



Scottish Law Commission
promoting law reform

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Report on Registration of Rights in Security by Companies

report



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Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Presented to the Parliament of the United Kingdom by the Secretary of State for
Constitutional Affairs and Lord Chancellor

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965¹ for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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NOTES

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

Scottish Law Commission

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on Registration of Rights in Security by Companies

To: The Right Honourable the Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

We have the honour to submit our Report on Registration of Rights in Security by Companies.

(Signed) RONALD D MACKAY, *Chairman*
GERARD MAHER
KENNETH G C REID
JOSEPH M THOMSON
COLIN TYRE

Miss Jane L McLeod, *Chief Executive*
21 June 2004

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Part 1 Introduction

Terms of reference

1.1 On 3 May 2002 we received a reference from the Department of Trade and Industry:-

"To examine the present scheme on the registration and priority of rights in security granted by companies and to make recommendations for its reform as it applies to

- (a) companies having their registered office in Scotland wherever the assets are located;
- (b) security granted under Scots law by oversea companies and companies having their registered office in England and Wales."

1.2 Following receipt of the reference and the establishment of an Advisory Group of practitioners and experts we published in October 2002 our Discussion Paper on *Registration of Rights in Security by Companies*.¹ The discussion paper was widely distributed and we received responses from legal practitioners, commercial interests and academic lawyers. We are very grateful to all who submitted comments,² which we have found very useful.

1.3 Our remit to examine the current registration scheme for rights in security granted by companies is part of the wider review of company law in the United Kingdom undertaken by the Department of Trade and Industry. The Final Report of the Company Law Review Steering Group,³ published as part of that review process, contained a recommendation that the Law Commission in England and Wales and the Scottish Law Commission be requested to examine the system for registering company charges and security and "quasi-security" over property other than land.

1.4 Flowing from that suggestion a reference was also made to the Law Commission which has conducted its own review of the registration scheme for securities granted by companies in England and Wales pursuant to that reference, the terms of which were wider than the terms of reference to the Scottish Law Commission. Among other things the Law Commission was asked to examine the law on the registration, perfection and priority of company charges; to consider the case for a new scheme of registration and priority of company charges; and to consider whether such a scheme should apply to both security in the strict sense and to what are termed "quasi-security interests" such as conditional sales, retention of title clauses, hire purchase agreements and financial leases.

¹ Scottish Law Commission Discussion Paper No 121 on *Registration of Rights in Security by Companies* (2002) ("the discussion paper").

² A list of those who submitted written comments on the discussion paper is contained in Appendix D.

³ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Final Report* (2001, URN 01/942), available at http://www.dti.gov.uk/cld/final_report/ch_12/pdf.

1.5 In its Consultation Paper "Registration of Security Interests: Company Charges and Property other than Land"⁴ the Law Commission made proposals for the introduction of new arrangements affecting the rules on perfection and priority of security rights granted by companies in England and Wales, namely a system of notice-filing. It may be helpful, at this stage, to say a little about notice-filing. The first system of notice-filing was set up in 1952 under Article 9 of the Uniform Commercial Code of the United States of America. Similar, though not identical, systems have since been enacted in the provinces of Canada and in New Zealand, but not elsewhere.⁵ Characteristically notice-filing systems differ significantly from a scheme of registration of securities by companies such as is currently in force. They are not transaction-based. Though important as respects the regulation of priority among security interests, filing of a "financing statement" simply gives notice that the parties have entered, or may in future enter, into one or more secured transactions in relation to specified property or a specified category of property. Details require to be sought from the parties. Notice may be given in advance of a transaction, and a proposed transaction may never take place. Existing systems of notice-filing apply also to "quasi-security interests". We understand that the Law Commission is likely to recommend that, if adopted in England and Wales, notice-filing should extend to such transactions. Existing systems apply only to moveable property but are not confined to corporate borrowing. We understand however that it is likely that, at least initially, any proposed system of notice-filing in England and Wales would be confined to companies.

1.6 The terms of the reference to us are not intended to include consideration of the introduction of notice-filing in Scotland. There are radical differences between the law of rights in security, and the underlying law of property in Scotland and England and Wales respectively. It is difficult to separate rules on registration of, or publicity for, rights in security from the substantive law. For the reasons noted in our discussion paper⁶ we consider that a system of notice-filing suited to English property law could not readily be adapted or adjusted to accommodate the very different concepts and structures of Scots property law. Whether it would be possible to devise a satisfactory scheme for Scots law would require a major study involving a substantial review of the law of security rights. The scope of this report is accordingly confined to the narrower issues raised in the terms of reference of considering the present scheme of registration and making recommendations for its reform.

The current law in summary

1.7 The law relating to the registration of securities granted by companies registered in Scotland is presently contained within Chapter II of Part XII of the Companies Act 1985 ("the 1985 Act") (the text of which, along with Part XVIII relating to floating charges, is reproduced in Appendix B to this report).

1.8 By section 410 of the 1985 Act particulars of certain "charges"⁷ granted by companies registered in Scotland require to be registered with the Registrar of Companies in

⁴ Law Commission CP No 164.

⁵ Some elements of a notice-filing system may be found in the Model Law on Secured Transactions prepared by The European Bank for Reconstruction and Development which has served as a basis for recent legislation in certain countries of eastern and central Europe.

⁶ Discussion paper, paras 1.28, 1.29.

⁷ The word "charge", in the sense of a security, is not a term of art in Scotland – cf *Scottish & Newcastle Breweries Ltd v Liquidator of Rathburne Hotel Co Ltd* 1970 SC 215, 219-20 per Lord Fraser.

Edinburgh. The rules also apply to overseas companies having a place of business in Scotland; to limited liability partnerships;⁸ and to European economic interest groupings.⁹ There are four main categories of "charge" which require to be registered: (i) securities over land (ii) securities over certain types of incorporeal moveable property, most notably book debts (iii) securities over ships and aircraft and (iv) floating charges.¹⁰ Only the last is expressed in terms of a particular type of security as opposed to a security over a particular type of asset, but the other categories may be described, with little loss of accuracy, as, respectively, standard securities, assignments in security, and ship and aircraft mortgages. The only consensual security not represented on the list is pledge – a security over corporeal moveables constituted by delivery. Not surprisingly, securities created by law – liens, for example, or the landlord's hypothec – are also omitted. A security over land is registrable even where the land is outside Scotland and the security governed by a foreign system, but whether the same rule applies in respect of other types of asset is unclear.¹¹

1.9 Registration with the Registrar of Companies is not constitutive of the real right. On the contrary, section 410 presupposes that the security has already been created by other means, for the rule is that registration must occur within 21 days of such creation.¹² Late registration requires the permission of the court, which in practice will usually be granted, subject to any rights acquired by others during the period from creation of the security until its eventual registration.¹³

1.10 Since registration is not needed to create the right, other means of encouraging registration are provided in the form of three sanctions for non-registration. First, a security of which particulars have not been registered is void against the liquidator, administrator, and creditors;¹⁴ secondly, the money debt in respect of which the security was granted becomes immediately due;¹⁵ and thirdly, the company and its officers are liable to a fine for every day of default.¹⁶

1.11 If a company acquires property which is already subject to a security, the security must likewise be registered within 21 days of settlement. The only sanction, however, is a fine.¹⁷ Provision is also made for registration of memoranda of satisfaction¹⁸ where the debt has been wholly or partially paid or property has been released from the charge and, in the case of floating charges only, of variations ("instruments of alteration").¹⁹

1.12 In a departure from normal practice in Scotland the text of the deed itself is not registered. Instead the person applying for registration gives certain particulars in a prescribed form, which then fall to be checked by staff at Companies House against a

⁸ Limited Liability Partnerships Regulations [SI 2001/1090] Reg 4 and Sch 2.

⁹ The European Economic Interest Grouping Regulations 1989 [SI 1989/638] Reg 18 and Sch 4. Pursuant to the Industrial and Provident Societies Act 1967, s 4, as amended an industrial and provident society is required to register a floating charge with the Financial Services Authority but is not otherwise required to register securities.

¹⁰ 1985 Act, s 410(4).

¹¹ The words "wherever situated" are used in s 410(4) only in relation to land.

¹² 1985 Act, s 410(2). Section 411 modifies the time limit where the property being secured is outside the United Kingdom.

¹³ 1985 Act, s 420. For a discussion, see G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146 pp 168-71.

¹⁴ 1985 Act, s 410(2).

¹⁵ 1985 Act, s 410(3).

¹⁶ 1985 Act, s 415(3).

¹⁷ 1985 Act, s 416.

¹⁸ 1985 Act, s 419, discussed further at paras 2.20–2.26 of the discussion paper.

¹⁹ 1985 Act, s 466, discussed further at paras 2.14–2.19 of the discussion paper.

certified copy of the deed. The registration process is completed by the issue of a certificate of registration which is conclusive evidence that the statutory requirements have been complied with.²⁰ Forms received by the Registrar are retained and constitute a searchable record of particulars of registered securities. In addition the Registrar is directed to maintain, for each company, a separate register of charges containing particulars derived from the forms²¹ which consists essentially of a briefer summary of the particulars supplied, with a cross-reference to the form containing those particulars. Copies of the actual deeds are not retained at Companies House, but must be kept at the company's registered office and made available during business hours to creditors (but not to merely potential creditors) and to members of the company.²²

1.13 In addition to requiring that particulars of certain charges be registered at Companies House, the 1985 Act requires²³ that a company maintain its own, internal register of charges, in which it must list certain particulars of every charge specifically affecting its property and all floating charges. It may thus include charges not registrable at Companies House. The internal register is open to inspection by anyone.²⁴ However, there appears to be no right, to anyone, to inspect a copy of the deed of a charge registered in the internal register, but not registrable at Companies House.²⁵ The legislation does not specify any time within which particulars must be entered in the internal register.

Criticisms of the present law

1.14 The present arrangements for the registration of security rights granted by companies are widely regarded as unsatisfactory. As we detailed in our discussion paper²⁶ over the years there have been repeated calls or proposals in both England and Scotland for reform. There are a number of respects in which the present arrangements, particularly when seen against the ordinary law of rights in security in Scotland, are open to criticism. We described these in our discussion paper.²⁷ The results of our consultation do not suggest that any of those criticisms was misplaced. The principal criticisms may be summarised as follows.

1.15 First, it is difficult to discern any coherent policy in the list or catalogue of securities of which particulars must be registered with the Registrar of Companies. The list does not aim at presenting a complete picture, since neither all of the assets over which security may be granted nor all forms of security are included. On the other hand it cannot be said that it selects securities which in Scotland would otherwise not be publicised. Registration of particulars of "charges" was introduced in Scotland by the Companies (Floating Charges) (Scotland) Act 1961. While the need to provide for publicity for the new floating charge being introduced to Scotland by that Act is understandable, the report²⁸ which preceded the legislation and which recommended adoption of the English registration provisions, with

²⁰ 1985 Act, s 418.

²¹ 1985 Act, s 417.

²² 1985 Act, s 423(1).

²³ 1985 Act, s 422.

²⁴ 1985 Act, s 423(2). A fee of 5p per inspection may be charged.

²⁵ The 1985 Act, s 421 requires retention at the registered office of copies of every charge requiring "registration under this Chapter", but s 423 refers to inspection of copies of charges requiring registration "with the registrar of companies").

²⁶ Discussion paper, para 1.17.

²⁷ Discussion paper, paras 1.11 to 1.16.

²⁸ Eighth Report of the Law Reform Committee for Scotland (1960 Cmnd 1017).

some modifications to reflect Scots law and terminology, does not explain why, as a matter of policy, it was thought appropriate to extend the requirement of registration of particulars with the Registrar of Companies to other existing forms of security, which have their own form of publicity.

1.16 Secondly, the particulars to be found in the Register at Companies House cannot be treated as wholly reliable. Since the deed or document granting the security is not registered, a discrepancy may exist between it and the registered particulars. Inaccuracy in the particulars does not affect the scope of the security, which is governed by the deed; nor does inaccuracy invalidate the registration since the certificate of registration issued by the Registrar is conclusive evidence of compliance with the registration requirements.²⁹ A further source of unreliability is that the particulars may be out of date. Except in the case of a floating charge, a variation in the terms of the security need not be registered. A change in the identity of the creditor will not appear. There is no requirement to register a discharge of the security, and being thus voluntary, this is often omitted. In practice the Register of Charges is not relied upon other perhaps than as a starting point for further inquiry in other registers.

1.17 A further difficulty in relying on the Register of Charges is presented by the fact that registration of the particulars must take place "within 21 days after the date of creation of the charge". This means that for a period of up to 21 days after a charge has been created, the Register of Charges may contain no particulars relating to it. This "invisibility period" is of especial importance in the case of floating charges, since, unlike other forms of security in Scotland, a floating charge is created simply by the private act of executing the instrument of floating charge and is not attended by any other form of publicity. Accordingly, a search in the Register of Charges cannot be relied upon as indicating the absence of any potential prior ranking floating charge and there is no other register or independent source to which a creditor or intending creditor may turn.

1.18 The sanctions for non-registration may also be criticised on their merits.³⁰ Section 415 of the 1985 Act places the duty of registering particulars of the security on the company granting the security. Of the sanctions for non-registration only two are directed to penalising the grantor of the security, namely acceleration of re-payment of the loan and the liability of the company and its officers to a fine. The daily default fine has been criticised on the ground that it represents a continuing criminal liability for failure to perform an act but late registration may only be done if authorised by a civil court.³¹ We understand that in practice criminal sanctions are not exacted. It is also our understanding that in practice it is the creditor – the grantee of the security – who normally attends to registration of the particulars. This is not surprising given that the third sanction relates to the validity of the security and thus penalises the creditor. The language employed in the statute is that the charge is "void against the liquidator or administrator and any creditor of the company". So expressed, the rule sits uneasily in the Scottish system of property law and in that context provides difficulties of application, discussed more fully in Appendix B to the discussion paper. That said however, if the effect of not registering particulars of a security is that it will normally be ineffective, the adoption of a rule that registration is the act by which a right in security is constituted would not constitute a radical change in legal policy.

²⁹ 1985 Act, s 418 (2)(c).

³⁰ The sanctions are described in para 1.10.

³¹ G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 164.

Summary of our principal recommendations

1.19 In approaching reform of the law in this area we have borne in mind the guiding principles which we set out in the discussion paper.³² In particular, we have had regard to the fundamental principle in Scots law that the creation and transfer of a real right, including a right in security, should be attended with publicity and that, as respects creation, the publicity in question should be constitutive of the right. Where the right is constituted by registration, the register should be both sufficient in the information which it contains and be accurate and up-to-date. Since the rules governing transactions which may be entered into by both companies and other, non-corporate persons should in general be the same for both of those categories of person, in the case of securities which may also be granted by non-corporate debtors the application of any additional or different rule respecting the validity or effectiveness of a grant by a company would require clear and careful justification. Further, having regard to the need for efficiency, unnecessary registration should be avoided and where registration is required the process should be as simple and expeditious as is consistent with the accuracy and sufficiency of the register.

1.20 In broad outline, our principal suggestions for reform are as follows:

(a) Floating charges

- (i) Registration in a register of floating charges should be essential in order to constitute a floating charge. Thus, without registration no inchoate security capable of later crystallisation is created. Floating charges should, in principle, rank *inter se* and with other forms of security by date of registration or constitution of the real right as the case may be.
- (ii) Any variation, assignation or discharge of a floating charge requires to be registered before it may affect any third party.
- (iii) To facilitate the mechanics of a secured transaction it should be possible to register an advance notice, the floating charge, if registered within 21 days, being deemed to have been registered on the date of registration of the advance notice.

(b) Other rights in security

All forms of security other than floating charges may be granted by non-corporate debtors and in Scotland the constitution of an effective right in security is dependent on some form of publicity. We consider that there is no sufficient reason for submitting the validity of such security rights to any additional registration requirement because the grantor is a company. Accordingly we recommend that the present requirement to register particulars of certain of these security rights with the Registrar of Companies should cease.

³² Paras 1.18–1.24.

(c) The company's own register: annual returns

We recommend that the current statutory requirement to maintain, at the company's registered office, an internal register of all securities specifically affecting property of the company and all floating charges should be removed. Instead -

- (i) the annual return submitted by the company to the Registrar of Companies should include certain short details of all rights in security granted by the company but not discharged at the return date; and
- (ii) a company should be under a statutory duty to supply to anyone making the request, and paying such fee as may be charged within prescribed limits, the same details respecting any right in security granted after the last return date; and
- (iii) inspection of copies of the security documents at the company's registered office should be allowed, again on payment of such fee as may be charged within prescribed limits.

Legislative competence

1.21 It appears to us that our proposals encompass both reserved and devolved matters in an area in which there may be doubt or debate as to the precise location of the dividing line. We include in Part 6 of this report a fuller discussion of this topic.

Draft Legislative Provisions

1.22 Appendix A contains draft Legislative Provisions, giving our recommendations legislative form. The draft Legislative Provisions assume the repeal, with accompanying transitional arrangements, of Chapter II of Part XII of the Companies Act 1985 (the current provisions on registration of charges) and Part XVIII of the Act (the current provisions on floating charges) as part of a wider repeal embracing also other provisions of the 1985 Act with which we are not concerned. The draft Provisions are in two parts. Part I relates to floating charges and Part II relates to our proposals on annual returns, the supply of information on security rights and inspection of copy documents.

1.23 The provisions in Part I of the draft (on floating charges) are intended to substitute for the existing provisions contained in Part XVIII of the 1985 Act. They constitute a re-statement of the statutory provisions on floating charges in Scotland incorporating the structural and other changes which we recommend, but with the exception of the statutory provisions on the appointment of a receiver and the attachment of a floating charge on such an appointment, which are to be found in Chapter II of Part III of the Insolvency Act 1986. In providing – subject to that exception – a comprehensive draft legislative text on floating charges we have taken the opportunity, with the valuable assistance and guidance of Parliamentary Counsel, of making some textual changes to some existing provisions which are not directly affected by our proposals with the aim of improving the structure of the provisions and making their comprehension easier but without altering the substance. We believe that presenting one comprehensive draft legislative measure is the best way to assist assessment of our recommendation. However, we would emphasise strongly that presenting this "single package" has been done for the reader's convenience and should not be seen as prejudging any decision which may have to be taken respecting the appropriate

way of implementing such aspects of our proposals as are within the legislative competence of the Scottish Parliament.

1.24 We do not consider that any of our proposals raise a human rights issue and it is our opinion that our recommendations are compliant with the European Convention on Human Rights.

Acknowledgements

1.25 Mr David Guild,³³ our consultant for this project, contributed a research paper as well as a great deal of other help and assistance. We are indebted to him for placing his expertise at our disposal. We were also greatly assisted by an Advisory Group of practitioners and experts, who met with us on three occasions and reviewed a draft of this report. The group comprised Mr Robin Clarkson (Paull & Williamsons), Mr R E M Davidson (Dundas & Wilson CS), Professor George L Gretton (University of Edinburgh), Mr Bruce Patrick (consultant, Maclay Murray & Spens) and Mr Charles Smith (Brodies WS). We were assisted by the Keeper of the Registers of Scotland and his staff who advised us on various matters relating to the Land and Sasine Registers and the possible establishment of a register of floating charges. Finally, we record our gratitude to Mr Jim Henderson, the Registrar of Companies, who answered our queries patiently and provided us with statistical and other useful information.

Structure of the report

1.26 Part 2 contains our discussion of and recommendations regarding floating charges. In Part 3 we consider the reasons for abolishing the requirement to register with the Registrar of Companies all forms of security other than floating charges, notably securities already registered in a specialist register and assignments in security. Part 4 concerns financial transparency and contains our recommendation for replacement of an internal register of securities kept at the company's registered office with our proposals for the introduction of a requirement on the company to lodge with the Registrar of Companies an annual return of outstanding securities granted by the company and to supply updating information. Part 5 is devoted to certain international private law issues particularly those arising in relation to English and Welsh companies as well as oversea companies granting security over assets located in Scotland. Part 6 contains a discussion of the extent to which our proposals involve matters devolved to the Scottish Parliament. The Appendices contain: (A) draft Legislative Provisions, (B) the provisions of Chapter II of Part XII and of Chapter I of Part XVIII of the Companies Act 1985, (C) selected provisions from the Scotland Act 1998, including those contained in sections C1 and C2 of Schedule 5 to the Act and (D) a list of those who submitted written comments on Discussion Paper No 121.

