



SCOTTISH LAW COMMISSION

MEMORANDUM No: 33

LAW OF RIGHTS IN SECURITY

COMPANY LAW: REGISTRATION OF CHARGES: SCOTLAND

1 December 1976

This consultative Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 March 1977. All correspondence should be addressed to:

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CONTENTS

<u>Chapter</u>		<u>Paragraph</u>	<u>Page</u>
1	Introduction	1.1	1
2	Registration of Debenture Floating Charges	2.1	3
3	Certificates of Registration	3.1	5
4	Memorandum of Satisfaction and Statutory Particulars	4.1	7
5	Other recommendations of the Report of the Company Law Committee (the Jenkins Report)	5.1	9
	Summary of provisional proposals and suggestions		15
	Appendix I		18
	Appendix II		21

MEMORANDUM NO 33

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1. Introduction

1.1 In this Memorandum the Scottish Law Commission takes under review certain questions relating to the registration of floating charges which are the subject of Proposals for the reform of the law of Scotland made to the Commission under section 3(1)(a) of the Law Commissions Act 1965, and also certain other matters concerning the registration of floating charges which came to the Commission's notice during its consideration of those Proposals. The Commission has previously had under consideration aspects of the law relating to floating charges, and between 1967 and 1970 carried out, under a reference from the then President of the Board of Trade, an examination of the working of the Companies (Floating Charges) (Scotland) Act 1961 with a view to making proposals for amending or new legislation. On 26 January 1970 the Commission presented to the President of the Board of Trade a Report¹ on the Act of 1961 containing a number of proposals and recommendations, to which legislative effect was given by the Companies (Floating Charges and Receivers) (Scotland) Act 1972.

1.2 Among the recommendations of the Commission's Report to which effect was given by the Act of 1972 were recommendations² relating to the provisions made by the Act of 1961 for the registration of charges created by companies incorporated in Scotland. These provisions were amended by the Act of 1972 and in their amended form now constitute Part IIIA of the Companies Act 1948. The Proposals received by the Commission, considered in Chapters 2, 3 and 4 of this Memorandum, are concerned with intended amendments of Part IIIA of the Act of 1948 which were contained in the Companies Bill ("the Bill") introduced during the Parliamentary Session 1973-74 but lost on the dissolution of Parliament in February 1974. The same subject-matter was considered in an article by Dr Enid A Marshall, Senior Lecturer in Business Law, University of Stirling, entitled "Between Two Companies Bills: A note on registration of charges". A copy of the article, which was published in

¹(1970) Cmnd. 4336.

²ibid. paras. 24-29.

September 1974¹ and which raised the questions subsequently made the subject of the Proposals submitted to the Commission, is appended² to this Memorandum. The additional matters concerning the registration of charges which came to notice during consideration of these Proposals are reviewed in Chapter 5 of the Memorandum.

1.3 Although we are aware that succeeding Governments have not meanwhile indicated an intention of re-introducing the Bill as part of an immediate legislative programme, nevertheless we have thought it advisable to examine the Proposals made to us in the light particularly of the criticisms and suggestions contained in the article by Dr Marshall, to which we have referred, and to express certain provisional views on these questions and also on the additional matters to which reference has been made. We would anticipate that, since these criticisms and suggestions and our provisional views relate to matters of a technical and non-contentious nature and arise from recommendations made in the Report of the Company Law Committee ("the Jenkins Report") published in June 1962³, they would, if thought to be well-founded, be taken under consideration in any future Bill which sought to effect a comprehensive reform of Company Law or of the law relating to floating charges.

¹ See 1974 S.L.T. (News) pp. 161-163. We are grateful to W Green & Son Ltd, the publishers of the Scots Law Times, for permission to reproduce the article.

² Appendix I.

³ (1962) Cmnd. 1749; see particularly para. 306.

2. Registration of Debenture Floating Charges

2.1 The first and perhaps the most important of the three criticisms to which we have referred relates to the particulars to be registered in respect of a floating charge "to the benefit of which the holders of a series of debentures are entitled". We shall refer to such a charge in this Memorandum as a "debenture floating charge".

2.2 The effect of the insertion of the new section 106CC proposed by the Bill¹ would be to remove the requirement in the case of a debenture floating charge to register as part of "the statutory particulars" of a charge a statement of any provisions (which in this Memorandum we shall refer to as "ranking provisions") of the charge and of any instrument relating thereto 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. This requirement in the case of a debenture floating charge is presently contained in section 106A(7) of the Act of 1948 as amended by the Act of 1972. The corresponding requirement in respect of other floating charges arises by virtue of the Companies (Forms) (Amendment No 4) Order 1972², which prescribed the particulars falling to be registered under section 106A(1) of the Act of 1948 as including particulars of ranking provisions which in terms of section 106D of the Act of 1948 require to be included in the register of charges kept by the Registrar of Companies. There are no corresponding requirements to register ranking provisions in respect of floating charges by companies incorporated in England, whether or not they fall into the category of debenture floating charges, but it is thought that the position of floating charges in Scotland (which are a statutory creation) requires that the relative registration requirement should be different.

