacant site sold and the proceeds of sale divided.[23] Division of the price is usually on equal basis despite the fact that, under the default rules, the land belongs only to the owner of the lowest apartment.

Maintenance

The default rules require that the strategic parts of the building (for example, the roof, outside walls, foundations) be maintained by everyone. Normally each pays an equal share, although real burdens may divide liability in a different way.

Management and use

Under the default rules decisions as to maintenance, and certain other matters, can be reached by a majority. The other owners are then bound, although a decision can be challenged in the court on the grounds of unfairness or unreasonableness. The default rules say nothing about the use of the building or of individual apartments, but provision is usually made by real burden (and so can be found on the Land Register). An example is given in the burdens section of the land certificate reproduced in Appendix A. Thus real burdens may provide that the apartments can be used only for residential purposes, or that no pets can be kept. Real burdens can be altered by the agreement of the owners of a majority of the apartments, or, on cause shown, by application to the Lands Tribunal.[24] In practice, the burdens are already in existence before any of the apartments is sold by the developer, and new burdens cannot be added without the agreement of all the owners in the building.

1.5 Building Lease (emphytéose – bail à construction/ Erbbaurecht)

The building lease is not recognised.

1.6 The Public Law Context of Real Property Transactions

There are no significant public law restrictions on transactions concerning land.

Housing is made available by local authorities and other social landlords for renting at rates kept artificially low.

To a limited extent transactions may be given favourable treatment for tax purposes. Thus the rate of transfer tax (*stamp duty land* tax) is lower for commercial property than for residential property.[25] And any profit made on the sale of a house used as one's main residence is exempt from capital gains tax.[26]

1.7 Brief Summary on "Real Property Law in Action"

In 1951 only 24% of houses in Scotland were owner-occupied, that is to say, occupied by the person

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22 Tenements (Scotland) Act 2004 s 18.
23 Tenements (Scotland) Act 2004 s 22.
24 Title Conditions (Scotland) Act 2003 ss 33 and 90.
25 See 3.7.2.
26 Taxation of Chargeable Gains Act 1992 s 222.

who owned it.[27] The remaining houses were rented, either from private landlords (48%) or, at a subsidised rent, from local authorities (28%). During the 1950s and 1960s, however, a large number of new houses were built by local authorities, so that by 1981 55% of all houses were *council houses*, ie rented from local authorities. In 1980 the new government of Margaret Thatcher passed legislation allowing tenants of council houses to buy their houses at a substantial discount.[28] The stated aim was to create a "property-owning democracy". Since 1980 more than half of all council houses have been bought in this way. By 2001 only 23% of houses were still rented from the local authority, while 64% of houses were owner-occupied. The last figure is expected to continue to rise.

In Scotland, therefore, the normal expectation is to buy rather than to rent. The market for housing is generally strong, particularly in the cities, where there has been significant price inflation over the last decade. This also makes housing attractive as an investment, and there has been a growing interest in "buying to let", ie buying a house to lease it out, thus giving the investor both the income stream from the rent and the capital growth from price inflation. The generally low rates of interest have encouraged this trend. The result has sometimes been an over-supply of houses to rent, and therefore a reduction in rents.

In 2002 the average price of a house (including apartments) in Scotland was £77.655 (= 110.000 Euros), and the average mortgage loan was 76% of the purchase price. More than one million houses – well over half the housing stock – were subject to mortgages, and the total amount on loan exceeded £40 billion.[29] It is common for owners to change lenders to obtain better terms, resulting in a re-mortgage of the property.

The legal profession is divided into solicitors and advocates. Most lawyers are solicitors. Almost all conveyancing – the transfer of land, and other related transactions – is carried out by solicitors and is an important part of their business, although declining fee levels for residential conveyancing has had an impact on profitability. Solicitors are regulated by the Law Society of Scotland, and must carry professional indemnity insurance.

Houses are often sold by estate agents. Some are solicitors and some are not. Estate agency is a business rather than a profession but is subject to limited statutory regulation.[30]

Disputes involving land law are usually settled by negotiation and without recourse to the courts, although there is also a steady stream of litigation. Alternative dispute resolution is uncommon. A court action proceeds with reasonable speed, and there are full rights of appeal including, ultimately, to the House of Lords in London. Legal aid is means-tested and so in practice is often not available to those who are sufficiently wealthy to own land. Disputes normally go before the ordinary courts, but a special court, known as the *Lands Tribunal for Scotland*, has jurisdiction in the discharge of real burdens and servitudes, in matters affecting land registration, and in certain other matters.

In property law certainty is a virtue admired above all others. Property law in Scotland achieves a reasonable level of certainty. More than most areas of the law, it operates on the basis of fundamental and immutable principles, derived for the most part from Roman law. These principles are illustrated and developed by case law and, sometimes, altered or re-stated by statute. The coherence of the Romanist approach was always under threat from the arcane complexities of the feudal system but, with the abolition of feudal tenure in 2004, that obstacle has finally been removed.

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27 The figures in this section are from Monopolies and Mergers Commission, *Solicitors Estate Agency Services in Scotland* (1997, Cm 3699) p 165 and from http://www.scotland.gov.uk/stats/.

28 Tenants' Rights Etc (Scotland) Act 1980. The current legislation is the more neutrally-named Housing (Scotland) Act 1987.

29 Emma McCallum and Ewen McCaig, *Mortgage Arrears and Repossessions* (2003) p 49.

30 Estate Agents Act 1979.

2. Land Registration

2.1 Organisation

2.1.1. Statutory basis

What is the statutory basis for land registration?

Is there a different system in a part of your country?

Answer. Land registration in Scotland dates from 1617. In effect it is mandatory, because registration is the only means of obtaining ownership of land. Most other real rights in land must also be constituted by registration.

The Registration Act 1617, which is still in force, established a register known as the Register of Sasines. Much more recently, the Land Registration (Scotland) Act 1979 established a second register known as the Land Register. The Land Register is gradually replacing the Register of Sasines. It was phased in, one county at a time, over a period of some 20 years, and since 1 April 2004 has applied throughout Scotland. The idea is that titles should, over time, move from the old register to the new. The usual trigger is sale. Thus the first time that land held on the Register of Sasines is sold, the title of the buyer is registered in the Land Register. All subsequent transactions in relation to that land are then registered in the Land Register, for the registers are mutually exclusive.[31] So far approximately 40% of all titles have been transferred from the Register of Sasines to the Land Register.

As the preamble of the 1617 Act makes clear, the purpose of setting up the Register of Sasines was to avoid fraud, in particular by the double-sale of the same property:

> "Oure Souerane Lord Considdering the gryit hurt sustened by his Maiesties Liegis by the fraudulent dealing of pairties who haveing annaliet thair Landis and ressauit gryit soumes of money thairfore Yit be thair vniust concealing of sum privat Right formarlie made by thame rendereth subsequent alienatioun done for gryit soumes of money altogidder vnprofittable whiche can not be avoyded vnles the saidis privat rightis be maid publict and patent to his hienes liegis FOR remedie whereoff and of the manye Inconvenientis whiche may ensew thairupon HIS Maiestie with aduyis and consent of the estaittis of Parliament statutes and ordanis That thair salbe ane publick Register In the whiche all Reuersiones regresses bandis and writtis for making of reuersiones or regresses assignatiounes thairto dischargis of the same renunciatiounes of wodsettis and grantis off redemptioun and siclyik all instrumentis of seasing salbe registrat .."

The full text of the 1617 Act runs only to a single printed page. Yet this short Act remains, even today, the main legislative basis of the Register of Sasines. At the end of the seventeenth century it was supplemented by the Real Rights Act 1693. The Register of Sasines (Scotland) Act 1987 allows the Register to be kept on microfiche or electronically.

The governing statute for the Land Register is the Land Registration (Scotland) Act 1979. It is supplemented by the Land Registration (Scotland) Rules 1980, which cover a number of practical points. Some administrative matters affecting both registers are provided for by the Land Registers (Scotland) Act 1868 and the Land Registers (Scotland) Act 1995.

The 1979 Act lacks a firm conceptual foundation, and is often difficult to understand and apply. Some of the difficulties are explored in a recent discussion paper produced by the Scottish Law Commission, which is engaged in a review of the Act.[32] It seems likely that the review will result in the repeal of the

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31 Land Registration (Scotland) Act 1979 s 2.

32 Scottish Law Commission, Discussion Paper on *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004; available on http://www.scotlawcom.gov.uk).

1979 Act and in its replacement by new legislation

2.1.2. Relevant institutions

Which institutions deal with the registration of land in your country? What are their basic competences?

Answer. As already mentioned, there are two separate registers, the Land Register and the Register of Sasines, both based in Edinburgh (but with an office in Glasgow). There are no local registers, so that all registration takes place centrally.

The system is not cadastral and there is no separate cadaster. The maps used in the Land Register are provided by a governmental body known as the Ordnance Survey.

2.1.3. Land register/registre foncier/Grundbuch

How is the register structured? What (legal) training have the people working at the register authority?

Answer. Both the Land Register and the Register of Sasines are managed by Registers of Scotland, a governmental Executive Agency.[33] The Agency and the Registers are directed in turn by a public official known as the Keeper of the Registers of Scotland.[34] The Keeper is thus the registrar. Like other officials at the Registers, the Keeper is an administrator and not a judge. Only the most senior officials have law degrees, but extensive in-office training is provided for other staff.

2.1.4. Is all real property registered?

For almost 400 years it has only been possible to acquire ownership of land by means of registration. This principle has no exceptions. Thus Scotland does not have special rules for certain types of land or owner. The result of this simple and universal principle is that virtually all land is registered in one of the two registers. Approximately 60% of titles are registered in the Register of Sasines and 40% in the Land Register.[35]

2.2 Contents of Registration

2.2.1. Which data are registered?

Land Register

The Land Register is a register of titles to land. It comprises a title sheet for each parcel of land, each with its own dedicated number.[36] Currently there are some 600.000 separate title sheets. The title sheet discloses the boundaries of the land, and the name and address of its owner. It also shows the subordinate real rights which affect the land. In particular it shows any rights in security ("mortgages") and any real burdens. It may also show servitudes. An example of a land certificate (the paper copy of a title sheet) is given in Appendix A.

Scotland accepts the publicity principle. This implies that all real rights should appear on the Register.

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[33] See http://www.ros.gov.uk.

[34] Land Registration (Scotland) Act 1979 s 1(2).

[35] These figures refer to titles and not to land area. Measured by land area the percentage of registrations in the Land Register would be much lower, reflecting the fact that the Land Register was only recently extended to the most rural areas.

[36] Title sheets are discussed further at 2.2.2 below.

But in practice some real rights, known as overriding interests, can be created without registration and so may not (or in some cases cannot) be noted on the Register.[37] The most important examples of overriding interests are leases of less than 20 years, servitudes, and floating charges.[38] Even here, however, some attention is paid to publicity. Thus floating charges appear in a separate register maintained by the Registrar of Companies;[39] servitudes, unless registered, must normally[40] be created by positive (acquisitive) prescription for which the period of possession is 20 years;[41] and a short lease is constituted as a real right only when possession is taken.[42]

The Land Register has also a secondary function. As well as showing the real rights which affect land, it is also used to publicise a bewildering variety of notices, agreements, and other matters which are potentially of interest to buyers and others who may deal with the land. Among the miscellaneous documents that may be registered are: agreements between the owner and certain public bodies;[43] tree preservation orders;[44] orders designating land as an area of special scientific interest;[45] notices in relation to improvement grants paid by the local authority;[46] and restraint orders in respect of the proceeds of crime.[47] But although the list is extensive, such documents are not often encountered in practice. Furthermore, the Land Register does not reveal many of the administrative law matters which are likely to be of most interest to buyers. Thus, for example, there is no mention on the Register of (i) zoning (ii) planning permission (iii) whether the roads and sewers are maintained privately or by a public authority, or (iv) notices by the local authority requiring that repairs be undertaken.

Register of Sasines

The Register of Sasines is quite different in character. It is a register of deeds and not a register of titles. When a deed is presented for registration, a copy is made and retained at the Register and the original is returned.[48] Thus the Register comprises copies of deeds, and nothing else. Traditionally any deed which was capable of creating a real right in land could be registered, subject to some limited exceptions (which corresponded to the overriding interests mentioned earlier in the context of the Land Register). But one of the most common deeds of all – a deed of transfer (*disposition*) in implement of a sale – now triggers the move to the Land Register and can no longer be registered in the Register of Sasines.

The Register of Sasines may also contain any of the miscellaneous documents mentioned above. Whether, in any particular case, they are registered there or in the Land Register is determined by whether the land in question remains in Register of Sasines or has moved across to the Land Register.

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37 Land Registration (Scotland) Act 1979 s 2(1), (4). Generally speaking, overriding interests, being already real rights, are "noted" on the Register rather than "registered". But short leases may not even be noted: see s 6(4).

38 Land Registration (Scotland) Act 1979 s 28(1).

39 Companies Act 1985 s 410.

40 But implied servitudes are also recognised in certain circumstances.

41 Prescipition and Limitation (Scotland) Act 1973, s 3; Title Conditions (Scotland) Act 2003 s 75.

42 Leases Act 1449. However, there is no requirement that the possession last for any particular period.

43 Those bodies with whom registrable agreements can be made include (i) planning authorities: Town and Country Planning (Scotland) Act 1997 s 75; (ii) Scottish Enterprise and Highlands and Islands Enterprise: Enterprise and New Towns (Scotland) Act 1990 s 32; (iii) Scottish Natural Heritage: Natural Heritage (Scotland) Act 1991 s 5(8); (iv) roads authorities: Roads (Scotland) Act 1984 ss 54 and 72; (v) National Park authorities: National Parks (Scotland) Act 2000 s 15; and (vi) litter authorities: Litter Act 1938 s 8.

44 Town and Country Planning (Scotland) Act 1997 s 161(1).

45 Wildlife and Countryside Act 1981 s 29.

46 Housing (Scotland) Act 1987 s 246(7).

47 Proceeds of Crime Act 2002 s 120.

48 Titles to Land Consolidation (Scotland) Act 1868 s 142.

2.2.2. Sample of Registration

A land certificate from the Land Register is reproduced and explained in Appendix A.

2.3 Registration Procedure

2.3.1. Application for Registration

Please describe the application procedure:

- Is there any form required for the application for registration?
- Is it usually a lawyer or a notary who applies for the registration on behalf of the parties?

Answer. Almost invariably, applications to the Register are made by a lawyer (solicitor) and not by the client personally. An application form must be completed, and must be accompanied by the deed in respect of which registration is to be made and by the appropriate registration fee.[49]

In the case of the Land Register the registrar (the Keeper) has power to ask for further documentation, and can reject an application if the documentation is not provided within 60 days.[50] For *first registrations* (ie the transaction which triggers the move from the Sasine to the Land Register) the application must normally be supported by the principal deeds which make up the title. In subsequent transactions it is usually necessary to produce the land certificate.[51]

The application form for the Land Register includes questions which allow an assessment to be made of the validity of the title and the possibility of future challenge.[52] This information is important because, once registered, the title is guaranteed and underwritten by a system of state insurance (indemnity). Before he concedes the guarantee, therefore, the registrar must be able to assess the risks. The application form is retained by the registrar (in electronic form) for possible future use in the event that the title is challenged and the guarantee called in. A false answer to one of the questions may have the effect of negating the guarantee.[53]

Title in the Register of Sasines is not guaranteed, and the application form is correspondingly less demanding.[54]

2.3.2. Duties of the Registrar

What does the registrar control?

How are the applicants informed about the registration?

Answer. The registrar must scrutinise the application to make sure that it is in order. In the case of the Land Register he must also form a view as to the validity of the deed.

An application to the Land Register must be rejected in certain circumstances, including (a) where the application relates to land which is not sufficiently described to allow identification on the Ordnance

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49 Land Registers (Scotland) Act 1995.

50 Land Registration (Scotland) Act 1979 s 4(1); Land Registration (Scotland) Rules 1980 r 12.

51 Land Registration (Scotland) Rules 1980 s 9(3).

52 Three are three different application forms for, respectively, first registrations, dealings in whole, and dealings in part. In all cases it also necessary to include an inventory of writs. See Land Registration (Scotland) Rules 1980 r 9 and Sch A forms 1 – 4.

53 At least if the error in the Register was caused by the fraud or carelessness of the applicant: see Land Registration (Scotland) Act 1979 s 9(3)(a)(iii).

54 The form is set out in the Register of Sasines (Application Procedure) Rules 2004 (SSI 2004/318).

Map (b) where it relates to land which is a souvenir plot,[55] and (c) where it is frivolous and vexatious.[56] In addition, the registrar can always reject an application where he is not satisfied as to the validity of the deed.[57] In practice, however, he often accepts doubtful titles, but on the basis that the state insurance (indemnity) is excluded.[58]

As the state guarantee does not extend to the Register of Sasines, it is unusual for the Keeper to reject applications there. In any event, his power to do so is uncertain and, to some extent, controversial.[59]

Assuming that an application is ultimately accepted, registration is taken to occur on the day on which the application was received. This is the rule for both registers.[60] This means that a title is treated as registered before – and sometimes long before – the relevant entry is made on the register. But a person inspecting the register is alerted to the pending application by an entry in the computerised application record.[61]

An applicant will be informed if the application is rejected. Otherwise the deed will be returned in due course, marked, in the case of the Register of Sasines, with a stamp indicating that it has been registered. In addition, an applicant for ownership in the Land Register receives the official copy of the title sheet, known as the *land certificate*.[62]

2.4 Access to information

- Is the registration done on paper or electronically?
- How can you get access to land registration information? Is it in the public domain or is the access restricted?

- In particular: Can you get access to the register :
  - if you have a *ius in rem* in the real property,
  - if you are negotiating with the owner about the purchase of the property - or if you want to find out who owns a property in order to make him an offer for purchasing or renting the property,
  - if you have an enforceable title against a debtor and are inquiring about the existence of real property to be seized in an execution procedure,
  - if a bank wants to check whether an applicant for a loan owns real property,
  - if the press wants to inquire on how much real property a politician owns.-
  - Can you search for information by address, by registration number of land and/or by holders of

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55 Defined as "a piece of land which, being of inconsiderable size or no practical utility, is unlikely to be wanted in isolation except for the sake of mere ownership or for sentimental reasons or commemorative purposes". In practice souvenir plots are often not much bigger than postage stamps.

