Michaelmas Term
[2010] UKSC 50
On appeal from: 2009 CSIH 36

JUDGMENT

Royal Bank of Scotland plc (Respondent) *v* John Patrick McCormack Wilson and another (Appellants) (Scotland)

Royal Bank of Scotland plc (Respondent) *v* Francis John Wilson and another (Appellants) (Scotland)

before

Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Clarke

JUDGMENT GIVEN ON

24 November 2010

Heard on 13 and 14 October 2010

Appellant
Alan A Summers QC
John P Robertson
(Instructed by Aitken
Nairn WS)

Respondent
Rhoderick R McIlvride
John Paul Sheridan
(Instructed by Anderson
Fyfe LLP)

LORD RODGER

The Facts

1. The appellants, Mr Francis John Wilson and his wife, Mrs Annette Wilson, are the proprietors of a house at 100 Dalum Grove, Loanhead, which is also now their home. On 12 July 1991 they granted a standard security over the house in favour of the respondent, the Royal Bank of Scotland ("the Bank"). The standard security was recorded in the Register of Sasines on 3 December of the same year.

2. The appellants, Mr John Patrick McCormack Wilson and Mrs Norma Wilson, are the proprietors of the neighbouring house at 98 Dalum Grove, Loanhead, which is also now their home. On 28 November 1991 they granted a standard security over the house in favour of the Bank. The standard security was recorded in the Register of Sasines on 4 December 1991. Since it is accepted that material circumstances in the two appeals are the same, for the sake of convenience, I shall concentrate on the appeal by Mr Francis John Wilson and Mrs Annette Wilson ("Mr and Mrs Wilson"), the result in which will be determinative of the appeal by Mr John McCormack Wilson and his wife.

3. The standard security granted by Mr and Mrs Wilson included the personal obligation in respect of which it was granted, in accordance with Form A in Schedule 2 to the Conveyancing and Feudal Reform (Scotland) Act 1970 ("the 1970 Act"). The personal obligation was in these terms:

> "WE, FRANCIS JOHN WILSON and MRS ANNETTE WILSON, residing at Sixty Three Park Avenue, Loanhead, Midlothian (hereinafter referred to as 'the Obligant') hereby undertake to pay to THE ROYAL BANK OF SCOTLAND plc (hereinafter referred to as 'the Bank', which expression includes its successors and assignees whomsoever) on demand all sums of principal, interest and charges which are now and which may at any time hereafter become due to the Bank by the Obligant whether solely or jointly with any other person, corporation, firm or other body and whether as principal or surety…."

The deed went on to declare that the interest was to be "at the rate(s) agreed between the Bank and the Obligant or (failing such agreement) determined by the

Bank and shall be payable at such dates as may be so agreed or determined by the Bank."

4. After further declarations, the deed continued: "For which sums … the said Francis John Wilson and Mrs Annette Wilson … hereby grant a Standard Security in favour of the Bank over" the house at Dalum Grove.

5. It is worth noting that the deed contained a declaration in terms of which the expression, "the Obligant", was to mean both the persons who granted the security "together and/or any one or more of them; and in all cases the obligations hereby undertaken by the Obligant shall bind all person(s) included in the expression 'the Obligant' and his, her or their executors and representatives whomsoever all jointly and severally without the necessity of discussing them in their order." It follows that Mr Wilson, as an individual, and Mrs Wilson, as an individual, were undertaking both a joint and a several obligation to pay the sums in question. In particular, Mrs Wilson was undertaking to pay any indebtedness of her husband to the Bank. I refer to the discussion by the House of Lords of a comparable term in *AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94. But, in addition, together with her husband, Mrs Wilson was granting the standard security in respect of both her own indebtedness under the personal obligation and the indebtedness of her husband under that obligation.

6. By a partnership letter dated 8 October 1992 Mr Wilson, along with his brother and his son, became jointly and severally responsible to the Bank for the repayment of any indebtedness or liability of the firm of F J Wilson Associates, and interest and charges thereon. By a further partnership letter dated 15 October 1993 Mr Wilson, along with his brother, became jointly and severally responsible to the Bank for the repayment of any indebtedness or liability of the firm of Wilson Brothers, and interest and charges thereon.

7. On 20 June 1995 Mr Alistair Henderson, Assistant Recoveries Manager in the Bank's Insolvency Unit, wrote to Mr Wilson in these terms:

> "**Our Penicuik Branch**
>
> I regret to learn that your indebtedness to the Bank as undernoted at our above Branch is not being repaid in accordance with arrangements and I have therefore to advise that unless within ten days from the date of this letter you effect repayment of the whole sums due to the Bank or, alternatively, make a substantial payment to account within that period coupled with acceptable proposals to

> take care of the remaining indebtedness I shall have no alternative but to institute proceedings against you for recovery.
>
> Such proceedings will involve expense for which you will be liable and it is therefore in your own interest to give this matter your immediate attention."

The note showed that the Business Current Account of Wilson Brothers was overdrawn in the sum of £22,250.61 excluding accrued interest and charges, while the equivalent sum for the Business Current Account of F J Wilson Associates was £26,211.88. There was a further indebtedness of £854.07 on a Business Term Loan to F J Wilson Associates.

8. Mr McIlvride, who appeared for the Bank, accepted that, when they sent this letter, the Bank were demanding payment of Mr Wilson's debt under his personal obligation in the standard security and were intending to exercise their powers under the standard security, to take possession of the house at Dalum Grove and to eject Mr Wilson and his family, if the debt were not paid. But the sheriff found that, when Mr Wilson received and read the letter, he did not understand this. He thought that the Bank were merely seeking the sums of money from him. Mrs Wilson did not see the letter until early in 2007 and no similar letter was ever sent to her.

9. No part of any of the sums mentioned in the letter of 20 June 1995 has been repaid to the Bank. A certificate of default dated 3 February 2006 indicates that, by then, the indebtedness in respect of Wilson Brothers had reached £141,247.52, including accrued interest of £1,865.85, and in respect of F J Wilson Associates it had reached £99,172.81, including accrued interest of £1,310.05.

These proceedings

10. In April 1998 the Bank began proceedings in Edinburgh Sheriff Court against Mr and Mrs Wilson. Besides the usual crave for expenses, the initial writ contained two craves. In the first crave, which constituted an application under section 24(1) of the 1970 Act, the Bank asked the court:

> "To grant warrant to the pursuers in terms of section 24(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 to enter into possession of [the house at Dalum Grove] being the subjects described in the Standard Security by Francis John Wilson and Mrs

> Annette Wilson for all sums of money due and that may become due to The Royal Bank of Scotland plc … and to exercise in relation to the said subjects all powers competent to a creditor in lawful possession of the security subjects including the power of sale of the said security subjects."

In the initial writ as originally drafted the Bank went on to crave removing of Mr and Mrs Wilson with a view to selling the subjects. But in the course of the hearing of an earlier appeal relating to a defence raised by Mrs Wilson, the Second Division granted leave to Mr McIlvride for the Bank to amend the crave to one for ejection: *Royal Bank of Scotland v Wilson* 2004 SC 153, 157, para 14. The second crave is now in these terms:

> "To grant warrant to officers of court summarily to eject the defenders, and their family, goods, gear, and effects, from the said subjects, and to make the same void and redd, that the pursuers, or others in their name, may enter thereto and peaceably possess and enjoy the same."

11. On 27 April 1998 the initial writ was served on Mr and Mrs Wilson. This was the first time that she became aware that the Bank were seeking to repossess her home and eject herself and the family.

12. The action has been in one court or another for over twelve years. After Mrs Wilson's particular defence was rejected by the Second Division in *Royal Bank of Scotland v Wilson* 2004 SC 153, a proof before answer was allowed. Eventually, it took place in February 2007 and on 2 May 2007 Sheriff Stoddart assoilzied Mr and Mrs Wilson. The Bank appealed to the Court of Session and on 5 May 2009 an Extra Division (Lord Nimmo Smith, Lord Reed and Lord Drummond Young) allowed the appeal and granted decree as craved: *Royal Bank of Scotland Plc v Wilson* 2009 SLT 729. In effect, therefore, the Bank were granted a decree for the ejection of Mr and Mrs Wilson from their home. The Wilsons appeal against that interlocutor.