¹ Clause 83 and Schedule 3, Part I, para. 4. The terms of the proposed new section 106CC are reproduced in Appendix II to this Memorandum.

² S.I. 1972/1636 (1972 III, p. 4786).

2.3 The requirement to register particulars was imposed in relation to Scottish floating charges when they first became competent with the coming into operation of the Act of 1961, and this had special reference to the provisions contained in section 5 of that Act regulating the ranking of charges. These provisions included a rule that where any property of a company was subject both to a floating charge and to a fixed security (not being a fixed security arising by operation of law) the fixed security should have priority over the floating charge unless inter alia the instrument creating the floating charge prohibited the company from subsequently creating any fixed security having priority over or ranking equally with the floating charge. This rule has been modified by section 5 of the Act of 1972 so that a prohibition of the kind described in section 5 of the Act of 1961 is no longer so conclusive in determining the ranking of floating charges.

2.4 Nevertheless, as the new section 5 specifically provided for the attachment to floating charges, including debenture floating charges, of ranking provisions, we consider that there is still a purpose in retaining the requirement to include a statement of such ranking provisions in the particulars of the charge to be filed, and we see no reason why this requirement should not apply to debenture floating charges as well as to other floating charges. If this view is accepted the provisions of the new section 106CC proposed by the Bill would require to be amended by the insertion in sub-section (3) of an additional paragraph (e) in the same terms as paragraph (e) in sub-section (2) of that section. We provisionally propose that this course should be followed in any future legislation on the subject, but would welcome comment.

3. Certificates of Registration

3.1 The second criticism relates to the form of certificates of registration issued by the Registrar following registration in terms of Part IIIA of the Act of 1948. The Bill proposed¹ that sections 98(2) and 106E of the Act of 1948 should be amended so as to assimilate the Scottish and English provisions in regard to the contents of certificates of registration by providing that certificates of registration issued by either Registrar would contain only a statement that particulars of the charge have been duly registered and the date on which they were registered.

3.2 From the representations which were made to us prior to the issue of our Report² on the Act of 1961 it would appear that, as stated in paragraph 20 of the Report, certificates of registration of charges issued by the Registrar under the proposed new provisions would not be sufficiently informative. It was pointed out that where a number of charges were created at the same time in favour of different creditors it was sometimes difficult to tell which certificates related to which charge. In particular some forms of certificate gave the name of the charging company but not the name of the creditor and the only means of identification was the serial number which the Registrar of Companies placed not only on the certificate but also on the document of charge which he marked and returned with the certificate.

3.3 To meet these objections our Report in paragraph 20 made proposals in regard to the contents of certificates of registration which were enacted by the Act of 1972 so as to become section 106E of the Act of 1948. That section is in the following terms:-

"106E. The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part of this Act, stating the name of the company and of the person first-named in the charge among the persons entitled to the benefit thereof (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 thereby secured, and the certificate shall be conclusive evidence that the requirements of this Part of this Act as to registration have been complied with."

¹ Clause 83, Schedule 2, Part I, para. 5 and Schedule 3, Part I, para. 6.

² (1970) Cmnd. 4336.

3.4 We would, in the light of the criticism submitted to us, provisionally suggest that the assimilation of the statutory provisions in regard to contents of certificates of registration should take the form of the incorporation in Part III of the Act of 1948 of a provision on the lines of section 106E. Indeed, it has been represented to us that it would be helpful in identifying certificates of registration in relation to the charges to which they refer if section 106E was amended to provide that certificates of registration should contain also short particulars of the property charged, and in our provisional view such amendment would be useful and appropriate. This would be especially useful where a number of properties are at the same time charged by means of separate standard securities in favour of the trustees for the holders of an issue of mortgage debenture stock. In such cases all the relative certificates of registration issued under section 106E would in the absence of such particulars be in identical terms distinguishable only by reference to serial numbers.

3.5 The desirability of a provision along the lines of section 106E extended as suggested is increased if, as was proposed in the Bill¹, effect is given to the recommendation of the Jenkins Report² that both in the case of Scottish and English charges it should no longer be necessary to file with the Registrar either the instrument creating or evidencing the charge or a copy thereof. While we agree with this recommendation its enactment would increase the difficulty to which we have referred of identifying certificates of registration unless a provision on the lines of section 106E is retained for Scottish registrations and introduced for English registrations. We would welcome comments on the matters raised in this and the preceding paragraph.