³³ Mr Guild was formerly a partner in Brodies WS and thereafter a member of the Faculty of Advocates.

Part 2 Floating Charges

Introductory

2.1 On the basis of a survey carried out on our behalf by the Registrar of Companies¹ it appears that the floating charge follows after the standard security over land as the form of security most frequently granted by Scottish companies.² Floating charges and standard securities together comprised approximately 95% of applications for registration in the Register of Charges. Since it is not possible under Scots law to create a non-possessory fixed security over corporeal moveable property and the creation of an effective security over incorporeal property such as receivables requires intimation to the account debtor of the assignation to the security holder, the relative frequency with which floating charges are used is perhaps understandable, despite the fact that realisation of the security after its crystallisation on receivership or liquidation is subject to the claims of preferred creditors.³

Creation on registration

2.2 The current legislation on floating charges does not contain any general provision about the way in which a floating charge is "created"⁴ but it is clear from section 410(5) of the 1985 Act that, at least for the purposes of registration, a floating charge is treated as being created at the moment of execution of the deed. The provisions of Part XVIII of the 1985 Act are generally couched on the view that a floating charge is created on execution of the instrument. In this important respect floating charges differ from other rights in security which would be seen as being "created" on their constitution as a real right by registration in the land or other specialist register or by intimation in the case of assignations in security.

2.3 It is in our view essential that, in accordance with the publicity principle, a floating charge should not be a secret security but should be publicised. As we have already mentioned, registration of charges at Companies House was introduced to Scotland along with, and for the purpose of giving publicity to, the floating charge. However, the arrangements suffer from the structural deficiency that the giving of publicity to a floating charge is separated from its creation (as an inchoate security right, which becomes a real right attaching to the property subject to the charge on crystallisation). The fact that an interval of up to 21 days may elapse between the creation of a floating charge and publication of its existence by the registration of particulars at Companies House has been described as the most severely criticised aspect of the current system.⁵ A lender taking a floating charge must run the risk of the 21 day period and trust that no other earlier floating charge, with a negative pledge,⁶ has been granted. A purchaser from the company who has

¹ During the period 26 February to 26 March 2002.

² The survey disclosed the registration of 418 standard securities and 332 floating charges.

³ Including the "pool" for ordinary creditors in terms of the Enterprise Act 2002.

⁴ Subs (2) of s 462 of the 1985 Act, which dealt with the mode of execution of the instrument of floating charge by a Scottish company and which indicated that the charge was created on execution, was repealed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 74(1) and Sch 8, para 33(6).

⁵ Diamond Report, para 26.1.

⁶ Ie an undertaking by the grantor not to grant any security ranking equally with or prior to that earlier floating charge – cf para 2.16 *intra*.

searched the Register of Charges must yet take the risk that a floating charge may have been granted and crystallised in that period.

2.4 With a view both to solving these, and other, practical difficulties and to bringing the creation of floating charges more into line with the creation of other rights in security in Scotland, the discussion paper put forward, as a fundamental proposal, that registration should be constitutive of the floating charge. As is mentioned in the discussion paper, this approach, which had been canvassed by the DTI in 1994, has significant advantages and no real disadvantages. It overcomes the structural problems inherent in the current arrangements. It removes any need for time limits or sanctions for non-registration since, as with a standard security, the fact that no form of right of security is obtained without registration, and registration gives priority, is a sufficient compulsitor on the grantee to attend promptly to registration. As we have already observed,⁷ making registration constitutive of the floating charge does not involve a radical change of legal policy from the current situation where failure to register will result in invalidity in most situations.

2.5 Virtually all of the consultees who responded to the discussion paper agreed with our proposal that registration should effect the creation of a floating charge and the proposal was unanimously supported by the members of our Advisory Group. Implementation of this proposal requires some re-working of the existing legislation in Part XVIII of the 1985 Act in order to adapt its terminology and structure to the different conceptual basis and our suggested draft legislative text seeks to do this. The proposal does not require changes to be made to the provisions on appointment of a receiver which are contained in the Insolvency Act 1986. We would add that, while registration would be constitutive of the floating charge as a form of security, on constitution the security right would of course remain essentially inchoate in the sense that only on crystallisation, through liquidation or receivership, would the property within the scope of the floating charge become encumbered with a fixed security. We accordingly put forward as a leading recommendation that:

- 1. Constitution of a floating charge, as an inchoate security right, should take place on registration.**

(Draft Legislative Provisions, clause 1(2))

A register of floating charges

Overseas companies

2.6 In 1960 the Law Reform Committee for Scotland concluded for certain technical reasons that neither the Sasine Register nor the Register of Inhibitions and Adjudications was suitable for the registration of floating charges and that best procedure would be to apply to Scottish companies the provisions which applied in England. The Committee did so in the context of recommending that it should be competent for a company registered in Scotland to grant a floating charge. The registration requirement, under Chapter II of Part XII of the 1985 Act, applies of course to incorporated companies which are registered in Scotland⁸ and also to overseas companies with a place of business in Scotland.⁹ The latter

⁷ Para 1.18.

⁸ 1985 Act, s 410(5).

⁹ 1985 Act, s 424.

are obliged to register that place with the Registrar of Companies in Edinburgh.¹⁰ The arrangements for registration of securities by companies accordingly assume that the company granting the security is already registered with the Registrar of Companies. Thus in days before the electronic recording of company information the provisions assumed an existing physical company file to which particulars of securities might readily be added, although in *N V Slavenburg's Bank v Intercontinental Natural Resources*¹¹ it was held that the absence of a file, through the failure of the oversea company to obtemper the requirement to register its place of business, did not avoid the need to give particulars of the charge to the Registrar.

2.7 However, a floating charge may be granted by any incorporated company, whether a company within the meaning of the 1985 Act or not¹² and accordingly a Scottish floating charge may also be granted by an oversea company which has no branch or place of business in Scotland. Currently such a floating charge would not require to be registered. The creation of a right in security without any publicity is already unsatisfactory but under our leading proposal registration becomes essential. We understand, particularly from our discussions with the Keeper of the Registers that in creating and maintaining a register of floating charges – the "register" being in modern times effectively a database – there is no technical requirement that the grantor be previously registered at Companies House. The decision in *Slavenburg's Bank* means that currently the Registrar has a register – the "Slavenburg Register" – of securities granted by oversea companies which have not registered any place of business with him. We consider it therefore appropriate and necessary that the arrangements for the registration of floating charges should accommodate the registration of all floating charges which may competently be granted under Scots law and that the arrangements should therefore not proceed on the basis of the grantor necessarily being already registered in the Register of Companies. We would add that in the discussion paper we observed that if, as we then proposed and now recommend,¹³ there should no longer be a requirement to register at Companies House particulars of securities other than floating charges, the Register of Charges would contain only floating charges and could appropriately be re-named as a Register of Floating Charges. We would further add that setting up a register of floating charges not linked to a pre-existing company registration may make easier an extension of the power to grant a floating charge to non-corporate traders, should that be thought desirable at some time in the future. In these circumstances, as an essential corollary to our leading recommendation on floating charges we recommend that:

2. **There should be a register of floating charges in which all floating charges must be registered, irrespective whether the grantor is a company registered in Scotland or has registered a branch or place of business with the Registrar of Companies.**

(Draft Legislative Provisions, clauses 1(2) and 9)

¹⁰ 1985 Act, s 691, s 696.

¹¹ [1980] 1 WLR 1076.

¹² 1985 Act, s 462(1).

¹³ See Recommendation No 13.

A devolved register

2.8 In our discussion paper,¹⁴ having observed that the Register of Charges could possibly be re-named the "Register of Floating Charges", we indicated that we also envisaged that it was likely that despite the change in nomenclature the new register would continue to be administered by the Registrar of Companies.

2.9 However, since publication of the discussion paper we have given closer thought to the devolution of competences to the Scottish Parliament and the Scottish Executive. As is discussed more fully in Part 6, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts, floating charges are a devolved matter.¹⁵ It has been pointed out to us that the Registrar of Companies in Scotland is an officer within the Department of Trade and Industry. The view has been expressed to us that it would be inappropriate for a "reserved" official to maintain a register devoted to floating charges and that, as a devolved matter, a register of floating charges would more appropriately come within the responsibility of the Keeper of the Registers of Scotland and thus within the responsibility of the Scottish Executive. With that view we agree. The suggestion that a register of floating charges of the kind recommended in this report should be maintained by the Keeper of the Registers of Scotland has been discussed with him and his officials and is, we understand, viewed approvingly. The Registrar of Companies in Scotland has not expressed any objection or reservation to us. We thus recommend that:

3. The Register of Floating Charges should be maintained by the Keeper of the Registers of Scotland.

(Draft Legislative Provisions, clause 9(1))

Registration of the deed

2.10 In the discussion paper, we asked consultees whether particulars of a security (as at present) or the security deed itself should be registered.¹⁶ Fourteen consultees responded to this question. Of them, eight were in favour of registration of the deed itself; five expressed their preference for the registration of particulars while one of the fourteen advocated a combination of both. It must of course be borne in mind that this question was posed in the context of registering a variety of types of securities. In light of the recommendations which we make later in this report that securities over land, securities registered in a specialist register and assignments in security should cease also to be registrable with the Registrar of Companies, the question is now confined to whether the deed or only particulars of a *floating charge* should be registered.

2.11 Requiring registration of the deed itself would remove the risk of inaccuracies and would facilitate the task of the staff at Registers of Scotland. The presenter would no longer have to summarise the deed on a form equivalent to the current Form 410. The staff at Registers of Scotland would not have to check the particulars against the deed (as is currently required at Companies House). As for the format of the deed itself, we believe that if parties desired it could be reduced to a standard form equivalent to a "Form B security" in

¹⁴ Discussion paper, para 2.52.

¹⁵ Scotland Act 1998, Sch 5, head C2.

¹⁶ Discussion paper, Proposal 18.

the terminology of the standard security.¹⁷ Only the text of the floating charge proper, as opposed to details of the contract, would require to be registered. This would have the benefit of simplifying matters and would address the concerns about confidentiality expressed by some consultees. On balance, we believe that the advantages of requiring registration of the deed itself outweigh the disadvantages. We would add that although we speak here of registration of the deed, the Register will of course be maintained in electronic form and will be searchable on-line. It is perhaps more appropriate to think of the Register as a database. We believe that a database which can provide the searcher with the full text of the document in which he is interested is inherently more useful than one which simply provides selected particulars. Registers of Scotland are currently piloting a system of automated registration of title to land, including such registration of standard securities and we understand that in principle the registration of floating charges could be similarly automated. With that further explanation we therefore recommend that:

4. The text of the deed of floating charge itself should be registered in the Register of Floating Charges.

(Draft Legislative Provisions, clauses 1(2) and 9(4))

Advance notices

2.12 In the discussion paper,¹⁸ we asked whether a system of priority notices should be introduced for floating charges, what period should be allowed between registration of the notice and registration of the floating charge, and whether a notice should be renewable (and if so, whether there should be limitations on renewal). Of the consultees who responded to these questions the majority were opposed to the introduction of a system of priority notices for floating charges. However it should be mentioned that among the minority in favour of a system of priority notices were the Law Society of Scotland, the Committee of Scottish Clearing Bankers and most of the solicitors from firms specialising in commercial law who responded. The members of our Advisory Group unanimously supported the introduction of priority notices for floating charges. It was strongly represented to us that the ability to file an advance priority notice would be of assistance in the practical settlement of secured transactions, particularly in the case of re-financing transactions.

2.13 The arguments for and against the introduction of priority notices for floating charges are set out at paragraphs 2.33-2.41 of the discussion paper. Among the advantages to a prospective lender is that of securing priority while still negotiating with the prospective borrower company. In releasing funds to the borrower the lender may be sure of his ranking. However, a system of priority notices may also have drawbacks. There is a risk that the Register of Floating Charges may become cluttered with advance notices filed during negotiations which did not result in agreement. Furthermore, if priority notices were universally used, the possible benefit of obtaining earlier priority over other creditors would be diminished. Confidentiality might also be an issue in the case of a company involved in negotiations with two or more different banks or other prospective lenders.

2.14 We have ultimately been persuaded that a system can be devised which reduces the potential drawbacks and which will yet be of practical advantage to the practitioner in settling

¹⁷ Conveyancing and Feudal Reform (Scotland) Act 1970: Sch 2, Form B.

¹⁸ Discussion paper, Proposal 6.

secured transactions involving floating charges. We propose that it should be competent to register an "advance notice of floating charge". Provided that the floating charge which it contemplates is itself registered within 21 days of the date of registration of the advance notice, that date is then deemed to be the date of registration of the floating charge. The period of 21 days would not be subject to extension or renewal.¹⁹ The advance notice would require to be signed by or on behalf of both the prospective creditor and the prospective debtor. We believe that the bilateral nature of the advance notice is likely not only to assist in avoiding the unwished disclosure of confidential negotiations but also, when coupled with the 21 day period, to mean that advance notices will generally be used only when agreement has been or is about to be reached.

2.15 Having taken into account the views of consultees and of our Advisory Group, we recommend that:

5. (a) **A system of advance notices should be introduced for floating charges.**
- (b) **The registration of an advance notice should confer a priority period of up to 21 days in respect that, if presented within that period, the floating charge to which the notice relates is deemed to have been registered on the date of the advance notice.**
- (c) **An advance notice should be given jointly by or on behalf of both the granter and the grantee of the intended floating charge.**
- (d) **An advance notice should not be renewable.**

(Draft Legislative Provisions, clause 2)

Ranking

2.16 The current rules of ranking are set out in section 464(4) of the 1985 Act. They are however only default rules since the original deed of floating charge or a subsequent instrument of alteration may contain (a) provisions prohibiting or restricting the creation of any other security (fixed or floating) ranking over, or *pari passu* with the floating charge or (b) with the consent of the holder of any subsisting fixed or floating security adversely affected by it, provisions regulating the ranking of subsisting and future securities.²⁰ The latter is usually known as a ranking agreement; the former is usually known as a negative pledge clause. The default rules in section 464(4) provide to the effect that floating charges rank *inter se* according to the time of registration under section 410; but that in a competition with a fixed security, the right to which has been constituted as a real right prior to the crystallisation of the floating charge, the fixed security ranks first. This means that under the default rules the floating charge will always rank behind any fixed security, including of course any fixed security constituted as a real right after the grant of the floating charge. In order to avoid that situation arising, in practice, virtually all floating charges contain a

¹⁹ A subsequent fresh advance notice could of course be registered after the expiry of the 21 days but retroactive priority could not be obtained beyond the registration date of the subsequent advance notice.

²⁰ 1985 Act, s 464(1).

negative pledge clause whereby the grantor undertakes not to grant any future security capable of ranking with or in priority to the floating charge.

2.17 In the discussion paper,²¹ we expressed the view that a default rule which was invariably displaced in practice had outlived any usefulness it may initially have had and proposed that it be reversed. Consultees were therefore asked whether they agreed that, subject to any ranking agreement, floating charges should rank with other securities, whether fixed or floating, by date of "creation" (with "creation" being the date of registration for floating charges and the date on which the security was constituted as a real right for other forms of security). Most of the fourteen consultees who responded to this proposal agreed with it: but some expressed concern that the concept of a real right might present difficulty were a Scottish floating charge to be in competition with another form of security in a jurisdiction which did not have that concept. However the concept is currently used in the default rules and we do not consider that legislation applying to Scotland can provide for extra-territorial conflicts.

2.18 We propose therefore that floating charges should rank with other securities, whether fixed or floating, by date of creation, the date of creation being defined, in the case of a floating charge, as the date on which the instrument of floating charge was registered, or deemed to be registered, and in any other case, the date on which the security was constituted as a real right. This would bring the law into line with current practice where a negative pledge clause is almost invariably inserted in the floating charge document. The proposed rules could be varied by a ranking agreement in the floating charge or document of alteration which would have to be duly registered. A creditor taking both a floating charge and a standard security will probably wish to ensure that, whatever the order of registration, the standard security ranks first. This is because preferential debts have priority over floating charges but not over fixed securities.²² The position has been altered in some respects by the Enterprise Act 2002 which reduces the number of preferred creditors²³ but creates a "ring-fenced" fund for the benefit of unsecured creditors out of money that would have otherwise been available to the floating charge holder.²⁴

2.19 Accordingly, we recommend that:

6. (a) **Floating charges should rank with other securities, whether fixed or floating, by date of creation.**
- (b) **"Creation" for this purpose means –**
 - (i) **in the case of a floating charge the date on which the floating charge document was registered or deemed to be registered and**
 - (ii) **in any other case, the date on which the security was constituted as a real right.**

²¹ Discussion paper, para 2.29.

²² 1985 Act, s 464(6); Insolvency Act 1986 s 175. The categories of preferential debts are set out in Sch 6 to the Insolvency Act 1986.

²³ Enterprise Act 2002, s 251.

²⁴ Enterprise Act 2002, s 252.

(c) The rule at (a) should be capable of being altered by a ranking agreement contained in the registered floating charge or a registered document of alteration.

(Draft Legislative Provisions, clauses 3 and 6)

Assignment, variation and discharge of floating charge

Assignment

2.20 There is at present no specific provision in the legislation for assignment of a floating charge but it has been held competent to do so on general principles of law.²⁵ The lack of any provision for the registration of particulars of an assignment of a floating charge is one of the defects in the current legislation. For example, a purchaser from the company who is relying on a letter of non-crystallisation who is unaware of the assignment may be misled into accepting a letter from the cedent. In the discussion paper,²⁶ we asked consultees whether they agreed with our proposal that the transfer of a floating charge should take effect only on registration of the assignment. Twelve of the fifteen consultees who responded to this proposal supported it. Such a change in the law would not only be consistent with our recommendation to make registration constitutive of the floating charge but it would also bring the assignment régime for floating charges into line with that for standard securities.²⁷ We accordingly recommend that:

7. An assignment of a floating charge should vest the floating charge in the assignee only on registration of the assignment.

(Draft Legislative Provisions, clause 5)

Variation

2.21 Section 466 of the 1985 Act currently provides for the variation of a floating charge by means of an "instrument of alteration". Under subsections (4) and (5) of section 466 particulars of an instrument of alteration require to be registered only in so far as the instrument varies or affects ranking, provides for the inclusion of a negative pledge, releases property from the floating charge or increases the amount secured. While those particulars may cover the matters most likely to be altered it remains that not all variations of a floating charge are currently registrable. More importantly, there is no effective sanction for failure to register since section 415 is not applied by section 466. The civil sanction is arranged by an application of section 410 that is so convoluted as to be almost meaningless.²⁸ Since property may be effectually released from the scope of the floating charge without registration of the instrument of alteration or other deed allowing the release,²⁹ an acquirer from a receiver may have no means of verifying whether the property which he is intending to acquire has not been earlier released from the floating charge.

²⁵ *Libertas-Kommerz v Johnson* 1977 SC 191.

²⁶ Discussion paper, Proposal 2.

²⁷ Conveyancing and Feudal Reform (Scotland) Act 1970, s 14(1).

²⁸ For further analysis, see Professor D A Bennett in *Palmer's Company Law* paras 13.410.1-13.411.

²⁹ *Scottish & Newcastle plc v Ascot Inns Ltd* 1994 SLT 1140.