13. As is immediately apparent from the fact that Mr and Mrs Wilson have not paid any of their indebtedness to the Bank, the appeal relates to rather technical legal issues which are said to stand in the way of the Bank enforcing their security. Moreover, both Mr and Mrs Wilson have for many years been aware of the debt and of the steps which the Bank are taking to enforce their security. But a striking feature of the case is that the letter which the Bank sent to Mr Wilson on 20 June 1995 did not make any express reference to the standard security. Indeed, as

already mentioned, at the time Mr Wilson did not realise that the Bank were indicating that they would, if necessary, take steps to enforce their security.

14. The steps taken to alert Mrs Wilson were even less satisfactory. Although, by virtue of the personal obligation in the standard security, she was personally liable for her husband's indebtedness under the partnership letters, the Bank have never sought to enforce that liability against her. Had they done so, they would have required to demand payment from her and she would have become aware of the situation. But presumably the Bank thought that there would be no point in trying to enforce her liability to pay the debt since she would not have had the resources to do so. What the Bank did, however, was to take steps which they considered would be sufficient to enforce the standard security that she and Mr Wilson had granted as proprietors of their home at Dalum Grove. The Bank wrote to Mr Wilson to demand payment. When he did not pay, they treated him as being in default and chose to enforce their security by applying to the court under section 24(1). This meant that the Bank did not contact Mrs Wilson at any stage before they launched these proceedings by serving the initial writ. This Court has to decide whether the Bank were entitled to enforce their standard security and obtain a decree of ejection of Mr and Mrs Wilson in this way.

The 1970 Act

15. In *Multi-Link Leisure Developments v North Lanarkshire Council* 2010 SC 302, 308, para 24, Sir David Edward QC, giving the opinion of an Extra Division of the Inner House, indicated that their Lordships were more familiar with the mindset of the Scots conveyancer than with the mindset of the man on the Jubilee line on his way to Canary Wharf. But even if the man on the Glasgow underground on his way to Buchanan Street were familiar with the mindset of the Scots conveyancer, he would often find his language and approach somewhat challenging. As its title suggests, the 1970 Act deals with matters of conveyancing. Moreover, it does so in a manner which makes few concessions to those not steeped in the art. Indeed, even Professor Gretton and Professor Reid have felt moved to warn that "The law about the enforcement of standard securities is a subject of great and unnecessary complexity: it is a veritable maze": *Conveyancing* (third edition, 2004), para 19-32. The Court must try to find a way through that maze.

16. Part II of the 1970 Act created a brand new form of security over heritable property, the standard security. Although securities granted in the old forms remained valid, all new securities had to take the form of a standard security. But, as Mr Summers QC emphasised on behalf of Mr and Mrs Wilson, Part II of the 1970 Act did not create a comprehensive code to regulate the way that the standard security was to operate. Rather, Parliament created the new form of security and

laid down certain rules as to its operation but, for the rest, slotted it into a modified version of the existing statutory and common law regulating heritable securities. To see this, it is sufficient to refer to section 20(1), which provides that the creditor's rights are to be in addition to "any right conferred by any enactment or by any rule of law", and to section 32:

> "The provisions of any enactment relating to a bond and disposition or assignation in security shall apply to a standard security, except in so far as such provisions are inconsistent with the provisions of this Part of this Act, but, without prejudice to the generality of that exception, the enactments specified in Schedule 8 to this Act shall not so apply."

It may therefore be necessary to travel outside the 1970 Act to see how the standard security works in particular situations.

17. The scheme of the 1970 Act is sometimes confusing, since it requires the reader to go backwards and forwards between the provisions contained in the body of Part II and the contents of Schedules 2 to 9. For example, section 9(2) provides that it is to be competent to grant and record a standard security to be expressed in conformity with one of the forms prescribed in Schedule 2 to the Act. Schedule 2 contains two forms of standard security, Form A, "to be used where the personal obligation is included in the deed", and Form B, which is to be used "where the personal obligation is constituted in a separate instrument or instruments." Appended to Schedule 2 are various notes telling the conveyancer what to do in certain situations. But, in order to discover the meaning of Form A, the reader has to return to section 10. That section explains what is meant by the personal obligation in Form A, thus avoiding the need for the draftsman of the standard security to spell it all out. The technique is familiar from, say, section 119 of the Titles to Land Consolidation (Scotland) Act 1868, with its (1594-word) commentary on Form No 1 of Schedule FF to that Act.

18. The effect of recording a standard security under section 9(2) is to be found in section 11. But, to discover the conditions which are to regulate the standard security (subject to any variations validly agreed by the parties), section 11(2) directs the reader to Schedule 3. This schedule contains the Standard Conditions, the first six of which impose various obligations on the debtor, e g, to maintain and repair the security subjects and to insure them. Conditions 7 to 10 relate to powers of the creditor, while 11 concerns the exercise of the debtor's right of redemption.

19. For present purposes conditions 8, 9 and 10 are of importance. They must therefore be set out, so far as relevant:

"8. The creditor shall be entitled, subject to the terms of the security and to any requirement of law, to call-up a standard security in the manner prescribed by section 19 of this Act.

9. (1) The debtor shall be held to be in default in any of the following circumstances, that is to say—

(a) where a calling-up notice in respect of the security has been served and has not been complied with;

(b) where there has been a failure to comply with any other requirement arising out of the security;

(c) where the proprietor of the security subjects has become insolvent.

…

10. (1) Where the debtor is in default, the creditor may, without prejudice to his exercising any other remedy arising from the contract to which the standard security relates, exercise, in accordance with the provisions of Part II of this Act and of any other enactment applying to standard securities, such of the remedies specified in the following sub-paragraphs of this standard condition as he may consider appropriate.

(2) He may proceed to sell the security subjects or any part thereof.

(3) He may enter into possession of the security subjects and may receive or recover feuduties, ground annuals or, as the case may be, the rents of those subjects or any part thereof.

(4) Where he has entered into possession as aforesaid, he may let the security subjects or any part thereof.

(5) Where he has entered into possession as aforesaid there shall be transferred to him all the rights of the debtor in relation to the granting of leases or rights of occupancy over the security subjects and to the management and maintenance of those subjects.

(6) He may effect all such repairs and may make good such defects as are necessary to maintain the security subjects in good and sufficient repair, and may effect such reconstruction, alteration and

improvement on the subjects as would be expected of a prudent proprietor to maintain the market value of the subjects, and for the aforesaid purposes may enter on the subjects at all reasonable times.

(7) He may apply to the court for a decree of foreclosure."

20. It is not the practice of conveyancers to set out these conditions in the standard security itself. So the debtor cannot discover the conditions regulating the security simply from reading it. To set them out would, of course, increase the length of the deed – and so defeat one of Parliament's aims in devising this form of shorthand deed. But, further than that, listing the contents of standard condition 10 would be potentially misleading, unless, at the very minimum, various sections in Part II of the Act were also reproduced. For example, it is only by consulting section 20 that the reader finds confirmation that, when a debtor fails to comply with a calling-up notice under section 19, the creditor can indeed exercise any appropriate power under standard condition 10. Equally, it is only by consulting section 23 that the reader discovers that – by contrast – if the debtor fails to comply with any other requirement arising out of the security after the service of a notice of default under section 21, the creditor can actually only exercise his powers under standard condition 10(2), (6) and (7) – unless he makes an application to the court under section 24 for a warrant giving him other powers.

21. Bearing in mind the structure of Part II of the Act, I turn to look more closely at the way that the legislation operates in the present case.