¹ See clause 83 and Schedule 2, Part I, para. 1(1) and Schedule 3, Part I, para. 1(1).

² (1962) Cmd. 1749 paras. 300, 302 and 306 (g).

4. Memorandum of Satisfaction and Statutory Particulars

4.1 The third criticism relates to the proposed assimilation of the Scottish and English procedures in respect of entries in the register of satisfaction of charges and the release of property from charges. Section 106F was incorporated into the Act of 1948 by the Act of 1972 principally to meet the objection that under the former provisions, which applied both in Scotland and in England, a memorandum of satisfaction was entered on the register on the basis of a unilateral declaration by officers of the company that the debt had been satisfied either in whole or in part or that the property charged had been released¹. Section 106F therefore provided that the Registrar was not to be entitled to enter a memorandum on the register unless -

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

4.2 Under the procedure proposed in the Bill for both Scotland and England² in respect of all registrable charges created after the coming into force of the new provisions the Registrar would be required, where there has been delivered to him a statement in the prescribed form signed on behalf of the company and by the person entitled to the charge to the effect (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 or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, to enter that statement in the register and the signature of any such statement and its delivery to the Registrar should in a question with the liquidator and any creditor of the company be binding on that person and any other person claiming under him.

¹ See our Report on the Act of 1961 - (1970) Cmnd. 4336 para. 22.

² Sections 106F and 100, as proposed to be amended.

4.3 While this procedure differs from the solution adopted in section 106F it would seem to be directed at the difficulty identified in our Report and we do not at present see any objection to its introduction into Scotland, although we would welcome comment on the matter. We would however provisionally propose (a) that it should be made competent not only for the person entitled to the charge but also for a person authorised to do so on his behalf to sign the prescribed form and (b) that, to meet the difficulty referred to in paragraph 22 of our Report of obtaining a signature by or on behalf of the creditor, provision should be made on the lines of the present paragraph (b) of section 106F(2) making it competent for the Court to direct the registration of a statement without a signature by or on behalf of the creditor where it is satisfied that such signature cannot readily be obtained. We would also welcome comment on these provisional proposals.

4.4 The proposals in the foregoing paragraph regarding the signature of statements of satisfaction and of release from charges would also apply to the similar procedure for signature of the statutory particulars of a charge created by a company as proposed in the Bill. The existing law requires "the prescribed particulars" of a charge created by a company to be signed only on behalf of the company¹. The intention of the Bill was, however, to replace "the prescribed particulars" with "the statutory particulars", which were defined in the Bill as "a statement in writing in the prescribed form signed on behalf of the company and (in a case within section 106A of this Act) by the person entitled to the charge" containing the matters specified in the Bill². We therefore recommend that the proposals in the foregoing paragraph should also be made applicable in relation to the signature of the statutory particulars of a charge created by a company as contemplated in the Bill.

¹See sections 106A and B of 1948 Act and relative forms set out in the Schedule to the Companies (Forms) (Amendment No 4) Order 1972 (S.I. 1972/1636 - 1972 III, p. 4786).

²See proposed new section 106CC of 1948 Act; also proposed new section 97A in Schedule 2, Part I, para. 4 of the Bill (English provision corresponding to proposed section 106CC).

5. Other Recommendations of the Jenkins Report

5.1 Turning to the other matters which we have taken under review, we have noted the intention to enact in the Bill the recommendations in the Jenkins Report (1) that the list of registrable charges be extended to cover charges on shares held by the company in a subsidiary¹ and (2) that it should no longer be necessary to file the instrument creating or evidencing the charge or a copy thereof². We have also noted the recommendations for the improvement of the English and Scottish provisions as contained in sections 96 and 106B so as to specify the time within which a company must register a charge³, and in sections 101 and 106G so as to provide that an extension of time granted by the Court for the registration of a charge may be made on the terms that such extension is without prejudice to any liability for default already incurred by the company or its officers⁴. Such legislation would have our support.

5.2 Having in view the desirability, to which both the Jenkins Report and our own Report refer, of avoiding duplication of entries and of ensuring that the entries in the English Register relating to English companies and entries in the Scottish Register relating to Scottish companies relate to all charges registrable under the laws of both countries, we would particularly welcome the provision proposed in the Bill to amend section 106 to bring it into line with section 106K and so remove the present anomaly under which Scottish registered companies may have a duty to effect registration in England under the existing section 106 while by virtue of the amendment of section 106K effected by the Act of 1972 English companies no longer have any duty to effect registration in Scotland.