2.22 In the discussion paper,³⁰ we asked consultees whether they agreed with our proposal that a variation of a floating charge should take effect only on registration of the instrument of alteration. All but one of the consultees who responded supported it. Accordingly, and consistently with our main recommendation that registration should effect creation of the floating charge, we remain of the view that amendment of the terms of the registered instrument of floating charge should be subject to the requirement that the amendment be registered. While an unregistered agreement between the grantor and the grantee to alter the terms of the floating charge might be contractually binding as between them, third parties would not be affected. We therefore recommend that:

- 8. The terms of an instrument of floating charge should not be held amended by an instrument of alteration unless that instrument of alteration has itself been registered.**

(Draft Legislative Provisions, clauses 6(1) and (2))

2.23 As already touched upon, one of the matters which may currently be covered by an instrument of alteration is the release of property from the floating charge.³¹ However, in *Scottish & Newcastle plc v Ascot Inns Ltd*³² it was held that it was not necessary to use an instrument of alteration and that property might be released from the embrace of the floating charge by private agreement. This means that the public information may be unreliable and presents the difficulty that a person purchasing property from a receiver cannot be certain of the receiver's title to sell. In order to correct this problem and enable those dealing with a receiver to rely on the Register we recommend that:

- 9. Property may be released from a floating charge only on registration of an instrument of alteration to that effect.**

(Draft Legislative Provisions, clause 6(3))

2.24 Varying the terms of a floating charge, for example, by extending the scope of the property covered by the charge or increasing a stated maximum sum secured, may adversely affect another security holder whose security was acquired subsequently to the floating charge but prior to the variation. The consent of that security holder is accordingly required for such a variation to be effective as against him and the draft Legislative Provisions are framed on that basis.

Discharge

2.25 Section 419 of the 1985 Act currently allows the registration of a "memorandum of satisfaction" where either (a) the debt for which the charge was given has been paid or satisfied in whole or in part or (b) part of the property charged has been released from the charge or has ceased to form part of the company's property. It must be noted that registering a memorandum of satisfaction in terms of section 419 does not operate to discharge the security or release the property. Instead, it presupposes that these acts (or at least the release of the property) have already taken place. For the reasons given in the

³⁰ Discussion paper, Proposal 3.

³¹ 1985 Act, s 466(4)(c).

³² 1994 SLT 1140.

discussion paper the provisions contained in section 419 are open to criticism.³³ In particular, the fact that a debt has been paid need not necessarily discharge the security since the security may be worded so as to cover other, future sums to become due. Further, circumstances may arise in which it is desired to discharge a security (either absolutely, or in favour of a different form of security) without payment of the secured debt being made. We believe that providing for registration of a deed of discharge on the extinction of a floating charge would not only be useful but would also simplify matters and bring floating charges into line with standard securities in that respect. However, it is not intended that registration of a deed of discharge would be the sole means whereby a floating charge may be discharged. Making provision for registering a discharge would be without prejudice to any other rule whereby a security may be discharged or extinguished such as by repayment of the debt (where the security is for a fixed amount and not for "all sums due or to become due").

2.26 In the discussion paper,³⁴ we asked consultees whether they agreed with our proposal that the extinction of a floating charge should take effect on the registration of a deed of discharge. A great majority of consultees who responded supported it. Accordingly, we see no reason to depart from our previously expressed view and therefore recommend that:

10. A floating charge may be discharged by registration of a deed of discharge.

(Draft Legislative Provisions, clause 7)

Limited liability partnerships; European economic interest groupings; and industrial and provident societies

2.27 A floating charge may be granted by a limited liability partnership (LLP), a European economic interest grouping (EEIG) and also by an industrial and provident society (IPS). In the case of an LLP or an EEIG the relevant regulations³⁵ apply the provisions of Part II of Chapter XII of the 1985 Act respecting registration of charges to these bodies. In the case of an IPS registered in Scotland, section 3 of the Industrial and Provident Societies Act 1967, (as substituted by the Companies Consolidation (Consequential Provisions) Act 1985) applies the provisions of Part XVIII of the 1985 Act to such societies and section 4 of the 1967 Act as amended, requires delivery to the Financial Services Authority of *inter alia* a copy of the instrument granting the floating charge within 21 days of its execution, under pain of nullity against any person other than the society. Although our terms of reference mention only rights of security granted by companies, we have thought it sensible to consider also floating charges by these three forms of entity. In our view it would not be expedient to maintain in existence the current registration arrangements for these three types of grantor of floating charges. Rather, the same arrangements as we propose for floating charges by companies should also apply to floating charges granted by an LLP, an EEIG or an IPS registered in Great Britain. Since the relevant provisions regarding floating charges by an LLP or an EEIG are contained in statutory instrument, the adaptations to give

³³ Discussion paper, paras 2.20-2.24.

³⁴ Discussion paper, Proposal 4.

³⁵ Limited Liability Partnership Regulations 2001 [SI 2001/1090] Reg 4 and Sch 2; The European Economic Interest Grouping Regulations 1989 [SI 1989/638] Reg 18 and Sch 4).

effect to our proposals for these entities would be effected by subordinate legislation. We therefore recommend:

11. **The provisions which we propose regarding floating charges granted by companies should also apply to floating charges granted by limited liability partnerships; European economic interest groupings; and by industrial and provident societies.**

(Draft Legislative Provisions, clause 12 [IPS only])

Existing floating charges: transitional arrangements

2.28 Since our proposals are, of course, not intended to have retrospective effect our recommendations on floating charges would apply only to floating charges created after the entry into force of the implementing legislative measures. Although we recommend an alteration to the existing default rules on ranking, we do not see that new rule as liable to disturb existing arrangements. Since the new rule is one of priority by date, post-commencement securities will always rank after pre-commencement securities. However, for the ranking of pre-commencement securities *inter se* it is necessary to apply the pre-commencement rules and clause 4 of the draft Legislative Provisions contains provisions making clear that as respects existing securities those existing ranking rules apply.

2.29 Plainly other transitional provisions will be necessary but we have not included such transitional arrangements in the draft Legislative Provisions partly for the reason that we envisage that the repeal of both chapters of Part XII of the 1985 Act would be part of a wider repeal with concomitant transitional provisions and the technical exercise of drafting a detailed text in isolation may not be particularly useful. However, in order to avoid our proposals having unintended retrospective effect we consider that the transitional provisions should make continuing provision for, among other things, the partial invalidity ("void against the liquidator" etc) of pre-commencement securities, both fixed and floating, of which particulars fell to be registered with the Registrar of Companies but were not duly registered; the recording of memoranda of satisfaction in respect of pre-existing securities; and the alteration of existing floating charges in terms of section 466 of the 1985 Act.

Miscellaneous

Floating charges granted over property held in trust by the company

2.30 In the discussion paper,³⁶ we proposed that the power of a company to grant a floating charge should extend to property which the company holds in trust. A majority of consultees who responded to this proposal supported it but a number of consultees also expressed reservations. One consultee in particular asked whether the intention behind the proposal was to reverse *Sharp v Thomson*³⁷ in respect of trusts.

2.31 On further reflection we have become more conscious of the difficulties inherent in this proposal and we shall briefly describe some of these. First, however, we would observe that the use by a trustee of trust assets as security for the trustee's personal obligations will

³⁶ Discussion paper, Proposal 7.

³⁷ 1997 SC (HL) 66.

normally constitute a breach of trust. Accordingly, although not expressly stated in the discussion paper, the proposal was essentially concerned with the granting of a floating charge over trust assets in security of a contractual liability of the trust. So conceived however, the proposal presents the difficulty of determining the event which results in the attachment of the floating charge to the trust assets. The personal insolvency of the trustee would not affect the trust property since that property would be excluded from the liquidation on the principle laid down by the House of Lords in *Heritable Reversionary Co Ltd v Miller*.³⁸ Conversely, insolvency of the trust estate need not be accompanied by insolvency of the trustee, since a trustee need not be personally liable in respect of a contractual obligation incurred as a trustee if he excludes such liability by making plain that he contracts only as trustee. Since under the current law the trust, even if insolvent, would not be subject to liquidation proceedings or receivership it is difficult to see how attachment could occur under the rules applying to companies in the ordinary way. Special provision would require to be made for the winding up of a trust where the assets were subject to a floating charge.

2.32 Moreover, while the proposal had in mind a single, corporate trustee, there is also the question whether a floating charge might be granted by a plurality of trustees, including perhaps a non-corporate trustee. It would also be necessary to address a change in the identity of the single corporate trustee and, in particular, whether a floating charge granted by that trustee could survive that trustee's replacement by a non-corporate trustee. These issues are in large measure a reflection of the concept of trust property as a separate patrimony and involve important issues of trust law. We have come to the view that it would not be appropriate to embark on an examination of such substantive questions of the law of trusts when our remit is limited to the registration of rights in security granted by companies. We therefore conclude that the issue of the creation of a floating charge over trust property is a matter which should not be pursued in the context of this project but is a matter to be examined in our ongoing review of trust law. That review will include publication of a discussion paper on separate legal personality.

Amendment of Patents Act etc

2.33 To the extent that it covers patents, trade marks or registered designs a floating charge ought at present to be registered in the appropriate intellectual property register kept at the Patent Office.³⁹ This additional registration requirement seems unnecessary and it may be noted that floating charges do not require to appear in any other specialist register. There was almost unanimous support for our proposal that floating charges should cease to be registrable at the Patent Office.⁴⁰ The Patent Office indicated that it did not foresee any practical difficulties were floating charges no longer to be registered with it and, indeed, that it was asked to register very few at present. We therefore recommend that:

³⁸ (1892) 19R (HL) 43.

³⁹ Patents Act 1977, s 33; Trade Marks Act 1994, s 25; and Registered Designs Act 1949, s 19.

⁴⁰ Discussion paper, Proposal 12.

- 12. Floating charges should cease to be registrable in the registers of patents, trademarks and registered designs respectively.**

(Draft Legislative Provisions, clause 11)

Part 3 Securities other than Floating Charges

Introduction

3.1 Floating charges can, of course, only be granted by companies [and by European economic interest groupings, limited liability partnerships and industrial and provident societies.]¹ The preceding part of this report was concerned with registration as the mode of publicity necessary for the proper constitution of that particular form of security. All other forms of right in security in Scotland may also be created by individuals or partnerships and, with limited exception,² are attended with their own, varying forms of publicity required to establish an effective security right. The question which now falls to be considered is whether in the case of those other forms of right in security the validity of the security should be subject to the additional requirement of registration by reason solely of the fact that it is granted by a company.

3.2 We sought to discover whether there was any justification for the current divergence from the uniformity principle, the essence of which was set out in the discussion paper³ to the effect that the rules for rights in security granted by companies should usually be the same as the rules for rights in security granted by non-corporate debtors. Divergence, when it occurs, should require careful justification. As we have already mentioned, the requirement for registration of particulars of these other forms of security was introduced in 1961 as a concomitant of the introduction of the floating charge but the report of the Law Reform Committee for Scotland which preceded the legislation, while conscious of the clear need to give publicity to the new floating charge, does not attempt any explanation of why additional registration requirements should be introduced as a condition of the validity of the existing forms of fixed security under Scots law (and, in the case of land, foreign law) in so far as they embraced certain types of asset.

3.3 All of the Advisory Group and many consultees favoured removal of the requirement of registration as a condition for the validity or effectiveness of those other forms of security. Among those who, to varying degrees, favoured retention of some registration requirement there were, broadly speaking, two inter-related strands of thinking. They are inter-related in the sense that both see a central, comprehensive register of securities as useful, but differ as respects the purpose for which the register may be used. It is, we think, evident that a register of securities may serve different purposes for different users and that those users may be grouped under two broad heads.

3.4 There are, firstly, those contemplating a transaction involving their acquisition of an asset or taking security over it, who will wish to be sure that the asset in question is not encumbered by an earlier security. No-one suggested however that anyone in this category

¹ See respectively European Economic Interest Grouping Regulations 1989 (SI 1989/638) Reg 18 and Sch 4 paras 4 and 13; Limited Liability Partnerships (Scotland) Regulations 2001 (SSI 2001/128) Reg 3 and Sch 1; Industrial and Provident Societies Act 1967 s 3.

² Assignment in security of copyright or moveable goodwill, there being no register of copyright or goodwill and no obligant to whom intimation may be made.

³ Discussion paper, para 1.24.

would actually rely on the Register of Charges at Companies House, in preference to searching other registers, or making other inquiry. The Register of Charges might simply assist in pin-pointing entries in the other registers or indicating particular areas of search, but the Register of Charges does not make a search of other registers superfluous. Against such convenience as may be afforded by the Register of Charges as a starting point must be set the inconvenience, and risks, involved for those upon whom the task of registration is placed. Whichever way one weighs those conveniences, the question remains whether the fact that the grantor of the security is a company should be material to the conditions of validity of the security.

3.5 Secondly, there are those who simply wish to form a broad overview of the company's financial health, perhaps for credit rating purposes, and for whom there is convenience in having a single register of securities granted by the company. However, it was impressed on us that on its own the Register of Charges makes only a small contribution to that overview, the aims of which will normally seek to establish the extent and nature of the unencumbered assets. Without other financial information the Register of Charges may say little about the creditworthiness of a company. Put in other words, for this category of inquiry, information about the general financial state of the company and its solvency will be the normal starting point. That information will usually be found in the annual reports and accounts.

3.6 The existence of limited liability for the shareholders in an incorporated company has its counterpart in the need for what is now sometimes termed "financial transparency". That need is partly met in the requirement to produce annual returns and reports and accounts. We consider that there are other ways in the form of annual reporting requirements by which potential lenders, customers or investors may be provided with information on the extent to which a company's assets are encumbered and to this we return in Part 4 of this report.

3.7 We consider that there is no reason in principle why the validity of a security should be subject to an additional requirement of registration simply because the grantor is a company and that there is no general justification for such a requirement. While we thus consider that there is no general reason for departing from the uniformity principle in respect of rights in security granted by companies, it is nonetheless also appropriate to examine whether as regards any of the categories of security there might yet be a particular ground for requiring registration as an additional element in the grant by a company and to that examination we now turn.

Securities over land

3.8 Among those who responded to the discussion paper there was substantial support for our proposal that securities over land should not be subject to any additional requirement of registration in the Register of Charges. The present requirement presents a particular difficulty for standard securities registered in the Land Register in that registration of particulars with the Registrar of Companies cannot anticipate registration in the Land Register and unless the Keeper of the Land Register is satisfied that timeous registration of those particulars has been effected after presentation to the Land Register, he requires to exclude indemnity. Although a procedure – which we describe in paragraph 3.6 ff of the discussion paper – has been devised to deal with this problem, it is somewhat clumsy, with

obvious scope for mishap.⁴ Since it is evident that nobody contemplating a transaction involving a company's heritable property would rely on the particulars in the Register of Charges in preference to the Land Register, the need to register particulars of a standard security at Companies House is widely viewed as an unnecessary and inconvenient complication which has potential hazards for the conveyancer.

3.9 The point was made by some of the minority of consultees in favour of registration of company securities that the Register of Charges may sometimes facilitate a search in the Land or Sasine Registers (which are arranged by county) by giving details of the location of the company's heritable property, and hence the property or properties to be searched. However, the Register of Charges indicates the location only of the company's encumbered heritable property and not property which is free of any security. Those contemplating a transaction involving the company's land or other heritable property will usually be aware of its location or locations. Moreover, we are told by the Keeper of the Registers of Scotland that multi-county electronic searches against the name of the proprietor company will shortly be available. We believe that any convenience afforded to searchers by the Register of Charges is greatly outweighed by the inconvenience to those engaged in the security transaction of the current requirement of presenting particulars of the standard security to the Registrar of Companies.

3.10 Section 410(4)(a) of the 1985 Act stipulates for the registration of particulars of any charge over land "wherever situated" and thus extends to securities over immoveable property furth of Scotland. None of those who responded to our discussion paper suggested that there was any need for, or utility in, this requirement. Rights in security over land outwith Scotland are governed by the *lex situs*. Most legal systems provide for a form of registration of ownership of, and security over, land and anyone concerned to transact with the company in respect of immoveable property abroad will naturally proceed in accordance with the law of the country in which the immoveable property is situate. Further, it is evident that there are difficulties in one legal system attempting effectively to render a security over land abroad, duly constituted *lege situs*, subject to some additional requirement of validity.

3.11 In these circumstances we do not consider that there is any particular feature or aspect of securities granted by companies over immoveable property which calls for any departure from the principle that transactions with companies be governed by the ordinary rules for the transaction in issue.

Securities registered in another specialist register

3.12 The discussion paper⁵ further proposed that particulars of securities registrable in any other specialist register (namely securities registrable in the Shipping Register,⁶ the Register of Aircraft Mortgages,⁷ or securities over patents, applications for patents, trademarks and registered designs, which are registered at the Patent Office⁸) should cease to be registrable with the Registrar of Companies. Although these registers do not involve issues of indemnity by the keeper of the relevant register, they share with the Land or Sasine

⁴ We understand from the Keeper that the number of standard securities from which indemnity is excluded by reason of a failure to submit the certificate by the Registrar of Companies in time is not insubstantial.

⁵ Discussion paper, Proposal 11.

⁶ Merchant Shipping Act 1995, Sch 1 para 7.

⁷ Mortgaging of Aircraft Order 1972 (SI 1972/1268) art 4.

⁸ Registered Designs Act 1949, s 19; Patents Act 1977, ss 32 and 33; Trade Marks Act 1994 s 25.

Registers the consideration that publicity of, and priority for, the security right is sufficiently catered for by the specialist registers themselves. Scots law does not contemplate any form of security (other than the floating charge) over the assets of the descriptions in question which would be effective without registration in the specialist register.

3.13 Leaving aside the viewpoint of the minority of respondents who saw value in having information on securities as part of a general picture of the financial health of a company, to which we have referred earlier, the only particular point made by some among that minority is that individual searches of all the specialist registers – some of which were not searchable on-line – often with a "nil" return would be more costly. Underlying this standpoint is of course the assumption that the central register is accurate and reliable, - which, for the reasons indicated in the discussion paper, the current Register of Charges is not. More importantly, however, it appears to us that an intending creditor or security holder assessing the risk involved in the transaction with the intended debtor company will consider the nature of that company's business and its likely assets. If patents, ships or aircraft are likely to be included in the assets of the company a search in the specialist register would normally be carried out in any event and reliance would not be placed on the Register of Charges. Conversely, if the intended debtor is a small family company carrying on business as, say, painters and decorators, the transaction is not contemplated on the basis that the company owns assets of that type and there is no practical reason for searching the specialist registers. Few companies own ships or aircraft and while ownership of registered intellectual property rights is more prevalent the number of companies for whom intellectual property constitutes an important asset is relatively small. Again, any additional cost or inconvenience to the searcher or inquirer caused by abolition of a double registration requirement has to be balanced against the costs and inconvenience and hazards of that requirement.

3.14 In these circumstances we are not persuaded that there is any good reason for altering the view taken in the discussion paper that no particular ground exists for subjecting these categories of security to any additional registration requirement.

3.15 We would add that, as we understand matters, the proposals of the Law Commission for "notice-filing" in England and Wales would not, of course, embrace security over immoveable property and may also not encompass securities over ships, aircraft or intellectual property which is the subject of a specialist register, if the security is registered in the specialist register and thus subject to that register's priority rules. This would represent a change from the existing arrangement under which such securities are registrable also in the Register of Charges.

Assignations in security

3.16 The current system of registration provides for registration of securities created by assignation of incorporeal moveable property rights only in the case of certain categories of asset.⁹ The provisional proposal advanced in the discussion paper¹⁰ was that there should be no requirement to register any assignation in security of incorporeals.

⁹ 1985 Act s 410(4); discussion paper, para 4.1.

¹⁰ Discussion paper, Proposal 13.

3.17 Of the thirteen consultees who responded to this proposal, six (including the Law Society of Scotland) agreed with it. Seven (including the Committee of Scottish Clearing Bankers) disagreed. In large measure the ground of opposition was based on the view – also expressed elsewhere in the responses – that it was useful to have a central register of all security interests granted by a company. If the policy of not requiring registration at Companies House of securities registered in other registers, including the Land and Sasine Registers is adopted, the argument in favour of a comprehensive central register falls, by reason of the lack of a full listing of all securities. It is accordingly necessary to consider whether there are particular grounds for maintaining, or instituting, a system of registration as part of the constitution of securities over incorporeal property which is not the subject of any specialist register.