The application under section 24(1)

22. As already explained, the Bank set events in train by writing to Mr Wilson in June 1995. Although he did not understand their letter in this way, by sending it, the Bank intended to warn him that they would take steps to enforce their standard security if he did not pay. Since his personal obligation under the standard security was to pay on demand, his liability to pay was not triggered until this demand was made. In other words he was not in default until he failed to comply with the demand. The question is: what steps does the 1970 Act envisage that a creditor in the position of the Bank will take in those circumstances?

23. As Lord Walker pointed out at an early stage in the hearing, subsections (1) and (2) of section 19 seem to provide a clear answer, that the creditor "shall" serve a calling-up notice:

> "(1) Where a creditor in a standard security intends to require discharge of the debt thereby secured and, failing that discharge, to exercise any power conferred by the security to sell any subjects of the security or any other power which he may appropriately exercise on the default of the debtor within the meaning of standard condition 9(1)(a), he shall serve a notice calling-up the security in conformity with Form A of Schedule 6 to this Act (hereinafter in this Act referred to as a 'calling-up notice'), in accordance with the following provisions of this section.
>
> (2) Subject to the following provisions of this section, a calling-up notice shall be served on the person last infeft in the security subjects and appearing on the record as the proprietor, and should the proprietor of those subjects, or any part thereof, be dead then on his representative or the person entitled to the subjects in terms of the last recorded title thereto, notwithstanding any alteration of the succession not appearing in the Register of Sasines."

Form A in Schedule 6 is in these terms:

> "TAKE NOTICE that CD (*designation*) requires payment of the principal sum of £ with interest thereon at the rate of ..... per centum per annum from the ..... day of ..... (*adding if necessary*, subject to such adjustment of the principal sum and the amount of interest as may subsequently be determined) secured by a standard security by you (*or* by EF) in favour of the said CD (*or* of GH to which the said CD has now right) recorded in the Register for ..... on ..... And that failing full payment of the said sum and interest thereon (*adding if necessary*, subject to any adjustment as aforesaid), and expenses within two months after the date of service of this demand, the subjects of the security may be sold."

If the Bank had served a calling-up notice, by virtue of section 19(2), it would have had to be served on Mrs Wilson, as one of the proprietors of the security subjects.

24. Under a calling-up notice Mr Wilson would have had two months in which to pay the full amount due to the Bank – after which he would have been in default within the meaning of standard condition 9(1)(a). By virtue of section 20(1) and (2), the Bank would then have been entitled to exercise any of their rights under

the security and, in particular, their right to enter into possession and to sell the house.

25. In fact, however, the Bank did not proceed under section 19, but took an entirely different course. The Bank treated Mr Wilson as having failed to comply with a requirement arising out of the security, other than a requirement under a calling-up notice. So they treated him as being in default under standard condition 9(1)(b).

26. Assuming, for the moment, that this was permissible, when Mr Wilson failed to comply with the demand to pay the debt, the Bank would have been entitled to serve a notice of default under section 21, calling on him to purge his default by paying the debt within one month. If Mr Wilson had been aggrieved by the requirement to pay, he could have applied to the court under section 22. If he had not objected, or his objection had been rejected and the notice of default upheld, then Mr Wilson would have been required to comply with the requirement in the notice. Failing which, the Bank would have been entitled to exercise their powers under standard condition 10(2), (6) and (7).

27. As explained already, the Bank did not go down this route. Instead, eventually, in April 1998 – still on the basis that Mr Wilson was in default under standard condition 9(1)(b) – they made an application to the court under section 24, which provides:

> "(1) Without prejudice to his proceeding by way of notice of default in respect of a default within the meaning of standard condition 9(1)(b), a creditor in a standard security, where the debtor is in default within the meaning of that standard condition or standard condition 9(1)(c), may apply to the court for warrant to exercise any of the remedies which he is entitled to exercise on a default within the meaning of standard condition 9(1)(a).
>
> (2) For the purposes of such an application as aforesaid in respect of a default within the meaning of standard condition 9(1)(b), a certificate which conforms with the requirements of Schedule 7 to this Act may be lodged in court by the creditor, and that certificate shall be *prima facie* evidence of the facts directed by the said Schedule to be contained therein."

As the first crave (at para 9 above) shows, the Bank asked the court to grant warrant to enter into possession of the house at Dalum Grove (standard condition

10(3)) and to exercise in relation to the house all powers competent to a creditor in lawful possession, including the power of sale (standard condition 10(2)). By granting decree in terms of the first crave, the Extra Division granted the Bank warrant to exercise those powers.

The Bank's crave for ejection

28. In the Inner House and in the hearing before this Court much of the argument was directed, however, to the Bank's second crave as amended, which, it will be recalled, is a crave for the ejection of Mr and Mrs Wilson and their family from their home.

29. Assuming that the Bank were granted the power under standard condition 10(3) to enter into possession of the subjects, under standard condition 10(1) they could only exercise this power in accordance with the provisions of Part II and "of any other enactment applying to standard securities". Paragraphs 18 to 24 of Schedule 8 to the 1970 Act show that section 5 of the Heritable Securities (Scotland) Act 1894 ("the 1894 Act") is among the provisions of that Act which apply to standard securities. Section 5 provides:

> "Where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant: Provided that this section shall not apply in any case unless such proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition."

As counsel for the Bank accepted, this section applies in the present case where the Bank wish to enter into possession of security subjects which are in the personal occupation of the proprietors, Mr and Mrs Wilson. In that situation section 5 allows the creditor to take summary proceedings for ejection, provided that the proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition. (The language of the section is not well adapted to a case where only one of the proprietors is in default.)

30. Mr McIlvride acknowledged that the Bank had not established that Mr Wilson had failed to make punctual payment of any interest due under the security.

So they have to show that there has been default by Mr Wilson "in due payment of the principal *after formal requisition*" (emphasis added). For his part, Mr Summers accepted that, if the Bank had served a calling-up notice in Form A in Schedule 6, this would have met the requirement of a formal requisition. He pointed out that the terms of such a calling-up notice were comparable in their material respects to the Form of Schedule of Intimation, Requisition, and Protest, which is Form No 2 in Schedule FF to the Titles to Land Consolidation (Scotland) Act 1868 – the form that would have been in use at the time when section 5 of the 1894 Act was enacted. But, he submitted, since the Bank had proceeded under section 24 of the 1970 Act, they had never served any kind of notice which could constitute a "formal requisition" for purposes of section 5 of the 1894 Act. So they were not entitled to ask the court for decree of eviction.

31. The Extra Division dealt with this point in para 44 of their judgment, 2009 SLT 729, 738:

> "We agree with the submission by counsel for the Bank that the Sheriff erred in holding that warrant for ejection can only be granted if a formal requisition of payment has been made in terms of section 5 of the 1894 Act. For the reasons given above, warrant for ejection may competently be granted where the debtor in a standard security is in default in terms of standard condition 9(1)(b). The only voucher that is required is a Schedule 7 certificate. No separate requisition is required. The effect of section 24 of the 1970 Act is that such a certificate constitutes a formal requisition for the purposes of section 5. In any event, there is no difference between these provisions. The requirement in a notice of default is the same as a requisition. The word 'formal' means no more than that it must be made in the statutory form. Moreover, the comma in the proviso to section 5, and the absence of further words such as 'in either case', make it clear that the phrase 'after formal requisition' only applies to payment of principal and not to interest."

As already explained, the point about payment of interest does not arise in this case since the Bank have not established that there has been a failure in that respect. So far as the Division proceeded on the basis that a Schedule 7 certificate can constitute a "formal requisition" for the purposes of section 5 of the 1894 Act, Mr McIlvride explained that he had not advanced that argument before the Division and felt unable to support this aspect of their reasoning. A Schedule 7 certificate contains no requirement of any kind: it is simply a piece of evidence which is created for, and used in, the proceedings. It cannot therefore constitute the formal requisition which must precede the proceedings for ejection. Moreover, even if the requirement in a notice of default in the form in Form B in Schedule 6 would count as a formal requisition, as the Extra Division argued, that is irrelevant

in the present case since the Bank did not serve such a notice. It respectfully appears to me that the reasoning of the Extra Division on this point cannot be upheld.