56 Land Registration (Scotland) Act 1979 s 4(2).

57 Land Registration (Scotland) Act 1979 s 4(1).

58 As he is empowered to do under s 12(2) of the Land Registration (Scotland) Act 1979. Exclusion of indemnity amounts to the complete withdrawal of the guarantee, because the Register can then be rectified even against a proprietor in possession: see s 9(3)(a)(iv).

59 The only reported case is *Macdonald v Keeper of the Registers* 1914 SC 854.

60 Titles to Land Consolidation (Scotland) Act 1868 s 142 (Register of Sasines); Land Registration (Scotland) Act 1979 s 4(3) (Land Register).

61 In the Register of Sasines this preliminary list of applications is called the presentment book.

62 Land Registration (Scotland) Act 1979 s 5(2). A land certificate is also given to the lessee under a long lease, because long leases have a title sheet to themselves.

rights on it?

Answer. The Land Register is, and always has been, kept in electronic form. In effect it is a bundle of data which can be downloaded and authenticated as and when required. By contrast, the Register of Sasines, for most of its history, was a paper register, but for some years now all additions have been held on microfiche.[63]

The application process remains paper-based, although plans are far advanced to allow, for the Land Register, automated registration of title involving the use of electronic deeds and applications.

From its very inception in 1617 the Register of Sasines was "ane publick Register". Equally, the Land Register has always been open to the public without restriction. This is seen as an important manifestation of the publicity principle. The registers can be consulted either in person or by an internet-based system called Registers Direct. A fee is payable. Alternatively one of the firms of private searchers can be instructed. The Registers Direct system holds the complete Land Register, as well as the property index (the search sheets) for the Register of Sasines.[64] Both registers are indexed by person and by property, although the property index is map-based only in the Land Register.[65] The Land Register is also indexed by title number.

2.5 Substantive Effects of the Registration

- What are the substantive effects of the registration?
  - Is the registration necessary for the creation or the transfer of the right (constitutive effect) or for its opposability against third parties - or is it merely declarative?
  - Does the registration confer a presumption or proof for the existence of the right? (if this is different for different rights and interests, please give the information for each interest.
- Is the reliance in good faith on the registered rights protected?

Answer. Registration is constitutive. Without registration no real right is created or transferred. But beyond this shared doctrine, there are major differences between the two registers.

Register of Sasines

Registration in the Register of Sasines creates neither a presumption nor proof that the right in question exists. Registration is a necessary condition of validity but not a sufficient condition. For the right to exist it is also necessary (i) that the deed was granted by the person who owned the land in question or by a person entitled to bind the owner and (ii) that the deed itself was valid both as to form and as to content. A bad deed is not made good by registration; and a future purchaser cannot assume that the right is in existence merely because the deed is registered. In practice any evidential difficulties are resolved by the rules of positive (acquisitive) prescription. The period of positive prescription is only 10 years.[66] Provided that the land has been possessed for this period it is not necessary to investigate older deeds.

Land Register

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63 Legislation was necessary to allow the change: see the Register of Sasines (Scotland) Act 1987 s 1.

64 See further http://www.ros.gov.uk/pdfs/rdbrochure.pdf.

65 Land Registration (Scotland) Rules 1980 r 23.

66 Prescription and Limitation (Scotland) Act 1973 s 1.

Today all new sale transactions are registered in the Land Register. Its rules are quite different. The Land Registration (Scotland) Act 1979 is loosely modelled on the Land Registration Act 1925 for England and Wales.[67] It also has affinities with the Torrens system which, having originated in South Australia in the 1860s, is today the dominant system of registration in the world.[68] In their origins, both the Torrens and the English systems were influenced by the systems in force in Germany and Austria,[69] but today any resemblance to these systems is slight.

The Scottish system – and, by and large, the English system as well[70] – may be summarised in the following propositions:

(i) Once it is registered, a title to land is guaranteed.

(ii) The guarantee applies in respect of both:

  (a) *Register error:* errors already on the Register at the time of the transaction (eg the wrong person registered as owner) and

  (b) *transactional error:* errors in the current transaction (eg lack of legal capacity on the part of the person granting the deed, or the forgery of his signature).

(iii) The guarantee can take one of two forms: in the event that the title is defective, the acquirer is either allowed to keep the property or he is paid its value.[71] He receives, in other words, either the "mud" or the "money".[72] The money comes from the state and is financed by the fee payable for registration. In effect, therefore, a small part of that fee is a compulsory insurance premium.

(iv) If the right being acquired is a subordinate real right (eg a mortgage), the guarantee takes the form of money. If the right is ownership, the acquirer receives the mud if he is in possession (including civil (indirect) possession). Otherwise he receives the money.[73]

(v) No guarantee is due if the error was caused by the fraud or carelessness of the acquirer. Thus a fraudulent acquirer receives neither the money nor the mud.[74]

(vi) Most titles, of course, are not defective and the guarantee is not needed. But even if the title is defective, the defect is initially cured at the time of registration. Thus a registration cannot normally be void. So if a deed of transfer from A to B is void, B will nonetheless become owner on registration and A will cease to be owner. But while registration confers a good title, it does not confer an unchallengeable one. So B becomes owner on registration, and remains owner unless or until the title is challenged. If a challenge occurs, it is then necessary to adjudicate between A and B. Normally B will have been in possession. In that case he keeps the prop-

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67 That Act has since been repealed, and replaced by the Land Registration Act 2002. But the essential features of the system remain unchanged.

68 For the spread of the Torrens system, see eg Alejandro M Garro, 'Recordation of Interests in Land' (2004) pp 42-8 (vol VI chapter 8 of the *International Encyclopaedia of Comparative Law*).

69 For the influence of the system in operation in Hamburg on the development of the Torrens system, see most recently Murray Raff, *Private Property and Environmental Responsibility* (Kluwer Law International, 2003).

70 This is only an outsider's view of English law, and my English colleague may be unhappy to be associated with what follows. In fact the system in England and Wales is different in some important respects from that which operates in Scotland. Furthermore, the fact that property law in Scotland is Romanistic in character affects both the substance of the rules and the manner in which they are expressed.

71 Land Registration (Scotland) Act 1979 ss 9 and 12.

72 The attractive phrase used in Thomas W Mapp, *Torrens' Elusive Title* (Alberta Law Review Book Series vol 1, 1978) para 4.24.

73 Land Registration (Scotland) Act 1979 s 9. The holder of a subordinate real right cannot be a proprietor in possession and so is not able to retain the right.

74 Land Registration (Scotland) Act 1979 ss 9(3)(a)(iii) and 12(3)(n).

erty and A is paid its value: thus B gets the mud and A the money.[75] As this example shows, money is sometimes paid, not only to the acquirer, but also to the "true" owner from whom the property has been taken. If, however, B was fraudulent or careless (eg he forged A's signature on the deed), B loses the benefit of the guarantee and the property is returned to A. This is achieved by *rectifying the Register*, ie by deleting the name of B and replacing it with the name of A. This does not have retrospective effect, and A is owner only from the date of rectification.

This system differs from the systems of many EU countries in a number of respects. The following tables sets out some of the differences. [This is a first attempt at such a table and is based on my own, incomplete, knowledge of other systems. Doubtless it misrepresents some EU systems and over-simplifies others. I look forward to being corrected at the meeting in Florence. Nonetheless the comparison seemed worth making.] Scotland (and England and Wales) are thus unusual in European terms. But their system is close to the Torrens system which is used widely outside Europe and especially in Commonwealth countries.

[75] Land Registration (Scotland) Act 1979 s 12(1)(b).

	Scotland (and England)	Other EU Countries
Effect of registration	Positive: *any* defect cured	Either (i) no defects cured or (ii) only defects already on the Register ("Register error")
Duration of cure	Potentially temporary. Title remains challengeable in the future – even after the land is transferred again. If an acquirer loses possession he may lose the property.	Permanent. If the conditions are met (eg good faith), the acquirer receives an unchallengeable title.
Role of possession	In the event of a title defect, possession determines the form of the guarantee (mud or money), and therefore whether property is returned to the "true" owner.	No role.[76]
State indemnity/insurance for acquirer	If the acquirer loses the property, he is paid state indemnity – even in respect of errors in his own transaction ("transactional error").[77]	No indemnity.
State indemnity/insurance for "true" owner who loses property	If the acquirer is in possession, and so keeps the property, the "true" owner is paid its value by the state.	No indemnity, although there may be a delictual claim against the registrar.
Good faith	No role for good faith as such, but the guarantee does not extent to errors caused by the fraud or carelessness of the acquirer.	In systems where title defects are cured, good faith is usually required.

In its recent review, the Scottish Law Commission has criticised various aspects of the Scottish system.[78] In particular, it argues that:

(a) The "positive" effect of registration (by which all titles are cured) is too crude and inflexible, and tends to give ownership to the wrong person.

(b) Possession is too awkward a concept, both legally and factually, to be used to determine

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[76] For the purposes of land registration. But possession is important for prescription.

[77] This is one of the points at which the Scottish/English model parts company with the Torrens system. In most countries which operate Torrens systems, indemnity is only payable to the "true" owner (ie the person who is deprived of ownership as a result of the registration of the acquirer.)

[78] Scottish Law Commission, Discussion Paper on *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004; available on http://www.scotlawcom.gov.uk).

whether an acquirer receives the mud or the money.

(c) The system makes ownership easy to acquire, but therefore also easy to lose. "Easy come" is matched by "easy go".[79]

The Commission proposes that the "positive" effect of registration should be confined to Register error, and that transactional error should not be cured by registration. So if the Register was already erroneous, the error should be disregarded and the acquirer receive a good title. But if the error is in the current transaction, the acquirer should not receive a good title – but should receive state indemnity instead. The fraud and carelessness test should be replaced by a test based on good faith. The overall result of these changes resembles §§ 891 and 892 BGB; but, unlike in Germany, there would continue to be a system of state indemnity.

2.6 Rank and Priority Notice

2.6.1. Rank (rang/Rang)

- How is the rank of registrations determined?
- Please quote the applicable article verbatim (and translate it into English)!

Answer. Rights rank by date of registration according to the maxim *prior tempore potior iure*.[80] In the case of mortgages, however, the creditors can alter the ranking by agreement.

For the Land Register the rule is expressed by the statute as follows:[81]

> "Titles to registered interests in land shall rank according to the date of registration of those interests.
>
> Where the date of registration or recording of the titles to two or more interests in land is the same, the titles to those interests shall rank equally."

Case: Owner grants first a mortgage to A, afterwards another mortgage to B. After that, creditor C has a third mortgage registered on the same property in an execution procedure. The time of registration is as follows: First B, then C, then A. What is the respective rank of the mortgages?

Solution: The mortgages rank according to date of registration: thus B, C, A. But if, at the time of registration, B knew about A's prior mortgage, he is treated as in bad faith and A can, by court action, have the ranking reversed.[82] This rule does not apply to rights arising under an execution procedure and so cannot be used against C, even if C knew of A's mortgage.

2.6.2. Priority Notice

- Is there any possibility to secure a future registration (or at least its rank)?
- Please quote the applicable article verbatim or include a copy in the original language and in an English translation (if there is no Internet source).
- Is the effect of this priority notice limited to a certain period of time?

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79 Thomas W Mapp, *Torrens' Elusive Title* paras 3.13 and 4.26.

80 (First in time, first in right).

81 Land Registration (Scotland) Act 1979 s 7(2), (4). For the Register of Sasines the equivalent rule is contained in the Real Rights Act 1693 and the Titles to Land Consolidation (Scotland) Act 1868 s 142.

82 The precise scope of this doctrine is, however, unclear. See K G C Reid, *The Law of Property in Scotland* para 697 and especially note 21.

Answer. There is neither a priority notice nor a freeze period. Instead, in an ordinary sale transaction, the solicitors acting for the seller give a personal guarantee that, for a limited period (normally 21 days) after the price has been paid and the deed of transfer delivered, no competing rights will be registered. This is known as a *letter of obligation*, and it is underwritten by the professional indemnity insurance which is compulsory for all solicitors.

3. Sale of Real Estate among Private Persons (consumers)

3.1 Procedure in general

3.1.1. Main steps of a real estate sale

Please describe first the procedure for a standard sales contract relating to real estate: Private owners (e.g. a married couple) sell their residential home to other private owners. Follow the steps of the questionnaire, if possible, but also mention if there are any peculiarities in your country, which we did not consider in any of the subquestions.

Answer. Usually the house is marketed professionally, either by the seller's lawyer (*solicitor*) or by an estate agent. A date is then set by which offers for the house must be made. Each person who wishes to buy must submit a formal offer. The seller then accepts one of the offers (usually the offer with the highest price). The sales contract (*missives of sale*) is formed by the offer and its acceptance (although in practice the initial acceptance is always a qualified one and must be accepted in turn). Each party has his own solicitor. The solicitor acting for the buyer must examine the seller's title to make sure that it is in order. He also prepares the deed of transfer (*disposition*). On the date agreed in the contract (*date of entry*) the seller delivers the signed disposition and the keys of the house in exchange for payment of the price. The buyer's solicitor then registers the disposition in the Land Register. On registration (but not before), ownership passes from the seller to the buyer.

3.1.2. Time frame

How long do these steps normally take in your country?

Answer. Typically between six and eight weeks, from the date of the offer to buy until the date of registration.

3.2 Real Estate Sales Contract

3.2.1. Form

Is there any form required by law – either for the sales contract or for the transfer of ownership (e.g. writing, deed, notarial act or any other authentic instrument)? Must it be done in an oral hearing with both parties present?

What are the consequences if the contract does not meet the formal requirements?

Answer. The sale of land involves two separate juridical acts: the sales contract (*missives of sale*) and the disposition. The first obliges the seller to sell and the buyer to buy. The second is a formal conveyance of the land and, on registration, confers ownership on the buyer. Unlike eg in Germany (where the Kaufvertrag and Auflassung may be in the same document), two separate documents are used. Both are governed by the Requirements of Writing (Scotland) Act 1995, and both, in terms of that Act, must be in writing.[83] In addition:

(a) The disposition must be signed at the end of the last page by the seller, and the signature witnessed by a single witness who also signs.[84] Special rules apply where the seller is a juristic person: for

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[83] Requirements of Writing (Scotland) Act 1995 s 1(2).

[84] Requirements of Writing (Scotland) Act 1995 ss 3 and 6(1) (which makes witnessing a requirement of registration).

example, in the case of a company the signature is by a director, the company secretary, or by a person who is authorised to sign on behalf of the company.[85]

(b) The sales contract consists of a series of offers, qualified acceptances, and final acceptance. Each must be signed at the end by the person making the offer or acceptance (or, in practice, by his solicitor).[86] Quite often the signature is witnessed (as with dispositions), but this is not a legal requirement.

An offer to buy is reproduced in Appendix B, and a disposition in Appendix C.

Notaries are not used, and indeed play almost no part in the transfer of land.[87] In practice most solicitors are notaries public, so that in effect there is no separate notarial profession.

It should be noticed that, in the ordinary case, the buyer does not sign anything at all. This is because (i) the sales contract is signed by solicitors and (ii) the disposition is a unilateral deed, signed only by the seller.

In principle, a contract (or disposition) which does not meet the formal requirements is a nullity. But the invalidity can be cured by actings.[88] Thus if one party acts in reliance on the "contract" in such a way that he would be materially prejudiced if it was not implemented, the contract is treated as valid provided that the other party knew of the actings and acquiesced in them. So if for example the buyer sells his existing house in reliance on the contract for the purchase of the new one, the other party to the first contract is not able to escape the contract on the grounds of lack of formality.

3.2.2. Who drafts the contract for a real estate sale normally?

The contract is drafted, and signed, by solicitors. However, it is not a single document but a series of documents. The documents take the form of letters (*missives*) between the solicitors acting for each party, written on ordinary notepaper of the law firm in question; and so the completed contract is known as *missives of sale*.

The first letter is usually an offer to buy sent by the buyer's solicitor on behalf of his client. This is likely to run to several pages: see Appendix B. It is followed by a much shorter letter from the seller's solicitor accepting most (but usually not all) of the terms of the offer. Often several further letters are required before final agreement is reached, and this may take a number of weeks. In difficult cases the contract may not be concluded until just before the date agreed for possession (the *date of entry*).

3.2.3. Preliminary contract

Is there a preliminary contract?

What legal effects does it have?

Answer. There is no contract *before* the sales contract.

3.7.1. Typical Real Estate Sales Contract

- Is there any standard form for a sales contract? Or is there any other form used quite often or published e.g. in a commonly used manual?

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85 A complete list is given in schedule 2 to the Act.

86 Requirements of Writing (Scotland) Act 1995 s 2(1), (2).

87 But where a house is held by a single individual, a notary is needed for the documentation required by the Matrimonial Homes (Family Protection) (Scotland) Act 1981. See 3.4.2. below.

88 Requirements of Writing (Scotland) Act 1995 s 1(3),(4).

- If possible include a **copy** of one or two typical sales contract forms (preferably as annexes to this questionnaire)!

Answer. No standard form exists. Most terms of the ultimate contract appear in the initial offer to buy, and each firm of solicitors has its own style of offer. But in practice most offers are broadly similar, and solicitors regularly review their style and, sometimes, copy clauses from their competitors.

In 1991 the Law Society of Scotland[89] produced a standard set of clauses suitable for the purchase of a house, but the clauses did not prove popular with the legal profession and were withdrawn in 1995. Since then there have been local initiatives, and in at least two parts of Scotland solicitors have reached agreement as to the clauses which should be put into an offer to buy, thus allowing such offers to be accepted with few (or even no) qualifications. The offer to buy which is accepted for use in Dundee is reproduced in Appendix B.