¹Jenkins Report para. 306(f): proposed new sections 95(2)(j) and 106A(2)(f).

²ibid. para. 306(g): proposed new sections 95(1) and 106A(1).

³ibid. para. 306(i).

⁴ibid. para. 306(j).

5.3 We are however in doubt whether the new sections 106 and 106K in the form proposed in the Bill would procure the establishment of adequate or satisfactory registration files in respect of companies incorporated outside Great Britain. Section 106(1) as proposed to be amended would apply the registration requirements of Part III to charges on property in England where either the charge is created or the property subject to the charge is acquired by a company incorporated outside Great Britain which has an established place of business in England. Section 106K(1) as proposed to be amended would be in identical terms save for the substitution of Part IIIA for Part III and Scotland for England in relation to the situation of the property charged or acquired and the established place of business. The effect of such provisions would be that a foreign-registered company with an established place of business in England would be required to register only charges on property in England and that unless and until it established a place of business in Scotland there would be no requirement to register charges on property in Scotland and then only in the Scottish Register. An enquirer would thus need to look at both the English and Scottish Registers to get a full picture of the state of the company's charges within Great Britain and he would be able to do so only if the company in question had established places of business both in England and in Scotland. This result would seem to us inconsistent with the rule which is now effective for companies incorporated inside Great Britain that the Scottish Register should disclose all registrable charges affecting companies incorporated in Scotland and the English Register should do likewise in relation to English companies. We would therefore provisionally propose that in any future legislation section 106(1) should be amended so that Part III will apply to charges on property in Great Britain which are created and to charges on property in Great Britain which is acquired by a company (whether a company within the meaning of the Act or not) incorporated outside Great Britain which has an established place of business in England and that section 106K(1) should be amended similarly so as to make Part IIIA applicable to charges on property within Great Britain of companies which have established places of business in Scotland. Under these provisions not only would the relative Register contain particulars of all registrable charges in Great Britain but also, in the case of a company with established places of

business both in Scotland and England, the relative entries would appear in their entirety in both Registers. We are inclined to think that the inconvenience of this duplication might be offset by the advantage to those dealing with the company in being able to search the Register in their own country. If, however, it is desired to avoid this duplication of entries each of the sections could be made subject to the proviso that in no case would a company require to comply with both Part III and Part IIIA. We would welcome comments on the provisional proposals and suggestions made in this paragraph.

5.4 The criticisms of the proposed new sections 106 and 106K would seem to apply also to the new sub-section implementing the recommendation in the Jenkins Report¹ that the provisions of section 106 should be extended to require the registration of charges already existing and affecting or capable of affecting the English property of a company incorporated outside England which establishes a place of business in England. The effect of the proposed new sections 106(2) and 106K(2) would, we think, be to require a company incorporated outside Great Britain which has property in England or Scotland subject to such a charge to register particulars of the charge when it established a place of business in England or Scotland. Thus, if a foreign company having granted a floating charge over its whole property and undertaking in its country of incorporation extended its operations to Great Britain with the result that it acquired debts in Scotland and England which became subject to the floating charge, the company would upon establishing a place of business in Scotland and in England require to effect registration in both countries. There would thus, as in the case of sections 106(1) and 106K(1), exist, on the one hand, the possibility of duplication of entries in both Registers and on the other the dangers of incompleteness in the entries appearing in any one Register because of the distinction between property in Scotland and in England. In our present view the solution would seem to lie in the amendment of the proposed new sections 106(2) and 106K(2), along the lines we have suggested in relation to sections 106(1) and 106K(1), but we would welcome comments on this provisional proposal.

¹ ibid. para. 306(1).

5.5 We have considered the implications of the proposal in the new section 106GG that a person entering into possession of the property of a company incorporated in Scotland as a creditor in any security over that property be required to give notice of the fact to the Registrar of Companies and also to give similar notification when he gives up such possession. This proposal was we understand made in implement of the recommendation contained in paragraph 306(k) of the Jenkins Report that section 102 of the Act of 1948 (which applies only to England and which requires that notice must be given to the Registrar of any appointment of a Receiver or a Manager of the property of a company) should be extended to apply to a person entering into possession as a mortgagee.