3.18 In the discussion paper it was recorded that in practice very few of the securities registered in the Register of Charges are assignments of incorporeals and the view was expressed that the infrequency of such securities was thus a factor to be borne in mind. Some of those consulted pointed out that when the Enterprise Act 2002 was brought into force¹¹ the floating charge would be made less attractive in respect that (a) the Act would restrict the holder's ability to appoint a receiver and (b) a fund for ordinary creditors would be "ring-fenced". Hence, it is said, assignments of incorporeals, particularly receivables, may become more common. Given the current state of Scots law respecting the creation of an effective security over book debts, particularly future book debts, the extent to which such predictions may prove sound may be open to debate. However, it is a matter to be borne in mind when viewing the historical infrequency of registration of assignments in security as a purely practical consideration which supports abolition of any need to register such assignments.

3.19 Some of those who responded to this proposal observed that the requirement to intimate to the debtor the assignment of the debt, if the assignment were to be effective, resulted in the transaction creating the security receiving only limited publicity. Those transacting, or proposing to transact, with the creator of the security had no means of knowing whether debts due to that creator had been assigned other than by making individual inquiry of the debtors. Accordingly, additional publicity in the shape of registration in the Register of Charges was desirable.

3.20 That argument has plainly some, at least initial, attraction. However registration of securities over such incorporeal assets presents, of course, the issue of the sanction for, or consequences of, a failure to register.

3.21 Were the validity or effectiveness of an assignment in security of such an asset to be tied to an additional requirement of registration we believe the results would be anomalous and unsatisfactory. In the first place, the outright transfer, by assignment, of incorporeals of the kind presently under consideration is not subject to any registration requirement. It is anomalous to subject an assignment in security to a requirement of registration while an assignment simpliciter is not so subject. Moreover, irrespective whether the security is created by *ex facie* absolute assignment plus back letter, or by assignment in a deed also containing the undertaking by the assignee (the security holder) to retrocess, the assignment divests the assignor. Thus, on intimation to the account debtor an assignment in security

¹¹ The relevant provisions came into force on 15 September 2003: SI 2003/2093, The Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003.

divests the cedent company and vests the account debt in the assignee. A rule that, in the case of a corporate cedent, vesting in the assignee occurred only on registration notwithstanding its earlier intimation would effectively introduce a special rule for the transmission of such incorporeal property owned by companies. We do not regard as acceptable requiring an account debtor to search a register in order to know whether the intimated assignation constitutes a valid transmission.

3.22 Ultimately, the limited nature of the publicity involved in assignations in security of the incorporeal rights in question is a reflection of the nature of that form of property which, unlike land or corporeal objects, is both intangible and not the subject of any public register. The creation of such a form of property is a matter of private transaction between the company and its debtor with the result that a third party requires to know of that transaction and to eliminate the possibility of its having been assigned outright before he can rely on its existence as part of the assets of the company.¹² In so far as it might be thought that transactions in such incorporeal property lack publicity, that lack flows not from the corporate nature of the party to the transaction but from the nature of the property in question.

3.23 We have therefore come to the conclusion that making the validity of an assignation in security subject to an additional registration requirement merely because the assignor is a company is not justifiable. To the extent that there is a wider interest in the financial standing of a limited liability company being known in general terms – the "financial health check" – which is reflected in the requirement to lodge annual accounts and returns, we consider in Part 4 an alternative means of satisfying the need for general information as to the financial health of the company. We therefore adhere to the view that the validity or effectiveness of assignations in security by companies should cease to be dependent on registration in the Register of Charges.

3.24 In reaching that view we are alert to the point that in the case of certain forms of incorporeal property, namely moveable goodwill, copyright and unregistered design right, there is no requirement for publicity, even by way of intimation, since there is no particular correlative obligant to whom intimation may be made. Whether goodwill, in isolation, may be assigned is a matter of debate, into which it is not necessary to enter. Assuming that goodwill may be equiparated with those other rights, the fact remains that those particular forms of incorporeal property may also be assigned absolutely without any publication requirement. Anyone intending to rely on the existence of copyright, design right, or goodwill, as a basis for transacting with the company is unlikely to proceed without conducting some "due diligence" exercise and without assurance that those intellectual property rights remain in the ownership of the company. Accordingly, we take the view that, on balance, there is no principled reason for making the validity of an assignation in security subject to an additional requirement when the assignor is a company.

3.25 Overall therefore the result of our consideration of securities other than floating charges is that the validity or effectiveness of a grant by a company of these other forms of security should not be subject to any additional requirement of registration at Companies House. In light of our recommendations for the establishment of a register of floating charges under the responsibility of the Keeper of the Registers of Scotland we now recommend:

¹² Discussion paper, para, 4.6.

- 13. There should no longer be any requirement to register particulars of a security granted by a company with the Registrar of Companies.**

Limited liability partnerships: EEIGs

3.26 As we recorded in paragraph 2.27 of this report the relevant regulations governing limited liability partnerships and European economic interest groupings apply the provisions of the 1985 Act relating to the registration of charges with the Registrar of Companies to these entities, as if they were companies.¹³ While appreciating that the terms of our remit make reference only to companies, we do not think that it would be sensible to retain the Register of Charges at Companies House for these two forms of trading entity while abolishing it as respects companies. We therefore recommend:

- 14. There should no longer be any requirement to register with the Registrar of Companies particulars of a security granted by a limited liability partnership or a European economic interest grouping.**

(This repeal would be effected by subordinate legislation.)

Transitional arrangements

3.27 Since it is conceivable that, notwithstanding the publicity otherwise given to fixed securities by companies, reliance may have been placed on the absence of any entry of particulars in the Register of Charges as invalidating the security, it is necessary, in order to avoid retrospective change, that the sanction of partial invalidity ("void against the liquidator" etc) be continued as respects pre-commencement securities. As earlier explained,¹⁴ our draft Legislative Provisions do not contain the technical legislative provisions necessary to ensure, by way of transitional provisions, the continuity of the existing regime as respects pre-commencement securities.

¹³ Securities (other than floating charges) by Scottish Industrial and Provident Societies are not subject to any registration requirement.

¹⁴ Para 2.29.

Part 4 Company's own Register: Accounts and Annual Returns

Introductory

4.1 A company is required by virtue of section 422 of the 1985 Act to maintain at its registered office an internal register of charges. The scope of the information contained in the internal register is potentially wider than that found currently in the Register of Charges held at Companies House since the legislation requires entry in the internal register of certain details of all charges specifically affecting the property of the company and all floating charges. It is open to inspection by the public. In the discussion paper,¹ consultees were asked for their views whether this duty should be abolished. The arguments for and against retention of the internal register of charges are set out in the discussion paper.² The main argument in favour of abolition of the internal register is that it is rarely consulted. There are no doubt various reasons for this. One of the reasons is that it duplicates, in large measure, the register at Companies House. Another is that the internal register is often not well maintained, albeit that the cost of compliance is minimal. Further, inspection requires actual attendance at the registered office. Apart from that inconvenience, it may be difficult to conduct an inspection anonymously. On the other hand, a properly maintained internal register provides more information in that it contains at least brief details of all securities granted by a company (rather than just the securities listed in section 410 of the 1985 Act).

4.2 Of the consultees who responded on this matter, three did not express a concluded view while opinion among the remainder was divided equally. A number of those who favoured abolition of the internal register of charges did so on the basis that the internal register largely duplicated what might be found in the Register of Charges kept at Companies House and their responses thus assumed the continuance of that register. It was not suggested however that there was any reason in principle why a company should not be required to make available to the public information about securities granted by it over its assets. Indeed, those grants will almost always have received some form of publicity. As we have already recorded in the preceding part of this report,³ a number of those responding on the question whether particulars of securities (other than floating charges) should continue to be registered with the Registrar of Companies saw utility in having a single list of securities available as part of the material with which to carry out a "financial health check". As a counterpart to securing limited liability for their members, companies are of course required to make annual returns and to publish annual accounts and other information and insofar as a single list of securities may be useful in fostering financial transparency we think it should be provided. If it is accepted as desirable in principle that a company provide information, accessible by the public, on securities granted by it, the question then becomes one of the appropriate means of providing that information.

¹ Discussion paper, Proposal 25.

² Discussion paper, paras 6.9-6.14.

³ Para 3.5.

4.3 In relation to the question, asked in the discussion paper, as to how performance of a duty to maintain an internal register might be ensured it was suggested to us, particularly by the Law Society of Scotland, that the company's auditors might be required to include in the auditors' report on the accounts a certificate that the register of charges had been properly maintained and we sought the views of the Institute of Chartered Accountants of Scotland on this suggestion.

4.4 Through the secretary to the Business Law Committee of the Institute we understand that from an auditor's standpoint the suggestion presents certain difficulties. In summary, although there are currently statutory requirements⁴ on those preparing the annual accounts of a company to supplement the balance sheet by stating the aggregate amount of the company's indebtedness for which security has been given, details of the particular securities are seen as only marginally relevant to the question whether the financial statements give a true and fair view of the company's affairs and it is thought questionable whether such a certificate is appropriate in an audit report on financial statements. There is, we are told, an intention that UK auditing standards be replaced by or harmonised with international ones, which would include movement towards a common audit report format and wording. While some national derogations will be permitted and necessary, these should ideally be avoided. There would on any view require to be some definition of "properly maintained". It was not clear how an auditor could ensure that the register was complete and accurate to a sufficient degree to issue a public report, since whether security for a debt exists is not necessarily evident from the ordinary accounting records; any certificate would require some inherent qualification as being one of opinion and dependent on the information supplied by the company's officers. In the case of large and complex groups of companies, which may have granted a large number of securities, some complicated by matters such as cross guarantees, checking the details might involve significant extra work for the auditor with a consequent increase in the audit fee.

4.5 Given these difficulties, the corresponding additional cost to the company of an increase in the auditors' fee and the view that an auditor would not be readily willing to take on such an additional responsibility under the present professional liability régime⁵ we consider that the proposal to link an internal register of securities to annual reporting requirements by means of an auditor's certificate that the internal register has been properly maintained is not one which we can commend.

4.6 Additionally, we have to say that the proposal for an auditor's certificate does not provide a complete solution. First, small companies may be exempt from audit⁶ and the proposed requirement for an auditor's certificate naturally would not apply to them. Secondly, having information available at a company's registered office involves the enquirer's having to go to that office and inhibits anonymous enquiry.

An annual reporting requirement

4.7 Nevertheless, the general notion of linking the maintenance of the internal register of securities to an annual reporting requirement is one which we believe can be further pursued

⁴ 1985 Act, Sch 4, para 48(4); Sch 8, para 44(2) (small companies); Sch 8A, para 8(2) (small companies: abbreviate accounts).

⁵ There would probably be consequences for professional liability insurance, to be reflected in increased audit fees, which we have not sought to quantify by seeking views from, among others, insurers.

⁶ 1985 Act, s 249A.

and utilised. Currently a company is not only under an obligation pursuant to section 242 of the 1985 Act to deliver to the Registrar annual accounts, a directors' report, and certain other reports dependent on the company's status but is also under a requirement to make annual returns to the Registrar under section 363 of the 1985 Act. We think that the desire for a central source of information on a company's grants of security may be, at least in part, addressed by requiring the company to supply annually a list of the securities which it has granted and which have not been discharged.

4.8 Such a list could take the form of an additional "report on securities" accompanying the annual accounts delivered under section 242 or, alternatively, a "securities return" forming part of the annual return made pursuant to section 363. In either case the penalty for non-compliance with the requirement to supply the information on securities would be the same as in the case of non-compliance respecting the other documentation or information. The business law committee of the Institute favours the latter alternative, namely the annual return. In practice the Registrar of Companies operates a "shuttle return". In the case of a company whose secured financing arrangements have not altered during the year, the administrative time involved would be minimal. Although submission of a report with the annual accounts would link the date of the security information to the balance sheet date, the additional time allowed for submitting annual accounts would mean the security information being less up-to-date than if submitted with the annual return. Further, the annual accounts and reports delivered under section 242 have the common feature that they require to be laid before and approved by the company in general meeting.⁷ But it is difficult to see any good reason for which a list of particulars of securities calls for approval at an annual general meeting and circulating copies of it to shareholders would involve additional printing costs. On balance therefore we also favour the inclusion of information on extant securities in the annual return.

4.9 We appreciate that, since it merely reflects the position at the return date, the information thus given in the securities return supplied to the Registrar of Companies would not be up-to-date but broadly the same is true of the annual accounts. As was observed during the course of our consultation, a list of securities is, of itself, of limited value in assessing the financial soundness of a company and will normally be one item to be considered along with the other financial information publicly available to those carrying out that assessment. On the other hand, the lodging of the annual return can be – and is – monitored by the Registrar and the obligation to deliver such documents to the Registrar is thus more readily policed than the obligation to maintain a register at the registered office. From informal discussion with the Registrar we understand that in practice the great majority of companies comply timeously with the requirement to deliver annual returns to Companies House. Delivery of an annual return on securities to Companies House would result in information on securities granted by companies at the return date being available at a central location and avoid some of the drawbacks involved in inspection at the registered office. The securities to be listed would be floating charges and fixed securities, but excluding any security arising by operation of law, such as lien. We therefore recommend:

⁷ 1985 Act, s 241; 241A.

- 15. The existing duty of directors to deliver to the Registrar an annual return should be supplemented by a requirement to include in the annual return details of securities granted by the company, and not discharged, as at the return date.**

(Draft Legislative Provisions, clause 14)

4.10 So far as the content of the return on securities is concerned, we consider that it should provide at least the same information as would be found in the existing internal register. The current provision on the internal register, namely section 422(2) of the 1985 Act stipulates that the internal register contain "a short description of the property charged, the amount of the charge and, except in the case of securities to bearer, the names of the persons entitled to it". We consider that in addition to those details it would be useful to record the form of the security and the date upon which the security deed was granted. We therefore recommend:

- 16. The particulars to be contained in the company's securities return should be –**

- (a) a short description of the property over which the security is granted;**
- (b) the form of the security;**
- (c) the name of the grantee;**
- (d) the date upon which the security was granted; and**
- (e) the obligation for which security is given.**

(Draft Legislative Provisions, clause 14(3))

Internal register or duty to supply details

4.11 We turn now to consider whether, assuming our recommendations for an annual securities return are accepted, a company should continue to be under a statutory duty to maintain an internal register of securities. Since details of securities extant at the last return date will be available at Companies House, the only practical purpose which might be served by such a register would be the provision of information on securities granted subsequently to that date. Although a "register" need not now take the form of a bound volume but may be a record kept in any other manner, including electronic records⁸ it appears to us to be unnecessary to place on the company a duty to maintain a register of securities, which may be uninspected from one return date to another, when the actual purpose of the register may be met simply by placing the company under a duty to supply details of any security granted since the last return date if requested to do so. A reasonable period – we suggest 10 days – would require to be allowed for meeting the request and the entitlement to receive details of securities granted since the last return may be made subject to payment of a prescribed fee. As regards the means of compelling performance of this duty, while failure could no doubt be

⁸ 1985 Act, ss 722, 723.

made a criminal offence, we are not attracted to that solution. Since the inquirer, if genuine, is seeking information we favour his being able to apply to the civil courts for an order compelling performance. We therefore recommend:

17. (a) A company should no longer be under any statutory duty to maintain an internal register of charges; but

(b) On being requested to do so, and on payment of such fee as may be prescribed, a company should be under a statutory duty to supply to the inquirer details of any security granted by the company since the return date of the last annual securities return being those details which would fall to be included in a securities return; or if no such security has been granted, to inform the inquirer accordingly.

(Draft Legislative Provisions, clause 15)

Inspection of copies

4.12 Next, there is the question of inspection of copies of the security deeds. Currently a company is under an obligation to keep copies of every security deed registrable under the Act.⁹ Copies of such securities as are registrable at Companies House¹⁰ may be inspected, at the registered office, by a creditor or a member of the company without a fee. However, the copies may not be inspected by any potential creditor, that is to say someone contemplating transacting with the company, nor indeed by anyone contemplating membership of the company. Such persons, and indeed any member of the public, may inspect the register on payment of 5p but have no access to the copies of the deeds themselves.

4.13 While the text of the security deeds granted by the company may often be available on a public record, we do not consider it burdensome for a company to keep copies of the deeds relating to its extant securities. Since an intending creditor or member may have just as much interest in the financial standing of a company as an existing creditor we also consider that the right of inspection of the copies should be available without restriction – other than payment of such fee as may be prescribed. For completeness copies of any deed altering or assigning a security should also be kept. As in the case of our suggested duty to supply up-dating information on securities, we propose application to the civil court as the means of compelling the allowance of inspection. We therefore recommend that:

18. (a) A company should be required to keep, at its registered office, a copy of every security deed granted by it and any deed altering or assigning the security.

(b) Copies of such security deeds should be open to general inspection on payment of such fee as may be prescribed.

(Draft Legislative Provisions, clause 16)

⁹ 1985 Act, s 421.

¹⁰ 1985 Act, s 423(1). Curiously, it appears that neither members, nor creditors, nor members of the public may inspect copies of securities registered in the internal register but not registrable at Companies House.

4.14 Finally, we would make clear that we do not regard acceptance of the recommendations in this Part of the Report as necessary for the implementation of the recommendations which we make in Parts 2, 3 and 5. The recommendations in those three Parts may be implemented independently of our proposals respecting the provision of information by means of the annual return or on request. It will also be appreciated that our recommendation regarding the provision to inquirers of details of securities granted since the date of the last annual return¹¹ and our recommendation on the retention and inspection of copies of security deeds¹² are not inter-dependent nor is acceptance of either or both of them essential to the implementation of our proposals on the annual return.

¹¹ Recommendation 17.

¹² Recommendation 18.

Part 5 International Private Law

Introductory

5.1 A variety of international private law issues may arise where a security is claimed over an asset situated in a country other than that in which the security was executed or created. There may, for example, be a question relating to the proper law governing the contractual aspects of the security if, say, the debtor and the secured creditor are based in different countries. There may even be issues as to the location of a particular asset, where the asset consists of an incorporeal right. Rights in security will generally fall to be tested on insolvency (there being no need for security if the debtor be solvent) and questions may also arise as to the jurisdiction to entertain insolvency proceedings and the true ambit of those proceedings. However, since this report is essentially concerned with registration requirements and their consequences for the effectiveness of a security, particularly a floating charge, we do not regard it as necessary or appropriate to explore such issues which will be decided in any given case by the normal rules of international private law.

5.2 Although questions regarding the effectiveness of a floating charge or similar security over assets located in a country other than that in which the security was executed or given may arise in a number of different situations or contexts, for current purposes it may be helpful to identify two principal contexts.

5.3 First, on liquidation or receivership a question may arise as between the holder of the security and the body of general, unsecured creditors whether assets beyond the territorial jurisdiction of the country in which the company is incorporated and under whose system of law the charge or security was created are embraced by the floating charge. The decision in *re Anchorline v Henderson Brothers Ltd*¹ is such an example, a floating charge granted by an English registered company being held, in England, to give its holder right to the proceeds of the company's assets situated in Scotland. Such a question appears essentially to be one for the law of the country of liquidation or receivership that is to say, normally the law of the country of incorporation. A further example may be found in the case of *Carse v Copen*² where conversely the majority of the court held that since, at that time, a floating charge was not recognised in Scots law, the grant by a Scottish company of a floating charge in English form was wholly ineffective in the liquidation in Scotland, even as respects assets situated in England.

5.4 Secondly, however, the question of the effectiveness of a floating charge may fall to be tested, not by the law governing the liquidation, but by the *lex situs* of the particular asset, as for instance where there is a competition between the holder of the floating charge and a creditor who claims to have a security over the asset or to have executed diligence in respect of that asset. An example of that situation may be found in *Gordon Anderson (Plant)*

¹ [1937] Ch 483.

² 1951 SC 233.

*Ltd v Campsie Construction Ltd and Anr*³ in which the issue was, put shortly, whether money owed to the insolvent grantor of an English floating charge by one of its debtors went to the receiver appointed under the floating charge or to another creditor of the insolvent company which had obtained decree against the insolvent and arrested the money due to the insolvent by the debtor in question. We shall refer to the latter situation as one involving "competitive effectiveness".