3.3 Transfer of Ownership and Payment

3.3.1. Requirements for Transfer of Ownership

What are the requirements for the transfer of ownership?

valid obligation contract (causa),

payment of the purchase price,

consent on the transfer of ownership,

registration with the land register.

Answer. More than 100 years before Savigny, the Scottish jurist, Viscount Stair, wrote of Scots law that "we do not follow that subtility of annulling deeds, because they are *sine causa*".[90] Thus Scotland adheres to the abstract system of transfer. Ownership is transferred by (i) a formal deed of transfer (*disposition*) signed by the transferor and signifying his consent to the transfer[91] followed by (ii) registration of the disposition. In the event that the *causa* is (or becomes) invalid, the transferor usually has a claim in unjustified enrichment for the return of the property.

The sales contract does not transfer the property and is not registered.

3.3.2. Payment due

How do you manage to make the payment and the transfer of ownership happen at the same time – or at least to minimize risks for both seller and buyer?

When is the payment due under a typical contractual agreement?

Is the payment effectuated via an escrow account or directly among the parties?

Is an insurance for risks inherent to the payment and the transfer of the property possible, usual or even obligatory?

Answer. In terms of the sales contract, payment is due on the *date of entry*. Unless the seller is building the house, it is unusual for there to be a deposit (ie a payment before the date of entry).

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89 The Law Society of Scotland is a statutory body which represents all solicitors in Scotland as well as investigating complaints by clients.

90 Viscount Stair, *Institutions of the Law of Scotland* (1681) II.3.14.

91 Note that the consent is to transfer and to the registration. In Scotland registration does not require the consent of the owner.

On the date of entry the buyer pays the price in exchange for delivery of the disposition and the keys to the house. Thus the buyer is able to take immediate possession, and to proceed to registration of the disposition. But until registration, ownership remains with the seller, and the buyer is thus vulnerable to the possibility of the seller's insolvency. As previously mentioned, the risk is covered by a personal guarantee by the seller's solicitors that no competing title will be registered for a period of 21 days after the date of entry. This *letter of obligation* is underwritten by the solicitors' professional indemnity insurance and so is, indirectly, a form of insurance for the buyer. No other insurance is used. In order to be safe, the buyer must register within the 21-day period. More is said about this issue at 4.2.3.

Solicitors firms are required to have a separate bank account for all money which is held on behalf of clients. Shortly before the date of entry the buyer pays money into the clients' account of his solicitors. On the date of entry itself the money is then transferred to the clients' account of the seller's solicitors. This can be done electronically or by cheque.

3.3.3. Ways of the seller to enforce the payment

How can the seller enforce the payment (e.g. by execution)?

Answer. It is competent in theory, but unknown in practice, for the parties to agree in the contract to execution without a preliminary judgment.[92] In the absence of such an agreement, the seller must first raise an action for payment, and obtain decree from the court. Execution[93] then follows.

3.3.4. Transfer of possession to the buyer

How, on the other hand, may the buyer be sure to get possession when he pays the purchase price?

Answer. If the seller, wrongfully, remains in possession, the buyer must raise a court action to have the seller ejected. Self-help is not permitted, so that if the buyer ejects the seller by force, the seller is entitled to have the possession restored.[94]

3.4 Seller's Title

3.4.1. Title Search: Ascertaining the seller's title

Which facts does the buyer (or the buyer's lawyer, the notary or the agent) have to ascertain before he can be sure that the seller has a valid title?

Answer. The position depends upon whether the property is on the (new) Land Register, or continues to be held on the (old) Register of Sasines.

Each property on the Land Register has its own title sheet[95] which discloses the name and address of the owner. As a matter of law, the person so named *is* the owner.[96] Thus the buyer need make no further inquiries.

For properties on the Register of Sasines, the position depends on positive prescription. Prescription

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92 This would require a clause in the contract that the buyer consents to registration for execution. Registration in this context means registration in the register ("books") of the court. After registration the seller could proceed immediately to execution.

93 Known in Scotland as "diligence".

94 Ejection by force is the delict of spuilzie (which derives from the *exceptio spolii* of Canon Law).

95 An example is given in appendix A.

96 Land Registration (Scotland) Act 1979 s 3(1)(a).

requires title as well as possession: there must be a registered disposition which has been followed by possession for 10 years. The effect of the possession is to validate the disposition and make it exempt from challenge.[97] The Register of Sasines contains copies of all previous dispositions. The disposition which is most recently older than 10 years is the starting point for prescription for, assuming that it was followed by possession, it can be taken to be valid. (In practice, however, possession is not checked.) From that starting point it is then necessary to check the validity of the *subsequent* dispositions, which link up the prescriptive disposition with the person who is currently selling the property. It will be noted that prior dispositions must be examined despite the fact that Scotland operates an abstract and not a causal system. But only the *dispositions* need be examined: the validity of the sales contracts is irrelevant to questions of title.

3.4.2. Title Search: Absence of Encumbrances

How does the buyer ascertain that he will acquire the property without encumbrances?

Answer. For an encumbrance to affect a buyer it must be a real right, and in Scotland a right affecting land cannot usually be real unless it is registered. Thus a search of the register will disclose the encumbrances. If an encumbrance has been removed by error from the Land Register, a buyer is not affected by it even if he is in bad faith (ie knows of the encumbrance and that it has been removed in error).[98]

Some encumbrances, known as *overriding interests*, can become real without registration. Servitudes are the most important example.[99] Here the buyer must simply take his chance. But the potential risk is limited by the fact that there is a *numerus clausus* of unregistered servitudes, and a servitude which does not appear on this list must be registered in order to be a real right.[100]

In practice buyers are usually content to accept encumbrances such as servitudes and real burdens. Indeed the standard clause in the sales contract merely provides that there are to be no "unusual or unduly onerous" encumbrances; and the same warranty would be implied by law even without an express provision. But a buyer will not normally accept mortgages. There is, however, a practical difficulty. The seller cannot repay the loan, and hence have the mortgage discharged by the bank, until the buyer pays the price; but the buyer is not willing to pay the price until the mortgage is discharged. The problem is resolved by the following compromise. The bank gives to the seller's solicitor a signed discharge even before the loan is repaid – but on the basis that it is not to be delivered to the seller until the time of repayment. On the date of entry, the buyer is given (among other things, such as the disposition and keys) the signed discharge in exchange for the price. The buyer then registers the discharge and the seller's solicitor uses the price, in the first instance, to repay the loan. Thus the bank gets its money, and the buyer knows, at the time of paying the price, that the mortgage will be discharged.

The practice just described applies only to ordinary mortgages (*standard securities*). Companies, however, are able to grant a special mortgage known as a *floating charge*. This is registered only in the Companies Register, although it is sometimes noted on the Land Register. Typically, floating charges

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97 Prescription and Limitation (Scotland) Act 1973 s 1.

98 Land Registration (Scotland) Act 1979 s 3(1)(a). This is a striking example of the absence, in the rules of land registration, of any principle of good faith. If, however, the buyer does not take, and hold, possession, the encumbrance can be restored to the Register and the buyer is paid indemnity by the state.

99 Mention might also be made of the (only quasi-real) occupancy rights conferred on the spouse of the owner by the Matrimonial Homes (Family Protection) (Scotland) Act 1981. These apply only where the matrmonial home is owned by one spouse only. In such a case a buyer must be alert to the risk – remote in practice – that the seller's spouse will assert her occupancy rights and refuse to leave the house. If the owner is married, his or her spouse will be asked to renounce the occupancy rights. If the owner is not married, he swears an affidavit to that effect (a rare example of the use of notaries public in the sale of land).

100 See 1.3.3.

are granted over all of the company's assets. But a floating charge "floats" over the assets for most or all of the charge's existence. In other words, it is a personal right and not a real right. This means that if a company sells land at a time when the charge is still floating, the buyer takes the land free of the charge. But if the charge attaches first, the land is affected by the charge. Surprisingly, the relevant date for resolving competitions is, not the date of registration of the buyer's disposition, but the (earlier) date on which the disposition is delivered to the buyer.[101] Any charge attaching after that date cannot affect the buyer. A charge attaches either when the company goes into liquidation or when the bank appoints a receiver to the company. Thus the solicitor acting for the buyer must ensure that, at the time the disposition is delivered, there has been neither liquidation nor receivership.

3.4.3. Title Insurance or Liability

Why did your system develop title insurance (or why is title insurance not necessary in your system)? In which cases is it used?

If title insurance exists: How much does it cost in a typical real estate sale?

Answer. Titles on the Land Register are indemnified by the state.[102] Thus, in effect, there is state title insurance, financed by a small part of the fee paid for registration. It is rarely needed. This is because the very act of registration cures all defects in the title, and these defects can revive to the prejudice of the buyer only if (i) the buyer is not in possession (including civil (indirect) possession) or (ii) even if he is in possession, if the defect was caused by his fraud or carelessness.[103] But buyers usually take possession, and they are not usually fraudulent or careless;[104] and in any event no indemnity is payable where the buyer was fraudulent or careless. (In practice, the carelessness attributed to a buyer is normally the fault of his solicitor: thus, while no indemnity can be obtained from the state, there is then a claim for damages against the solicitor.)

Titles on the Register of Sasines are not indemnified by the state. Nonetheless private insurance is rare, and is only used where there is some obvious and indisputable defect in the title. Private insurance might also be used for Land Register titles in a case where the registrar had exercised his right to exclude the state indemnity.

3.4.4. Leases

How does the buyer make sure that there are no leases on the sold property?

What are the consequences for the buyer if such contracts exist?

How may problems related to leases be dealt with in the drafting of the contract?

Answer. Leases of more than 20 years must be registered.[105] Hence they can be discovered from the register. But a lease of a house has a maximum permitted duration of 20 years and so cannot be registered. Yet if the tenant has taken possession, the lease will be binding on a buyer.[106] The sales contract

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101 This was the eventual decision of the House of Lords in a celebrated, and strongly contested, litigation: *Sharp v Thomson* 1997 SC (HL) 66.

102 Land Registration (Scotland) Act 1979 s 12.

103 Land Registration (Scotland) Act 1979 ss 3(1)(a) and 9.

104 As was noted earlier, a buyer normally receives the mud rather than the money.

105 Land Registration (Scotland) Act 1979 s 3(3). But this rule did not apply before the 1979 Act came into force so that, in theory, land might be subject to an unregistered lease granted in 1970 – or in 1870.

106 Leases Act 1449.

routinely contains a clause warranting vacant possession[107] – which includes a warranty as to the absence of leases. In addition, possession by a tenant is often obvious to a buyer. In practice, the risk of a latent lease is extremely small.

3.5 Defects and Warranties

3.4.1. Legal rules

What are the buyer's legal rights against the seller, intermediaries (estate agents) and/ or notaries,

concerning a defect of title,

concerning defects affecting the quality of the property,

concerning restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract?

Answer. The rights of the buyer against the seller depend on the terms, express or implied, of (i) the sales contract (*missives of sale*) and (ii) the disposition (ie the deed that conveys the property and is registered).

The sales contract contains warranties of various kinds (see 3.5.2 below). There is also an implied term (a) that the property is owned by the seller and (b) that it is not subject to any encumbrances which are unusual or unduly onerous. In practice this implied term as to title is invariably the subject of an express provision in the contract.[108]

The disposition repeats the guarantee as to title, except that, in relation to (a), the guarantee is only against eviction. Thus the guarantee is not engaged merely because the seller did not own the property, and a claim arises only if the true owner asserts and establishes his claim.

The remedies for breach of the contract are usually damages and, if the breach is material, rescission. The remedy for breach of the guarantee of title in the disposition is damages.

The solicitor who acts for the buyer has a duty to examine the seller's title and to check certain other matters only some of which are the subject of express provision in the sales contract. (For some others, see 3.6.1.) Failure to do so adequately is professional negligence and gives rise to a claim in damages. In some cases, therefore, a buyer will have a remedy against both, or either, of the seller and his own solicitor.

3.4.2. Typical contractual clauses: the scope of *caveat emptor*

What kind of contractual clauses on warranties are typically agreed upon in a real estate sale among private persons?

Is it possible to exclude the remedies of the buyer? Does it make a difference if the seller or the buyer acts in the course of his trade, business or profession?

To what degree do courts exercise control over the fairness of such clauses?

Answer. Apart from title (mentioned at 3.5.1), no warranties are *implied* into a contract for the sale of land (including land with an existing building). So there can be no question of *excluding* warranties. Rather the question is, what warranties are to be *included*? In a private sale, the physical quality of the building is not warranted, except incidentally (eg, sometimes, the central heating system), and it is for

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[107] Appendix B clause 1(a).

[108] Appendix B clause 6.

the buyer to form his own judgment on the matter, usually with the professional help of a surveyor. But some other warranties are commonly found, eg that –

(a) the property is served by a public road, and by a public water supply, sewer, and electricity supply;

(b) there are no outstanding liabilities for construction or repair;

(c) all work carried out to the property is covered by the necessary planning and building permissions; and

(d) the seller has no knowledge of any proposal by any neighbouring owner which might affect the value or amenity of the property.

There would be no difficulty in excluding or restricting the remedies of a buyer in a private contract, but this is unknown in practice. Where an attempted exclusion occurs in a contract between a person selling in the course of his business and a private buyer, the clause in question (unless individually negotiated) would be liable to attack under the Unfair Terms in Consumer Contracts Regulations 1999 (implementing Directive 93/13/EEC).[109] But there is no reported case of the 1999 Regulations being used in this context.

3.4.3. Liability of the Buyer for Debts of the Seller

Is the buyer liable for arrears of the seller, regarding in particular

real estate taxes

other taxes, e.g. related to buildings on the property or the business of the seller conducted on the property

charges for garbage collection, water and gas delivery,

charges for the administration of condominium apartments

How are these problems treated in typical contractual clauses?

Answer. As a general rule, a buyer is not liable for arrears of the seller. But two exceptions may be mentioned.

First, where the seller has failed to comply with an affirmative real burden (eg an obligation to maintain shared property, or to pay administration charges for apartments or other developments), the buyer, on becoming owner, is jointly and severally liable with the seller.[110] Thus the creditor has a choice of enforcement against either the seller or the buyer. But if the buyer is made to perform, he has a statutory right of recovery against the seller. A difficulty is how the buyer is to find out about unimplemented obligations. There is special protection in the case of obligations to pay for maintenance which has already been carried out: a buyer is liable only if a notice has been registered against his property.[111]

Secondly, local authorities[112] can serve a notice on owners requiring that certain repairs be carried out.[113] (In practice this power is only exercised in relation to apartment blocks.) Such notices bind the

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109 SI 1999/2083 as amended by SI 2001/1186, regs 5 and 8. Paragraph 1(b) of Sch 2 lists as one of the indicative terms which may be regarded as unfair a term which has "the object and effect of inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or or partial non-performance .."

110 Title Conditions (Scotland) Act 2003 s 10. For real burdens see 1.3.6.

111 Title Conditions (Scotland) Act 2003 ss 10(2A), and 10A.

112 A local authority is the elected council for each city or district.

113 For example, under the Civic Government (Scotland) Act 1982 s 87.

person who is owner at any given time. Thus a notice originally served on the seller but still not implemented will bind the buyer, who will have to pay for the repairs. Notices are disclosed in the property enquiry certificates which are always obtained in a sale transaction. The buyer will therefore know of the potential liability. In addition, there is often a clause in the sales contract making the seller liable for the notice and, sometimes, allowing the buyer to deduct the estimated cost from the purchase price.

3.6 Administrative Permits and Restrictions

3.6.1. Standard Requirements

In a typical conveyance of a residential estate:

Which permits are required?

Does the draftsperson (notary) check the building permit, zoning ordinances and/or environmental issues (e.g. in France asbestos contamination)?

Are there any statutory pre-emption rights for public authorities?

Answer. It is helpful to distinguish the following –

(i) permits needed if the sales contract is to be valid;

(ii) permits which allow the current buildings and their current use;

(iii) permits which will allow buildings which the buyer intends to build, or a change of use which the buyer intends;

(iv) restrictions on use;

(v) liabilities which would affect the buyer as the new owner; and

(vi) rights of pre-emption.

No permits are needed in respect of (i).

For (ii) the buyer must check matters such as whether (a) the current use corresponds to the zoning and (b) any building recently built has received the proper consents in respect of planning permission and building control.[114]

For (iii), a change of use will often require planning permission, and may not be compatible with the zoning. A new building will require planning permission and a building warrant.

Various restrictions on use might exist at (iv). The owner might have agreed to restrictions as a condition of planning permission.[115] Trees might be the subject of a tree preservation order.[116] The property might be in a conservation area, be listed as of special architectural or historic interest,[117] or have been designated as a site of special scientific interest.[118] Other restrictions are also possible.

One commonly encountered liability (v) – repairs notices by the local authority – was mentioned at 3.5.3. Less common but more serious are remediation notices for contaminated land.[119]

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[114] See generally Town and Country Planning (Scotland) Act 1997; Building (Scotland) Act 2003.

[115] Town and Country Planning (Scotland) Act 1997 s 75.

[116] Town and Country Planning (Scotland) Act 1997 s 160.

[117] Planning (Listed Buildings and Conservations Areas) (Scotland) Act 1997.

[118] Wildlife and Countryside Act 1981 part II.

[119] See generally Environmental Protection Act 1990 part IIA (inserted by the Environment Act 1995); Contaminated Land

There is no right of pre-emption (vi) in favour of a public authority. Most rights of pre-emption exist only as a matter of private law. A local community has a right of pre-emption where a "community interest" in a particular property has been approved by the Scottish Executive and registered in the Register of Community Interests in Land; but only rural properties are eligible, and registrations are rare.[120]

3.6.2. Requirements for certain types of real estate sales only

- Please state briefly the additional administrative permits and restrictions for other typical cases, e.g. the sale of agricultural or industrial land.