5.6 The Scottish provisions contained in the proposed new section 106GG would seem to go further than the corresponding English provision. The proposed amendment of section 102 for England would extend the registration requirement to persons entering into possession of the property of a company as a mortgagee of that property with the corresponding registration requirement when such person gives up possession. The Scottish provisions proposed in section 106GG would extend to persons entering into possession of the property of a company "as a creditor in any security". The difficulty arises from the fact that the expression "security" appears to have a wider meaning in Scots law than the expression "mortgage" has in English law. As we understand it, a mortgage in English law requires as an essential element that there is some disposition, transfer, assignment, charge or agreement to create a charge on or over property of some kind for the purpose of securing money or money's worth¹. The term "security" in Scots law covers any floating charge for the purpose of securing a debt (which would normally imply an obligation to pay or repay money) and also for securing any other obligation (which would comprehend an obligation for securing money's worth but could conceivably be wider)². It also covers any transaction in which there is a disposition, transfer or assignation of property of any kind in security of a debt or obligation. In addition it covers a security which does not involve either a floating charge or a disposition, assignation or transfer but arises merely by operation of law, as in the case of lien.³

¹See Halsbury's Laws of England (3rd Ed) Vol. 27, para. 236 at p-155.

²Act of 1972, s.1(1).

³Act of 1972, s.5(2).

That kind of security would not, we understand, fall within the meaning of mortgage in the English sense. Moreover there are situations, often arising from contracts, where property of a company is held by a creditor until the company pays money or performs an obligation. These are not normally described or thought of as security transactions but the result on analysis is truly the creation of a security.

5.7 Further it is clear that if the word "security" is used without its meaning being restricted by definition the ambit of the provisions would extend beyond charges which are registrable under the Act. It seems to us that the logic of the legislation is that notices of enforcement should be given only in respect of registrable securities. Indeed the proposed additions to section 102 for England would seem also to be subject to the criticism that they may extend beyond registrable charges to mortgages which are not registrable under section 95 of the Act of 1948. It is important in this context to keep in mind that, while the English provision appears by way of supplement to section 102 in its present form - which applies only to England and which requires notice to be given to the Registrar of the appointment and removal of a receiver or manager - the corresponding Scottish provisions appear in sections 13(1), 14(3) and 22(5) of the Act of 1972. These provisions, it should be noted, are contained in Part II of the Act of 1972 which for the first time made it competent under the law of Scotland for the holder of a floating charge to appoint a receiver of such part of the property of the company as was subject to the charge. Thus in Scotland the power to appoint a receiver is restricted to the holder of a floating charge which is of course one of the forms of charge which are registrable in terms of Part IIIA of the Act of 1948. This would seem to add weight to the argument that the application of the recommendation of the Jenkins Report has not been fully examined in its application to Scotland.

5.8 We therefore suggest that further consideration should be given to the appropriateness in a Scottish context of the proposed new section 106GG and in particular that consideration should be given to using phraseology not incorporating the expression "security" or to defining the expression "security" so as to ensure that it does not extend to securities or arrangements in the nature of securities which are not themselves registrable

under Part IIIA. Our provisional view is that the proposed new section 106GG(1) might be amended as follows or to the following effect:-

"If any person takes or enters into possession of the property of a company by virtue of the powers conferred upon him by or in relation to a charge to which section 106A of this Act applies he shall"

Section 106GG(2) would also require to be appropriately amended. We would welcome comments on these provisional proposals and suggestions.

Summary of Provisional Proposals and Suggestions

In any future legislation concerning registration of floating charges there should be incorporated provisions to the following effect:

1. A provision amending the proposed new section 106CC of the Companies Act 1948 by the insertion in sub-section (3) of an additional paragraph (e) in the same terms as paragraph (e) in sub-section (2) of that section. Para 2.4

2. A provision on the lines of section 106E of the Act of 1948 to be incorporated in Part III of that Act with a view to the assimilation of the statutory provisions in regard to contents of certificates of registration. Para. 3.4

3. An amendment of section 106E of the Act of 1948 providing that certificates of registration should contain also short particulars of the property charged. Para.3.4

4. A provision making it competent not only for the person entitled to the charge but also for a person authorised to do so on his behalf to sign the prescribed form under the procedure proposed in the Bill (ie sections 106F(1) and 100(1) of the Act of 1948 as proposed to be amended). Para. 4.3

5. A provision on the lines of the present paragraph (b) of section 106F(2) of the Act of 1948 making it competent for the Court to direct the registration of a statement without a signature by or on behalf of the creditor where it is satisfied that such signature cannot readily be obtained. Para. 4.3

6. A provision applying the recommendations contained in paragraph 4.3 of the Memorandum (see items 4 and 5 above) to the procedure proposed in the Bill for signature of the statutory particulars of a charge created by a company. Para. 4.4

7. A provision amending section 106(1) of the Act of 1948 so that Part III of that Act will apply to charges on property in Great Britain which are created and to charges on property in Great Britain which is acquired by a company (whether a company within the meaning of the Act or not) incorporated outside Great Britain which has an established place of business in England, and a similar provision amending section 106K(1) of the Act of 1948 so as to make Part IIIA of that Act applicable to charges on property within Great Britain of companies which have established places of business in Scotland. Para 5.3