32. Counsel preferred to base his argument on part of the wording of section 24(1) of the 1970 Act. He argued that, if the court did indeed grant the Bank warrant to exercise any of the remedies which a creditor is entitled to exercise on a default within the meaning of standard condition 9(1)(a), then the Bank would be in the same position as if they had served a calling-up notice with which Mr Wilson had not complied. In other words, the Bank must be treated as having, in effect, served a calling-up notice which – as Mr Summers accepted – would constitute a formal requisition for purposes of section 5 of the 1894 Act. So the court could grant decree to eject Mr and Mrs Wilson, who had no substantive defence to the Bank's claim.

33. The argument certainly has its attractions, not least because – as Mr McIlvride stressed – Mr and Mrs Wilson know perfectly well what they have been asked to pay and they have had ample opportunity to put forward their defence. Nevertheless, I would not accept the argument since the simple fact is that section 5 of the 1894 Act only allows the creditor to take proceedings for ejection if they have been preceded by a formal requisition. Mr Summers referred to a number of authorities, including *Inglis' Trs v Macpherson* 1911 2 SLT 176, to show that section 5 was passed in order to introduce a new summary procedure for obtaining the drastic remedy of ejection. Mr McIlvride accepted this. That being so, it would, in my view, be wrong to water down the precondition imposed by Parliament for using that summary procedure. In more concrete terms, if a formal notice had been given, Mrs Wilson would have been warned about the situation and about the danger of being ejected from her home, before any proceedings were started. Which seems only reasonable. Approaching the matter on this footing, I would have allowed the appeal.

34. Mr McIlvride's cri de coeur – that to impose a requirement on the Bank to make a formal requisition is tantamount to requiring them to serve a calling-up notice – really brings us back to the fundamental point. Were the Bank actually, all along, obliged to serve a calling-up notice if they wanted to require payment of the debt and, failing payment, to sell the Wilsons' house? I must retrace my steps to see if there is another way through the maze.

Must a creditor serve a calling-up notice when section 19(1) applies?

35. The terms of section 19(1) are quoted at para 23 above. It is not disputed that the subsection applies to the situation in this case: undoubtedly, therefore, the

Bank *could* have served a calling-up notice, with the result that any default would be under standard condition 9(1)(a). The question is: were they *bound* to do so? Section 19(1) ("he shall serve a notice calling up the security") appears to say that they were. But, in practice, it has not been treated as requiring a creditor to serve a calling-up notice in these circumstances. Rather, it has been treated as permitting a creditor to use the calling-up procedure, but as also permitting him, in the alternative, to treat the debtor as being in default within the meaning of standard condition 9(1)(b). On that approach, the creditor can serve a calling-up notice under section 19, or serve a notice of default under section 21, or simply apply to the court for a warrant under section 24. Section 19(1) is simply one option for the creditor: he can use it if he wants, but he can also choose to use one of the other remedies, if he wants. Such, we were told, is the way the legislation has been interpreted in practice.

36. Counsel mentioned that at the hearing in the Inner House one of the judges questioned whether this was the correct interpretation of these sections. But, understandably, the point was not pursued after their Lordships were referred to the decision of the Extra Division (Lord Sutherland, Lord MacLean and Lord Allanbridge) in *Bank of Scotland v Millward* 1999 SLT 901. This decision would certainly have been well known to Lord Drummond Young who had been counsel for the Bank of Scotland. It is not binding on this Court, however, and its reasoning must be scrutinised. A footnote to another report of the case, 1998 SCLR 577, 585, suggests that an appeal to the House of Lords may have been contemplated. If so, it was not pursued.

37. In *Millward* Lord MacLean gave the court's decision, which is summarised at p 903H-I:

> "In our opinion the law is correctly stated in Halliday's *Conveyancing Law and Practice* (2nd ed), that the creditor *may* serve a calling up notice where a creditor in a standard security intends to require repayment of the principal sum and interest, but he is not required to do so. He may, alternatively, serve a notice of default."

As this summary suggests, their Lordships appear to have been much influenced by their perception that the late Professor Halliday, whom they rightly described as "the architect of the Act", considered that a creditor who intends to require repayment of the principal sum and interest is not obliged to serve a calling-up notice under section 19(1) and has the alternative of serving a notice of default under section 21(1). It is noticeable that they make no mention of an application to the court under section 24(1). Before looking more closely at what Professor

Halliday said, I must examine an assumption that apparently underlies the Extra Division's approach in *Millward*.

38. In outlining the parties' arguments Lord MacLean recorded, 1999 SLT 901, 903B-C, that counsel for the Bank had "acknowledged" that section 19 of the Act applied only when there was a requirement of discharge of the entire debt. In the present case the Bank required Mr Wilson to repay the entire debt and so it is – strictly speaking – unnecessary to decide whether that view is correct. Moreover, the point may be unlikely to arise very often in practice since most banks and building societies will include an acceleration clause entitling them to require repayment of the entire loan if the debtor fails to pay any part of the total debt when it becomes due.

39. Nevertheless, it should not be assumed that it is only where the creditor requires repayment of the entire sum that serving a calling-up notice under section 19(1) is competent. Presumably – no reasoning is given in *Millward* – the view that this is the position is based on the opening words of section 19(1): "Where a creditor in a standard security intends to require discharge of the debt thereby secured…". The suggestion must be that the combination of "the debt thereby secured" and "discharge" indicates that Parliament is referring to the situation where the creditor requires the debtor to pay the whole of the debt or perform the whole of the obligation ad factum praestandum for which the security has been granted.

40. As Lord Clarke pointed out in the course of the argument, however, section 9(8)(c) provides that "debt" means "any obligation due, or which will or may become due, to repay or pay money … and any obligation … *ad factum praestandum*…." An obligation to repay £50K of a loan of £100K must fall within the words "any obligation due … to repay … money" and the debtor who repays £50K discharges that obligation, which is secured by the standard security. Moreover, where Parliament wishes to refer to the whole of the debt due from the debtor, it uses the expression "whole amount due". See sections 18(4), 27(1)(c), 28(2) and 30(1) and standard condition 11(4) and (5) in Schedule 3. For these reasons, it seems difficult to restrict the scope of section 19(1) to situations where the creditor intends to recover the entire debt.

41. It may be worth mentioning another point about the opening words of section 19(1). They refer to the creditor in a standard security intending to require discharge of "the debt thereby secured". That expression aptly describes the debtor's liability under any personal obligation, irrespective of whether it is constituted by a separate instrument (Form B in Schedule 2) or in the deed itself (Form A). So a calling-up notice applies to both. It is much less clear that the same can be said of a notice of default – or of the procedure in section 24(1). Both of

those procedures apply where the debtor is in default "within the meaning of standard condition 9(1)(b)" and, reading short, that standard condition applies where there has been a failure to comply with a requirement "arising out of the security". Where the debtor fails to comply with a personal obligation constituted by a separate instrument, he fails to comply with a requirement under that instrument. But it is hard to see how he can properly be said to have failed to comply with a requirement "arising out of the security".

42. It is true that, when Parliament refers to "the whole amount due under the security" in section 28(4), for example, this must refer to standard securities in Form B as well as Form A. But, by section 30(2), that expression has to be read in the light of the definition of "whole amount due" in section 18(4). So read, the expression provides no basis for ignoring the specific words used in standard condition 9(1)(b).

43. There is therefore a difficulty in holding that a notice of default could apply to a failure to pay a sum due under a separate instrument. This tends to support the view that serving a calling-up notice under section 19(1) is the only competent route in the circumstances, since it is hard to see why Parliament would have intended to distinguish between Form A and Form B standard securities in this respect. Other complications can be envisaged, but it is unnecessary to explore them.