Answer. The permits needed (whether in respect of current use or future intended use) depend on the nature of that use. A restaurant, for example, requires a fire certificate and a liquor licence. Business premises must comply with the Offices, Shops and Railway Premises Act 1963 and the Health and Safety at Work Act 1974. In the purchase of agricultural land the buyer will be concerned with matters such as grant schemes, or whether any woodlands are restricted by forestry dedication agreements.[121] If agricultural land is leased, the tenant may have a statutory right of pre-emption.[122]

3.6.3. Control of administrative permits and restrictions

- Is the control of administrative permits and restrictions left to the buyer's own responsibility, or is it carried out by the notary or another lawyer?

Answer. Normally the matters discussed above would be handled by a solicitor and not by the buyer personally.

3.7 Transfer Costs

3.7.1. Contract and Registration

Please indicate the approximate costs for the sale of a real estate in your country (in general and for a property of (a) 100.000 and (b) 300.000 Euros). Please specify the costs for:

drafting and executing the contract (e.g. the fees of an attorneys or notary),

title insurance (if usual in your country),

registration in the land register.

Answer. A separate lawyer (solicitor) is employed by the seller and the buyer. Each pays his own costs. Thus there are two separate sets of costs. The figure given for solicitor's fees includes VAT at 17.5%. Title insurance is not used in Scotland.

For property worth 100.000 Euros the costs are –

Seller's costs

solicitor's fees 900 Euros

(Scotland) Regulations 2000 (SSI 2000/178).

120 Land Reform (Scotland) Act 2003 part II.

121 Forestry Acts 1947 and 1967.

122 Agricultural Holdings (Scotland) Act 2003 part 2.

Buyer's cost

solicitor's fees 900 Euros

registration 220

TOTAL (for both seller and buyer) 2.020 Euros.

For property worth 300.000 Euros the costs are –

Seller's costs

solicitor's fees 2.000 Euros

Buyer's costs

solicitor's fees 2.000 Euros

registration 700

TOTAL (for both seller and buyer) 4.700 Euros

3.7.2. Transfer Taxes

How high are taxes on the transfer of real property? On what is the tax based (on the real value, on the purchase price etc.)?

Is the due payment of the taxes a requirement for the registration of the transfer of a property?

Does the notary/lawyer collaborate in the collection of the tax?

Answer. Stamp duty land tax is payable on the transfer of land throughout the United Kingdom. The tax is based on the purchase price. The rates, which are more favourable for non-residential properties, are as follows:

Category	***Rate***
Not more than £60.000 (residential property) or £150.000 (other property)	0%
From £60.001 (residential property) or £150.001 (other property) to £250.000	1%
From £250.001 to £500.000	3%
More than £500.000	4%

£1 = c. 1.5 Euros. So £60.000 = 90.000 Euros, and £500.000 = 750.000 Euros.

Tax is due on whole amount of the price and not just on the amount above the threshold (£60.000 or £150.000). The rates at the higher levels have increased sharply in recent years. Until the late 1990s the

top rate (for all properties over £60.000) was only 1%.

Reduced rates are paid for transfers in areas designated as disadvantaged areas. In such areas no tax is payable in respect of non-residential properties, while for residential properties the initial threshold is raised from £60.000 to £150.000.[123]

Due payment is a requirement of registration.[124] Liability is with the buyer and not the seller; and in practice the tax is paid by the buyer's solicitor on behalf of his client.

3.7.3. Real Estate Agents

How often is a real estate agent involved in the sale of residential property among private persons?

How much is the agent's fee?

Who usually pays the agent – the seller or the buyer?

Answer. An estate agent is involved in most cases (75-95%). In the east of Scotland the solicitor usually acts as the estate agent, whereas in the west a separate estate agent tends to be used. A survey carried out in 1996 found that the average fee for solicitor estate agents was 1.12% of the price, and for non-solicitor estate agents it was 1.42%.[125] The fee is paid by the seller.

Total costs. It may be of interest to add together the costs in 3.7.1, 3.7.2, and 3.7.3 to give an idea of the total cost of buying and selling a house –

For property worth 100.000 Euros the costs are

Seller's costs

solicitor's fees	900 Euros
estate agent's fees	1.500

Buyer's cost

solicitor's fees	900 Euros
registration	220
stamp duty land tax	1.000

TOTAL (for both seller and buyer) 4.520 Euros.

For property worth 300.000 Euros the costs are –

Seller's costs

solicitor's fees	2.000 Euros

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[123] Finance Act 2003 Sch 6 paras 4 and 5.

[124] Finance Act 2003 s 79.

[125] Monopolies and Mergers Commission, *Solicitors Estate Agency Services in Scotland* (Cm 3699, 1997) pp 250 and 286.

estate agent's fees	4.500

Buyer's costs

solicitor's fees	2.000 Euros
registration	700
stamp duty land tax	3.000
TOTAL (for both seller and buyer)	12.200 Euros

These figures omit certain other expenses such as advertising or surveyor's fees. Further, in practice, there would often be a mortgage, which will result in a modest increase in the solicitor's fees.

If these costs are lower than in some other EU countries, this may reflect the relatively high levels of home ownership in the United Kingdom and also the relative frequency with which people "trade up" by selling one house and buying another. In Scotland around 64% of houses are occupied by their owner (as opposed to rented to tenants).[126] Of course, whether people buy houses because the costs are low, or the costs are low because people buy houses, is difficult to say.

3.8 Buyer's Mortgage

- In order to finance the purchase price, buyers usually have to mortgage the house. Under which conditions and modalities is this possible?

Answer. In the purchase of residential property the same solicitor usually acts both for the buyer and the lender (typically a bank or building society). Thus the solicitor has two clients whose interests may not always be identical. Most lenders are members of the Council of Mortgage Lenders, and, if so, the solicitor must comply with the detailed instructions set out in the *CML Lenders' Handbook for Scotland*.[127]

As previously noted, the purchase price is due on the date of entry. Lenders advance the loan to the buyer's solicitors shortly before that date. But it cannot be released to the buyer until he has given his solicitors such money as, together with the loan, will cover the purchase price, stamp duty land tax and the cost of registration.[128] The loan can then be used to pay the price even before the mortgage deed is registered. The mortgage deed will already have been prepared and signed by the buyer, and it is registered at the same time as the disposition, as soon as possible after the date of entry.

The equivalent procedure for discharging the seller's security was discussed at 3.4.2.

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[126] See http://www.scotland.gov.uk/stats/. The figures are for 2001. See also 1.7.

[127] Available only online, at http://www.cml.org.uk. It is continuously updated.

[128] *CML Lenders' Handbook for Scotland* para 10.3.

4. Special Problems concerning the Sale of Real Estate (Cases)

4.1 The Conclusion of the Contract

After inspection, the buyer tells the seller that he wants to buy the house. Thereafter, both of them sign a written contract, which states that the seller will sell and the buyer will buy the house under usual conditions. The purchase price is also indicated in the written document. What, if any, legal effect does this document have?

Answer. Normally the sales contract is drafted by lawyers (solicitors), and it would be very unusual for a contract to be entered into in this way. But it is perfectly valid, both as to form and as to content. So far as *form* is concerned, it is sufficient that the contract is signed at the end by each party.[129] So far as *content* is concerned, the parties need only reach agreement as to the property and the price. Other appropriate terms will be implied. Thus the document has effect as a contract, obliging the seller to sell and the buyer to buy.

4.2 Seller's title

4.2.1. Consequences of an invalid Sales Contract

A has sold real property to B. Now, B wants to sell it to C. However, before entering into the contract, C finds out that the sales contract concluded between A and B was invalid,

a) because it lacked the required form;

b) because A did not possess legal capacity;

c) because an administrative permit required for the contract has never been applied for.

May C go ahead with the contract and acquire the property validly?

Answer. In Scotland the transfer of ownership requires only the registration of a unilateral deed (*disposition*) signed by the seller. A sales contract, although usual, is not necessary, and is always a separate document from the disposition. Furthermore, the system of transfer is abstract, so that the disposition (and hence of the transfer) are unaffected by the invalidity of the sales contract. In principle, therefore, B would have become owner despite the invalidity of the sales contract, and so C can become owner in turn.

Sometimes, however, the reason for the invalidity of the sales contract also has the effect, independently, of invalidating the disposition. Of the three reasons mentioned in the question, that would be true only of (b) (absence of legal capacity). So if A lacks capacity to enter into a sales contract he will also lack capacity to grant a disposition to B. Hence the disposition will be void. Nonetheless, registration in the Land Register[130] cures invalidity, even in the current transaction. So B will become owner.[131] Hence C can acquire from B.

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[129] Requirements of Writing (Scotland) Act 1995 s 2.

[130] There are two registers: the (new) Land Register and the (old) Register of Sasines. But all transfers on sale are registered in the Land Register. See 2.1.1.

[131] But B's title can be set aside by A if the registrar's failure to find the error in the disposition was due to B's fraud or carelessness. See 2.5. On the present facts that result is unlikely to occur.

The Seller is not the owner

A sells his property to B, who pays the purchase price and has the transfer registered with the land register. Only afterwards, it turns out that A was not the owner, with B having however relied in good faith on A's title. (This may happen e.g. when the seller was believed to have inherited the property from his uncle by a will, but a subsequent will is found in which the uncle leaves his entire assets to a charity. To make it a case, let us suppose further that the seller has become insolvent and cannot repay the money.)

How is B protected?

May he retain the property?

How is the buyer protected if, already during the transaction, it turns out that the seller is not the owner?

Answer. It is helpful to begin with the position of A.[132] The mere act of registration in the Land Register cures any defect in the applicant's title. Thus on registration A became owner. Of course, it is true that A should not have become owner, because his title was bad. The Register is thus inaccurate. That means that it can be corrected (*rectified*) if either (i) A is not in possession or (ii) even if A is in possession, the inaccuracy was caused by A's fraud or carelessness. In a case such as this A was probably careless. Hence, on the error being discovered, the Register could be corrected. But unless or until this occurs, A is owner of the property. If the Register is corrected under (i) B is entitled to state indemnity (ie to payment of the value of the property). But if it is corrected under (ii), no indemnity is payable.

As A is owner, no protection is needed for B. B is buying from the person who is the owner. Hence B becomes owner in turn. But in showing B as owner, the Register remains inaccurate. Thus, as with A so with B: the Register can be corrected if either (i) B is not in possession or (ii) the inaccuracy was caused by B's fraud or carelessness.

In practice (ii) could not occur. The mistake was not B's but A's or the registrar's. Thus, even if B was in bad faith – even if B knew, at the time of the purchase, that A's registration was incorrect – there is no fraud or carelessness in the sense required by the statute.[133] So good faith is not needed in order for B to become, and remain, owner.

If (i) occurs – if B is not in possession (including civil (indirect) possession) – the Register can be corrected and B would lose ownership. But he would then be entitled to state indemnity.

4.2.2. Execution against the Seller

After the parties have signed the sales contract, but before its registration, a creditor of the seller distrains upon the property in order to enforce a judgement against the latter.

Are there risks for the buyer (e.g. to loose his payment)?

How may the buyer be protected (e.g. in drafting the sales contract)?

Answer. The normal chronology of a sales transaction is (i) conclusion of the sales contract (ii) date of entry, when the price is paid in exchange for delivery by the seller of the deed of transfer (*disposition*) and (iii) registration of the disposition by the buyer. Thus, although the seller receives the price at stage (ii), ownership passes to the buyer only at stage (iii). The time gap between stage (ii) and stage (iii) is usually around two weeks.

The answer to the question depends on exactly when the seller's property was attached by his creditor.

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132 For a fuller explanation see 2.5.

133 *DougbarProperties Ltd v Keeper of the Registers of Scotland* 1999 SC 513 (also available on http://www.scotcourts.gov.uk.)

Attachment requires registration.[134]

If the attachment took place at *stage (i)*, there is no risk for the buyer. He has not yet paid the price. Before he does so, he will search the Register and discover the attachment. He will then refuse to pay until the attachment is lifted.

Attachment at *stage (ii)* was, in recent years, a highly controversial subject. Some support in court decisions could be found for the view that, once the disposition was delivered, the property could no longer be attached by the seller's creditor – even although the seller remained owner. This view was, in effect, based on the idea of constructive trust:[135] after delivering the disposition, the seller would hold the property on trust for the buyer. The property would thus be held in the seller's *trust* patrimony and not in his *private* patrimony. Hence it could not be attached by a private creditor.[136] But this view – which is based on English law[137] – has now been abandoned by a decision of the House of Lords in 2004: *Burnett's Trustee v Grainger*.[138] The decision reasserts traditional and well-settled rules of Scots law. These rules are that: until registration of the buyer's disposition, the seller remains owner; hence the property can still be attached by the seller's creditors; and accordingly there is a "race to the Register" between the seller's creditor (with the attachment) and the buyer (with the disposition). Whoever registers first wins. As Lord Rodger of Earlsferry explained in *Burnett's Trustee*:[139]

"Those taking part in this race are no Corinthians and swear no Olympic oath of sportsmanship. If your opponent is slow off the mark, mistakes the way or stumbles, you do not chivalrously wait for him to catch up: you take full advantages of his mistakes. Nice guys finish last and don't get the real right."

In practice the buyer is protected by a personal guarantee (*letter of obligation*) from the seller's solicitors that no competing title will be registered for a period of 21 days.[140] Nonetheless the Scottish Law Commission has recommended legislation which would handicap the creditor by preventing registration for 21 days.[141]

Attachment at *stage (iii)* is bound to fail. For, following registration, ownership is with the buyer and not with the seller.

4.3 Payment

4.2.1. Delay in payment

The buyer pays late. What are the seller's remedies?

May the seller rescind the contract?

Does the buyer have to pay a (statutory) penalty or is he liable for damages?

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134 Attachment of land is called *adjudication.*

135 Ie a trust arising, not by the parties' actions but by operation of law.

136 See in particular *Sharp v Thomson* 1997 SC (HL) 66. The subject generated a large amount of literature and, eventually, a referral to the Scottish Law Commission. The controversy is fully set out in parts 1 and 2 of the Scottish Law Commission's Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001; available on http://www.scotlawcom.gov.uk).

137 Although in English law the trust arises earlier, on conclusion of the sales contract.

138 2004 SLT 513 (also available on http://www.parliament.the-stationery-office.co.uk/pa/ld/ldjudinf.htm). The case concerned insolvency and not attachment but the issues are the same.

139 At para 141.

140 See 2.6.2.

141 Scottish Law Commission, Report on *Diligence* (Scot Law Com No 183, 2001) para 3.55; Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001) para 4.9. Implementation of the Report on *Diligence* is expected shortly: see Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland* (2004).

Answer. Under the general law, the seller cannot rescind without giving the buyer a reasonable time to pay. But the sales contract invariably contains a provision allowing the seller to rescind if the buyer's delay is more than some short period such as two weeks.

There is no statutory penalty, but damages are payable. In addition, the contract often provides that the buyer is to pay interest on the price for a stipulated period.[142]

4.4 Defects and Warranties

4.4.1. Misrepresentation

Half a year after the buyer has moved in, a water pipe breaks and floods parts of the house. The water pipe was put in when the house was built some decades ago.

In spring, the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other year in spring.

An extension of the house has been built without the necessary permit of the building authority. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by the previous owner.

For which of these defects is the owner liable if the contract contains a clause which excludes the seller's liability, i.e. by stating that the buyer accepts the property in the state in which it is at the date of the conclusion of the contract? What are the buyer's remedies?

Answer. There is no need for a clause stating that the buyer accepts the property in the state in which it was in at the date of conclusion of the contract, for that is the rule under the general law, even without express provision. In practice a clause of this kind is not used.

In each case the owner (buyer) is liable; and, unless the contract contains an express warranty (or there was fraudulent or negligent misrepresentation), he has no remedy against the seller. In practice an express warranty is likely to be found only in respect of the building authority permit.[143] Note, however, that there is usually a clause providing for the expiry of the contract two years after the date of entry.[144] Thus claims cannot be made after this date.

Normally a professional surveyor is employed by the buyer to inspect the property. If a physical defect is not discovered, there may be a claim for professional negligence against the surveyor. But a claim is unlikely to arise in respect of the matters mentioned in this question.

4.4.2. Destruction of the house

After the parties have signed the sales contract, the house burns down. What are the consequences for the contract?

May the buyer rescind the contract or does he have to pay the purchase price?

May the seller rescind the contract? Is he liable for damages? Is there a voluntary or mandatory insurance for these cases?

Answer. Under the general law, risk passes to the buyer on conclusion of the sales contract. Thus, even if the house burnt down the buyer would still have to pay the purchase price. But in practice this rule is

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[142] See Appendix C clause 1(c).

[143] Appendix C clause 9(c).

[144] Appendix C clause 12.

almost always altered by provision in the contract to the effect that risk remains with the seller until the date of entry.[145] If the house burns down before that date, the buyer can rescind the contract.

Insurance is normal but not mandatory.

[145] Appendix C clause 2(d).

5. Sale of a house or apartment by the building company (vente d'immeuble à construire/Bauträgervertrag)

5.1 Statutory Basis

5.1.1. National Law

Do any special rules (e.g. on consumer protection) apply if the seller also constructs the house which he is selling? When do these rules apply?

Answer. No special rules apply at present. Each building company uses its own standard-form contract. A governmental task force recently expressed disquiet about the provisions of some builders' contracts and recommended the introduction of a voluntary code, to be reinforced, if necessary, by legislation.[146]

5.1.2. Influences of EU law

What, if any, are the influences of existing EU law, in particular the consumer protection directives, on the national law of the *vente d'immeuble à construire*?

Answer. Only the Unfair Terms in Consumer Contracts Directive (93/13/EEC) is of significance.[147] As originally transposed into UK law it was apparently confined to the sale and supply of goods, and so did not extend to immovable property. The position was, however, changed by the Unfair Terms in Consumer Contracts Regulations 1999.[148] So far, however, the impact of the Regulations appears to be slight.

5.2 Procedure in general

5.2.1. Single houses

Please describe the procedure for a standard contract: A construction company (the „builder") buys a large piece of land and splits it up into several small parcels. On these small parcels, it plans to build town houses. Now, the builder sells the small parcels with the houses (which have not yet been built) to several buyers. Let us assume that all the buyers are consumers, and that the builder uses his own standard contract terms.