8. A provision amending the proposed new sections 106(2) and 106K(2) of the Act of 1948 along the same lines as the provisions suggested above for amendment of sections 106(1) and 106K(1) of that Act. Para. 5.4

9. Provisions amending the proposed new section 106GG(1) and (2) of the Act of 1948 designed to ensure that the application of that section would not extend to securities or arrangements in the nature of securities which are not themselves registrable under Part IIIA of the Act of 1948. Para. 5.8

The Commission would welcome comments on these provisional proposals and suggestions, and also upon any other matters covered by this Memorandum, including the matters raised in paragraph 3.5, the opening sentence of paragraph 4.3 and the concluding passage of paragraph 5.3.

The Commission is at present considering difficulties which have occurred in the operation of sections 5 and 7 of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 and the problem of the Registrar's responsibility for contents of the register. If any of these matters are thought to necessitate consultation, the Commission may in due course issue a further Memorandum. In the meantime, the Commission would be grateful for information about any matters of doubt or difficulty which have arisen in practice in relation to floating charges and for any suggestions or proposals for clarification, improvement or reform of this area of Scots law.

BETWEEN TWO COMPANIES BILLS

A note on registration of charges

THE Companies Bill which received its second reading in the House of Commons on 17th January of this year was one of the Bills lost on the dissolution of Parliament the following month, and the present Government has not included major company law reform in its immediate legislative programme.

Whether the next Companies Bill is to be very different from, or substantially the same as, the Bill recently lost, one may confidently conjecture that some provisions, unlikely to be the subject of political controversy, will simply be carried forward from the lost Bill to reappear in its successor. Amongst these provisions probably are the proposed amendments as to registration of charges, which comprised Part VI of the lost Bill.

To appreciate the effect of these amendments it is necessary to view them in their historical context.

1. The starting point is Part III of the Companies Act 1948, comprising ss. 95 to 106 of that Act and containing what may, for brevity, be called the "English" provisions on registration of charges, i.e., the provisions applicable by s. 95 to companies registered in England and extended by s. 106 to other companies which have established places of business in England.

2. The second stage is the Companies (Floating Charges) (Scotland) Act 1961, which made the giving of security by way of floating charges competent under Scots law. By this Act (s. 6 and Schedule 2) there was added to the Act of 1948 a new Part — Part IIIA, headed "Registration of Charges (Scotland)" and consisting of ss. 106A to 106K. These "Scottish" provisions were similar to, but not in all respects the same as, the English provisions in Part III.

3. The Jenkins Report (Cmd. 1749) was published in June of the following year and included a number of proposals for amendment of both the English and the Scottish provisions as to registration of charges (paras. 300-306). On the differences between the English and the Scottish provisions the Jenkins Committee expressed the hope "that when a new Companies Act is being drafted the two sets of registration provisions will be assimilated so far as practicable, to avoid duplication of entries and to ensure that the entries in the English register relating to an English company, and those in the Scottish register, relating to a Scottish company, relate to all charges registrable under the laws of both countries" (para. 305).

4. The next stage was the publication in April 1970 of the Scottish Law Commission's "Report on the Companies (Floating Charges) (Scotland) Act 1961" (Cmd. 4336). That report recommended (i) extensive changes in the Scots law relating to floating charges and (ii) the introduction of receiverships to Scotland. Under heading (i) were included some recommendations for amendment of the registration provisions.

5. The Companies (Floating Charges and Receivers) (Scotland) Act 1972 substantially enacted the recommendations made in the Scottish Law Commission's Report, and it is in the schedule to that Act that the presently applicable Part IIA of the Companies Act 1948 is to be found.

One of the main objects of the Companies Bill was to give effect to most of the outstanding recommendations of the Jenkins Committee. The amendments of Parts III and IIIA of the Companies Act 1948, set out in Schedules 2 and 3 respectively, were for the most part in accordance with that object. Thus the Jenkins Committee recommended (Cmd. 1749, para. 306 (f)) that the list of registrable charges be extended to cover charges on shares held by the company in a subsidiary, and the Bill sought to make this addition to ss. 95 (2) and 106A (2) for England and Scotland respectively. Again, the Jenkins Committee recommended (ibid., para. 306 (g)) the repeal of the English requirement in s. 95 (1) for delivery of the instrument of charge to the registrar and also the repeal of the corresponding Scottish requirement in s. 106A (1) for delivery of a copy of the instrument; the committee further recommended (ibid.) that the particulars delivered to the registrar should be required to be signed by both the chargee and the charger; the provisions of the Bill as to "the statutory particulars" of charges (ss. 95 (1) and 97A (1) for England and 106A (1) and 106CC (1) for Scotland) would have given effect to these recommendations and would incidentally have eliminated the existing distinction between the English and the Scottish provisions. Further recommendations of the Jenkins Committee for the improvement of the English provisions in ss. 96 (duty of company to register charges created by company), 101 (rectification of register of charges), 102 (registration of enforcement of security) and 106 (application of Part III to charges created, and property subject to charge acquired, by company incorporated outside England) (Cmd. 1749, para. 306 (i) to (l)) and of the corresponding Scottish provisions would also have been adopted. None of the Jenkins Committee's recommendations referred to in this paragraph was made the subject either of comment in the Scottish Law