5.5 Although in terms of international private law Scotland and England and Wales are generally treated as two separate countries, the existence of a legislature which is capable of legislating for both jurisdictions means of course that cross-border issues as between Scotland and England and Wales may be seen differently from an equivalent situation involving a jurisdiction outwith Great Britain and may more readily be addressed by statutory provision. We propose to deal first with the grant by a Scottish company of a floating charge embracing assets outwith Scotland and the creation by an oversea company of a floating charge over assets within Scotland before examining the *intra* Great Britain issues.

Scottish companies: Floating charges over assets outwith Scotland

5.6 In contrast to fixed securities under Scots law, a feature of the floating charge is that it is commonly granted over the whole "property and undertaking" of the grantor and consequently the ultimate nature and the location of the assets comprising that property and undertaking at the moment of crystallisation are not known at the time when the floating charge is created. In particular, one cannot know at the moment of the creation of the floating charge whether on crystallisation assets will be outwith Scotland⁴. Indeed, it may be that all of the assets attached by the floating charge will be outside Scotland. In the discussion paper we did not suggest that, so far as Scots law was concerned, any requirement additional to registration in the Register of Floating Charges should be stipulated before a floating charge by a Scottish company might extend to assets situated abroad and be effective in the liquidation as between its holder and the ordinary creditors. Whether such a Scottish floating charge would have competitive effectiveness under the law of the country in which the assets are situated is, of course, a matter for the law of that country as the *lex situs*. Those who responded to our discussion paper were virtually unanimous in thinking that - from the viewpoint of Scots law- no additional requirement was appropriate before the floating charge might embrace, on its crystallisation, assets situated abroad. We therefore recommend:

- 19. No requirement, additional to registration in the Register of Floating Charges, should be imposed under the law of Scotland before a floating charge may be effective to embrace, on crystallisation, assets located outside Scotland.**

Oversea companies: Assets in Scotland

5.7 As we indicated earlier⁵ a floating charge granted by an oversea incorporated company which does not have a place of business in Scotland need not be registered under

³ 1977 SLT 7. It was held that appointment of the receiver under the English floating charge attached assets situated in Scotland and since that attachment occurred on an earlier date than the arrestment, the receiver prevailed over the arrester.

⁴ Unless the charge were expressly restricted to assets within Scotland, which would be unusual.

⁵ See para 2.7.

the current arrangements. A feature of the Register of Floating Charges which we have recommended is that it does not presuppose, and is independent of, the grantor's being incorporated in Scotland or having registered a branch or principal place of business in Scotland with the Registrar of Companies. There is therefore no reason for treating a floating charge granted by an overseas incorporated company differently from a company registered in Scotland. Indeed, since we propose that registration be essential to the creation of a floating charge under Scots law, an overseas company wishing to create a floating charge in Scotland simply cannot avoid registering the floating charge in the Register of Floating Charges. Whether, in the liquidation or other winding up proceedings of the overseas company, the relevant overseas jurisdiction under which those proceedings are conducted would recognise the Scottish floating charge as conferring any preference on its holder is ultimately a matter for that jurisdiction. But insofar as questions turned on Scots law as the *lex situs* of the assets in question, a floating charge registered in the Register of Floating Charges would receive its normal effect. We therefore recommend:-

- 20. A floating charge granted by an overseas incorporated company and intended to be effective in Scotland as respects assets located in Scotland should require to be registered in the Register of Floating Charges.**

(Draft Legislative Provisions, clauses 1 and 13)

***Intra* Great Britain issues**

5.8 While the registration requirements for companies incorporated in the respective constituent parts of Great Britain have altered since 1961, the current regime, which stems from 1982, may be described as reciprocal in the sense that the 1985 Act makes broadly similar registration requirements for both England and Wales and Scotland respectively. The current legislation requires that particulars of a registrable security granted by a company incorporated in England and Wales only be registered in Cardiff (even if the company be principally based in Scotland and the assets over which the security is granted are in Scotland) and conversely that a floating charge or other registrable security granted by a company registered in Scotland need only be registered at Companies House in Edinburgh. There is thus no need, nor indeed any possibility, for a company registered in the one jurisdiction to register particulars of its grants of security in the Register of Charges kept in the other jurisdiction. In practical terms, this means that a floating charge created by an English or Welsh company of which particulars are registered at Companies House in Cardiff does not require to undergo any further registration procedure in Scotland. The same applies *vice versa* for Scottish companies respecting any need to register particulars in Cardiff. In the context of the broad parallelism of the regimes installed in both parts of Great Britain after 1962, and especially in an era when electronic communication was less developed than now, the reciprocity achieved in 1982 made some sense and we recognise its value.

5.9 However, the changes which we are proposing and the changes which we understand are likely to be proposed for England and Wales by the Law Commission each involve departing, in different ways, from the existing reciprocal registration arrangements. Thus our proposals that a floating charge be constituted by registration of the text of the instrument would not be satisfied by the current provision for post-creation registration of particulars. Equally, the future introduction in England and Wales of a system of notice-filing

would involve a significant departure from the existing reciprocal arrangement. As we described in the discussion paper⁶ notice-filing presents practical obstacles to the maintenance of reciprocity irrespective whether the existing registration rules were to be retained in Scotland or whether our proposals for floating charges were to be implemented. In essence, the problem which presents itself is that notice-filing systems are not transaction based, the financing statement giving notice only of the possible existence of one or more secure transactions and not of the terms or particulars of the transactions themselves.

5.10 In the discussion paper⁷ we suggested that the difficulty might be met in one of two ways. First, one could simply treat companies incorporated in England and Wales as other foreign companies and require that, for competitive effectiveness, a floating charge granted by such a company must be registered in Scotland, that is to say, in the proposed Register of Floating Charges. The alternative was the provision, in Cardiff, of means whereby the floating charge itself would be registered and by that registration receive competitive effectiveness in Scotland. We understand however from discussions with the Law Commission that the provision of such a facility for the registration of the terms of a floating charge at Companies House in Cardiff is not contemplated as part of the normal system for filing financing statements. It would be required to be provided specifically and exceptionally for floating charges by English companies intended to embrace Scottish assets. Moreover, the secured creditor would have to be alert both to the possible existence in Scotland of assets which might readily be subject to a competing Scottish security or diligence and also to the need for the creditor to perform the additional step of registering the floating charge once it had been executed and delivered. No doubt the instructions displayed to those using an electronic notice-filing system could contain advice that a floating charge might not be effective as respects assets in Scotland unless the charge itself underwent the further registration process and a link might be provided to the additional database. Given that it would thus be necessary to create an additional database in Cardiff and that extra steps would require to be taken by the holder of the English floating charge, we now believe that, in an age of electronic communication, there is little practical advantage in having a "Scottish facility" in Cardiff rather than registration in the Register of Floating Charges in Edinburgh. We accordingly now favour the first alternative canvassed in the discussion paper.

5.11 Recognising the impracticability of adapting the proposed notice-filing system to provide for transaction-based publicity for floating charges embracing, or potentially embracing, Scottish assets, the Law Commission suggested to us, in the course of our discussions with them, that a special rule of international private law might be promulgated in Scotland which would give competitive effectiveness in Scotland to a floating charge granted by a company incorporated in England and Wales merely if a financing statement had been filed in Cardiff by the holder of the floating charge as respects the company. We have carefully considered that suggestion and although understanding of the desires and policy which underly it we have come to the conclusion that the suggestion is not one which we could commend. The suggested rule would enable companies incorporated in England and Wales to create a floating charge over assets in Scotland which would be competitively effective without meeting the publicity requirements asked of Scottish and other oversea companies. It would be fundamentally incompatible with our leading recommendation that a

⁶ Para 2.48.

⁷ Para 2.49.

floating charge be created by the act of registering the floating charge in the Register of Floating Charges. The suggested rule found no favour among our Advisory Group.

5.12 We have therefore come to the conclusion that in light of our other leading proposals there is no proper basis for applying to floating charges granted by companies incorporated in England and Wales any régime differing from that applying to such securities when granted by companies incorporated elsewhere. In order to obtain competitive effectiveness as respects assets in Scotland a floating charge created in England and Wales by a company incorporated in that jurisdiction should be registered in the Register of Floating Charges in Scotland.

5.13 In taking the view that filing of a financing statement is insufficient to confer competitive effectiveness in Scotland and that a floating charge by a company incorporated in England and Wales should therefore be registered in the Register of Floating Charges in Scotland there are two matters which we think should be noted.

5.14 First, we do not suggest that the law in England and Wales as established in *re Anchorline* should be altered. Our concern, in Scotland, is with what is required for a floating charge granted⁸ by a company in England or Wales to be effective in a competition with a creditor of the company who holds another security over an asset in Scotland or who has executed diligence against such an asset. In such a situation it would not, in our view, be appropriate that the rights of the other creditor in Scotland, who has acquired the security or executed diligence, should yield to a floating charge created in England which has not been publicised in Scotland nor received any equivalent publicity in England and Wales. But since the law of Scotland is hostile to non-possessory fixed securities over moveables the practical scope for such competition occurring in practice is correspondingly restricted. On the other hand, in the absence of such a situation of competition it appears that, following *Anchorline*, a floating charge granted by a company incorporated in England and Wales would be enforceable *in persona* in England or Wales as respects assets in Scotland, notwithstanding the absence of registration in the Register of Floating Charges.

5.15 Secondly, and perhaps more importantly, we understand that the introduction of notice-filing is likely to result in the floating charge falling largely into disuse in England and Wales. The reason for this is that whereas in a floating charge attachment of the charge to the property is postponed until the floating charge crystallises, notice-filing schemes provide for attachment to occur when the security right is granted (or, if the security embraces future assets, when the property is subsequently acquired). In that sense the security taken under notice-filing schemes does not float but is fixed. However, notice-filing schemes generally allow a purchaser of goods of the kind regularly and ordinarily sold by the company granting the security to acquire goods of that description free of the security interest. To the extent that the grantor of the security is thus able to give unencumbered title to a purchaser of such goods there is a resemblance to the floating charge. But, as already mentioned, the concept of crystallisation is lacking and accordingly if the "general security interest" extends to the whole assets and undertaking of the grantor, a disposal of capital goods would not escape the security interest. By way of example, the purchaser of an item of plant from a building contractor who had given such a general security interest would only acquire that item of plant subject to the fixed security. In other words, at least as respect certain assets, the

⁸ We assume the floating charge to be created in terms of English law.

general security interest would operate as a fixed, non-possessory security. Further, because there is no question of the security floating until crystallisation, the general security interest under a notice-filing system will prevail over execution creditors, in contrast to the Scottish floating charge which, on crystallisation, is subject to the rights of creditors who have effectually executed diligence before crystallisation. If this understanding of the general security interest under a notice-filing system is correct, it appears to us that it will normally constitute a form of security which would not be recognised in Scots law and its registration requirements thus become irrelevant.

5.16 However, we should add that although normally the general security interest under a notice-filing system will be such a fixed, non-possessory security not paralleled in Scots law, we further understand that it would remain technically possible under a notice-filing system to have a floating charge equivalent to a Scottish floating charge in respect that the parties might agree that the security only attach on the occurrence of insolvency or the appointment of a receiver. It is difficult to see circumstances in which the creditor would normally wish such a form of security in preference to the fixed security rights available under a notice-filing system. If one such circumstance were knowledge that the debtor company owned, or were likely to own, moveable assets in Scotland and an active intention to create a security recognised by and effective under Scots law, we think that the natural course would be to create a separate, additional Scottish floating charge. Accordingly, we think the likely demise of the floating charge in England and Wales rather militates against the provision of a reciprocal registration arrangement for such a security.

5.17 In these circumstances we recommend:

- 21. A floating charge granted by a company incorporated in England and Wales and intended to be effective in Scotland as respects assets located in Scotland should require to be registered in the Register of Floating Charges.**

(Draft Legislative Provisions, clauses 1 and 13)

5.18 We have so far considered the competitive effectiveness in Scotland of a floating charge granted in England or Wales by a company incorporated there. The converse situation is that of the effectiveness of a floating charge created in Scotland as respect assets situated in England or Wales on crystallisation of the floating charge. We would stress that this is primarily a matter for the law of England and Wales. Consistently with the recommendation contained in Recommendation 19, there is no need for Scots law to impose any additional requirement before a Scottish floating charge might be effective in England and Wales. We would also observe that since we propose registration of the whole text of a floating charge in the database comprising the Register of Floating Charges, the information publicised by that registration would be greater than that given by a financing statement.

5.19 It appears to us that the issue of the competitive effectiveness in England and Wales of a Scottish floating charge overlaps with the question whether the notice-filing system intended for England and Wales will enable a financing statement to be filed in the notice-filing database as respects overseas and other companies not incorporated in England or Wales, or whether a company registration at Companies House in Cardiff will be essential in order to grant the "general security interest" envisaged under that system. Although we appreciate that the Law Commission has, for understandable reasons, not reached a

concluded view and that further consultation is taking place, one solution, to which we understand the Law Commission's current thinking to be inclined, is that it should be possible for EU and other overseas companies holding moveable assets in England and Wales to create security over those assets in accordance with the notice-filing regime. If that approach were adopted, it would appear to us to deal substantially with both the issue of giving effect in England or Wales to a Scottish floating charge and also with the issue of the grant by Scottish companies of fixed securities, in English form, over moveable assets owned in England or Wales. In both cases, the creditor would simply file a financing statement in the notice-filing database as respects the Scottish debtor company. It may, in the event, be technically possible for someone interrogating the English notice-filing database and finding an entry relating to a Scottish floating charge to be given a link to the Register of Floating Charges. Conversely, the Register of Floating Charges may contain advice to the party registering the floating charge to consider filing a financing statement and provide the on-line user with the link. We would add that we appreciate that, in the case of a Scottish floating charge an element of "double registration" is involved but in an electronic, on-line system the burden is minimal.

5.20 If, on the other hand, the view were to be taken that existing registration at Companies House was necessary before a financing statement might be filed and that overseas companies could only grant security in England or Wales, respecting assets held there, in accordance with the law applicable to non-corporate English trading entities, we would record our understanding that the registration of companies in both parts of Great Britain is accommodated within the same, main-frame computer. A requirement such as the matching of the name and number of a company to the name and number input by the creditor as respects the debtor company, might therefore technically be accommodated for Scottish companies against whom the lender, or other creditor, wishes to take security in English form over assets in England and Wales, or to ensure the competitive effectiveness of his, Scottish, floating charge.

5.21 In the discussion paper⁹ we asked consultees whether, in the event that notice-filing is introduced in England and Wales, Scottish companies would be under a competitive disadvantage such that it would be desirable that they be subject to notice-filing as respects fixed securities granted by them over assets in England and, if so, whether it would be preferable for such notice-filing to take place in Edinburgh or for the Scottish company to register a place of business in England or Wales with the Registrar in Cardiff. As respects the first limb of the question, a number of those consulted felt unable to express an opinion but of those who did most took the view that it would be desirable that notice-filing be available as respects companies incorporated in Scotland. We too think that it would be regrettable if it were not possible for a Scottish company with assets in England to create, in England, and in accordance with English law, a security over those assets in the same way as a company registered in England. We therefore hope that the notice-filing system can be so arranged or configured as to accommodate Scottish companies operating in England or Wales and wishing to create a "general security interest" over the property which they own there.

⁹ Paras 6.20, 6.21.

5.22 The second limb of the question which we posed in the discussion paper reflected a traditional, "non-electronic" view or picture of a register which we now believe is no longer apposite. As we understand matters, the intention is that the database (or register) of financing statements will be searchable on-line and, particularly, that the filing of a financing statement will be effected electronically. The physical location of the computer containing the database is, we believe, not really material if it is accessible over the internet. As we have already mentioned, currently the company records of the Registrars in both Cardiff and Edinburgh are retained in electronic form in the same main-frame computer. In these circumstances we think that the question whether the filing of financing statements respecting Scottish companies may be done more conveniently in Edinburgh or Cardiff is unlikely to arise in an electronic system.

5.23 As we have already noted, the creation by Scottish companies of securities which are effective in England is ultimately a matter for English law. As at the date of this report, the proposals for England and Wales have not been finalised and our observations are to that extent provisional. We hope however that they will be of assistance. We will be happy to reconsider matters, if need be, once the proposals for England and Wales have reached a more advanced stage.

Part 6 Legislative Competence

6.1 In this Part of our report we endeavour to carry out the task of identifying which of our recommendations for legislative change are matters devolved to the Scottish Parliament and which are reserved to the UK Parliament, all in terms of the Scotland Act 1998. The principal provisions which we identify as pertinent to this issue are Sections C1 and C2 of Head C of Schedule 5 to the Scotland Act, read along with section 30(1) of the Act itself. For convenience, we reproduce *inter alia* the text of Sections C1 and C2 of Schedule 5 in Appendix C to this report. There has been no judicial discussion of the proper approach to the interpretation of the potentially complicated structure adopted by the legislature in Schedule 5 or, indeed, reserved and devolved matters generally. The views which we express should be seen in that light.

6.2 Head C of Schedule 5 is given the title "Trade and Industry". Section C1 bears the heading "Business Associations". It lists as a reserved matter the – "creation, operation, regulation and dissolution of types of business association". (There then follow certain exceptions to the reservation and interpretation provisions which are not material save to say that "business association" includes incorporated companies.) Section C2, which is headed "Insolvency" reserves to Westminster, in relation to business associations, various topics respecting such things as the grounds and modes of winding up, liability to contribute to assets on winding up. There then follows an exception from that reservation to Westminster which contains within it an exception from the exception. It is in these terms:- "Floating charges and receivers, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts.". It therefore appears that subject to the sub-, or counter-, exception of "preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts" the law respecting floating charges in Scotland is a devolved matter, as of course is the general law relating to other rights in security in Scotland. As we noted at paragraph 1.31 of the discussion paper, when preparing subordinate legislation applying parts of the Companies Acts 1985 to limited liability partnerships, the view was taken that floating charges were devolved and therefore required a Scottish statutory instrument.¹ The question therefore appears to be that of the extent to which legislation giving effect to our proposals may properly be said to relate to the matters reserved to Westminster by Section C1. More narrowly, since one is plainly not concerned with the creation or dissolution of companies, the question is whether such legislation would relate to the "regulation" or "operation" of companies. In judging whether a provision "relates" to a reserved matter one must bear in mind the "purpose" test laid down in section 29(3) of the Scotland Act 1998.²

¹ Scotland Act 1998, s 54(2)(a); Limited Liability Partnerships (Scotland) Regulations 2001 (SSI 2001/128) Reg 3 and Sch 1 (applying ss 462, 463, 466(1), (2), (3) & (6), 486 and 487 of the Companies Act 1985). By contrast, ss 410-423 and 464, 466(4) & (5) and 487 of the 1985 Act are applied by the Limited Liability Partnerships Regulations 2001 (SI 2001/1090).

² S 29(3) and (4) provides –

"(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

6.3 We think it relatively clear that draft legislative provisions for our recommendations regarding annual returns, the supplying of updated information, and the inspection of documents together with the repeal of the requirement to maintain an internal register would relate to the regulation or operation of companies and hence to the reserved matters in issue.

6.4 Although perhaps less clear-cut, we consider that, conversely, our recommendations respecting floating charges do not relate to those reserved matters. Those recommendations are concerned with the means of creation of the (inchoate) security right and its subsequent variation, transmission and extinction and also the ranking of securities. They thus relate, in a substantial sense, to the law of floating charges and we would regard them as being a devolved matter.

6.5 Of possible greater difficulty in terms of constitutional law are our recommendations respecting other forms of security. In essence we recommend the repeal of the requirement of registration of particulars of the listed categories of fixed securities, which also leads one to ask both as to the "purpose" of the provisions which would be repealed, and the "purpose" of the recommended repeal.