Is the contract governed by any special regulation?

When does the buyer have to pay the purchase price (e.g. after termination of the building or according to the state of the building)?

Are there statutory warranties for material defects?

Answer. Building companies always contract on their own standard terms. Sometimes the buyer signs without legal advice, but even if legal advice is taken, builders are reluctant to alter their standard terms.

The contract is not subject to any special regulation. Nor are there statutory warranties for material defects, although case law requires builders to do their work competently. A deposit – eg of 1% of the

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146 Housing Improvement Task Force, *Stewardship and Responsibility: A Policy Framework for Private Housing in Scotland* (2003; available on http://www.scotland.gov.uk/hitf) paras 204-08.

147 Thus for example the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (SI 1987/2117), which transposes the Doorstep Selling Directive (85/577), does not apply to construction of a building or the sale of land.

148 SI 1999/1186. The change is in the definition of "seller or supplier" in reg 3(1), which no longer refers to "goods". Compare the original Regulations (SI 1994/3159).

price – is usual, and is paid at or shortly after conclusion of the contract. The remainder of the price is due – as standardly with sales contracts[149] – on the date of entry. See further 5.4.1.

5.2.2. Condominiums

Let us assume that the builder does not sell a single house, but an apartment in a condominium which he is planning to build. Are there any differences as compared with the previous case?

Answer. No.

5.2.3. Renovation

Another variation: Let us assume that the builder has bought an old house which he wants to renovate and split up into separate apartments. He sells the apartments before completing the renovation. What, if any, are the differences as compared with the first and second case?

Answer. There are no differences.

5.3 Conclusion of the Contract

Is there any **formal requirement** for the conclusion of the contract?

Is there any preliminary contract?

Is there any mandatory **waiting period** before the contract can be concluded?

Has the buyer a **right to withdraw from the contract** (in particular, if the buyer acts as a consumer)?

Answer. No special rules apply. Thus, as usual, the sales contract (or each individual document of which it is comprised) must be signed at the end by the parties.[150] There is no preliminary contract. Nor is there is a waiting period or a right to withdraw.

5.4 Payment

5.4.1. Payment date

When is the payment due under usual contractual arrangements?

Is the payment made directly by the buyer to the builder or is deposited on an escrow account?

Is it usual or possible to make the contract directly enforceable without the intervention of a court? (E.g. may the buyer submit to immediate enforceability in the sales contract?)

Answer. Payment is due on the date of entry. But that date depends on the completion of the house and so is not specified in the sales contract – or, if specified, can be altered unilaterally by the builder. Small delays are common.

Usually the money is paid to the builders' solicitors, just as, in an ordinary sale, it is paid to the seller's solicitors.[151] But sometimes payment is made directly to the builder.

It is possible, but unusual, to put a clause in the contract allowing direct enforceability without the inter-

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[149] See 3.3.2.
[150] See 3.2.1.
[151] See 3.3.2.

vention of the court.

5.4.2. Securities

Are there any securities for the buyer, such as guarantees or insurances?

Answer. Most builders are members of one of the new home warranty schemes, and banks are reluctant to lend money on security of a new house which is not covered by such a scheme.[152] By far the most common scheme is the Buildmark warranty provided by the National House-Building Council (NHBC).[153] Among other matters, this protects the buyer if the seller becomes bankrupt and does not complete the house. The NHBC will either refund any money paid by the buyer or pay for the completion of the house.[154]

5.4.3. Acquisition of Ownership

How is it ensured that the buyer only has to pay if it is certain that he will become the new owner?

How is it ensured that the buyer is granted ownership free of existing liens (in particular free of a mortgage which has been granted by a bank to the construction company to finance the building)?

Answer. The title of the builder is verified by the lawyer (solicitor) acting for the buyer in exactly the same way as in the purchase of any other land.[155] If the title is bad, or encumbered by a mortgage, the buyer cannot be forced to pay the price.

5.4.4. Building

Under usual contractual arrangements, does the buyer have to pay before or only after the building is finished, or does he have to pay instalments according to the state of progress of the construction?

Answer. If the house is part of a development of houses by the same builder, payment is usually required only when the house is finished. But if the house is being built uniquely for the buyer, typically by a small building company, payment is often required in instalments, corresponding to various stages of the building process.

5.4.5. Financing of the Buyer

How can the buyer finance his purchase? (e.g. Can he set up a mortgage on his future property? From what moment on? How is his mortgage related to a prior mortgage granted to the construction company? Do the banks have special duties of care when granting loans secured by a mortgage to the construction companies (because a future buyer may thus be prevented from taking up a loan on the parcel bought from the company?)

Answer. Normally the buyer does not pay the price until the house is completed. Thus, in principle, the position is exactly the same as for a normal purchase of land. So the buyer grants the bank a mortgage at exactly the same time as he becomes owner by registration; and the bank releases its money slightly

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152 *CML Lenders' Handbook for Scotland* para 6.6.

153 See http://www.nhbc.co.uk/.

154 *Buildmark Warranty* part C1. But the amount paid cannot exceed the greater of £10,000 or 10% of the value of the house.

155 See 3.4.

earlier, in time for the buyer to use it to pay the price.[156]

Often there is a prior mortgage by the builders. If this is an ordinary mortgage (*standard security*) a deed of restriction by the bank will be registered excluding the house from the mortgage.[157] If it is a floating charge, the transfer of the house has the automatic effect of removing the security.[158] Either way, the end result is that the house is subject only to the buyer's mortgage.

5.5 Builder's Duties - Protection of Buyer

5.5.1. Description of the Building

How does the contract usually describe the building if it has not yet been completed (e.g. floor plan and written specifications)? Is this description sufficient in practice (in ordinary cases)?

Answer. Except for apartments, the description is of the land rather than the building. But in both cases it tends to be rather vague, often no more than a plot number. That is sufficient for the contract. By the time that the disposition is being prepared, the house is usually complete, and the description there will typically use a plan showing the boundaries of the land and the outline of the building.

5.5.2. Late Termination of the Building

Does the contract usually provide for an exact delay for the termination of the building?

Which claims does the buyer have in the event that the delay is not respected?

Answer. Typically no provision is made for delay; but this is because the date on which the building is to be completed is not usually specified in the sales contract (see 5.4.1). It is an implied term that the building must be completed within a reasonable time, and a failure to do so would allow the buyer to rescind and to claim damages.

5.5.3. Material Defects

Which claims does the buyer have if there are material defects of the building? What is the limitation period for these claims?

Does the buyer have any claims against third parties other than the builder (e.g. against the companies commissioned by the builder or against a guarantor)?

Answer. There is a claim against the builders, usually for damages. If, as usually, the builders are members of the National House-Building Council (NHBC), there is also a Buildmark warranty.[159] This allows direct recovery from the NHBC in respect of structural and other major damage arising in the first ten years (but not for the first two years). In addition, the NHBC underwrites the builders' obligations in respect of the first two years.

The claim is subject to negative (extinctive) prescription and not limitation. The period is five years from the date when the buyer discovered (or ought reasonably to have discovered) about the defect, but subject to an overall limit of 20 years.[160]

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156 See 3.8.

157 As with a deed of discharge in an ordinary transaction, this is delivered to the buyer in exchange for the price, allowing the buyer to ensure that it is registered. See 3.4.2.

158 For floating charges, see 3.4.2.

159 See also 5.4.2.

160 Prescription and Limitation (Scotland) Act 1973 ss 6, 7 and 11.

5.6 Builder’s Insolvency

5.6.1. Unfinished Building

Let us suppose that the buyer buys an apartment on the third floor of a building yet to be built and that the builder goes insolvent after completing the basement. Is there any protection for the buyer?

Answer. Under the Buildmark warranty,the NHBC will either complete the building or, at its option, return any money which the buyer has already paid.

5.6.2. Repayment

Let us suppose that the buyer rescinds the contract because the builder is late in finishing the building and that there are many material defects in the already completed parts of the building. However, after the buyer has terminated the contract, the builder goes insolvent. May the buyer expect repayment if he has already paid some instalments?

Answer. The buyer is not a preferred creditor in the builder's insolvency and so will in practice receive little or nothing in respect of his claim. Often in such cases the Buildmark warranty applies with the result that the money will be repaid by the NHBC; but it seems that the rescission of the contract would terminate also any NHBC warranty.

6. Private International Law

6.1 Contract Law

6.1.1. Conflict of Law Rule

Does your legal system allow the choice of the applicable law also for contracts on real property?

Answer. Yes. The position is regulated by article 3(1) of the Rome Convention.[161]

In the absence of a choice of the applicable law by the parties: Is the *lex rei sitae* applicable also to contractual obligations concerning real property (e.g. to the obligation to transfer real property or to set up a mortgage on it)?

Answer. Yes: Rome Convention article 4(3). The position might possibly be different if, despite the property being in Scotland, the contract is connected in its entirety with another country: article 4(5).[162]

If the lex rei sitae governs the real property rights, can the parties choose a different lex contractus which is however related to other parts of the transaction (e.g. for a loan contract if the mortgage securing it follows the lex rei sitae, or a construction contract for a property to be sold – "dépecage")

Answer. Yes.

6.1.2. Formal Requirements

If, in your legal system, any formal requirements for the obligation to transfer real property exist: Is the obligation valid if the form prescribed by domestic law has not been respected, but only that prescribed by the law of the place where the contract has been celebrated? Is this so even when the law of the place where the contract has been celebrated allows the contract to be done in writing without any other formal requirements?

Answer. The answer is uncertain. The question of whether, in Scotland, the rules of Scots law as to form are mandatory in the sense intended by article 9(6) of the Rome Convention has never been tested. Since, however, the Scots law as to form is undemanding (writing signed at the end by the parties)[163] it may be that the question is unlikely to arise in practice.

6.2 Real Property Law

6.2.1. Conflict of Law Rule

Does your legal system apply the *lex rei sitae* rule to immovable property?

Answer. Yes. This rule arises by case law and not by statute.[164]

6.2.2. Formal Requirements

Is it possible to register the transfer of real property in your land register if the act of transfer has been celebrated in another State? If not: What are the reasons given for the exclusive jurisdiction of the na-

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161 The Rome Convention was incorporated into UK law by the Contracts (Applicable Law) Act 1990.

162 Dicey & Morris on *The Conflict of Laws* (13th edn, 2000, by Lawrence Collins) para 33-225.

163 See 3.2.1.

164 See A E Anton, *Private International Law* (2nd edn, 1990, with P R Beaumont) pp 602 ff.

tional system?

Answer. Yes. There is no requirement that the act of transfer be celebrated in Scotland, or by a Scottish lawyer.

6.3 Restrictions for Foreigners to acquire Land

6.3.1. Restrictions limited to Foreigners

Are there any restrictions for foreigners to acquire real property?

If so: Do these restrictions also apply to nationals of other EU Member States? Have these restrictions been challenged under EU law? If relevant: When will the restrictions for EU-nationals end?

Answer. There are no restrictions.

6.3.2. Other Restrictions

Are any other permits required which play a role particularly for foreigners acquiring real property (or about which foreigners complain more than nationals)?

Answer. No.

6.4 Practical Case: Transfer of Real Estate among Foreigners

Let us suppose that a couple of nationals of another EU Member State own a vacation home in your country. They consider to transfer the ownership either to their children (as a gift) or to another couple, who are nationals of the same Member State as them. If possible, the parties want to conclude all necessary contracts in their state of origin. They ask a local lawyer/notary there to prepare the transaction. This lawyer/notary asks you about the easiest way for the parties. What way do you recommend – or what is considered to be the best practice?

Answer. In theory all the legal work could be carried out by a foreign lawyer. But in practice a foreign lawyer could not carry out the actual transfer of ownership (ie the drawing up of the deed of transfer, and its registration) without the advice and assistance of a lawyer in Scotland. It is likely to be quicker, cheaper and more efficient to use only a Scottish lawyer for the whole transaction.

7. Encumbrances/Mortgages (and Land Charges)

Terminology:

In this study, the usual English term “mortgage” is used in a double meaning. Usually, it is understood in a wide sense and refers to all kinds of securities in real estate. However, when it comes to the distinction between accessory and non-accessory securities, the term “mortgage” is used for the accessory type where the expression “land charge” is used for non-accessory securities.

In many examples, the mortgagee has been called „bank“, because she normally is a bank. If special regulation on consumer credits is applicable, please indicate if the answer is different for a consumer or a professional creditor.

The debtor is also the land owner unless explicitly stated otherwise.

If it matters for your answer, you may assume that the secured claim is a bank loan. However, if you make this assumption, please explain if other claims may be treated differently (Otherwise, we would suppose that your answers apply to all types of money claims secured).

7.1 Types of mortgages/land charges

7.1.1. Types of mortgages

Which types of mortgages (or land charges) exist in your legal system?

Which is the most common type of mortgage?

Please indicate also the respective statutory bases!

Answer. There is no non-accessory security.

The only accessory security which exists purely for land is the *standard security*.[165] This is provided for by part II of the Conveyancing and Feudal Reform (Scotland) Act 1970. As well as securing a money obligation, a standard security can secure an obligation to perform an act (such as to build a house).[166] The obligation can be current, future, or contingent. A money obligation can be for a fixed amount or for "all sums due and to become due". In practice, standard securities are almost always in respect of all sums due and to become due.

If the debtor is a company or a limited liability partnership it can also secure a debt by means of a *floating charge*. A floating charge can cover property of any kind and not merely land. It was discussed briefly at 3.4.2 and will not be discussed further here.

7.1.2. Legal nature

What is the legal nature of mortgages (or land charges)? (*Ius in rem* or *in personam*; title or lien etc.)

Answer. A standard security is a subordinate real right (ie a real right which is not ownership).

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[165] To be completely strict one should say that the standard security is the only *voluntary* security. Securities without the owner's consent can be obtained as a result of execution, or, occasionally, by virtue of some special statutory provision.

[166] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8) (definition of "debt").

7.2 Setting up a mortgage

7.2.1. Example

- The bank grants a loan to the debtor. What steps does the bank have to follow in order to establish a security right over real property owned by the debtor?

Answer. Usually the bank and the debtor enter into a preliminary agreement in writing. The security documentation comprises (a) a loan contract, often unilateral in form,[167] and (b) a deed granting the standard security. The second of these must follow the form prescribed in the legislation.[168] These can be in a single document or in two separate documents.[169] The documents are signed by the parties at the end, and by a single witness. The security deed is not signed by the bank. The security is constituted by registration of the security deed.[170] If the debtor is a company, details of the security must also be registered with the Registrar of Companies within a further period of 21 days.[171]

7.2.2. Legal requirements for the loan contract affecting the mortgage

- Which legal requirements does the bank have to respect when granting a mortgage loan? In particular: Must the bank give some minimum information to the customer before a valid loan contract can be signed? Are there minimum periods between the release of the information, the signature of the contract and the setting up of the mortgage? Can the mortgage been erased within certain periods if the customer wants to cancel it?

Answer. Usually there are no legal requirements. But the position is different if the mortgage loan is subject to the Consumer Credit Act 1974. A loan is subject to this Act only if (i) the borrower is a consumer (ii) the lender is not a private individual, a bank, or a building society, and (iii) the amount of the loan is less than £25,000. Where the 1974 Act applies the borrower must be given a copy of the loan contract in advance,[172] which must include the following notice:[173]

> YOUR RIGHT TO WITHDRAW
>
> This is a copy of your proposed credit agreement which is to be secured on land. It has been given to you now so that you may have at least a week to consider its terms before the actual agreement is sent to you for signature. You should read it carefully. If you do not understand it, you may seek professional advice. If you do not wish to go ahead with it, you need not do so.
>
> If you decide NOT to go ahead with the agreement, you should inform the creditor or, if you prefer, any supplier or broker involved in the negotiations. You can do this in writing or orally for example by telephone. If the agreement arrives for signature and you have decided NOT to go ahead, DO NOT SIGN IT. Then you will not be legally bound by the agreement.

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167 Where a loan contract is unilateral (ie signed only by the borrower) it is called a *personal bond.* There is an argument that a personal bond is a unilateral obligation and not a contract; but unilateral obligations are also binding in Scots law.

168 Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2).

169 Known respectively as form A and form B securities, after the forms in Sch 2 to the Conveyancing and Fwudal Reform (Scotland) Act 1970.

170 Conveyancing and Feudal Reform (Scotland) Act 1970 s 11(1).

171 Companies Act 1985 s 410. The Scottish Law Commission views this additional requirement as unnecessary and has recommended its abolition: see Scottish Law Commission, Report on *Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004; available on http://www.scotlawcom.gov.uk) paras 3.8 – 3.11 and 3.25.

172 Consumer Credit Act 1974 s 58(1).

173 Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 (SI 1983/1557) reg 4, Sch part I.

The borrower thus has a *consideration period* of at least a week, during which he must not be contacted by the lender. After the consideration period ends, the contract can be given to the borrower for signing, but it must be sent by post and not given personally.[174] There are detailed rules as to the information which the contract must contain, including the amount of the loan, the rate of interest, any additional charges, the annual percentage charge, the total amount payable, and the timing and amount of any repayments.[175] Once the loan contract is signed, however, neither it nor the mortgage can be cancelled.[176]

7.2.3 Formal requirements

Is there any formal requirement for the setting up of a mortgage?

Answer. If a document is to be registered, it must be counter-signed by a witness.[177] This means that the security deed must be witnessed; and the practice is also to use a witness for the loan contract, partly to allow registration in the court books and hence execution without a court decree.

7.2.4 Registration

Is the registration of the security in the land register (or any other register) necessary? If so, which indications does the registration need to contain?

Answer. Registration is necessary in one of the two land registers (the Land Register or the Register of Sasines).[178] Registration constitutes the security.[179] In addition, if the debtor is a company, the security must be registered within a further period of 21 days with the Registrar of Companies.[180]

When registered in the Land Register, the security appears in the C (Charges) Section of the title sheet for the property. This discloses only (i) the name and address of the owner/debtor (ii) the name and address of the creditor and (iii) the amount of the loan.[181] A copy of the security deed is retained by the registrar and can be inspected but, unless it includes the loan contract, it may not be any more informative.