44. I can now return to the reasoning of the court in *Bank of Scotland v Millward* 1999 SLT 901. The Extra Division appear to have been influenced by their perception that conveyancing practitioners used notices of default "even in situations where they could use calling up notices": 1999 SLT 901, 903G. In particular, they had been told, at p 903C-D, that the Bank of Scotland tended to use calling-up notices for residential property and notices of default for commercial property, apparently on the view that commercial debtors did not need to be given so long to pay. But the facts of this case suggest that other financial institutions do not follow that policy. In any event the practice of even the most distinguished conveyancers cannot prevail if it is irreconcilable with the provision enacted by Parliament.

45. Against the background of the perceived practice of conveyancers, the Extra Division suggested, at p 903G-H, that, if a creditor had to use the calling-up procedure in section 19(1), this would mean that the creditor could use a notice of default where 99% of the debt had been demanded, but would have to use a calling-up notice where 100% had been demanded. They did not consider that the statutory framework in sections 19 to 22 necessarily led to that conclusion. Indeed it does not: the substance of the supposed objection dissolves if, contrary to the

Division's assumption, a calling-up notice can be served in cases where the creditor has asked for payment of less than the whole debt.

46. The Extra Division really based their conclusion, that a calling-up notice and a notice of default are alternatives, on their understanding of Professor Halliday's view. They referred to his *Conveyancing Law and Practice* Vol 2 (second edition, 1997), para 54-05:

> "Where a creditor in a standard security intends to require repayment of the debt thereby secured and, failing such repayment, to exercise any of his powers in respect of a security, he may serve a calling up notice."

The court emphasised the word "may". But the simple fact is that Parliament used the word "shall" in section 19(1). Although their Lordships must have accepted the submission of counsel for the bank that "shall" had to be read "in a permissive and not a mandatory sense", they do not explain what there is in the Act, or indeed in authority, to justify that interpretation of section 19(1). For my part, I can see nothing.

47. Moreover, I very much doubt whether Professor Halliday actually intended to say otherwise. It is noticeable that, while the Division emphasised the word "may" in the passage which they quoted, the author did not. Nor did he say that, alternatively, the creditor may serve a notice of default in such cases. The Division cited the second (posthumous) edition of his *Conveyancing Law and Practice* (revised by Mr I J S Talman), but the same applies to the first edition, published during his lifetime: *Conveyancing Law and Practice* Vol 3 (first edition, 1987), paras 39-03, and 39-19 and 39-20. The same also goes for his commentary on the 1970 Act, the first edition of which was published very shortly after the Act was passed. In *The Conveyancing and Feudal Reform (Scotland) Act* (first edition, 1970), para 1-27; (second edition, 1977), para 1-26, Professor Halliday – who was in a position to know – said that the provisions for the enforcement of the standard security had posed the most difficult questions of policy for the legislature. In his view sections 19 to 29 incorporated "a compromise solution which permits considerable flexibility in procedures but affords reasonable protection to the debtor on essential matters." He went on to describe the calling-up procedure (first edition, para 1-28; second edition, para 1-27), before continuing in the next paragraph: "A new additional remedy is provided which permits the creditor to proceed in certain circumstances by way of serving a notice of default." While Professor Halliday was pointing to the wider range of remedies which the new statute made available to the creditor to cater for different situations, there is nothing to show that he considered that serving a notice of default was an

alternative to serving a calling-up notice – far less, that the section 24(1) procedure was also such an alternative.

48. What Professor Halliday did emphasise – and rightly emphasise – was the quite different point that a calling-up notice and a notice of default are not mutually exclusive. In other words, a creditor can use both, if that is appropriate. Lord MacLean refers, 1999 SLT 901, 903E-F, to the relevant passage in Professor Halliday's *Conveyancing Law and Practice* Vol 2, para 54-22. Passages to a similar effect are found in his earlier works. There may indeed be situations where the creditor will want to exercise both rights at the same time and, as section 21(1) shows, there is nothing to prevent this. For example, if the security subjects were deteriorating, the creditor might well wish to serve both a calling-up notice requiring the debtor to pay the debt and a notice of default requiring him to fulfil his repairing obligation. Although the Extra Division drew attention to this point, it does nothing to support their view that a notice of default can be used as an alternative to the calling-up notice. That is an altogether different matter.

49. The auctoritas of Professor Halliday among conveyancers was, and is, immense. But, for judges at least, in the end even a word from Professor Halliday would have to yield to the words of Parliament. In that event it would also be worth bearing in mind the observation of the Earl of Halsbury LC, that the worst person to construe a statute is the person who was responsible for its drafting, since he "is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed": *Hilder v Dexter* [1902] AC 474, 477. Happily, however, in my view there is no sufficient reason to conclude that Professor Halliday intended to say anything that is inconsistent with the text of the statute.

50. Finally, it is noticeable that serving a calling-up notice under section 19 entitles the creditor to exercise a wider range of powers on default than those that are available on default after service of a notice of default under section 21. Compare section 20(1) with section 23(2). The disparity is instructive: if Parliament had really intended that the two remedies should operate as alternatives in this particular situation, it might have been expected to align the rights and powers available to the creditor to deal with it.

51. For these reasons I would overrule the decision in *Bank of Scotland v Millward* 1999 SLT 901 on this point and hold that, in a case falling within the scope of section 19(1), the creditor must serve a calling-up notice. That interpretation ensures that all debtors are treated alike and, in particular, that they are all given the two-month period in which to pay, that is specified in the calling-up notice. Professor Halliday stressed that, in enacting the enforcement powers, Parliament had been concerned to strike the right balance between creditors and

debtors. Interpreting section 19(1) in this way ensures that Parliament's policy on this important matter is given effect.

Conclusion

52. In these cases case the Bank did not serve a calling-up notice back in 1998. Mr McIlvride was unable to say why. He was also unable to say why they had not done so at some later stage when the cases had become bogged down in technical arguments about section 24 of the 1970 Act and section 5 of the 1894 Act. Unfortunately, for all the reasons which I have given, the Bank have pursued the wrong course. I would therefore allow the appeals, recall the interlocutor of the Extra Division, sustain the first plea-in-law for the first defender and the plea-in-law for the second defender and assoilzie both defenders in each of the appeals.

53. It is only right that I should acknowledge the assistance that I have derived from the excellent submissions of counsel on both sides.

LORD HOPE

54. I agree with Lord Rodger that these appeals must be allowed and I would make the orders that he proposes. I also agree with him that, on a correct analysis of the relevant provisions of the Conveyancing and Feudal Reform (Scotland) Act 1970 ("the 1970 Act"), the Bank pursued the wrong course when they decided to enforce these securities. It has to be recognised however that this conclusion runs counter to the way these provisions have been widely understood and applied in practice for the past four decades. So I should add some words of my own to explain why I too have come to be of that view.

55. The 1970 Act was the product of a movement for reform of conveyancing law and practice which had been embodied in a series of reports, of which the relevant one for present purposes was the Report of the Halliday Committee (Cmnd 3118) which was published in December 1966. It contained proposals for the modernisation and simplification of the existing system which formed the basis for the measures enacted in Parts II to IV of the 1970 Act. Among the proposals in the Halliday Report was the introduction of a new statutory security. It was to be incompetent to create a heritable security by any other means after 29 November 1970, when the relevant provisions were to come into force six months after the Act was passed: section 54(2)(a).

56. The new standard security was to follow one of the forms prescribed in Schedule 2. Form A was for use where the personal obligation was included in the deed. It contains an obligation to pay the debt. Form B was for use where the personal obligation was included in a separate instrument or instruments. It contains no obligation to pay the debt and is limited to creating the security, but the nature of the debt and the instrument or instruments constituting it must be referred to and sufficiently identified. The introduction to the commentary on the Act in *Current Law Statutes* noted that a valuable innovation under section 11 was the incorporation in the new security of the standard conditions prescribed in Schedule 3, unless conventionally varied. They were to regulate every standard security. The import of the form of bond and disposition in security prescribed was much more limited. Absent special agreement to the contrary, the creditor could insure the subjects against all loss by fire and recover the premiums from the debtor, but it was not until he had entered into possession that he was given any statutory powers of management: Conveyancing (Scotland) Act 1924, section 25(1)(a). It has been suggested that the creditor was entitled to object to any act which diminished the security: Gordon, *Scottish Land Law* (2nd ed, 1999), para 20-12. Where the security was constituted by way of ex facie absolute disposition, a back letter would typically contain obligations on the debtor such as to keep the subjects in good repair or to observe title conditions. It would also set out the terms on which the ex facie absolute owner was entitled to enter into possession in the event of the debtor's default in the fulfilment of any of his obligations: Gordon, para 20-100. But the benefit of incorporating the standard conditions was that everything that was relevant to the maintenance and enforcement of the security was set out in the statute.