Commission's Report or of enactment in the Companies (Floating Charges and Receivers) (Scotland) Act 1972. These proposed reforms of the English and Scottish provisions were, therefore, very much in step with one another.

With other proposed reforms this was not so, the Act of 1972 having afforded an opportunity, which was seized, for earlier amendment of the Scottish provisions. For instance, although the Jenkins Committee recommended the repeal of s. 99 (endorsement of certificate of registration on debentures), that English requirement remains applicable, whereas the corresponding, but slightly different, Scottish provisions, formerly in s. 106E (copy of certificate of registration to be sent to debenture holder), were removed on the passing of the Act of 1972, in accordance with the view of the Scottish Law Commission that the provisions did not "serve a purpose sufficiently important to justify the practical difficulties and expense involved" (Cmnd. 4336, para. 21); the Bill sought to bring the English provisions into line with the Scottish provisions in this respect. Similar considerations have arisen in relation to the amendment of ss. 106 and 106K: the Jenkins Committee recommended (Cmnd. 1749, para. 306 (n)) assimilation so as to avoid duplication of entries and to ensure that the entries in the English register, relating to an English company, and those in the Scottish register, relating to a Scottish company, related to all charges registrable under the laws of both countries; the Scottish Law Commission considered (Cmnd. 4336, para. 28) that that recommendation would "in a large measure clarify and solve the present difficulties", and the amendment of s. 106K made by the Act of 1972 went a certain way towards assimilation: s. 106K now extends the provisions of Part IIIA 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"; the Bill, if passed, would have introduced a corresponding provision for s. 106, but in the meantime anomalies remain since s. 106 relates to companies incorporated "outside England", not merely to companies incorporated "outside Great Britain".

Not all the reforms proposed in the Bill were derived from the Jenkins Report. In this connection three matters seem worthy of comment, each raising the question of whether the existing Scottish provisions are not preferable to the new Scottish provisions which the Bill sought to introduce.

The first matter concerns the list of particulars required to be registered. The English

provisions presently applicable are in s. 98 and differ according to whether the charge is one "to the benefit of which the holders of a series of debentures are entitled" (s. 98 (1) (a)) or is "any other charge" (s. 98 (1) (b)). The corresponding Scottish provisions are in s. 106D; they are identical to the English provisions except that, in the case of floating charges, registration is required also of the restrictions, if any, on the company's power to grant further securities ranking in priority to, or *pari passu* with, the floating charge. The Scottish Law Commission observed (Cmnd. 4336, para. 24) that the effect of registration of such restrictions was to give notice to all concerned including creditors taking fixed securities. The Commission did not suggest repeal of this requirement. The provisions of the Bill, however, would have effected a partial repeal: in s. 106CC, as set out in the Bill, the requirement for registration of restrictions has been removed in the case of a charge to the benefit of which the holders of a series of debentures are entitled (s. 106CC (3)), although it has been retained in the case of other charges (s. 106CC (2)). The corresponding English provisions proposed in the Bill (s. 97A) are substantially the same as the provisions now applicable, i.e., they make no reference to registration of restrictions¹. The requirement for registration of restrictions was included in the Act of 1961 because of doubts which had arisen in England as to whether registration of restrictions constituted actual notice to all persons (Eighth Report of the Law Reform Committee for Scotland: The constitution of security over moveable property: and floating charges (1962: Cmnd. 1017, para. 51)), and that fact ought not to be lost sight of in the consideration of whether the proposed provisions in s. 106CC would have been an improvement for Scotland.