Registration in the Register of Sasines involves merely taking a copy of the deed, which is then available for public inspection.

7.2.5. Time and Costs

How long does the registration of a mortgage normally take?

What can be done to speed up the process? (e.g. In Germany, the notary can give an opinion to the effect that the registration of the mortgage in the foreseen ranking position is secured. This opinion is usually accepted by banks. In other countries, lawyers' opinions about the validity of the mortgage are used.)

Is it possible to use priority notices or similar devices? How effective are they to secure the mortgage and its rank? (see 2.6)

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174 Consumer Credit Act 1974 s 61(2).
175 Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553) (as amended).
176 Comsumer Credit Act 1974 s 67(a).
177 Requirements of Writing (Scotland) Act 1995 s 6.
178 See 2.1.1 for the difference between these registers.
179 Conveyancing and Feudal Reform (Scotland) Act 1970 s 11(1).
180 Companies Act 1985 s 410.
181 See Appendix A for an example.

Is it possible to speed up the process with the use of the internet?

- What are the costs for establishing a typical security for (a) 100.000.- and (b) 300.000.- Euros?

lawyer/notary fees,

registration fee (*Grundbuchamt*),

are these fees fixed by law?

taxes (who collects the taxes?)

Answer. Usually a lawyer (solicitor) is employed by the bank to prepare the security documentation and to verify the title of the debtor to the land. The solicitor's duties are set out in the *CML Lenders' Handbook for Scotland*.[182] If necessary, the solicitor could complete his work in a few days. There is no system of priority notices, but the security is treated as registered on the day on which it is received at the register.[183]

For a security of 100.000 Euros the costs are –

solicitor's fees	600
registration	110[184]
TOTAL	710 Euros

For a security of 300.000 Euros the costs are –

Solicitor's fees	1800
Registration	355
TOTAL	2155 Euros

No tax is payable. The solicitor's fees include VAT at 17.5%. Only the registration fee is fixed by law.[185]

7.3 Causality and Accessoriness

7.3.1. Invalid loan contract

Let us assume that the loan contract is invalid. How does this affect the mortgage - assuming that all other requirements for creating a mortgage have been complied with?

Answer. The mortgage is also invalid. A standard security is accessory to the loan contract, so that if the contract fails the standard security fails as well. [186]

7.3.2. Right of withdrawal

Let us assume that the debtor-consumer has a statutory right to withdraw from the loan contract. The

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[182] Published only in electronic form, on http://www.cml.org.uk. It is continuously updated.

[183] See 2.3.2 above.

[184] But where the security accompanies a disposition, the fee for the security is only 33 Euros.

[185] Fees in the Registers of Scotland Order 1995 (SI 1995/1945).

[186] For deeds rgeistered in the Land Register (as opposed to the Register of Sasines), defects affecting real rights are cured by the Land Registration (Scotland) Act 1979 s 3(1)(a). But the defect here is in a personal right. Further, s 3(1) does not apply "insofar as the right .. is capable .. of being vested as a real right". A "mortgage" without a loan contract is not capable of being vested as a real right.

debtor exercises this right only after the mortgage on the real estate has already been established. (This might be possible if the bank did not inform the debtor properly about his right to withdraw and, as a consequence, the deadline for the withdrawal has not yet expired.)

Can the bank still use the mortgage to secure her right for repayment of the loan?

Answer. As implemented in the United Kingdom, the Doorstep Sales Directive (85/577 EEC), which was founded on in case C-481/99, *Heininger* (ECR 2001, I-234), does not apply to mortgages.[187] Further, as was seen in 7.2.2, even when the mortgage is subject to the Consumer Credit Act 1974, there is no right to cancel a loan agreement once it is signed. The absence of a right of cancellation is precisely to avoid the problems thrown up by this question.

If it were possible for the situation described to arise in Scotland, the answer is uncertain but is likely to depend on whether money has been advanced to the debtor. If an advance has been made, and not repaid, there is still a debt to secure even if, following the cancellation of the loan agreement, the obligation to repay may arise under the law of unjustified enrichment. Thus it is arguable that the mortgage can be used to secure repayment especially if, as usually, it is in respect of "all sums". Conversely, if no money has yet been advanced, the cancellation of the agreement means that none can be advanced in the future and hence that there is no debt to secure. Accordingly the mortgage is extinguished.

7.3.3. Changing the secured debt

The debtor has repaid the loan for which the mortgage was granted. Now, he applies for another loan. Can the old mortgage be used to secure also the new loan (and if so, under which conditions)? Or is it necessary to set up a new mortgage?

Answer. If the mortgage was for a stipulated loan of a fixed amount, and that loan has been repaid, it would be necessary to set up a new mortgage for the new loan. But in practice mortgages are almost always in respect of all sums which are due or may become due to the bank in the future. This covers all indebtedness to the bank, from whatever source and at whatever time. Thus the old mortgage would automatically secure any new loan by the bank.

For the rest of 7.3.3 it is assumed that the mortgage is for all sums.

Let us assume that 30% of the mortgage loan has been repaid. Now, the mortgagee wants to take up another loan for his business, amounting to 25% of the old loan, but with a much higher annual amortisation and a different interest rate. Can the “free” part of the old mortgage be used to secure this loan? What has to be done for this?

Answer. An all-sums mortgage will automatically cover any new loan provided it is with the same bank. There is no limit to the amount of the new loan: the "free" part of the mortgage is infinite (subject only to the value of the land which is being secured).

Let us assume that the debtor has agreed on a loan secured by a mortgage. However, the house to be financed is not yet build, but its completion has been agreed upon as a condition for the disbursal of the loan. Therefore, the debtor wants to take up an interim loan from another bank. Can the mortgage be used to secure this interim loan until it is replaced by the final mortgage? How can this happen?

Answer. No. A different mortgage would be needed for each bank.

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[187] Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (SI 1987 2117) reg 3(2)(a)(i).

The bank and the mortgagor have agreed on a mortgage loan for a five year term at a fixed interest rate. Now, this period is over, and both sides want to agree on a new loan for another five years, but at a different interest rate. Can the old mortgage secure the new loan?

Answer. Yes. An all-sum mortgage secures any debt from the same bank.

What if in the last example the mortgagee wants the new loan from another bank? Could the old mortgage be used for the new loan? If yes, what steps need to be taken? Is the consent of the old bank necessary?

Answer. No. A new mortgage would be necessary.

What if the new loan is not designed to finance a property but a car or the mortgagee's company and is subject to different conditions, e.g. a higher interest rate and a higher amortisation?

Answer. This makes no difference to the answers.

The mortgagee runs a business and is in permanent need for credit. He agrees with his bank on a maximum credit line, which is used for different loans. Can this credit line be secured by a mortgage? Are there special forms of mortgages for it?

Answer. Yes. This is covered by an ordinary all-sums mortgage.

7.3.4 Independent/abstract promise of payment

In your legal system, is there anything like an independent/abstract promise of payment (*garantie personelle autonome/cédule abstraite*)? If so, can it be secured by a mortgage?

Answer. A unilateral obligation (promise) is enforceable under the law of Scotland. And *any* obligation can be secured by a mortgage.

7.3.5. Mortgage for the land owner himself

Can a mortgage be set up also for the land owner (*Eigentümergrundschuld*)? without a loan contract? Could he set up the mortgage "on stock" when negotiating with several banks? How is the pre-existing mortgage assigned to a later loan?

May the owner reserve priority to himself for a future mortgage?

Answer. There is no equivalent of the Eigentümergrundschuld in Scotland. A mortgage is always accessory. Thus none of the above is possible.

7.4 Enforcement and other rights of the bank

The debtor did not pay the interest or did not repay the loan. Therefore, the bank wants to enforce the mortgage/land charge.

Please describe the main steps of the enforcement procedure!

Is a court decision necessary to render the mortgage enforceable?

How long does the enforcement procedure regularly take before the bank receives the proceeds of the mortgage? Can the debtor slow down the procedure, especially if the mortgage is on his residential home? Can the bank act in receivership in the meantime (*Zwangsverwaltung*)?

Can the bank sell the real estate without foreclosure, i.e. without a court decision and a compulsory auction? Can the owner grant the bank the right to purchase or the power to sell the property by means of a normal real estate sales contract (in the event that the loan is not repaid)?

Are there any instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons?

What happens in the event that insolvency procedures over the debtor's estate are initiated? Will the foreclosure procedure be stopped? How are the mortgagee's rights protected in an insolvency procedure?

Answer. No court procedure is needed in order to establish the existence of the debt. Instead the bank can immediately begin the enforcement process. Various methods of enforcement are available under the legislation but usually they involve service of a notice on the debtor. The notice requires either that the debtor pay the missing instalments of interest or, at the election of the bank, that he repay the whole loan.[188] The period allowed for payment is one month or, in the case of repayment of the loan, two months. If the period expires without payment, the bank can immediately sell the property. No special procedure is needed, and the sale is organised in the same way as a private sale. Thus a buyer would be unable to tell that the sale is in enforcement of a mortgage, and this tends to result in a higher price. The bank has a statutory duty to obtain the best price reasonably possible.[189] The whole process can be carried out in approximately four months but usually takes a month or two longer.

No application to the court is needed although it is common for banks, following the expiry of the notice, to obtain a formal court declarator confirming their power of sale. The sale itself is not supervised by the court. A court action may, however, be necessary in order to eject the debtor if he refuses to leave the property. Furthermore, in the case of residential property the debtor is entitled to apply to the court, before the expiry of the notice, for an order suspending the exercise of the enforcement procedure "to such extent, and for such period, and subject to such conditions as the court thinks fit".[190] In exercising its power the court must have regard to matters such as the prospects of the debtor being able to pay, and the availability of alternative accommodation. Quite separately, the debtor is able to challenge in court either the notice itself or the existence or amount of the debt.[191]

It is thought that the debtor could grant the bank a right to purchase, although this is unknown in practice. In addition, where no buyer can be found, the court has power to award the property to the bank;[192] but this too is virtually unknown.

The bank is not prejudiced by insolvency proceedings. The property can be sold either by the bank or by the trustee acting in the insolvency.[193] Whichever method is chosen the bank is, naturally, entitled to repayment of the debt from the proceeds of sale.

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188 These are, respectively, a notice of default and a calling-up notice. See generally Conveyancing and Feudal Reform (Scotland) Act 1970 ss 19-23 and Sch 3 standard condition s 9(1)(a), 10(2).

189 Conveyancing and Feudal Reform (Scotland) Act 1970 s 25.

190 Mortgage Rights (Scotland) Act 2001 s 2.

191 Only a notice of default can be challenged in this way; Conveyancing and Feudal Reform (Scotland) Act 1979 s 22. No provision in the Act allows a challenge to the debt but this seems competent as a matter of the general law.

192 Conveyancing and Feudal Reform (Scotland) Act 1970 s 28.

193 In the absence of agreement, the first to intimate an intention to sell to the other is entitled to sell. See Bankruptcy (Scotland) Act 1985 s 39(4)(b).

7.5.1. Distribution of proceeds

How are the proceeds from the enforcement procedure distributed among the creditors? Is the distribution different in case of legal foreclosure or insolvency of the owner or the debtor?

Answer. First, the bank which sells is entitled to its expenses. Next, the proceeds are divided amongst those creditors holding mortgages over the property in accordance with their ranking. Finally, any proceeds left after all secured creditors have been paid are given to the debtor (or, if the debtor is insolvent, to the trustee acting on his insolvent estate).[194] The rule just described applies in all cases.

7.5.2. Overriding interests

Are there any fiscal or other charges – imposed by statute in favour of privileged creditors such as the state or local authorities – that take preference over the mortgage without being registered?

Can you indicate a percentage of how much of the value of the real estate these charges usually amount to?

Note: Such charges might comprise of:

the costs of the foreclosure procedure,

taxes levied on real estate (or other taxes owed by the owner),

fees for electricity, heating, garbage collection or other utilities,

the salary of workers if an enterprise is established on the land.

Answer. There are no preferential charges.

7.6 Scope of the mortgage

7.6.1. Buildings

If there is a mortgage on a real estate, does the mortgage necessarily also encompass a house built on it? Are there separate mortgages on buildings without the land?

Answer. In principle, a mortgage of land must include any house. But in the case of apartment blocks, ownership of the individual apartments is separated from ownership of the land, and a mortgage over the land need not, of itself, encompass any of the apartments. See 1.2.2 and 1.4.

7.6.2. Machinery

If there is a business on the mortgaged premises, does the mortgage also extend to its assets such as machinery, cars, raw material etc.?

Answer. The mortgage only extends to such machinery as has, by accession, become part of the land. Movable property is not secured by a mortgage.

7.6.3. Insurance

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[194] Conveyancing and Feudal Reform (Scotland) Act 1970 s 27.

If the house is destroyed e.g by fire, does the insurer have to pay to the owner or to the mortgagee (or only jointly to both of them)?

Answer. Payment must be made to the holder of the policy.[195] In practice the policy will either be in the joint names of the owner and the bank, or in the sole name of the owner (but with the bank's interest noted).

7.7.4. Right to redeem

May the mortgagor redeem the mortgage at any time at will or only under certain conditions?

Is it possible to restrict the mortgagor's statutory right of redemption?

Answer. If no provision is made to the contrary, whether expressly or impliedly, then the debtor is entitled to redeem the mortgage at any time.[196] But if, for example, the loan is for a fixed term, no redemption could take place until that term had expired.

7.7.5. Redemption after foreclosure

May the mortgagor redeem the mortgage even after foreclosure?

Answer. Although the position is not entirely clear for all types of enforcement, it seems that in general a debtor is able to redeem the mortgage unless or until the bank has concluded a binding contract to sell the property to a third party.[197]

7.8 Security granted by a third party

Let us assume that the debtor is not able to offer any kind of security for the loan. However, his wife is willing to mortgage her real estate.

Are there any limitations on the liability of a third party according to statutory or case law, e.g. if the mortgage is to secure the debts of the husband's enterprise, including also all future debts?

Answer. There are no limitations. The wife is free to secure on her property any debts that she chooses. But if she was induced to sign only by her husband's misrepresentation or undue influence, the bank is likely to be regarded as in bad faith unless it made sure that the wife was advised by a lawyer of her own. If the bank is in bad faith the mortgage can be set aside.[198] In practice banks always ensure that separate advice is given.

7.9 Plurality of mortgages

If the owner has already set up (and registered) a mortgage and then wants to set up a second mortgage for another bank, can he do so without the consent of the first bank? Would the holder of the second

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195 *Scottish Amicable v Northern Insurance* (1883) 11 R 287 expecially at 302.

196 Conveyancing and Feudal Reform (Scotland) Act 1970 s 18, as amended by the Redemption of Standard Securities (Scotland) Act 1971 s 1.

197 Conveyancing and Feudal Reform (Scotland) Act 1970 s 23(3), as amended by the Redemption of Standard Securities (Scotland) Act 1971 s 1.

198 *Smith v Bank of Scotland* 1997 SC (HL) 111; *Royal Bank of Scotland v Wilson* 2003 SC 544. The equivalent doctrine in England and Wales is more favourable to the position of the wife, and correspondingly more demanding both on the bank and on the lawyers who advise the wife.

mortgage have a direct claim against the owner? What would happen if he wanted to execute the mortgage? Could he do so without the consent of the holder of the first mortgage? What would be the consequences for the first mortgage? Would it become due – or would the property be foreclosed – auctioned with the first mortgage on it?

Answer. A second mortgage does not need the consent of the first bank. The holder of the second mortgage has a direct claim against the owner and, if the owner defaults, can enforce the mortgage by selling the property. The consent of the first bank is not required for the sale, but the second bank must observe the rules of ranking and so must pay the first bank in full before taking any of the proceeds for itself. The first mortgage is only discharged if the loan secured is repaid in full. Otherwise it continues to burden the property.

What happens to the second ranking mortgage, if the loan of the first mortgage has been repaid completely or partially? Does the second mortgage get a better position or even the first rank? (Or does the owner get the right on the position for the refunded parts of the first mortgage, and the second mortgage remains at its position?)

Answer. If the first mortgage is completely discharged, the second mortgage ranks first in its place. If the first mortgage is discharged in part, the ranking of the second mortgage is correspondingly improved.

Can mortgages be of equal ranking? How can this be effected? (Only by applying for registration on the same day or even in the same minute or by a later change of the ranking?)

Answer. Mortgages can be of equal ranking. This occurs either (i) by applying for registration on the same day[199] or (ii) by an agreement between the banks that the ranking will be equal.

Can the ranks of mortgages be exchanged or altered by agreement of the parties involved? Please describe the necessary steps.

Answer. Creditors can (and often do) alter the ranking of their securities by entering into, and registering, a contract to that effect (a *ranking agreement*). If the contract is not registered, it binds the parties personally but does not alter the ranking. The distinction is important only if one of the creditors were to become insolvent.

The ranking can also be altered *without* agreement. Thus suppose that bank 1 holds a mortgage which (as almost always) is in respect of all sums. A second mortgage is then granted to bank 2. Bank 2 is, naturally, concerned that, if bank 1 advances further money to the debtor, the ranking of the second mortgage will be lowered. So, just in the same way as the position of a second mortgage can be *improved* if the loan due under the first mortgage becomes smaller, so also it can be *worsened* if the loan due becomes larger. A second mortgage is thus subject to the expansion or contraction of the first mortgage. But the law provides a remedy. If bank 2 notifies bank 1 of its mortgage, any subsequent voluntary advance by bank 1 will rank after the mortgage to bank 2.[200]

7.10 Several properties

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[199] Land Registration (Scotland) Act 1979 s 7(4).

[200] Conveyancing and Feudal Reform (Scotland) Act 1970 s 13.

Can one and the same mortgage cover several properties? Can a mortgage on one property be extended to another property of the same or another owner? In foreclosure, how far does the liability of each property go?