57. It is plain that much thought was given to the design of the forms, which were supplemented by the seven notes annexed to Schedule 2, and to the content of the standard conditions. These were matters of particular interest to the conveyancer, whose expertise lies the framing of deeds that give effect to the transaction that the client wishes to enter into and will meet the requirements for registration. A conveyancer in practice deals mainly with the sale and purchase of heritable property: Sinclair, *Handbook of Conveyancing Practice in Scotland* (3rd ed, 1995), para 1.1. His task is usually complete when the deed that transfers title to the purchaser or the deed that creates the heritable security is registered. What to do if a creditor has to enforce his security because the debtor has failed to perform his obligations under it has normally passed to someone else. The draftsman of the 1970 Act had to consider this problem, however, and the relevant provisions are to be found in sections 19 to 28 and in standard conditions 8 to 11. Section 19 provides for the calling-up of the security, and section 20 sets out the rights of the creditor if the debtor is in default in failing to comply with the calling-up notice. Section 21 introduces what the commentator in *Current Law Statutes* described as an entirely new remedy, the notice of default.

58. These provisions need to be read in the light of standard condition 9(1), which provides:

> "The debtor shall be held to be in default in any of the following circumstances, that is to say –
>
> (a) where a calling-up notice in respect of the security has been served and has not been complied with;
>
> (b) where there has been a failure to comply with any other requirement arising out of the security;
>
> (c) where the proprietor of the security subjects has become insolvent."

59. The circumstances listed in standard condition 9(1) are not presented as alternatives which are exclusive of each other. Necessarily so, as all three circumstances could be present in the event of the debtor's insolvency. But, as the wording indicates, they are distinct circumstances. The question that these appeals give rise to is whether a creditor who wishes to enforce the security to obtain performance of the debt for which security was given can choose whether to proceed by way of a calling-up notice or may proceed instead on the basis that the debtor is in default under standard condition 9(1)(b). Finding the right answer to this question is important if the creditor wishes, as the Bank does in this case, to obtain an order to eject a debtor who is in personal occupation of the subjects of the security under section 5 of the Heritable Securities (Scotland) Act 1894, which applies to standard securities by virtue of section 32 of the 1970 Act. That section applies if the debtor has made default "in due payment of the principal after formal requisition". It is not in doubt that a calling-up notice which is served under section 19 of the 1970 Act is a formal requisition for the purposes of section 5 of the 1894 Act. But the kind of default referred to in standard condition 9(1)(b), which is the route that the Bank has chosen to enforce the securities in this case, does not require the service of a calling-up notice. The requirements of section 5 could have been met by serving a notice of default which was appropriately worded, but the Bank did not regard this as a step that needed to be taken.

60. Mr Summers QC's case for Mr and Mrs Wilson was that the Bank had failed to serve on them a document that could be described as a formal requisition for the purposes of section 5 of the 1894 Act. He set out his argument in this way. Summary ejection by a heritable creditor of a proprietor with a valid and subsisting title is not possible apart from section 5: *Inglis's Trustees v Macpherson* 1911 2 SLT 176, 177-178, per Lord President Dunedin; Craigie, *Scottish Law of Conveyancing; Heritable Rights* (1899), p 949. If there is no formal requisition within the meaning of that section, the proprietor cannot be ejected. The word "formal" is not defined in the 1894 Act, but it should be understood as requiring the creditor to provide full details of the security to the proprietor so that the basis

for the demand is made clear. What will be required to achieve that clarity will depend on the circumstances of the case. In this case the absence of any reference to the security in the Bank's demand letters gave the misleading impression that this was a demand that was made of the husbands only, in respect of their obligations as partners for partnership debt: see para [6] where their terms are set out by Lord Rodger. No such letter was sent to the wives, and there was no mention in the letters of their obligations under the standard securities.

61. In the Inner House this argument was rejected by the Extra Division (Lords Nimmo Smith, Reed and Drummond Young): 2009 SLT 729, paras 39-44. In para 44, delivering the opinion of the court, Lord Nimmo Smith said:

> "We agree with the submission by counsel for the bank that the sheriff erred in holding that warrant for ejection can only be granted if a formal requisition of payment has been made in terms of section 5 of the 1894 Act. For the reasons given above, warrant for ejection may competently be granted where the debtor in a standard security is in default in terms of standard condition 9(1)(b). The only voucher that is required is a Schedule 7 certificate. No separate requisition is required. The effect of section 24 of the 1970 Act is that such a certificate constitutes a formal requisition for the purposes of section 5. In any event there is no difference between these provisions. The requirement in a notice of default is the same as a requisition."

The Schedule 7 certificate referred to in this passage is the certificate that the creditor may lodge in court under section 24(2) of the 1970 Act. If it contains the information required by the Schedule, which includes specification of the standard security in respect of which the default is alleged to have occurred and full details of the default, it will be prima facie evidence of the facts founded on as the default. These details were given in the certificates of default that the Bank lodged in January and February 2006, long after the actions were served in April 1998. They were not to be found in the demand letters which were sent to the husbands in June 1995.

62. The propositions which I have quoted from the Extra Division's opinion do not fit easily with the concept of a formal requisition as an essential preliminary for the taking of proceedings for ejection under section 5 of the 1894 Act. This was explained by Gloag and Irvine, *Law of Rights in Security* (1897), p 98. After noting that a creditor was entitled to remove the debtor by an action of removing in the Court of Session (see, eg, *Blair v Galloway* 1853 16 D 291), the authors said that no-one was entitled to make rules by contract which tend to establish a diligence different from that established by law and that extreme powers in a bond, although consented to by the debtor, will not be enforced:

> "Thus where it was stipulated that in the event of the debtor falling into arrears for two months with monthly instalments of the debt it should be in the power of the creditor to remove him 'without any warning or legal process whatever,' it was held that such extreme powers could not be legally enforced, and that a petition to the sheriff for summary removal of the debtor from the occupation of the subjects was incompetent.
>
> But the powers of a creditor in this respect have been enlarged by the Heritable Securities Act, 1894. It is there provided that where a debtor is in the natural possession of the lands covered by the security, or a part thereof, and has made default in payment of the interest under the security, or of the principal after a formal requisition for payment, the creditor may take proceedings to eject him as if he were an occupant without title. That is to say, it is presumed, he may bring a summary action of removing in the sheriff court."

63. The requirement that there should be a formal requisition or demand for payment was not new. Section 119 of the Titles to Land Consolidation (Scotland) Act 1868 made provision for the service of a demand for payment in the form of No 2 of Schedule FF, which is headed "Form of Schedule of Intimation, Requisition and Protest." The essential requirement of the formal requisition referred to in section 5 of the 1894 Act is that the proprietor should be put on notice *before* summary proceedings for possession are brought against him that the principal sum due under the bond and disposition in security is due for payment and that, in the event of non-payment by a given date, the creditor may proceed to take proceedings against him. The reference to default in payment "after" formal requisition in section 5 makes it clear that the requisition must come first. The default occurs if, and only if, the demand that it sets out is not complied with.