6.6 We understand that the purpose of the introduction of registration of company charges in England in 1900 was to give public notice of certain charges, especially unpublicised universal floating charges³ and to avoid the secrecy whereby English companies might create unpublicised security rights. Although the validity of a charge became dependent on timeous registration, that was not seen as inherent in the creation of a charge but, rather, as a sanction for the aim of greater transparency in a company's affairs. So viewed one can see the argument that the provisions for registration of company charges come within the notion of the regulation or operation of a company.

6.7 However, such secret security was not possible in Scotland. The restriction of the registration requirement introduced in 1900 to companies incorporated in England and Wales is thus understandable. Registration of company charges was introduced to Scotland as a concomitant to floating charges. The Companies (Floating Charges) (Scotland) Act 1961 provided, in section 6, -

"For the purpose of securing the publication of floating charges created by companies and other charges so created which ought to be published for the information of persons considering taking security from companies by way of floating charge, the Act of 1948 shall have effect subject to the amendment set out in the Second Schedule to this Act."

The Second Schedule contained the provisions broadly antecedent to the current Part II of Chapter XII of the 1985 Act. So, perhaps unusually, the legislature provided an indication of the purpose of the amendment. The need for publication of floating charges is obvious. As

(4) A provision which –
(a) would otherwise not relate to reserved matters, but
(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters, is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise."

This purpose test is closely akin to the "respection" or "pith and substance test" developed and applied by the courts in regard to some Commonwealth constitutions and the Government of Ireland Act 1920: cf *Gallagher v Lynn* [1937] AC 863; *R (Hume & ors) v Londonderry Justices* [1972] NI 91.

³ Cf *Agnew & Ann v Commissioner of Inland Revenue* [2001] 2 AC 710.

is stated in the discussion paper and in our report⁴ it is not apparent why it was thought necessary or appropriate to include other, fixed, security rights within the registration provisions but section 6 indicates that it was "for the information of persons considering taking security from companies by way of floating charges". To that extent the introduction of the Scottish registration provisions, and their extension to fixed securities, is historically linked to floating charges. Hence it might be argued the matter of repeal of the registration requirements is devolved as a concomitant of floating charges.

6.8 However, it is not clear why potential holders of floating charges as opposed to any creditor or potential creditor should need a special form of publicity for fixed securities additional to that otherwise given in the constitution of a fixed security in Scotland. Given that the provisions, in so far as applying to fixed securities, might be seen as contributing to greater transparency in a company's affairs, an argument that they fall within reserved matters may be advanced. Further, the current registration provisions in the 1985 Act do not contain words linking registration of particulars of fixed securities to the taking of security by way of floating charge. Moreover, and importantly, the purpose of legislation giving effect to our repeal proposals would be unrelated to floating charges but directed, instead, at removal of a requirement placed on the constitution of fixed securities by companies which is not placed on non-corporate persons in a similar situation. Put in other words, while registration of fixed securities in the Register of Charges at Companies House may have come about as a side-wind to the introduction of floating charges, abolition of that registration is not a necessary concomitant of our proposals on floating charges. We therefore favour the view that our proposal for securities other than floating charges (namely the repeal of the requirement of registration of particulars of the security) is a reserved matter, but the question is not without difficulty.

6.9 For the reader's convenience the draft Legislative Provisions contained in Appendix A have been drafted without regard to issues of legislative competence. We believe that the best way to assess the impact of our recommendations is to see the implementing provisions as a single package. However, it should be emphasised that this does not pre-judge any decision that may have to be taken on whether there should be separate Scottish implementation of the devolved aspects of the proposed reform. There may indeed be a variety of ways in which our recommendations might be implemented.

⁴ Paras 1.15, 3.2.

Part 7 List of Recommendations

1. Constitution of a floating charge, as an inchoate security right, should take place on registration.

(Paragraph 2.5; Draft Legislative Provisions, clause 1(2))

2. There should be a register of floating charges in which all floating charges must be registered, irrespective whether the grantor is a company registered in Scotland or has registered a branch or place of business with the Registrar of Companies.

(Paragraph 2.7; Draft Legislative Provisions, clauses 1(2) and 9)

3. The Register of Floating Charges should be maintained by the Keeper of the Registers of Scotland.

(Paragraph 2.9; Draft Legislative Provisions, clause 9(1))

4. The text of the deed of floating charge itself should be registered in the Register of Floating Charges.

(Paragraph 2.11; Draft Legislative Provisions, clauses 1(2) and 9(4))

5.
 - (a) A system of advance notices should be introduced for floating charges.
 - (b) The registration of an advance notice should confer a priority period of up to 21 days in respect that, if presented within that period, the floating charge to which the notice relates is deemed to have been registered on the date of the advance notice.
 - (c) An advance notice should be given jointly by or on behalf of both the grantor and the grantee of the intended floating charge.
 - (d) An advance notice should not be renewable.

(Paragraph 2.15; Draft Legislative Provisions, clause 2)

6.
 - (a) Floating charges should rank with other securities, whether fixed or floating, by date of creation.
 - (b) "Creation" for this purpose means –
 - (i) in the case of a floating charge the date on which the floating charge document was registered or deemed to be registered and
 - (ii) in any other case, the date on which the security was constituted as a real right.

(c) The rule at (a) should be capable of being altered by a ranking agreement contained in the registered floating charge or a registered document of alteration.

(Paragraph 2.19; Draft Legislative Provisions, clauses 3 and 6)

7. An assignation of a floating charge should vest the floating charge in the assignee only on registration of the assignation.

(Paragraph 2.20; Draft Legislative Provisions, clause 5)

8. The terms of an instrument of floating charge should not be held amended by an instrument of alteration unless that instrument of alteration has itself been registered.

(Paragraph 2.22; Draft Legislative Provisions, clauses 6(1) and (2))

9. Property may be released from a floating charge only on registration of an instrument of alteration to that effect.

(Paragraph 2.23; Draft Legislative Provisions, clause 6(3))

10. A floating charge may be discharged by registration of a deed of discharge.

(Paragraph 2.26; Draft Legislative Provisions, clause 7)

11. The provisions which we propose regarding floating charges granted by companies should also apply to floating charges granted by limited liability partnerships; European economic interest groupings; and by industrial and provident societies.

(Paragraph 2.27; Draft Legislative Provisions, clause 12 [IPS only])

12. Floating charges should cease to be registrable in the registers of patents, trademarks and registered designs respectively.

(Paragraph 2.33; Draft Legislative Provisions, clause 11)

13. There should no longer be any requirement to register particulars of a security granted by a company with the Registrar of Companies.

(Paragraph 3.25)

14. There should no longer be any requirement to register with the Registrar of Companies particulars of a security granted by a limited liability partnership or a European economic interest grouping.

(Paragraph 3.26)

15. The existing duty of directors to deliver to the Registrar an annual return should be supplemented by a requirement to include in the annual return details of securities granted by the company, and not discharged, as at the return date.

(Paragraph 4.9; Draft Legislative Provisions, clause 14)

16. The particulars to be contained in the company's securities return should be –
- (a) a short description of the property over which the security is granted;
 - (b) the form of the security;
 - (c) the name of the grantee;
 - (d) the date upon which the security was granted; and
 - (e) the obligation for which security is given.

(Paragraph 4.10; Draft Legislative Provisions, clause 14(3))

17. (a) A company should no longer be under any statutory duty to maintain an internal register of charges; but
- (b) On being requested to do so, and on payment of such fee as may be prescribed, a company should be under a statutory duty to supply to the inquirer details of any security granted by the company since the return date of the last annual securities return being those details which would fall to be included in a securities return; or if no such security has been granted, to inform the inquirer accordingly.

(Paragraph 4.11; Draft Legislative Provisions, clause 15)

18. (a) A company should be required to keep, at its registered office, a copy of every security deed granted by it and any deed altering or assigning the security.
- (b) Copies of such security deeds should be open to general inspection on payment of such fee as may be prescribed.

(Paragraph 4.13; Draft Legislative Provisions, clause 16)

19. No requirement, additional to registration in the Register of Floating Charges, should be imposed under the law of Scotland before a floating charge may be effective to embrace, on crystallisation, assets located outside Scotland.

(Paragraph 5.6)

20. A floating charge granted by an overseas incorporated company and intended to be effective in Scotland as respects assets located in Scotland should require to be registered in the Register of Floating Charges.

(Paragraph 5.7; Draft Legislative Provisions, clauses 1 and 13)

21. A floating charge granted by a company incorporated in England and Wales and intended to be effective in Scotland as respects assets located in Scotland should require to be registered in the Register of Floating Charges.

(Paragraph 5.17; Draft Legislative Provisions, clauses 1 and 13)

Appendix A

Draft Legislative Provisions

NOTE: These draft provisions assume that Chapter II of Part XII (registration of charges) and Part XVIII (floating charges) of the Companies Act 1985 have been repealed as part of a wider repeal of provisions of that Act – see paragraphs 1.22 and 1.23 of the report.

PART 1

FLOATING CHARGES

1 Creation of floating charges

- (1) A company may, for the purpose of securing any debt or other obligation incurred or to be incurred by, or binding upon, the company or any other person, grant in favour of the creditor in the debt or obligation a charge (a “floating charge”) over all or any part of the property which may from time to time be comprised in the company’s property and undertaking.
- (2) On and after the coming into force of this section, a floating charge is (subject to section 2) created only when a document—
 - (a) granting a floating charge, and
 - (b) subscribed by the company granting the charge,is registered in the Register of Floating Charges.

NOTE

Subsection (1) derives from section 462(1) of the 1985 Act and restates the statutory rule that, in Scotland, a company may grant a floating charge. In view of the generality of the phrases “debt or other obligation” and “all or any part of the property” the reference in parentheses in the existing provision to the former including a “cautionary obligation” and the latter “uncalled capital” is unnecessary. The term “company” is defined in clause 13 of the draft Legislative Provisions.

Subsection (2) implements Recommendation 1. It lays down the new rule that, after the proposed legislation enters into force, the creation of a floating charge occurs only when the document granting the floating charge is registered in the Register of Floating Charges (which is instituted in terms of clause 9). See paragraphs 2.2 – 2.5 of the report.

Section 462(5) of the 1985 Act provides that a floating charge has effect in relation to heritable property without the need for the document granting the charge to be recorded in the Land Register or Register of Sasines. It is evident from section 28 of the Land Registration (Scotland) Act 1979 that a floating charge constitutes an “overriding interest” and is not a registrable interest. The provision that floating charges are created by registration in the Register of Floating Charges implies no further act of registration is required and the terms of section 462(5) are not re-enacted in these draft Legislative Provisions.

2 Advance notice of floating charges

- (1) Where a company proposes to grant a floating charge, the company and the person in whose favour the charge is to be granted may apply to have joint notice of the proposed charge registered in the Register of Floating Charges.
- (2) A notice under subsection (1) must—
 - (a) be in such form,
 - (b) contain such particulars, and
 - (c) be given in such manner,as the Secretary of State may by order made by statutory instrument prescribe.
- (3) Where—
 - (a) a notice under subsection (1) is registered in the Register of Floating Charges, and
 - (b) within 21 days of the notice being so registered, a document—
 - (i) granting a floating charge conforming with the particulars contained in the notice, and
 - (ii) subscribed by the company granting the charge,is registered in the Register of Floating Charges,the floating charge so created is to be treated as having been created when the notice was so registered.
- (4) An instrument containing an order under subsection (2) is subject to annulment in pursuance of a resolution of either House of Parliament.

NOTE

This clause implements Recommendation 5 by making provision for the registering of an advance notice of a floating charge. See paragraphs 2.12 – 2.15 of the report. The purpose of an advance notice is to assist the mechanics of settling secured transactions by allowing parties to obtain priority of ranking from the date of the advance notice provided that settlement is completed to the extent that the floating charge is registered within 21 days of the advance notice. An advance notice cannot be registered unilaterally. The form of an advance notice and the way in which it may be given may be prescribed by statutory instrument. It is envisaged that the regulations may provide that the advance notice may be subscribed either by the parties or by their solicitors.

3 Ranking of floating charges

- (1) Subject to subsections (2) to (4) and to any provision made under subsection (5), a floating charge, created on or after the coming into force of this section, which has attached to all or any part of the property of a company—
 - (a) ranks with—
 - (i) any other floating charge which has attached to that property or any part of it, or
 - (ii) any fixed security over that property or any part of it,according to date of creation, and
 - (b) ranks equally with any floating charge or fixed security referred to in paragraph (a) which was created on the same date as it was created.

- (2) Where all or any part of the property of a company is subject to both—
 - (a) a floating charge, and
 - (b) a fixed security arising by operation of law,the fixed security has priority over the floating charge.
- (3) Where the holder of a floating charge over all or any part of the property of a company has received intimation in writing of the subsequent creation of—
 - (a) another floating charge over the same property or any part of it, or
 - (b) a fixed security over the same property or any part of it,the priority of ranking of the first-mentioned charge is restricted to security for the matters referred to in subsection (4).
- (4) Those matters are—
 - (a) the present debt incurred (whenever payable),
 - (b) any future debt which, under the contract to which the charge relates, the holder is required to allow the debtor to incur,
 - (c) any interest due or to become due on the debts referred to in paragraphs (a) and (b),
 - (d) any expenses or outlays which may be reasonably incurred by the holder, and
 - (e) in the case of a floating charge to secure a contingent liability (other than a liability arising under any further debts incurred from time to time), the maximum sum to which the contingent liability is capable of amounting, whether or not it is contractually limited.
- (5) The document granting a floating charge over all or any part of the property of a company may make provision regulating the order in which the charge ranks with any other floating charge or any fixed security (including a future floating charge or fixed security) over that property or any part of it.
- (6) Where provision is made under subsection (5), the document granting the charge requires to be subscribed by the holder of any subsisting floating charge, or any subsisting fixed security, which would be adversely affected by the provision.
- (7) For the purposes of subsection (1)—
 - (a) the date of creation of a fixed security is the date on which the right to the security was constituted as a real right, and
 - (b) the date of creation of a floating charge subsisting before the coming into force of this section is the date on which the instrument creating the charge was executed by the company granting the charge.
- (8) This section is subject to sections 175 and 176 (preferential debts in winding up) of the Insolvency Act 1986.

NOTE

This clause is concerned with the ranking of a floating charge both with other floating charges and with fixed securities affecting all or part of the same property as that covered by the floating charge. Subsection (1) sets out the leading principle that ranking proceeds on the basis of date of creation which, in the case of fixed securities is the date upon which the security was constituted as a real right (see subsection (7)). It implements Recommendation 6. See paragraphs 2.16 – 2.19 of the report. Where the floating charge is created on the same day as another floating charge or fixed security, the rule is that the respective securities rank equally. Subsection (2) is concerned with a competition

between a floating charge and a fixed security arising by operation of law – such as lien or a landlord's hypothec. It continues the existing rule that such fixed securities arising by operation of law have priority over any floating charge. Subsection (3) continues an existing provision whereby the holder of the second, later floating charge may protect the value of his security by giving notice to the holder of the earlier floating charge in which event the priority ranking of the earlier floating charge is restricted to the amount of the debt then outstanding plus any further advances which the holder of that earlier floating charge is contractually obliged to make. In view of the change in the ranking rule, the same facility is extended to the holder of a subsequent fixed security. The ranking of securities may be the subject of agreement among the secured creditors and this is dealt with in subsections (5) and (6), the latter of which makes express what might otherwise be implied namely that any ranking agreement requires the participation of the holder of any subsisting security who would be adversely affected by the ranking arrangement. Reference should be made to clause 6 for the method whereby a ranking agreement may be registered. The priority of preferential debts is preserved by subsection (8).

4 Ranking of floating charges: transitional arrangements

- (1) Floating charges subsisting immediately before the coming into force of this section rank with each other as they ranked with each other in accordance with section 464 of the Companies Act 1985 immediately before the repeal of that section by this Act.
- (2) A floating charge subsisting immediately before the coming into force of this section ranks with a fixed security so subsisting as it ranked with the security in accordance with section 464 of that Act immediately before the repeal of that section by this Act.
- (3) Despite the repeal by *[this Act]* of Chapter II of Part XII of that Act and Chapters I and III of Part XVIII of that Act, those provisions are to be treated as continuing in force in so far as is necessary for the purposes of subsections (1) and (2).

NOTE

The new rules on creation of floating charges and ranking by date of creation will not disturb the priority of ranking of existing securities, whether fixed or floating, since they have all been created prior to the coming into force of the new rules. Holders of such securities will not be adversely affected by the creation of any new floating charge. However, for clarity, this clause is intended to make plain that, for existing security rights, the existing rules continue in force.

5 Assignment of floating charges

- (1) A floating charge may be assigned (and the rights under it vested in the assignee) by the registration in the Register of Floating Charges of a document of assignment subscribed by the holder of the charge.
- (2) An assignment under subsection (1) may be in whole or to such extent as may be specified in the document of assignment.
- (3) This section is without prejudice to any other enactment, or any rule of law, by virtue of which a floating charge may be assigned.

NOTE

The existing legislation contains no provision on assignment of floating charges but in one first instance judicial decision (*Libertas – Kommerz v Johnson* 1977 SC 191) it was held that a floating charge was assignable on general principles of law. Subsection (1) gives statutory affirmation of the assignability of a floating charge and further gives effect to Recommendation 7 by providing for

vesting in the assignee on registration in the Register of Floating Charges. Subsection (2) makes clear that partial assignation is possible. Subsection (3) is necessary since a floating charge may transfer not only by voluntary assignation but also by operation of law (eg on bankrupt sequestration of the holder the floating charge transfers to his trustee). See paragraph 2.20 of the report.

6 Alteration of floating charges

- (1) The terms of the document granting a floating charge may be altered, but only by a document of alteration—
 - (a) subscribed by—
 - (i) the company which granted the charge,
 - (ii) the holder of the charge, and
 - (iii) the holder of any other subsisting floating charge, or any subsisting fixed security, which would be adversely affected by the alteration, and
 - (b) registered in the Register of Floating Charges.
- (2) But paragraph (a)(i) of subsection (1) does not apply in respect of an alteration which—
 - (a) relates only to the ranking of the first-mentioned charge with any other floating charge or any fixed security, and
 - (b) does not adversely affect the interests of the company which granted the charge.
- (3) The granting, by the holder of a floating charge, of consent to the release from the charge of any of the property to which the charge relates is to be treated as constituting an alteration to the terms of the document granting the charge.

NOTE

This clause implements Recommendations 8 and 9. See paragraphs 2.21 – 2.23 of the report. It is intended to ensure that third parties can rely upon the Register. Given that the terms of a floating charge must be published in the Register, it follows that any agreement between the holder of the floating charge and any other adversely affected security holder to alter the terms of the floating charge or its ranking must likewise be registered before it can receive effect as an alteration of the registered text. An unregistered agreement to alter the terms of a floating charge would remain as a contractual agreement between the parties to it but could not affect any third party.

One way in which the terms of a floating charge may be altered is by inserting a ranking agreement or changing an existing ranking arrangement. A ranking agreement is essentially an agreement between secured creditors and may be of no interest to the debtor. Subsection (2) enables an agreement between the secured creditors, in which the debtor is not participant, to be registered, provided that the debtor is not thereby adversely affected.

Subsection (3) addresses the case – exemplified in *Scottish & Newcastle plc v Ascot Inns Ltd* 1994 SLT 1140 - in which the holder of a floating charge gives his consent to specific assets, or a specific class of assets, of the company being released from the scope of the floating charge while yet remaining in the ownership of the company. If, as is currently the case, the fact of such a release is not published, an acquirer from a receiver appointed by the holder of the floating charge cannot be confident of his title. The subsection is not, of course, directed towards the escape of individual assets from the scope of the charge on the onerous or gratuitous transfer of the asset by the company to a third party prior to attachment of the floating charge.

7 Discharge of floating charges

- (1) A floating charge may be discharged by the registration in the Register of Floating Charges of a document of discharge subscribed by the holder of the charge.
- (2) A discharge under subsection (1) may be in whole or to such extent as may be specified in the document of discharge.
- (3) This section is without prejudice to any other means by which a floating charge may be discharged or extinguished.