Answer. The same mortgage can cover several properties. But an existing mortgage cannot be extended to further properties.[201] Instead a new mortgage must be granted. When a mortgage comes to be enforced, each property is equally liable, but the bank can choose to sell one of the properties and not the others.

7.11 Transfer of the mortgage

7.11.1. Transfer of the mortgage in general

The debtor has set up a mortgage/land charge to the benefit of bank 1 to secure a loan granted to him. Now, bank 1 wants to refinance the loan with bank 2. How can bank 1 transfer the mortgage to bank 2? Please describe the necessary steps!

Answer. Bank 1 signs a deed of transfer known as an *assignation*. The wording to be used is provided by statute.[202] The deed is unilateral, and bank 2 does not sign. A notary is not required. The assignation is registered, and bank 2 also intimates to the debtor (ie informs him of the transfer).

Can bank 1 transfer the mortgage without transferring also the secured claim (i.e. the claim arising out of the loan contract)? If not, are there any other options for bank 1 to use the mortgage as collateral for its debt with bank 2?

Answer. No. But bank 1 could instead grant a mortgage over the mortgage.

Does the transfer have to be registered? (Is the registration necessary for the transfer to be valid or to be opposable against third parties? This question applies particularly in the insolvency of the transferring bank (bank 1).) What other ways exist to make the transfer insolvency-proof?

Answer. Registration is constitutive: without it, the transfer is not effective.

Instead of registration, bank 1 could attempt to set up a trust. This is done by a declaration that the mortgage is held by bank 1 in trust for bank 2. The trust is not registered. Assuming that the trust is valid, bank 2 is protected if bank 1 becomes insolvent. This is because the trust patrimony of bank 1 is separate from its private patrimony, and it is only the private patrimony which is affected by insolvency. It is, however, controversial whether a trust can be used in this way with the sole purpose of defeating the claims of creditors, and so there is some doubt as to whether the trust would be legally effective.[203]

May the debtor or the land owner object to the transfer of the mortgage? Does the debtor or the land owner have to be informed about the transfer?

Answer. There is no right to object, but the debtor must be informed.

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[201] Conveyancing and Feudal Reform (Scotland) Act 1970 s 16(1).

[202] Conveyancing and Feudal Reform (Scotland) Act 1970 s 14(1) and Sch 4 forms A and B.

[203] A trust has been upheld in the context of receivables: see *Tay Valley Joinery Ltd v CF Financial Services Ltd* 1987 SLT 207. But the decision is controversial.

What are the approximate costs for the transfer of a mortgage – and the time required?

Answer. The costs depend on the price being paid for the transfer. They are likely to be similar to the costs for the initial creation of the mortgage (for which see 7.2.5). If necessary, the transfer could take place quickly, in a matter of days.

Let us assume that bank 1 does not have a valid claim (as in question 7.3.1). If it transfers the mortgage to bank 2, can the latter still acquire the mortgage in good faith?

Answer. Scotland does not have a system of good faith acquisition: see 2.5. It is true that, if a right is registered in the Land Register, any underlying defect is cured and the right is good; but, for reasons explained at 7.3.1, it is thought that this rule does not apply in present case. Thus the mortgage, void in the hands of bank 1, would equally be void in the hands of bank 2.

Let us assume that there is a valid claim, but the setting up of the mortgage is invalid. Can bank 2 still acquire the mortgage in good faith?

Answer. If the mortgage was registered in the (new) Land Register, it could not, by definition, be invalid. Hence the question does not arise. If, however, it was registered in the (old) Register of Sasines,[204] there is no protection for an acquirer, and the mortgage would remain invalid despite the "transfer".

If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, how can bank 2 enforce the mortgage? (Or does bank 1 have to enforce the mortgage?)

Answer. This situation cannot arise: a mortgage cannot be transferred without registration.

If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, whose consent is necessary for any changes in the registration (the consent of bank 1 or of bank 2)?

Answer. In Scotland consent is not required for changes in registration. But either bank could transfer the security to a third party,[205] although for bank 1 to do so would be to breach its warranty of title to bank 2.

7.11.2. Transfer to more than one creditor

Typically the bank may want to split up and syndicate the loan. Can the loan and the mortgage be split up and only a portion be transferred to bank 2? Can portions be transferred to different banks? Could those banks transfer the loans and the mortgage(s) to other banks later?

Answer. The loan may be split up by a partial transfer (assignation), eg a transfer to the extent of 100.000 Euros.[206] Alternatively, bank 2 could be given an undivided share in the mortgage, so that the entire mortgage was held by both banks. In practice the former is uncommon and the latter unknown.

7.11.3. Administration of the mortgage by a trustee or fiduciary

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[204] For the difference between the Land Register and the Register of Sasines, see 2.1.1.

[205] This is true even of bank 2: see Conveyancing and Feudal Reform (Scotland) Act 1970 Sch 4 note 1.

[206] Conveyancing and Feudal Reform (Scotland) Act 1970 s 14(1) (transfer "in whole or in part").

May the mortgage be administered by a trustee or fiduciary? In case of insolvency of the trustee, would the mortgage fall in the insolvency estate?

Answer. Yes, although this is unknown in practice, at least for residential property. A mortgage would not fall into the insolvent estate of the trustee.

7.12 Conflict of Laws Issues

The real estate is situated on national territory whereas the debtor (who is also the owner of the real estate) resides in another EU-country.

7.12.1. Bank loan taken by a foreign debtor in the host country

Which law is applicable when the debtor takes a loan with a bank in the host country where the real estate is situated (to the loan contract, the security contract and the mortgage)? Could a law different from the law governing the property be chosen for the loan contract?

Answer. The mortgage is governed by the *lex situs* and hence by the law of the host country (Scotland).

The law applicable to the contracts is governed by the Rome Convention.[207] Under article 3 of that Convention any choice of law by the parties is usually respected. Hence it would be open to the parties to choose a law different from the law governing the property. In the absence of such a choice, the security contract (if there is one) would presumably be governed by the law of the host country, under article 4(3) of the Rome Convention (subject matter is a right in immovable property). The position of the loan contract is more difficult. Under article 4(2) a contract is usually governed by the law of the place of residence or principal place of business of "the party who is to effect the performance which is characteristic of the contract". But in a loan contract there are obligations on both parties – on the bank to provide the loan and on the debtor to repay it. Probably, but not certainly, the provision of the loan is the characteristic performance; and if that is correct, the loan contract in the present case will be the law of the host country. But that answer is subject to the terms, and form, of the contract. If, for example, the loan contract and security contract were combined, then, arguably, the applicable law would be the country in which the property was situated.

7.12.2. Bank loan taken in the debtor's country of residence

Which law is applicable when the debtor takes a loan with a bank in his country of residence (to the loan contract, the security contract and the mortgage)?

Answer. Again the mortgage and the security contract are governed by the host country; but the loan contract is governed by the country of residence (and where the bank has its principal place of business).

7.12.3. Bank loan taken in a third EU-country

Which law is applicable when the debtor takes a loan with a bank in a third EU-country (to the loan contract, the security contract and the mortgage)? Could a law different from the law governing the property be chosen for the loan contract?

Answer. The same as before, except that the loan contract would probably be governed by the law of third EU country.

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[207] Applied to the UK by the Contracts (Applicable Law) Act 1990.

7.12.4 National Restrictions on the Right of a Debtor to Secure Debt with a Mortgage assessed under EU Law

Does your national law contain other restrictions or de facto disadvantages for foreign debtors which might negatively affect cross border transactions involving real property and therefore fall foul of EU law?

Answer. No. There is, for example, no restriction on mortgages in a foreign currency.

8. Bibliography

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Three different parliaments have produced legislation for Scotland. Until 1707 Scotland was an independent country, with its own parliament. After the union with England and Wales in 1707, the separate Scottish and English Parliaments were replaced by a new Parliament for the United Kingdom. All Scottish statutes between 1707 and 1999 were passed by this Parliament. Following the Scotland Act 1998 a separate Scottish Parliament was established in 1999 with extensive jurisdiction in matters of private law. But the United Kingdom Parliament retains power to legislate on all areas of Scottish law, although by convention it does not usually do so in respect of matters which have been devolved to the Scottish Parliament. In the list that follows, the statutes are grouped according to the parliament by which they were passed.

Acts of the pre-1707 Scottish Parliament are not available electronically.

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Andrew J M Steven and Scott Wortley (eds), *Avizandum Statutes on Scots Property, Trusts and Succession Law* (Avizandum Publishing Ltd, Edinburgh, 2004)

Various editions exist of the Acts of the United Kingdom Parliament, and all Acts from 1988 are available, in the form originally enacted, at www.hmso.gov.uk. Work is proceeding on a Statute Law Database which will give online access to the current version of all United Kingdom legislation. All Acts of the Scottish Parliament are available on www.hmso.gov.uk. Statutory instruments, both Scottish and UK, are likewise available.

Legislation both of the United Kingdom and the Scottish Parliaments is also available on various commercial databases such as Westlaw and Lexis.

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APPENDIX A

LAND CERTIFICATE

Guidance note

There is a separate *title sheet* for each parcel of land on the Land Register. If the land is leased for more than 20 years, a second title sheet is opened for the lease. Title sheets are held only in electronic form. Each title sheet has its own dedicated number (in this case ELN12345).

A *land certificate* (reproduced below, in a separate file) is the official paper copy of the title sheet, and is issued to the owner on registration. It is divided into four sections.

The **Property Section** (A Section) describes the land. This is done mainly by reference to a plan which derives from a master map produced by the Ordnance Survey.[208] The Register uses a digital mapping system, so that plans are held electronically. For urban property the scale is 1/1250.

The land certificate in the present case shows 11 Burns Walk, Haddington. This is a flat (ie an apartment) on the upper floor of the building 5 – 11 Burns Walk. By use of different colours the plan shows (a) the superficial area of the flat (blue) (b) a garage (mauve) (c) a garden (pink) and (d) a footpath (brown). Sectional plans are not used for apartments.

Page A1 of the land certificate gives further information. The property was first registered in the Land Register on 28 February 2000. Unless newly built at that time, it will have previously been registered in the Register of Sasines. The land certificate was issued at that time and has not been updated since. (It can be submitted to the Register for updating at any time but in practice this is usually done only at the time of transfer.)

Certain ancillary rights (*pertinents*) are listed on page A1. These are a mixture of (i) rights of shared ownership (*common property*) and (ii) praedial servitudes.

The **Proprietorship Section** (B Section) shows the owner. Thus in the present case Mr and Mrs Wilkinson became owners on 28 February 2000. The price paid by them was £68,000. Note that the Register does not disclose information as to previous owners: it shows who is owner today but not who was owner in, for example, 1994 or 1999.

The **Charges Section** (C Section) lists any mortgages (*rights in security*) affecting the property. It shows a standard security which is held by the Royal Bank of Scotland. Although the initial loan is given as £55000, this is – as almost always – an "all-sums" security and so will secure any future advances by the Royal Bank to Mr and Mrs Wilkinson.[209]

The final section is the **Burdens Section** (D Section). This discloses the real burdens[210] and servitudes which affect the property. Note that these are the burdens and servitudes in respect of which 11 Burns Walk is the *burdened property*. Burdens and servitudes in respect of which it is the *benefited property* are, as already seen, listed in the Property Section.

This is usually much the longest of the four sections. It is possible to reconstruct the history of the property from the two deeds listed. Thus in 1967 Haddington Town Council conveyed some 14 acres (= 6

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[208] Ordnance Survey is a department of the UK government. See http://www.ordnancesurvey.co.uk.

[209] See 7.1.1.

[210] For real burdens see 1.3.6.

hectares) of land to a building company, John T Bell and Sons Limited (entry 1 on page D1). The real burdens in the deed of transfer fall into two parts. First, John T Bell is required to build houses, including flatted houses (clause second). Clause third makes detailed provision as to height and building materials. One of those houses was 11 Burns Walk. Secondly, various rules are made for the use of the houses once built. Thus no greenhouses or summer houses are to be added (clause fifth); the houses are to be used as residences for one family and not for business (clauses sixth and seventh); the houses are to be kept in good repair and insured (clauses eighth and ninth); no caravans are to be parked in the property (clause eleventh); no poultry, pigeons, cattle, horses, sheep or pigs are to be kept (clause twelfth); and the front garden is to be laid out in grass, and trees and shrubs must not normally exceed 3 feet (1 metre) in height (clauses thirteenth and fourteenth). Detailed regulations of this kind are typical for modern housing estates in Scotland.

Presumably John T Bell and Sons Limited went on to build the houses as required, because the other deed listed in the Burdens Section (entry 2 on page D 5) is a deed of transfer (*disposition*) of 11 Burns Walk (only). Thus the second deed relates to a much smaller area of land than the first. It may be assumed that dispositions in identical terms were granted by John T Bell in respect of the other houses in the development. The first two clauses impose praedial servitudes of access. (The equivalent rights created *in favour of* 11 Burns Walk are in the Property Section.) The remaining clauses impose affirmative real burdens of maintenance and repair. Clause three, for example, requires the owner of 11 Burns Walk to pay half the cost of maintaining the roof (the other half being borne by the owner of the lower flat, 9 Burns Walk).

The first of the two deeds is a grant in feu, that is to say, it created a new feudal estate of *dominium utile*.[211] Thus the grantees (John T Bell and Sons Limited) were the feudal *vassals* (or *feuars*) of Haddington Town Council. The Council were thus the feudal *superiors*. References to "feuars" and "superiors" can be found in a number of the clauses. Granting land in feu was a common method of creating real burdens, allowing the burdens to be enforced by the Council and its successors as superiors against John T Bell and its successors as feuars. The feudal system was abolished in 2004 but the burdens remain, and are today mutually enforceable by all those owning land within the area of 14 acres feued in 1967 (ie the houses in the housing estate). Thus Mr & Mrs Wilkinson can stop their neighbours from eg keeping pigs, running a business from their house, or parking caravans. But their neighbours have identical rights against Mr & Mrs Wilkinson.

The burdens in the second deed are, likewise, mutually enforceable by the owners in the housing estate.[212] In effect, the burdens in the two deeds are the local "laws" of the estate.

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211 For a brief account of the feudal system, see 1.2.1.

212 Title Conditions (Scotland) Act 2003 s 53.

APPENDIX B

OFFER TO BUY

Guidance note

The land certificate in Appendix A shows Mr & Mrs Wilkinson as owners of 11 Burns Walk, Haddington. In Appendix B and C it is assumed that Mr & Mrs Wilkinson are now selling the house to a Mr & Mrs Mackintosh. Appendix B shows the offer to buy. This runs in the name of Mr & Mrs Mackintosh's solicitors and is the first letter of the contract (*missives of sale*). It will be met by a qualified acceptance by the solicitors acting for Mr & Mrs Wilkinson (not shown) and then in all probability by a further qualified acceptance by the solicitors acting for Mr & Mrs Mackintosh. After several letters, terms will finally be agreed and the contract concluded. See 3.2.2. Each letter is signed at the end on behalf of the firm of solicitors which sent it. Neither Mr & Mrs Wilkinson nor Mr & Mrs Mackintosh sign.

Offer to buy

Armstrong & Co
Solicitors
4 Heriot Place
Edinburgh EH3 6JJ

1 October 2004

Our Ref/ M32779/LR

Dear Sirs

The Purchaser hereby offers to purchase the Property, and the Fixtures and Fittings with the pertinents of the Property, at the Price and on the conditions hereinafter contained.

Particulars of Offer. For the purpose of this Offer:

The Purchaser means James Alexander Mackintosh and Sandra Jane Mackintosh, 31 Jamaica Street, Glasgow.

The Property is as advertised, as described in the written particulars, if any, or as pointed out to the Purchaser on inspection and comprises the upper flat, 11 Burns Walk, Haddington EH41 3QQ together with the garage and garden ground effeiring thereto.

The Price is ONE HUNDRED THOUSAND TWO HUNDRED AND TWENTY TWO POUNDS STERLING (£100222) of which £ 98000 is apportioned on the Heritage and the balance on the Moveables.

The Date of Entry will be 30 November 2004 or such other date as may be mutually agreed.

The Time Limit for Verbal Acceptance is 5 pm on 1 October 2004

and for Written Acceptance is 5 pm on 5 October 2004.

The Missives mean this Offer and all qualifications thereof leading up to final conclusion of the bargain and the contract constituted thereby.

1. Settlement

(a) The Price shall be payable on the Date of Entry in exchange for delivery of a valid Disposition in favour of the Purchaser or his Nominees, the appropriate classic Letter of Obligation by the Seller's Solicitor and vacant possession of the Property which is hereinafter referred to as "settlement".

(b) If at the Date of Entry the Seller is not in a position to give vacant possession or implement any other obligations incumbent upon him in terms of the Missives then the Purchaser will be entitled:-

(i) To claim damages for any loss incurred by him arising from such failure, and

(ii) after 14 days to treat the continuing failure to give possession or implement any other obligation as repudiation and to rescind the bargain on giving the Seller written notice to that effect.

(c) If the Price is not paid in full on the Date of Entry interest shall be charged on such amount as is outstanding from the Date of Entry until either the Price is paid in full or as hereinafter provided the resale proceeds are received at Five per centum per annum above the base rate charged from time to time by the Bank of Scotland and that notwithstanding consignation nor that the Purchaser may not have taken entry. The Purchaser will not be entitled to take entry without payment of the Price in full. In the event of the Price or part thereof together with any interest due thereon remaining unpaid fourteen days after the Date of Entry the Seller will, at his option, but without prejudice to any other remedies open to him, be entitled to treat the non-payment as repudiation of the contract by the Purchaser entitling him to rescind the contract without prejudice to any claims competent to him against the Purchaser arising from breach of contract on giving written notice to that effect. In the event of the Seller exercising his right to rescind he shall be entitled to proceed to resell the Property and shall be entitled to the continuing payment of interest as aforesaid until the resale proceeds are received (or in the event of the Property not having been sold for a period of twelve months following the Date of Entry) together also with the whole and proper reasonable costs of resale and any capital loss on resale or otherwise directly attributable to the Purchaser's default provided that the Seller will not be entitled to claim interest hereunder and the fourteen day period hereinbefore referred to will not be held to have commenced if and for so long as the delay in settlement is caused by the Seller or his agents. This Clause shall continue to be enforceable notwithstanding rescission.