64. The Extra Division's conclusion that the requirement for a formal requisition was met by the lodging of the Schedule 7 certificates eight years after the raising of these actions seems hard to understand in the light of that background. But the point is the same however long or short the interval was between the raising of the actions and the lodging in court of the certificates. Unless there was clear wording in the 1970 Act to support it, it would seem that the Extra Division ought to have held that the statutory requirement was not satisfied because Mr and Mrs Wilson were not put on notice before the actions were raised that the Bank was proposing to enforce the security. Section 5 of the 1894 Act was not amended by the 1970 Act, so that section is left to speak for itself. It cannot be said that the change in the timing of the requirement that follows from the Extra Division's decision has been addressed directly. Section 32 of the 1970 Act provides, however, that the provisions of any enactment relating to

a bond and disposition or assignation in security shall apply to a security, except in so far as such provisions are inconsistent with the provisions of Part II of that Act. This makes it necessary to look more closely at the wording of these provisions.

65. It has to be said that it was no part of Mr Summers's argument that the Bank had pursued the wrong course by relying on a standard condition 9(1)(b) default and applying to the sheriff court under section 24 instead of serving a calling-up notice. He concentrated on the Bank's failure to serve a further document which could be regarded as a formal requisition before the actions were raised. It was Mr McIlvride's attempt, in a very able argument, to answer this point that led to the scrutiny of the provisions of Part II which has led in turn to the conclusion that the Bank's error can be traced back to their choice of remedy and to the conclusion, too, that the passage in Lord MacLean's opinion in *Bank of Scotland v Millward* 1999 SLT 901, 903 on which the Extra Division relied to the effect that there was a choice of remedies was unsound.

66. It is perhaps worth noting that the point that Lord MacLean made in *Bank of Scotland v Millward* had already been considered in the sheriff court. In *United Dominions Trust Ltd v Site Preparations Ltd (No 1)* 1978 SLT (Sh Ct) 14 and *United Dominions Trust Ltd v Site Preparations (No 2)* 1978 SLT (Sh Ct) 21 it was argued that a failure to pay interest was not "a failure to comply with any other requirement arising out of the security" as required by standard condition 9(1)(b). It was said that the liability to pay interest arose out of the existence of the debt and that the appropriate procedure to follow was the calling-up procedure. In the first case Sheriff DB Smith said at p 16 that it would be a very strained interpretation of standard condition 9(1)(b) to hold that a failure to pay interest was not a failure to comply with the requirement arising out of the security. In the second Sheriff Wm C Henderson said at p 23 that the requirements to pay interest and/or capital were every bit as much requirements arising out of the security as the other standard conditions incorporated by reference in the security documents. These cases are cited in Gloag and Henderson, *Law of Scotland* (12th ed, 2007), para 37-09, fn 137 for the proposition that failure to pay interest under a loan secured is a failure to comply with a requirement of the security for the purposes of standard condition 9(1)(b): see also Cusine and Rennie, *Standard Securities* (2nd ed, 2002), para 8.21.

67. The Extra Division in *Bank of Scotland v Millward* 1999 SLT 901 relied for its conclusion that standard conditions 9(1)(a) and 9(1)(b) were alternative and not mutually exclusive on Professor Halliday's statements in his *Conveyancing Law and Practice* (2nd ed, 1997), para 54-05 that where a creditor in a standard security intends to require repayment of the debt thereby secured and, failing such payment, to exercise any of his powers in respect of a security he "may" serve a calling up notice and in para 54.22 that the remedies of serving a calling-up notice and serving a notice of default were not mutually exclusive. It also relied on a

passage in the latter paragraph where Professor Halliday said that where there was serious default in payment of interest and capital and the debtor has abandoned the subjects, which are deteriorating, service of a notice of default may be the quickest approach to a sale of the security subjects.

68. Lord Rodger doubts whether, when he used the word "may", Professor Halliday intended to indicate that the word "shall" in section 19(1) was to be read in a permissive, and not a mandatory, sense. But a further indication that it was indeed Professor Halliday's view that this word was to be read in the permissive sense is to be found in a passage from his commentary on the 1970 Act, *The Conveyancing and Feudal Reform (Scotland) Act 1970* (2nd ed, 1977), at para 10.19, where he discussed the circumstances in which a notice of default could be used:

> "Any failure by the debtor to implement an obligation enforceable under a standard security will entitle the creditor to serve a notice of default. Default in payment of interest or of a periodical instalment of capital and interest, or breach of an obligation under standard conditions 1, 2, 3 or 5, or failure to implement an obligation undertaken in the personal obligation or in a variation of the standard conditions, are obvious examples. The only qualification is that the failure should be remediable."

69. Professor Halliday is not alone in failing to notice the distinction between circumstances in which a calling-up notice is required and those where recourse must be had instead to a notice of default or a section 24 application to the sheriff court. Cusine and Rennie say in their introduction to para 8.14 that there is some doubt about what condition 9(1)(b) means, the question being whether "a failure to comply with any other requirement arising out of the security" is wider than a failure to comply with something mentioned in a notice of default. In their view this phrase means "a failure to comply with any condition of the standard security, or the standard conditions, ie anything except failure to comply with a calling-up notice." But I understand them to accept that the passage which they quote from Professor Halliday's *Commentaries* is an accurate statement of the effect of the 1970 Act. This is certainly the predominant view that is taken in the textbooks. The approach is to view the Act as providing the creditor with a basket of remedies and then providing him with the calling-up notice, the notice of default and the application to the sheriff court for a warrant as different routes by which they can be obtained.

70. In *The Laws of Scotland: Stair Memorial Encyclopaedia: Conveyancing* (2005), paras 223-224 it is stated that a calling-up notice is to be used where the creditor wants payment of *all* the debt, and that a notice of default is used where

there has been failure to comply with any requirement of a security. The word "other" which the statute uses in standard condition 9(1)(b) is omitted from the reference to the notice of default, suggesting that this is a mechanism that can be used for any failure to comply with a requirement of the security. Cusine and Rennie, *Standard Securities*, para 8.03 say that a creditor who wishes the debt to be discharged by payment of the amount due or performance of an obligation ad factum praestandum "may" serve a calling-up notice, but that it would also be appropriate to serve a calling-up notice in respect of a default which cannot be remedied. The editors of the 12th edition of Gloag and Henderson, *Law of Scotland*, in their carefully re-written chapter on *Rights in Security*, para 37.09 say that where the creditor in a standard security intends to require discharge of the debt secured and, failing discharge, to exercise any power conferred by the security to sell the subjects, the creditor "may" serve a calling-up notice. They too omit the word "other" before the word "requirement" when they summarise the circumstances when a notice of default may be used. Gretton and Reid, *Conveyancing* (3rd ed, 2004), para 19.36, referring to *Bank of Scotland v Millward* 1999 SLT 901, say that the calling-up procedure and the notice of default procedure are often alternatives, and that in practice there is a certain tendency amongst institutions to use the former for residential standard securities and the latter for commercial ones. They do however note that the law in this area is of labyrinthine complexity: *Conveyancing 2009*, p 179.

71. There may indeed be cases where the calling-up procedure and the notice of default procedure are both available as alternatives. The example given by Professor Halliday in *Conveyancing Law and Practice*, para 54.22, where there has been serious default in payment of interest and capital and the debtor has abandoned the subjects, which are deteriorating, may be such a case. But a case such as the present, where the creditor is faced with a defaulting debtor who is in personal possession of the subjects and intends to seek an order for the debtor's summary ejection under section 5 of the 1894 Act, cannot be dismissed so easily. Treating a calling-up notice and a notice of default as alternatives between which the creditor may choose at his option runs into serious difficulty when this is tested against the section 5 requirement that ejection is a remedy that may only be sought where the debtor is in default after formal requisition. The calling-up procedure satisfies that requirement. The notice of default procedure and the warrant procedure referred to in section 24, without more, do not.