NOTE

This clause implements Recommendation 10. It is essentially facultative. Payment of the debt, or performance of the obligation, secured by the floating charge will normally discharge or extinguish the security and this is recognised in subsection (3). But it is useful to have a means whereby the Register of Floating Charges may be cleared of floating charges which have been so discharged or extinguished. There may also be instances in which, as part of a re-financing arrangement, it is desired to discharge an existing floating charge in favour of some other form of security and this clause provides a ready, public means of achieving that. See paragraphs 2.25 – 2.26 of the report.

8 Effect of floating charges on winding up

- (1) Where a company goes into liquidation (within the meaning of section 247(2) of the Insolvency Act 1986), a floating charge created over property of the company attaches to the property to which it relates.
- (2) The attachment of a floating charge to property under subsection (1) is subject to the rights of any person who—
 - (a) has effectually executed diligence on the property to which the charge relates or any part of it,
 - (b) holds over that property or any part of it a fixed security ranking in priority to the floating charge, or
 - (c) holds over that property or any part of it another floating charge so ranking.
- (3) Interest accrues in respect of a floating charge which has attached to property until payment is made of any sum due under the charge.
- (4) Part IV (except section 185) of the Insolvency Act 1986 has (subject to subsection (1)) effect in relation to a floating charge as if the charge were a fixed security over the property to which it has attached in respect of the principal of the debt or obligation to which it relates and any interest due or to become due on it.
- (5) Subsections (1) to (4) do not affect the operation of—
 - (a) sections 53(7) and 54(6) (attachment of floating charge on appointment of receiver) of the Insolvency Act 1986, or
 - (b) sections 175 and 176 (payment of preferential debts in winding up) of that Act.

NOTE

The essence of a floating charge is that until either the company goes into liquidation or a receiver is appointed the security right is inchoate and the company may dispose (even gratuitously) of assets within the scope of the charge and the acquirer will obtain ownership unencumbered by any security right. This clause, which simply repeats the existing law, deals with attachment, or crystallisation, of the floating charge on a winding up, when the floating charge is converted into a fixed security over

the assets then within its scope. A floating charge similarly attaches or crystallises on the appointment of a receiver. The relevant statutory provisions on receivership are in the Insolvency Act 1986. They are not affected by the proposed reforms. Going into liquidation "within the meaning of section 247(2) of the Insolvency Act 1986" encompasses the insolvent liquidation of assets of an overseas company – see sections 220 and 221 of that Act.

9 Register of Floating Charges

- (1) The Keeper of the Registers of Scotland (the "Keeper") must establish and maintain a register to be known as the Register of Floating Charges.
- (2) The Keeper must accept an application for registration of—
 - (a) any document delivered to the Keeper in pursuance of section 1, 5, 6 or 7, and
 - (b) any notice delivered to the Keeper in pursuance of section 2,provided that the application is accompanied by such information as the Keeper may require for the purposes of the registration.
- (3) On receipt of such an application, the Keeper must note the date of receipt of the application; and, where the application is accepted by the Keeper, that date is to be treated for the purposes of this Part as the date of registration of the document or notice to which the application relates.
- (4) The Keeper must, after accepting such an application, complete registration by registering in the Register of Floating Charges the document or notice to which the application relates.
- (5) The Keeper must—
 - (a) make the Register of Floating Charges available for public inspection at all reasonable times,
 - (b) provide facilities for members of the public to obtain copies of the documents in the Register, and
 - (c) supply an extract of a document in the Register, certified as a true copy of the original, to any person requesting it.
- (6) An extract certified as mentioned in subsection (5)(c) is sufficient evidence of the original.
- (7) The Keeper may charge such fees—
 - (a) for registering a document or notice in the Register of Floating Charges, or
 - (b) in relation to anything done under subsection (5),as the Secretary of State may by order made by statutory instrument prescribe.
- (8) The Secretary of State may by regulations made by statutory instrument make provision as to the form and manner in which the Register of Floating Charges is to be maintained.
- (9) An instrument containing—
 - (a) an order under subsection (7), or
 - (b) regulations under subsection (8),is subject to annulment in pursuance of a resolution of either House of Parliament.

NOTE

This clause implements Recommendations 2 and 3. It provides for the setting up of the new Register of Floating Charges under the management of the Keeper of the Registers of Scotland. The form and manner in which the Register is to be organised and maintained will be the subject of regulations made by statutory instrument. The date of receipt is to be the date of registration of the relevant document (or advance notice). The intention is that (as with the Sasine Registers) the Register should record the text of the document and not (as with the Books of Council and Session) retain the document in its physical form. Subject to the stipulation of appropriate procedures, it is intended that registration can in due course be effected electronically.

10 Subscription of documents

In section 6 (registration of documents) of the Requirements of Writing (Scotland) Act 1995 (c.7), after paragraph (a) of subsection (1) there is inserted—

“(aa) to register a document in the Register of Floating Charges;”.

NOTE

The Requirements of Writing (Scotland) Act 1995 provides for a form of subscription of documents whereby the document has an evidential presumption of having been validly subscribed by the signatory. Essentially, the requirement is that the signature has been witnessed. The 1995 Act provides that only documents having such "presumed authenticity" may be registered in *inter alia* the Sasine Register. In practice the same requirement is asked of documents presented to the Land Register. This clause applies the equivalent rule in the case of the Register of Floating Charges, which will facilitate a uniform treatment of applications to the Registers of Scotland when electronic conveyancing is introduced.

11 Floating charges over registered designs etc.

- (1) In section 19 (registration of assignments, etc.) of the Registered Designs Act 1949 (c.88), after subsection (5) there is added—

“(6) This section shall not apply in relation to any interest in a registered design arising by virtue of a floating charge granted by a document registered under section [*Register of Floating Charges*] which has not attached to the property to which it relates.”.

- (2) In section 33 (effect of registration, etc., on rights in patents) of the Patents Act 1977 (c.37), after subsection (3) there is inserted—

“(3A) Subsection (3)(b) and (c) does not include the granting of a floating charge by a document registrable under section [*Register of Floating Charges*].”.

- (3) In section 25 (registration of transactions affecting registered trade mark) of the Trade Marks Act 1994 (c.26), after subsection (2) there is inserted—

“(2A) Subsection (2)(c) does not include the granting of a floating charge by a document registrable under section [*Register of Floating Charges*].”.

NOTE

The purpose of this clause is to implement Recommendation 12. It removes the current additional registration requirement that, in so far as it covers patents, trade marks or registered designs, a floating charge must also be registered in the appropriate register at the Patent Office. See paragraph 2.33 of the report. However, since it is conceivable that once a floating charge has

crystallised the holder may wish to register the attached floating charge to establish title to the relevant intellectual property right, the wording of the amendments is designed to preserve that possibility.

12 Floating charges granted by industrial and provident societies

- (1) For section 3 (application to registered societies of provisions relating to floating charges) of the Industrial and Provident Societies Act 1967 (c.48) there is substituted—

“3 Application to registered societies of provisions relating to floating charges

- (1) The provisions of Part [*Floating charges*] (in this section referred to as the “relevant provisions”) shall apply to a registered society as they apply to an incorporated company.
- (2) Where, in the case of a registered society—
- (a) there are in existence—
 - (i) a floating charge created under the relevant provisions (as applied by this section); and
 - (ii) an agricultural charge created under Part II of the Agricultural Credits (Scotland) Act 1929; and
 - (b) any assets of the society are subject to both charges,
- sections [*Ranking of floating charges(1)*] and [*Effect of floating charges on winding up(2)(c)*] shall have effect for the purposes of determining the ranking with one another of those charges as if the agricultural charge were a floating charge created under the relevant provisions on the date of creation of the agricultural charge.”.
- (2) Section 4 (filing of information relating to charges) of that Act is repealed.
- (3) In section 5 (supplemental provisions) of that Act—
- (a) for paragraph (b) of subsection (1) there is substituted—
 - “(b) any security, except a floating charge, granted by a registered society over any of its assets,”; and
 - (b) the references to section 4 of that Act are to be treated as references to that section as it had effect immediately before its repeal by subsection (2).

NOTE

This clause implements part of Recommendation 11. Its purpose is to apply the recommended registration regime for floating charges by companies to floating charges in Scottish form granted by industrial and provident societies registered in Great Britain. Such charges are currently registered with the Financial Services Authority by virtue of section 4 of the Industrial and Provident Societies Act 1967, which is repealed. We also recommend that the regime should apply to floating charges granted by a limited liability partnership and a European economic interest grouping. As the relevant provisions relating to these latter bodies are contained in statutory instrument, it is anticipated that the amendments necessary to apply the new regime to them would be effected by subordinate legislation. See paragraph 2.27 of the report.

13 Interpretation of Part 1

In this Part—

“company” means an incorporated company (whether or not a company within the meaning of the Companies Act 1985),

“fixed security”, in relation to any property of a company, means any security (other than a floating charge or a charge having the character of a floating charge) which on the winding up of the company in Scotland would be treated as an effective security over that property including, in particular, a heritable security (within the meaning of section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970)).

NOTE

This clause defines company in a way which includes an oversea company.

It also defines “fixed security” in terms based on and to the same effect as the definition in section 486 of the 1985 Act.

PART 2

INFORMATION ABOUT SECURITIES

14 Annual return to contain information about securities

- (1) The annual return of every company registered in Scotland must contain the relevant particulars of the securities specified in subsection (2).
- (2) The securities are—
 - (a) any fixed security affecting any property of the company (but excluding a fixed security arising by operation of law), and
 - (b) any floating charge over any property of the company,as at the date to which the return is made up.
- (3) For the purposes of subsection (1), the relevant particulars are—
 - (a) the type of the security and the obligation it secures,
 - (b) a short description of the property to which the security relates,
 - (c) the name and address of the person in whose favour the security was granted and, if different (and if known by the company), the name and address of the present holder of the security, and
 - (d) the date on which the security was granted.

NOTE

This clause and the following two clauses are designed to foster financial transparency. See generally Part 4 of the report.

Subsections (1) and (2) implement Recommendation 15 of the report. Subsection (1) requires the company to supply annually a list of the securities which it has granted and which have not been discharged. This ‘securities return’ forms part of the company’s annual return made pursuant to section 363 of the Companies Act 1985 and will mean that information on securities granted by companies at the return date will be available at Companies House. A company will no longer be

under a statutory duty (section 422(1) of the 1985 Act) to keep an internal register. See Recommendation 17 and clause 15.

Subsection (2) prescribes the types of securities which must be listed in the securities return, namely fixed securities and floating charges but not fixed securities arising by operation of law (such as lien or a landlord's hypothec).

Subsection (3) implements Recommendation 16 of the report and sets out the particulars which must be included in the securities return. Details of the type of security and the date upon which the security deed was granted are required in addition to the information which should currently be found in the company's internal register (section 422(2) of the 1985 Act). In paragraph (a), the phrase "the obligation it secures" has been employed as a security could be granted in respect of a non-pecuniary obligation. In paragraph (c), the duty to provide the name and address of the grantee and the current holder is qualified by recognition that the company which granted the security may not be aware of the identity of the current holder.

See paragraphs 4.7 – 4.10 of the report.

15 Company to provide information about securities

- (1) Every company registered in Scotland must—
 - (a) on request, and
 - (b) on payment of any fee charged under subsection (3),supply the relevant particulars of the securities specified in subsection (2) to the person who made the request.
- (2) The securities are—
 - (a) any fixed security affecting any property of the company (but excluding a fixed security arising by operation of law), and
 - (b) any floating charge over any property of the company,granted since the date to which the most recent annual return of the company was made up (or, if the company has not made its first annual return, since incorporation of the company).
- (3) A company may charge such fees (if any) for supplying particulars under subsection (1) as it may determine subject to such limits as the Secretary of State may by order made by statutory instrument prescribe.
- (4) If a request for relevant particulars is not met—
 - (a) within 10 days of the payment of any fee charged under subsection (3), or
 - (b) where no such fee is charged, within 10 days of the request,the Court of Session may order the immediate supply of the relevant particulars to the person who made the request.
- (5) For the purposes of subsection (1), the relevant particulars are—
 - (a) the type of the security and the obligation it secures,
 - (b) a short description of the property to which the security relates,
 - (c) the name and address of the person in whose favour the security was granted and, if different (and if known by the company), the name and address of the present holder of the security, and
 - (d) the date on which the security was granted.

- (6) An instrument containing an order under subsection (3) is subject to annulment in pursuance of a resolution of either House of Parliament.

NOTE

Clause 15 implements Recommendation 17 of the report. Subsection (1) requires the company to supply details of any security granted since the last return date if requested to do so by any person. Thus an up-to-date picture of the company's securities can be obtained from a combination of the securities return (see clause 14) and the requested information. This supplants the need for maintenance of an internal register of charges as currently required under section 422 of the 1985 Act.

Subsection (2) sets out the types of securities of which particulars can be requested. These are the same types of securities as must be listed in the annual return under clause 14(2).

Subsection (3) provides that a fee may be charged for the supply of this information subject to any limit set by the Secretary of State.

Subsection (4)(a) allows the company 10 days from payment of the chargeable fee to meet a request for particulars under subsection (1). Under subsection 4(b), if no fee is charged, the company must supply the details within 10 days of the request. If the company does not comply, the person who requested the information may apply to the Court of Session for an order compelling performance.

Subsection (5) sets out the particulars of the security which can be requested under subsection (1). These are the same particulars as are required to be listed in the securities return under clause 14(3).

See paragraph 4.11 of the report.

16 Company to keep copies of documents relating to securities

- (1) Every company registered in Scotland must keep at its registered office a copy of every document granting, varying or assigning the securities specified in subsection (2).
- (2) The securities are—
 - (a) any fixed security affecting any property of the company (but excluding a fixed security arising by operation of law), and
 - (b) any floating charge over any property of the company.
- (3) The copies of documents kept under subsection (1) are to be open to inspection (on payment of any fee charged under subsection (5)) during normal business hours.
- (4) An inspection under subsection (3) is subject to such reasonable restrictions as the company may impose.
- (5) The company may charge such fees (if any) for an inspection under subsection (3) as it may determine subject to such limits as the Secretary of State may by order made by statutory instrument prescribe.
- (6) If an inspection under subsection (3) is refused, the Court of Session may order the immediate inspection of the copy of the document to which the refusal relates.
- (7) An instrument containing an order under subsection (5) is subject to annulment in pursuance of a resolution of either House of Parliament.

NOTE

Clause 16 implements Recommendation 18 of the report. Part of this provision replaces section 421 of the 1985 Act which requires companies to keep copies of every security registrable under the Act. In terms of subsections (1) and (2), a company must keep at its registered office a copy of all security deeds granted by it and all deeds altering or assigning the security. The requirement applies only as respects extant securities.

Subsections (3) to (7) implement Recommendation 18(b) of the report and provide for the inspection of copies of documents kept by the company in terms of the preceding subsections. Unlike the existing statutory provision (section 423 (1) of the 1985 Act) the right of inspection is available to all.

Under subsection (3) a company must allow inspection of the copies, on payment of any fee, during normal business hours.

Subsection (4) allows a company to impose reasonable restrictions on an inspection (for example by giving the applicant a time appointment).

Subsection (5) allows the company to charge fees for an inspection. The amount of the fees may be limited by order of the Secretary of State.

In terms of subsection (6), if an inspection is refused, or so unreasonably restricted as to be equivalent to a refusal, the applicant may compel inspection through the court.

See paragraphs 4.12-4.13 of the report.

17 Interpretation of Part 2

In this Part, “fixed security”, in relation to any property of a company, means any security (other than a floating charge or a charge having the character of a floating charge) including, in particular, a heritable security (within the meaning of section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970).

NOTE

This provision defines ‘fixed security’ for the purpose of Part 2. The definition is based on that contained in Part 1 but differs from it in respect that Part 2 is concerned with information about the grant of securities, rather than their effectiveness in a winding up, which will usually depend on whether the grantee has taken the appropriate steps by way of registration or intimation to make the right of security real and this may not be known to the company.

Appendix B

COMPANIES ACT 1985 c.6

Chapter II

REGISTRATION OF CHARGES (SCOTLAND)

Charges void unless registered.

410.– (1) The following provisions of this Chapter have effect for the purpose of securing the registration in Scotland of charges created by companies.

(2) Every charge created by a company, being a charge to which this section applies, is, so far as any security on the company's property or any part of it is conferred by the charge, void against the liquidator or administrator and any creditor of the company unless the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument (if any) by which the charge is created or evidenced, are delivered to or received by the registrar of companies for registration in the manner required by this Chapter within 21 days after the date of the creation of the charge.

(3) Subsection (2) is without prejudice to any contract or obligation for repayment of the money secured by the charge; and when a charge becomes void under this section the money secured by it immediately becomes payable.

(4) This section applies to the following charges—

(a) a charge on land wherever situated, or any interest in such land (not including a charge for any rent, ground annual or other periodical sum payable in respect of the land, but including a charge created by a heritable security within the meaning of section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970),

(b) a security over the uncalled share capital of the company,

(c) a security over incorporeal moveable property of any of the following categories—

- (i) the book debts of the company,
- (ii) calls made but not paid,
- (iii) goodwill,
- (iv) a patent or a licence under a patent,
- (v) a trademark,

- (vi) a copyright or a licence under a copyright,
- (vii) a registered design or a licence in respect of such a design,
- (viii) a design right or a licence under a design right,

(d) a security over a ship or aircraft or any share in a ship, and

(e) a floating charge.

(5) In this Chapter "company" (except in section 424) means an incorporated company registered in Scotland; "registrar of companies" means the registrar or other officer performing under this Act the duty of registration of companies in Scotland; and references to the date of creation of a charge are—

(a) in the case of a floating charge, the date on which the instrument creating the floating charge was executed by the company creating the charge, and

(b) in any other case, the date on which the right of the person entitled to the benefit of the charge was constituted as a real right.

Charges on property outside United Kingdom.

411.— (1) In the case of a charge created out of the United Kingdom comprising property situated outside the United Kingdom, the period of 21 days after the date on which the copy of the instrument creating it could (in due course of post, and if despatched with due diligence) have been received in the United Kingdom is substituted for the period of 21 days after the date of the creation of the charge as the time within which, under section 410(2), the particulars and copy are to be delivered to the registrar.

(2) Where a charge is created in the United Kingdom but comprises property outside the United Kingdom, the copy of the instrument creating or purporting to create the charge may be sent for registration under section 410 notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situated.

Negotiable instrument to secure book debts.

412. Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company is not, for purposes of section 410, to be treated as a charge on those book debts.

Charges associated with debentures.

413.— (1) The holding of debentures entitling the holder to a charge on land is not, for the purposes of section 410, deemed to be an interest in land.

(2) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled pari

passu, is created by a company, it is sufficient for purposes of section 410 if there are delivered to or received by the registrar of companies within 21 days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars in the prescribed form—

- (a) the total amount secured by the whole series,
- (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined,
- (c) a general description of the property charged,
- (d) the names of the trustees (if any) for the debenture holders, and
- (e) in the case of a floating charge, a statement of any provisions of the charge and of any instrument relating to it which prohibit or restrict or regulate the power of the company to grant further securities ranking in priority to, or pari passu with, the floating charge, or which vary or otherwise regulate the order of ranking of the floating charge in relation to subsisting securities,

together with a copy of the deed containing the charge or, if there is no such deed, of one of the debentures of the series:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar of companies for entry in the register particulars (in the prescribed form) of the date and amount of each issue of debentures of the series, but any omission to do this does not affect the validity of any of those debentures.

(3) Where any commission, allowance or discount has been paid or made, either directly or indirectly, by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions (whether absolute or conditional) for any such debentures, the particulars required to be sent for registration under section 410 include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made; but any omission to do this does not affect the validity of the debentures issued.

The deposit of any debentures as security for any debt of the company is not, for purposes of this subsection, treated as the issue of the debentures at a discount.

Charge by way of ex facie absolute disposition, etc.