2. Condition of Property and Fixtures and Fittings

(a) So far as the Seller is aware the Property (including the larger building or tenement of which the Property offered for forms part, if appropriate) is not and has not been affected by:-

(i) any structural defects;

(ii) any defect in the water supply, plumbing, drainage, gas or electrical systems or electrical or gas fittings and fixtures; or

(iii) any wet rot, dry rot, rising damp or infestation by woodworm or other insect.

(b) In the event of any specialist treatment work having been carried out to the Property, valid and effective guarantee certificates with all relative particulars given by timber preservation or other contractors will be delivered at settlement and any rights arising therefrom will be assigned to the Purchaser.

(c) If central heating is installed, the whole central heating system, including storage heaters, is now, and at settlement will be, in proper working order. The Purchaser will have 5 working days from settlement to intimate any defects to the Seller or the Seller's Agents. The Seller's rights under any maintenance agreement will be assigned to the Purchaser.

(d) The Property, including all buildings and other items included in the Price and the whole garden ground (if any) will be maintained by the Seller in their present condition fair wear and tear excepted and will remain at the Seller's risk until settlement. In the event of the Property being materially damaged or destroyed by fire or any other cause prior to settlement, the Purchaser or Seller shall have the right to resile from the Missives without any claim or penalty being due by either side.

(e) The cost of any mutual repairs ordered or instructed but not effected prior to the Date of Entry will be borne by the Seller. The Seller is not aware of any intended scheme of mutual repairs which has not yet been ordered or instructed.

(f) In the event of cavity wall insulation having been installed, the Property is not of timber framed construction. Any Cavity Wall Insulation Guarantee Certificate will be delivered at settlement.

3. N.H.B.C. and The Construction (Design and Management) Regulations 1994

(a) In the event of the Property having been completed within 10 years prior to settlement, there will be delivered at settlement Buildmark 10 Year Protection Notice.

The Seller is unaware of any defects giving rise to a claim under N.H.B.C. Details of any claim made to date so as to restrict the cover outstanding under the scheme will be disclosed prior to settlement.

(b) In the event that The Construction (Design and Management) Regulations apply to the Property, the Health and Safety file will be delivered to the Purchaser at settlement.

4. Sub-divided Property

If the Property forms part of a tenement or sub-divided building then:

(a) The Purchaser will be entitled to a right of common property with the other proprietor(s) to the *solum*, roof and roof space of such tenement or sub-divided building and the drying green (if any) pertaining thereto.

(b) The Property is burdened with an equitable proportion only and not the whole cost of maintaining the roof, main walls, common passages and stairs, and other common parts of such tenement or sub-divided building.

5. Services

The Property is bounded by a public road and is connected directly to the public water supply, public sewer and public electricity supply. The existing private pipes, drains and cables connecting the Property to all these services (and to the gas main if any) all enter the Property directly from the adjoining public road.

6. Title

(a) If the provisions of Sections 2.(1) and 3.(3) of the Land Registration (Scotland) Act 1979 do not apply to the transfer of the Seller's interest in the Property, the Seller will at or prior to settlement deliver or exhibit a good marketable title to the Property and clear Searches, the Search in the Property Register covering a continuous period of at least forty years prior to the date of recording of the Disposition in favour of the Purchaser or from the date of recording of the Foundation Writ, if earlier.

(b) If the provisions of Sections 2.(1) and 3.(3) of the Land Registration (Scotland) Act 1979 do so apply, but the title is not registered under the said Act, the Seller will at or prior to settlement deliver or exhibit a good marketable title together with a Form 10 Report brought down to a date as near as practicable to the date of settlement and showing no entries adverse to the Seller's interest, the cost of the said report being the responsibility of the Seller. In addition, the Seller, at or before the Date of Entry and at his expense shall deliver to the Purchaser such documents and evidence as the Keeper may require to enable the Keeper to issue a Land Certificate in name of the Purchaser as the registered proprietor of the whole subjects of Offer and containing no exclusion of indemnity in terms of Section 12.(2) of the Land Registration (Scotland) Act 1979; such documents shall include (unless the whole subjects of Offer only comprise part of a tenement of flatted building) a plan or bounding description sufficient to enable the whole subjects of Offer to be identified on the Ordnance map and evidence (such as a Form P16 Report) that the description of the whole subjects of Offer as contained in the title deed is habile to include the whole of the occupied extent. The Land Certificate to be issued to the Purchaser will disclose no entry, deed or diligence prejudicial to the Purchaser's interest other than such as are created by or against the Purchaser, or have been disclosed to, and accepted by, the Purchaser prior to settlement. Notwithstanding the delivery of the Disposition above referred to, this Clause shall remain in full force and effect and may be founded upon until implemented.

(c) If the title is registered under the Land Registration (Scotland) Act 1979, the Seller will at or prior to the Date of Entry deliver or exhibit a Land Certificate (containing no exclusion of indemnity under Section 12.(2) of the said Land Registration (Scotland) Act 1979) and all necessary links in title evidencing the Seller's exclusive ownership of the Property, a P17 Report if required and a Form 12 Report brought down as near as practicable to settlement and showing no entries adverse to the Seller's interest, the cost (if any) of the said Reports being the responsibility of the Seller. In addition, the Seller will furnish to the Purchaser such documents and evidence as the Keeper may require to enable the interest of the Purchaser to be registered in the Land Register without exclusion of indemnity under said Section 12.(2). The Land Certificate to be issued to the Purchaser will disclose no entry, deed or diligence prejudicial to the Purchaser's interest other than such as are created by or against the Purchaser or have been disclosed to and accepted by the Purchaser prior to settlement. There are no overriding interests affecting the Property at settlement. Notwithstanding the delivery of the Disposition above referred to, this Clause shall remain in full force and effect and may be founded upon until implemented.

(d) The Seller will produce appropriate evidence, if required, to satisfy the Purchaser that there are no entries in any Charges Register or Company Files which adversely affect the title.

(e) If the Seller is a Company, the Seller will provide Searches in the Charges Register and Company Files brought down to a date twenty two days after the date of recording or registration, if appropriate, of the Disposition in favour of the Purchaser or the Purchaser's nominees. In the event of such Searches disclosing any Floating Charge affecting the Property on settlement, there will be delivered at settlement a Certificate of non-crystallisation of such Floating Charge granted by the holders thereof, such Certificate, incorporating a Deed of Release, in a form to be produced by the Pur-

chaser's Solicitors. Such Searches will be produced on and will be updated as aforesaid within one month after settlement.

(f) The Disposition to be delivered in terms of Clause 1.(a) will include a Clause that the Property will be held by the Seller in trust for the Purchaser from the date of delivery thereof until the date of recording of the said Disposition.

7. Title Conditions etc.

Without prejudice to the generality of Clause 6:

(a) There are no servitudes and no unusual or onerous real conditions affecting the Property.

(b) All obligations *ad factum praestandum* affecting the Property have been duly implemented and all continuing conditions and restrictions have been and are being duly complied with.

(c) There is no outstanding liability for any part of the cost of constructing walls, fences, roadways, footways, footpaths or sewers, or for implementing obligations referred to in Clause 7.(b).

(d) There is no capital or recurring pecuniary burden of any kind affecting the Property and at the Date of Entry, there will be no outstanding obligations for which the Purchaser may become personally liable.

(e) If the Feuduty is unallocated, the proportion attributable to the Property does not exceed £5.

(f) Minerals are included only in so far as the Seller has right thereto but, if excluded, the title contains conditions as to compensation for subsidence damage which are adequate to protect the interests of the Purchaser. There are no known or intended workings of minerals and no known subsidence under the Property or in the vicinity thereof which would or might affect the stability or value or amenity of the Property. If the subjects lie within an "affected area" as detailed in the current Coal Mining Searches Law Society of Scotland Guidance Notes then it is an essential condition of the missives that there will be exhibited prior to and delivered at settlement a Coal Mining Search in the form approved by the said Law Society and the Coal Authority, which Search is satisfactory in all respects, the purchaser being the sole judge at his discretion as to whether or not said Search is satisfactory.

(g) There will be provided at the Seller's expense Extracts (or quick copies in respect of the purchaser inducing First Registration) of any writs in the prescriptive progress and Quick Copies of any writs referred to for burdens in the title or other writs required, which are not exhibited to the Purchaser's agent along with the Title Deeds for examination. If the prior Titles contain no plan of the Property the Seller may be required to bear the cost of preparation of a deed plan to be attached to the Disposition in favour of the Purchaser, other than in respect of flatted or sub-divided properties.

8. Planning

(a) There is no existing designation, agreement, scheme, declaration, resolution, order, notice or other matter affecting the Property or the value or amenity thereof under any statutory enactment; and the Seller has no knowledge that any of the same is proposed. The Seller shall be responsible for the implementation of any notices or orders served by the Local Authority prior to or on the Date of Entry. Unless otherwise specified herein any notices or orders served by the Local Authority dated after the date of this Offer but prior to or on the same date as settlement shall be the responsibility of the Seller.

(b) The roadways, footways, footpaths, kerbs, sewers and main drains *ex adverso* the Property have been taken over by the Local Authority and there are no road widening proposals affecting the Property.

(c) (i) There are no entries relating to the Property in the Register maintained under Section 78R(1) of the Environmental Protection Act 1990 (including any amendment, variation or re-enactment thereof) ("the Act") and the Contaminated Land (Scotland) Regulations 2000.

(ii) The Local Authority has not served and, so far as the Seller is aware has not resolved to serve, any notice relating to the Property under Section 78B(3) of the Act .

(iii) The Local Authority has not consulted and, so far as the Seller is aware resolved to consult, with the Seller or any occupier of the Property under Section 78(G)(3) of the Act in relation to anything to be done on the Property as a result of adjoining or adjacent land being contaminated.

(iv) No entry has been made in the Register and the Local Authority has not served nor, so far as the Seller is aware, has resolved to serve, under Section 78(B)(3) of the Act in relation to any adjoining or adjacent land which has been identified as contaminated because it is in such a condition that harm or pollution of controlled waters might be caused on the Property.

(d) Prior to settlement, the Seller will exhibit the usual and current Local Authority Property Enquiry Certificates. The Purchaser shall accept the terms of said Property Enquiry Certificates providing they do not disclose any matter materially prejudicial to the Purchaser's interest in the Property. Declaring that if the said Property Enquiry Certificates disclose any matter materially prejudicial to the interests of the Purchaser in the Property, then the Purchaser may resile from the Missives providing written intimation is given to the Seller's agents within five working days from receipt of the said Property Enquiry Certificates without any penalty being due to or by either party .

9. Development

(a) The Seller has no knowledge of any proposal by any neighbouring proprietor which might affect the value or amenity of the Property;

(b) If there has been any material development on the Property in terms of the Town and Country Planning Acts since 1st January, 1948, the appropriate Planning Permission will be exhibited prior to and delivered at settlement, if required by the Purchaser;

(c) If any works have been carried out to the Property requiring a Building Warrant, Completion Certificate, pavement access consent or listed building consent since 1st January, 1960, the appropriate Building Warrant, Completion Certificate, pavement access consent or listed building consent will be exhibited prior to and delivered at settlement, if required by the Purchaser; and

(d) If any works have been carried out on or to the Property requiring consent of the Superior or other party in terms of the Title Deeds such consent will be exhibited prior to and delivered at settlement.

10. Occupancy Rights

At settlement, the Property will not be affected by any occupancy rights as defined in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (as amended).

11. Breach of Contract by the Seller

Without prejudice to and in addition to the Contract (Scotland) Act 1997 in the event of there being any breach of contract on the part of the Seller both before and after settlement and without prejudice to any other rights and remedies available, the Purchaser shall be entitled to retain the Property and to claim damages from the Seller for either (a) the cost of remedying the said breach notwithstanding any rule of law to the contrary; or (b) in the event of the breach being irredeemable the diminution in value of the Property.

12. Missives to remain in force

Without prejudice to the terms of Clauses 6(b) and 6(c) the Missives shall remain in full force and effect until implemented notwithstanding the delivery of a Disposition in favour of the Purchaser or the Purchaser's nominees but that for a maximum period of two years after settlement or such longer period as may be necessary, if founded upon in any proceedings raised prior to the expiry of the said two year period. Every warranty in the Missives shall, unless otherwise expressly provided be deemed to include a personal obligation on the Seller to ensure that the same is implemented at or before settlement. If any personal obligation in the Missives shall not have been implemented at settlement, the same shall continue to be enforceable in terms of this Clause and the Purchaser shall be entitled to all or any of the remedies available to him for breach thereof under Clause 11 hereof. A clause to this effect shall be inserted in the Disposition, if required by the Purchaser, or holograph letters will be exchanged at the Date of Entry to give effect to the terms of this Clause.

13. Waiver

The Purchaser shall have the sole option unilaterally to waive any of the provisions of the Missives which operate to any extent to his benefit, in which event the Purchaser shall be entitled to insist on proceeding with the contract as if any such provision so waived had never been incorporated therein, without prejudice to the right of the Purchaser to claim damages, if appropriate, under the Missives.

14. Effect of Qualifications

If this Offer is accepted but subject to one or more qualifications, then, at any time before the bargain is concluded, the Purchaser shall be entitled to withdraw any qualification introduced in to the Missives by the Purchaser and, if otherwise appropriate, to hold the bargain as concluded excluding that condition.

15. Fixtures and Fittings

The whole fixtures and fittings in or about the Property on this date, all of which are owned outright by the Seller and include, without prejudice to that generality, all (if any) moveables stated to be included in the Price, or in the sale, in any advertisement or written particulars, as also all (if any) of the following items which are in or about the Property: garage, garden shed or hut, greenhouse, summerhouse, paving slabs, all types of blinds, fitted pelmets, curtain rails and runners, curtain poles and rings thereon, stair carpet fixings, all fitted bedroom furniture, all bathroom and cloakroom mirrors, showers, cabinets and other toilet fittings, all kitchen units, all cookers, hobs, ovens, dishwashers, fridges and freezers if integral to or encased in matching units, extractor hoods, extractor fans, central heating plant, oil in storage tank, gas in gas cylinders or tank, electric storage heaters, gas fires, electric fires which are fixed or wired in, immersion heater, loft insulation and all other lagging,

electric light fittings (including all fluorescent lighting, wall lights, dimmer switches and bulbs and bulb holders but not shades), television aerials with leads-in, satellite dishes, all telephone points, loft ladder, rotary clothes dryer, fencing, door chimes, burglar alarms, other security systems and associated equipment, double glazing units and/or secondary glazing, shelving, fireplace surround units, all other fittings and fixtures the removal of which would adversely affect the decoration or fabric of the Property and all fitted carpets and fitted floor coverings.

16. Acceptance

If a Time Limit is specified, this Offer (unless previously withdrawn) is open for acceptance reaching us before the Time Limit.

17. Future Address

The Seller's future address will be disclosed to the Purchaser or his agent at or before settlement if requested by the Purchaser or his agent.

18. Materiality of Conditions and Evidence of Compliance

All the conditions of this Offer are material conditions. The Seller will, if called upon, produce appropriate evidence to satisfy the Purchaser that the whole provisions of the Missives have been or will be duly satisfied.

APPENDIX C

DISPOSITION

Guidance note

Ownership is not transferred by the sales contract (the first part of which is reproduced in Appendix B). Nor can the sales contract be registered. Instead a formal deed of transfer (*disposition*) must be drawn up and registered. It is signed at the end by the sellers (Mr & Wilkinson) and by a witness. It is not signed by the buyers (Mrs & Mrs Mackintosh).

Disposition

WE, DAVID JAMES WILKINSON and MONICA WILKINSON, spouses, residing formerly at Ten Beil Park, Dunbar and now at Eleven Burns Walk, Haddington,[213] registered proprietors of the subjects hereinafter disponed, IN CONSIDERATION of the price of ninety eight thousand pounds (£98000) paid to us by JAMES ALEXANDER MACKINTOSH and SANDRA JANE MACKINTOSH, spouses, residing at Thirty one Jamaica Street, Glasgow, of which price we hereby acknowledge receipt,[214] HAVE SOLD[215] and DO HEREBY DISPONE[216] to the said James Alexander Mackintosh and Sandra Jane Mackintosh ALL and WHOLE that upper flat, garage and garden ground known as Eleven Burns Walk, Haddington being the subjects registered under Title Number ELN12345:[217] WITH ENTRY and actual occupation on Thirtieth November Two Thousand and Four;[218] and we grant warrandice:[219] IN WITNESS WHEREOF these presents are signed by us at Glasgow on Twenty Third November Two Thousand and Four in the presence of George Alan Wilson, One Radcliffe Terrace, Glasgow.[220]

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213 The UK does not have identity cards. Nor is it normal practice to refer to dates of birth. Thus Mr & Mrs Wilkinson are identified only by their address. Two addresses are given because the first address is the one used in the Proprietorship Section of the land certificate (see Appendix A).

214 The price is paid in exchange for delivery of the disposition. This is a formal acknowledgement of payment.

215 This refers back to the sales contract.

216 These are the formal words of transfer, indicating the sellers' consent. "Dispone" means "transfer". A disposition is a formal transfer (or conveyance) of the property by the sellers to the buyers.

217 The property is described by reference to the title number (ie the number on the land certificate). Nothing more is needed although it is normal (as in this case) to include the postal address.

218 This is the date of entry agreed in the sales contract. That is the day on which the price is paid, the disposition delivered, and possession taken. The words "actual occupation" operate as a guarantee that there are no tenants or other occupiers: see 3.4.4.

219 This is a formal guarantee that the title is good, and that it is unencumbered by unusual or unduly onerous burdens. See 3.4.1. Even without this clause, the guarantee would be implied.

220 This final clause, known as the *testing clause*, states the place and date of signature, and the name and address of the witness. A notary is not needed.