The second matter concerns certificates of registration issued by the registrar. By s. 98 (2) of the Act of 1948 the registrar's certificate is required to state the amount secured by the charge. Under the Act of 1961 an identical provision was made applicable to Scotland (s. 106D (2)). The Scottish Law Commission, however, received representations to the effect that certificates issued by the registrar under s. 106D (2) were not sufficiently informative: where several charges were created at the same time in favour of different creditors, it was sometimes difficult to tell which certificate applied to which charge, and in particular some forms of certificate gave the name of the charging company, but not the name of the

¹ In s. 97A (2) (d) "the person entitled to the charge" seems to require alteration to "the amount secured by the charge".

creditor, with the result that the only means of identification was the serial number placed by the registrar on the certificate and on the copy of the document of charge. The Commission therefore proposed (Cmnd. 4336, para. 20) that the registrar's certificate should state also the name of the charging company and of the creditor or of the first-named creditor where there was more than one (or, in the case of a series of debentures, the name of the holder of the first debenture to be issued). This proposal was enacted by the Act of 1972, as s. 106E. The provisions in the Bill as to the registrar's certificates would have restored uniformity to the English and Scottish provisions, but would seem to be open to the very objection referred to by the Scottish Law Commission and already removed from the Scottish provisions by the Act of 1972, for the only information required to be given in the registrar's certificate would have been the fact that particulars had been received and the date on which they had been received (s. 98 (2) and s. 106E (1)).

The third matter concerns entries of satisfaction and of release of property from charges. Under the provisions in the Bill, s. 100 would have been amended so as to require delivery to the registrar of a statement signed, not only on behalf of the company, but also by the person entitled to the charge. The Scottish Law Commission had commented adversely (Cmnd. 4336, para. 22) on the then existing Scottish and English practice according to which the registrar entered a memorandum of satisfaction on the register on the basis of a unilateral declaration by officers of the company; the Commission considered that it would be more satisfactory if the holder of the floating charge or his representative were to be required to certify as correct the particulars given by the company to the registrar. Accordingly such a requirement was introduced into s. 106F by the Act of 1972. The proposed amendment of s. 100 would, therefore, have to a certain extent effected assimilation of the English and Scottish provisions. However, the new s. 100 would not have been closely modelled on the existing s. 106F: in particular, it would not have included the provision that the court, on being satisfied that the creditor's certification could not readily be obtained, would have power to direct the registrar to make the appropriate entry — a provision incorporated in s. 106F on the recommendation of the Scottish Law Commission (Cmnd. 4336, para. 22); the new s. 106F proposed by the Bill would also have been without this provision. The Scottish Law Commission had also commented (*ibid.*) on the practice of some

solicitors, when acting for a purchaser of part of a company's property, to request the company, if it had granted a floating charge, to file a memorandum of satisfaction; the Commission considered that a memorandum of satisfaction was unnecessary in such circumstances, but suggested that there should be an express enactment so as to avoid any question. Accordingly, s. 106F as amended by the Act of 1972 includes such an express enactment in subs. (3). Under the provisions of the Bill that subsection would have been retained in s. 106F, but would not have been introduced into s. 100. While it is gratifying to note the attempted partial incorporation into the English provisions of a reform of Scottish origin, the question may be asked whether even more might not, with benefit to both systems, have been derived from the existing s. 106F.

It would seem that these three matters justify some dissatisfaction in Scotland, and the present time, while the next Companies Bill is not yet in its final form, may be the most appropriate time for such dissatisfaction to be expressed.

ENID A. MARSHALL.

APPENDIX II

PROPOSED SECTION 106CC OF COMPANIES ACT 1948

AS CONTAINED IN COMPANIES BILL

"106CC.--(1) In this Part of this Act "the statutory particulars", in relation to any charge, means a statement in writing in the prescribed form signed on behalf of the company and (in a case within section 106A of this Act) by the person entitled to the charge containing the matters specified in the following provisions of this section applicable to the charge.

The statutory particulars.

(2) In the case of any charge not within subsection (3) of this section the matters to be contained in the statutory particulars are -

- (a) if the charge is a charge created by the company, the date of its creation, and if the charge 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) such description of the property charged as is sufficient to enable it to be identified;
- (d) the person entitled to the charge;
- (e) in the case of a floating charge, a statement of any provisions of the charge and of any instrument relating thereto 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.

(3) In the case of a charge to the benefit of which the holders of a series of debentures are entitled, the matters to be contained in the statutory particulars are -

- (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) such description of the property charged as is sufficient to enable it to be identified;
- (d) the names of the trustees, if any, for the debenture holders.

(4) 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 matters to be contained in the statutory particulars shall include the amount or rate per cent. of the commission, discount or allowance so paid or made; but for the purposes of this subsection the deposit of any debentures as security for any debt of the company shall not be treated as the issue of the debentures at a discount.

(5) Any omission to state in the statutory particulars the full amount secured or correctly to describe part of the property charged shall not affect the validity of the charge as to the amount stated or as to the part of the property which is correctly described; and an omission to state in those particulars the matters mentioned in subsection (4) of this section shall not affect the validity of the debentures issued."