414.— (1) For the avoidance of doubt, it is hereby declared that, in the case of a charge created by way of an ex facie absolute disposition or assignation qualified by a back letter or other agreement, or by a standard security qualified by an agreement, compliance with section 410(2) does not of itself render the charge unavailable as security for indebtedness incurred after the date of compliance.

(2) Where the amount secured by a charge so created is purported to be increased by a further back letter or agreement, a further charge is held to have been created by the ex

facie absolute disposition or assignation or (as the case may be) by the standard security, as qualified by the further back letter or agreement; and the provisions of this Chapter apply to the further charge as if—

(a) references in this Chapter (other than in this section) to the charge were references to the further charge, and

(b) references to the date of the creation of the charge were references to the date on which the further back letter or agreement was executed.

Company's duty to register charges created by it.

415.— (1) It is a company's duty to send to the registrar of companies for registration the particulars of every charge created by the company and of the issues of debentures of a series requiring registration under sections 410 to 414; but registration of any such charge may be effected on the application of any person interested in it.

(2) Where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(3) If a company makes default in sending to the registrar for registration the particulars of any charge created by the company or of the issues of debentures of a series requiring registration as above mentioned, then, unless the registration has been effected on the application of some other person, the company and every officer of it who is in default is liable to a fine and, for continued contravention, to a daily default fine.

Duty to register charges existing on property acquired.

416.— (1) Where a company acquires any property which is subject to a charge of any kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Chapter, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument (if any) by which the charge was created or is evidenced, to be delivered to the registrar of companies for registration in the manner required by this Chapter within 21 days after the date on which the transaction was settled.

(2) If, however, the property is situated and the charge was created outside Great Britain, 21 days after the date on which the copy of the instrument could (in due course of post, and if despatched with due diligence) have been received in the United Kingdom are substituted for 21 days after the settlement of the transaction as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(3) If default is made in complying with this section, the company and every officer of it who is in default is liable to a fine and, for continued contravention, to a daily default fine.

Register of charges to be kept by registrar of companies.

417.— (1) The registrar of companies shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under this Chapter, and shall enter in the register with respect to such charges the particulars specified below.

(2) In the case of a charge to the benefit of which the holders of a series of debentures are entitled, there shall be entered in the register the particulars specified in section 413(2).

(3) In the case of any other charge, there shall be entered—

(a) if it is a charge created by the company, the date of its creation, and if it was a charge existing on property acquired by the company, the date of the acquisition of the property,

(b) the amount secured by the charge,

(c) short particulars of the property charged,

(d) the persons entitled to the charge, and

(e) in the case of a floating charge, a statement of any of the provisions of the charge and of any instrument relating to it which prohibit or restrict or regulate the company's power to grant further securities ranking in priority to, or pari passu with, the floating charge, or which vary or otherwise regulate the order of ranking of the floating charge in relation to subsisting securities.

(4) The register kept in pursuance of this section shall be open to inspection by any person.

Certificate of registration to be issued.

418.— (1) The registrar of companies shall give a certificate of the registration of any charge registered in pursuance of this Chapter.

(2) The certificate—

(a) shall be either signed by the registrar, or authenticated by his official seal,

(b) shall state the name of the company and the person first-named in the charge among those entitled to the benefit of the charge (or, in the case of a series of debentures, the name of the holder of the first such debenture to be issued) and the amount secured by the charge, and

(c) is conclusive evidence that the requirements of this Chapter as to registration have been complied with.

Entries of satisfaction and relief.

419.— (1) Subject to subsections (1A) and (1B), the registrar of companies, on application being made to him in the prescribed form, and on receipt of a statutory declaration in the prescribed form verifying, with respect to any registered charge,—

(a) that the debt for which the charge was given has been paid or satisfied in whole or in part, or

(b) that part of the property charged has been released from the charge or has ceased to form part of the company's property,

may enter on the register a memorandum of satisfaction (in whole or in part) regarding that fact.

(1A) On an application being made to him in the prescribed form, the registrar of companies may make any such entry as is mentioned in subsection (1) where, instead of receiving such a statutory declaration as is mentioned in that subsection, he receives a statement by a director, secretary, liquidator, receiver or administrator of the company which is contained in an electronic communication and that statement—

- (a) verifies the matters set out in paragraph (a) or (b) of that subsection,
- (b) contains a description of the charge,
- (c) states the date of creation of the charge and the date of its registration under this Chapter,
- (d) states the name and address of the chargee or, in the case of a debenture, trustee, and
- (e) where paragraph (b) of subsection (1) applies, contains short particulars of the property which has been released from the charge, or which has ceased to form part of the company's property (as the case may be).

(1B) Where the statement under subsection (1A) concerns the satisfaction of a floating charge, then there shall be delivered to the registrar a further statement which—

- (a) is made by the creditor entitled to the benefit of the floating charge or a person authorised to act on his behalf;
- (b) is incorporated into, or logically associated with, the electronic communication containing the statement; and
- (c) certifies that the particulars contained in the statement are correct.

(2) Where the registrar enters a memorandum of satisfaction in whole, he shall, if required, furnish the company with a copy of the memorandum.

(3) Without prejudice to the registrar's duty under this section to require to be satisfied as above mentioned, he shall not be so satisfied unless—

- (a) the creditor entitled to the benefit of the floating charge, or a person authorised to do so on his behalf, certifies as correct the particulars submitted to the registrar with respect to the entry on the register of a memorandum under this section, or
- (b) the court, on being satisfied that such certification cannot readily be obtained, directs him accordingly.

(4) Nothing in this section requires the company to submit particulars with respect to the entry in the register of a memorandum of satisfaction where the company, having created a floating charge over all or any part of its property, disposes of part of the property subject to the floating charge.

(5) A memorandum or certification required for the purposes of this section shall be in such form as may be prescribed.

(5A) Any person who makes a false statement under subsection (1A) or (1B) which he knows to be false or does not believe to be true is liable to imprisonment or a fine, or both.

Rectification of register.

420. The court, on being satisfied that the omission to register a charge within the time required by this Act or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that it is on other grounds just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended or (as the case may be) that the omission or mis-statement shall be rectified.

Copies of instruments creating charges to be kept by company.

421.– (1) Every company shall cause a copy of every instrument creating a charge requiring registration under this Chapter to be kept at the company's registered office.

(2) In the case of a series of uniform debentures, a copy of one debenture of the series is sufficient.

Company's register of charges.

422.– (1) Every company shall keep at its registered office a register of charges and enter in it all charges specifically affecting property of the company, and all floating charges on any property of the company.

(2) There shall be given in each case a short description of the property charged, the amount of the charge and, except in the case of securities to bearer, the names of the persons entitled to it.

(3) If an officer of the company knowingly and wilfully authorises or permits the omission of an entry required to be made in pursuance of this section, he is liable to a fine.

Right to inspect copies of instruments, and company's register.

423.– (1) The copies of instruments creating charges requiring registration under this Chapter with the registrar of companies, and the register of charges kept in pursuance of section 422, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than 2 hours in each day be allowed for inspection) to the inspection of any creditor or member of the company without fee.

(2) The register of charges shall be open to the inspection of any other person on payment of such fee, not exceeding 5 pence for each inspection, as the company may prescribe.

(3) If inspection of the copies or register is refused, every officer of the company who is in default is liable to a fine and, for continued contravention, to a daily default fine.

(4) If such a refusal occurs in relation to a company, the court may by order compel an immediate inspection of the copies or register.

Extension of Chapter II.

424.– (1) This Chapter extends to charges on property in Scotland which are created, and to charges on property in Scotland which is acquired, by a company incorporated outside Great Britain which has a place of business in Scotland.

(2) In relation to such a company, sections 421 and 422 apply with the substitution, for the reference to the company's registered office, of a reference to its principal place of business in Scotland.

PART XVIII

FLOATING CHARGES AND RECEIVERS (SCOTLAND)

Chapter I

FLOATING CHARGES

Power of incorporated company to create floating charge.

462.— (1) It is competent under the law of Scotland for an incorporated company (whether a company within the meaning of this Act or not), for the purpose of securing any debt or other obligation (including a cautionary obligation) incurred or to be incurred by, or binding upon, the company or any other person, to create in favour of the creditor in the debt or obligation a charge, in this Part referred to as a floating charge, over all or any part of the property (including uncalled capital) which may from time to time be comprised in its property and undertaking.

(2)

(3)

(4) References in this Part to the instrument by which a floating charge was created are, in the case of a floating charge created by words in a bond or other written acknowledgment, references to the bond or, as the case may be, the other written acknowledgment.

(5) Subject to this Act, a floating charge has effect in accordance with this Part and Part III of the Insolvency Act 1986 in relation to any heritable property in Scotland to which it relates, notwithstanding that the instrument creating it is not recorded in the Register of Sasines or, as appropriate, registered in accordance with the Land Registration (Scotland) Act 1979.

Effect of floating charge on winding up.

463.— (1) Where a company goes into liquidation within the meaning of section 247(2) of the Insolvency Act 1986, a floating charge created by the company attaches to the property then comprised in the company's property and undertaking or, as the case may be, in part of that property and undertaking, but does so subject to the rights of any person who—

(a) has effectually executed diligence on the property or any part of it; or

(b) holds a fixed security over the property or any part of it ranking in priority to the floating charge; or

(c) holds over the property or any part of it another floating charge so ranking.

(2) The provisions of Part IV of the Insolvency Act (except section 185) have effect in relation to a floating charge, subject to subsection (1), as if the charge were a fixed security over the property to which it has attached in respect of the principal of the debt or obligation to which it relates and any interest due or to become due thereon.

(3) Nothing in this section derogates from the provisions of sections 53(7) and 54(6) of the Insolvency Act (attachment of floating charge on appointment of receiver), or prejudices the operation of sections 175 and 176 of that Act (payment of preferential debts in winding up).

(4) Interest accrues, in respect of a floating charge which after 16th November 1972 attaches to the property of the company, until payment of the sum due under the charge is made.

Ranking of floating charges.

464.— (1) Subject to subsection (2), the instrument creating a floating charge over all or any part of the company's property under section 462 may contain—

(a) provisions prohibiting or restricting the creation of any fixed security or any other floating charge having priority over, or ranking *pari passu* with, the floating charge; or

(b) with the consent of the holder of any subsisting floating charge or fixed security which would be adversely affected, provisions regulating the order in which the floating charge shall rank with any other subsisting or future floating charges or fixed securities over that property or any part of it.

(1A) Where an instrument creating a floating charge contains any such provision as is mentioned in subsection (1)(a), that provision shall be effective to confer priority on the floating charge over any fixed security or floating charge created after the date of the instrument.

(2) Where all or any part of the property of a company is subject both to a floating charge and to a fixed security arising by operation of law, the fixed security has priority over the floating charge.

(3) The order of ranking of the floating charge with any other subsisting or future floating charges or fixed securities over all or any part of the company's property is determined in accordance with the provisions of subsections (4) and (5) except where it is determined in accordance with any provision such as is mentioned in paragraph (a) or (b) of subsection (1).

(4) Subject to the provisions of this section—

(a) a fixed security, the right to which has been constituted as a real right before a floating charge has attached to all or any part of the property of the company, has priority of ranking over the floating charge;

(b) floating charges rank with one another according to the time of registration in accordance with Chapter II of Part XII;

(c) floating charges which have been received by the registrar for registration by the same postal delivery rank with one another equally.

(5) Where the holder of a floating charge over all or any part of the company's property which has been registered in accordance with Chapter II of Part XII has received intimation in writing of the subsequent registration in accordance with that Chapter of another floating

charge over the same property or any part thereof, the preference in ranking of the first-mentioned floating charge is restricted to security for—

- (a) the holder's present advances;
- (b) future advances which he may be required to make under the instrument creating the floating charge or under any ancillary document;
- (c) interest due or to become due on all such advances;
- (d) any expenses or outlays which may reasonably be incurred by the holder; and
- (e) (in the case of a floating charge to secure a contingent liability other than a liability arising under any further advances made from time to time) the maximum sum to which that contingent liability is capable of amounting whether or not it is contractually limited.

(6) This section is subject to sections 175 and 176 of the Insolvency Act (preferential debts in winding up).

Continued effect of certain charges validated by Act of 1972.

465.— (1) Any floating charge which—

- (a) purported to subsist as a floating charge on 17th November 1972, and
- (b) if it had been created on or after that date, would have been validly created by virtue of the Companies (Floating Charges and Receivers) (Scotland) Act 1972,

is deemed to have subsisted as a valid floating charge as from the date of its creation.

(2) Any provision which—

- (a) is contained in an instrument creating a floating charge or in any ancillary document executed prior to, and still subsisting at, the commencement of that Act,
- (b) relates to the ranking of charges, and
- (c) if it had been made after the commencement of that Act, would have been a valid provision,

is deemed to have been a valid provision as from the date of its making.

Alteration of floating charges.

466.— (1) The instrument creating a floating charge under section 462 or any ancillary document may be altered by the execution of an instrument of alteration by the company, the holder of the charge and the holder of any other charge (including a fixed security) which would be adversely affected by the alteration.

(2) Without prejudice to any enactment or rule of law regarding the execution of documents, such an instrument of alteration is validly executed if it is executed—

(a)

(b) where trustees for debenture-holders are acting under and in accordance with a trust deed, by those trustees; or

(c) where, in the case of a series of secured debentures, no such trustees are acting, by or on behalf of—

(i) a majority in nominal value of those present or represented by proxy and voting at a meeting of debenture-holders at which the holders of at least one-third in nominal value of the outstanding debentures of the series are present or so represented; or

(ii) where no such meeting is held, the holders of at least one-half in nominal value of the outstanding debentures of the series;

(3) Section 464 applies to an instrument of alteration under this section as it applies to an instrument creating a floating charge.

(4) Subject to the next subsection, section 410(2) and (3) and section 420 apply to an instrument of alteration under this section which—

(a) prohibits or restricts the creation of any fixed security or any other floating charge having priority over, or ranking *pari passu* with, the floating charge; or

(b) varies, or otherwise regulates the order of, the ranking of the floating charge in relation to fixed securities or to other floating charges; or

(c) releases property from the floating charge; or

(d) increases the amount secured by the floating charge.

(5) Section 410(2) and (3) and section 420 apply to an instrument of alteration falling under subsection (4) of this section as if references in the said sections to a charge were references to an alteration to a floating charge, and as if in section 410(2) and (3)—

(a) references to the creation of a charge were references to the execution of such alteration; and

(b) for the words from the beginning of subsection (2) to the word "applies" there were substituted the words "Every alteration to a floating charge created by a company".

(6) Any reference (however expressed) in any enactment, including this Act, to a floating charge is, for the purposes of this section and unless the context otherwise requires, to be construed as including a reference to the floating charge as altered by an instrument of alteration falling under subsection (4) of this section.

Chapter III

GENERAL

Interpretation for Part XVIII generally

486. – (1) In this Part, unless the context otherwise requires, the following expressions have the following meanings respectively assigned to them, that is to say –

"ancillary document" means –

- (a) a document which relates to the floating charge and which was executed by the debtor or creditor in the charge before the registration of the charge in accordance with Chapter II of Part XII; or
- (b) an instrument of alteration such as is mentioned in section 466 in this Part;

"company" ... means an incorporated company (whether a company within the meaning of this Act or not);

"fixed security", in relation to any property of a company, means any security, other than a floating charge or a charge having the nature of a floating charge, which on the winding up of the company in Scotland would be treated as an effective security over that property, and (without prejudice to that generality) includes a security over that property, being a heritable security within the meaning of section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970;

...

"Register of Sasines" means the appropriate division of the General Register of Sasines.

Appendix C

SCOTLAND ACT 1998 c.46

PART I

THE SCOTTISH PARLIAMENT

Legislative competence.

29. - (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or with Community law,

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

(4) A provision which—

(a) would otherwise not relate to reserved matters, but

(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,

is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.

Legislative competence: supplementary.

30. – (1) Schedule 5 (which defines reserved matters) shall have effect.

(2) Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient.

(3) Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of this Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Scotland.

(4) An Order in Council under this section may also make such modifications of—

(a) any enactment or prerogative instrument (including any enactment comprised in or made under this Act), or

(b) any other instrument or document,

as Her Majesty considers necessary or expedient in connection with other provision made by the Order.

SCHEDULE 5

PART II

SPECIFIC RESERVATIONS

Preliminary

1. The matters to which any of the Sections in this Part apply are reserved matters for the purposes of this Act.

2. A Section applies to any matter described or referred to in it when read with any illustrations, exceptions or interpretation provisions in that Section.

3. Any illustrations, exceptions or interpretation provisions in a Section relate only to that Section (so that an entry under the heading "exceptions" does not affect any other Section).

HEAD C – Trade and Industry

Section C1

C1. Business associations

The creation, operation, regulation and dissolution of types of business association.

Exceptions

The creation, operation, regulation and dissolution of—

(a) particular public bodies, or public bodies of a particular type, established by or under any enactment, and

(b) charities.

Interpretation

"Business association" means any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit; and "business" includes the provision of benefits to the members of an association.

Section C2

C2. Insolvency

In relation to business associations—

- (a) the modes of, the grounds for and the general legal effect of winding up, and the persons who may initiate winding up,
- (b) liability to contribute to assets on winding up,
- (c) powers of courts in relation to proceedings for winding up, other than the power to sist proceedings,
- (d) arrangements with creditors, and
- (e) procedures giving protection from creditors.

Preferred or preferential debts for the purposes of the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986, and any other enactment relating to the sequestration of the estate of any person or to the winding up of business associations, the preference of such debts against other such debts and the extent of their preference over other types of debt.

Regulation of insolvency practitioners.

Co-operation of insolvency courts.

Exceptions

In relation to business associations—

- (a) the process of winding up, including the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or of that part,
- (b) the effect of winding up on diligence, and
- (c) avoidance and adjustment of prior transactions on winding up.

In relation to business associations which are social landlords, the following additional exceptions—

- (a) the general legal effect of winding up,
- (b) procedures for the initiation of winding up,
- (c) powers of courts in relation to proceedings for winding up, and

(d) procedures giving protection from creditors,

but only in so far as they relate to a moratorium on the disposal of property held by a social landlord and the management and disposal of such property.

Floating charges and receivers, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts.

Interpretation

"Business association" has the meaning given in Section C1 of this Part of this Schedule, but does not include any person whose estate may be sequestrated under the Bankruptcy (Scotland) Act 1985 or any public body established by or under an enactment.

"Social landlord" means a body which is—

(a) a society registered under the Industrial and Provident Societies Act 1965 which has its registered office for the purposes of that Act in Scotland and satisfies the relevant conditions, or

(b) a company registered under the Companies Act 1985 which has its registered office for the purposes of that Act in Scotland and satisfies the relevant conditions.

"The relevant conditions" are that the body does not trade for profit and is established for the purpose of, or has among its objects and powers, the provision, construction, improvement or management of—

(a) houses to be kept available for letting,

(b) houses for occupation by members of the body, where the rules of the body restrict membership to persons entitled or prospectively entitled (as tenants or otherwise) to occupy a house provided or managed by the body, or

(c) hostels,

"house" and "hostel" having the meanings given in section 338(1) of the Housing (Scotland) Act 1987.

"Winding up", in relation to business associations, includes winding up of solvent, as well as insolvent, business associations.

Appendix D

List of those who Submitted Written Comments on Discussion Paper No 121

David A Bennett (Bennett & Robertson LLP)
Civil Aviation Authority
Committee of Scottish Clearing Bankers
Consumer Credit Trade Association
Dundas & Wilson
Faculty of Advocates
Joan M FitzPatrick (Friels)
Professor George L Gretton
Nicholas Grier
Jim Henderson (Companies House)
Stephen Inglis (McCash & Hunter)
Institute of Credit Management
Keeper of the Registers of Scotland
Law Society of Scotland
Professor William W McBryde
McJarrow & Stevenson
Andrew Meakin, Alistair Orr and Colin Harley (Maclay Murray & Spens)
Lionel D Most (Burness)
The Patent Office
Philip, Gauld & Co
Roy Roxburgh (Ian Smith & Company)
Scottish Law Agents' Society
A M Simpson & Son
Dr Andrew J M Steven
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