72. The answer to the problem is to be found in the words of the statute, to which all too frequently insufficient attention appears to have been given. The word "default" is used in standard condition 9 to describe three quite different circumstances. In *Laird v Securities Insurance Co Ltd* 1895 22 R 452,461 Lord Adam said that this meant nothing more or less than that the debtor had failed to pay. But the word takes its meaning from its context. Each of the circumstances referred to in standard condition is treated as a "default" for the purposes of Part II

of the 1970 Act. There is a default for these purposes where the proprietor of the subjects has become insolvent, even though there has not yet been any failure in payment of any part of the debt which is secured by the standard security: standard condition 9(1)(c). That there is a difference between the defaults contemplated by standard conditions 9(1)(a) and 9(1)(b) is indicated by the word "other" which appears before the words "requirement arising out of the security" in standard condition 9(1)(b). In other words, standard condition 9(1)(a) refers to the kind of requirement which is to be dealt with by serving a calling-up notice. Standard condition 9(1)(b) refers to any requirement which is not to be so dealt with. To understand the difference between them it is necessary to refer back to section 19, in which the calling-up procedure is described.

73. Section 19(1) states that when a creditor in a standard security intends to require discharge of the "debt" thereby secured and, failing that, to exercise any of the powers which he may appropriately exercise on the default of the creditor within the meaning of standard condition 9(1)(a), he "shall" serve a notice calling-up the security. The word "debt" is widely defined in section 9(8)(c), which must be read together with section 9(3) which provides that the grant of any right over land or an interest in land for the purpose of securing any debt by way of a heritable security shall only be capable of being effected by standard security. It includes any obligation due, or which will become due, to pay or repay money. It also includes any obligation ad factum praestandum. No distinction is drawn between obligations to pay the whole or part of the principal, the payment of the principal by instalments or the payment of interest or capital. So the word "debt" in section 19(1) refers to anything and everything that is "secured" by the grant of the interest referred to in the standard security. Where the Act means to refer to the whole amount due it says so: see section 18(4). The word "debt" is not so limited.

74. Section 21(1) introduces the valuable innovation referred to in the introduction to the commentary on the Act in *Current Law Statutes*. It applies where the debtor is in default within the meaning of standard condition 9(1)(b) and the default is remediable. As standard condition 9(1)(b) refers to a failure to comply with any *other* requirement arising out of the security, this section must be taken to refer to defaults other than in respect of the debt secured by the standard security. Content for its application is to be found in the requirements that are set out in standard condition 1 (maintenance and repair), standard condition 2 (completion of buildings), standard condition 3 (observance of conditions in title) and standard condition 5 (insurance) and any other similar conditions that may have been included by way of variation to maintain the value of the security subjects. It was a weakness of the previous law that the steps that might be taken to achieve this were not clearly spelled out in the statutes. The innovation is broadened by giving the creditor the right under section 24(1) to apply to the court for a warrant to exercise any of the remedies which he is entitled to exercise on a default within the meaning of standard condition 9(1)(a).

75. The Bank is this case has been seeking all along to require discharge of the debt secured by the standard security. Mr McIlvride said that its position was that a calling-up notice was appropriate for use where the property had been abandoned and the creditor could exercise the powers referred to in standard condition 10 immediately. If the debtor was still in occupation it was preferable to proceed under section 24 and apply to the court for a warrant to exercise them. Unfortunately this approach overlooks the fact that the summary process of ejection, to which resort may be needed in these circumstances, is available only under section 5 of the 1894 Act and then only if the proprietor is in default after a formal requisition has been served on him. Section 19(1), properly understood according to its own terms and read together with standard condition 9(1)(a), addresses this problem. The route that standard condition 9(1)(b) indicates does not, as it is designed to deal with requirements arising under the standard security other than the discharge of the debt secured by it. So even if the Bank had taken the further step of serving a notice that met the requirements of section 5, it would not have been entitled to the order it seeks as it did not serve a calling-up notice as required by section 19(1).

LORD WALKER

76. I agree with the judgments of Lord Hope and Lord Rodger.

LADY HALE

77. I agree that this appeal should be allowed, for two reasons. The first formed no part of counsel for the appellants' argument but emerged during the hearing before us. Section 19(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 requires that a creditor in a standard security who intends to require the discharge of the debt secured and, failing that, to exercise any of his enforcement powers "shall" serve a calling up notice. Although we were referred to textbooks and authorities since the Act which have assumed that "shall" means "may", we were not referred to anything in the Report of the Halliday Committee (Cmnd 3118), which led to the Act, suggesting that it was intended that a creditor could by-pass the calling up procedure required by section 19(1), either by serving a notice of default under section 21 or by applying to the court for a warrant under section 24.

78. If practice south of the border is anything to go by, the policy makers whose decisions lead to legislation are not actually responsible for the words which Parliamentary counsel use in translating their instructions into statutory language. I

would therefore be surprised if Professor Halliday were responsible for the words used in the Act. This makes the absence of any prior recommendations on this point the more telling. Without them, we need only focus on the actual language of the Act.

79. Although section 24 says that a creditor may apply to the court for a warrant if the debtor is in default within the meaning of standard condition 9(1)(b) or (c), it does not say that a default within the meaning of standard conditions 9(1)(b) or (c) is to be equated with a default within the meaning of standard condition 9(1)(a) or vice versa. In other words, it does not displace the requirements of section 19(1).

80. In policy terms, it would be very surprising if it did. Why provide for the calling up procedure at all, if it can simply be got round by going to court under section 24? There is obvious good sense in a policy which requires prior notice to the proprietors that a creditor intends to call in his security if the debt is not paid. This case is a good example. We do not know whether these debtors could have found a way of discharging their debts had they and their wives been told at the outset that their homes were at risk. In some cases, no doubt, it would be quite impossible. But in others, there might be enough surplus value (what we south of the border would call "equity") in the home to raise alternative finance to pay off the loan or the home might be sold to do this before the debt had escalated to astronomical proportions as it has done here. The Bank, of course, has every interest in allowing the debt to mount up until it gets close to the value of the home. Without the calling up procedure the creditor can simply allow the debt to escalate without suffering any disadvantage. There has to be something to make him declare his hand at a time when the debtor may be able to do something about it.

81. Secondly, in cases like this, there has to be power actually to get the occupiers out of the premises. Without this the other remedies, such as the power of sale, will not work. As I understand it, the only way in which this can now be done is under section 5 of the Heritable Securities (Scotland) Act 1894. This requires a formal requisition, at least for repayment of the principal. The calling up procedure supplies this, although no doubt there are other ways. The policy is the same. A debtor should be given an opportunity of remedying his default before he is dispossessed. It is not much to ask. Who knows whether these wives had sums in their own bank accounts which might have enabled them to discharge these debts had they been told? It is sexist simply to assume that they did not.

82. It is such an injustice to deprive these wives of their homes without even asking whether they might have had the resources to discharge their husbands' debts that I cannot believe that, even in 1970, Parliament could have contemplated it. We have been given no reason to think that it did.

83. These reasons are simply a supplement to the reasons given by Lord Hope and Lord Rodger. In agreement with them both, therefore, I would allow this appeal.

LORD CLARKE

84. I agree that this appeal should be allowed on the simple basis that, as Lord Rodger has demonstrated, *Bank of Scotland v Millward* 1999 SLT 901 was wrongly decided. The effect of section 19(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 is that a creditor in a standard security who intends to require discharge of the secured debt and, failing that discharge, intends to exercise "any power conferred by the security to sell any subjects of the security or any other power which he may appropriately exercise on the default of the debtor within the meaning of standard condition 9(1)(a) … *shall* serve … 'a calling up notice'". (My emphasis.)

85. In *Bank of Scotland v Millward* the Inner House construed 'shall' as if it said 'may'. However, it gave no convincing reason for doing so and there is in my opinion no warrant for construing the word 'shall' in that way in the context of the Act. As I see it, the purpose of the subsection was to ensure that the proprietors of secured property should be given proper notice of the creditor's intention to take possession of or to sell the property. The giving of such a notice is a simple step and would have saved years of litigation in this case. The Bank did not give such a notice on the facts of this case. It follows that, although this point was not taken on behalf of the appellants until it arose in the course of the argument in this appeal, for the reasons given by Lord Rodger, I would allow the appeal on that ground.