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Discussion Paper on Registration of Rights in Security by Companies

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

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ABBREVIATIONS

1961 Act
: Companies (Floating Charges) (Scotland) Act 1961

1985 Act
: Companies Act 1985

1986 Act
: Insolvency Act 1986

1989 Act
: Companies Act 1989

Diamond Report
: A L Diamond, *A Review of Security Interests in Property* (Department of Trade and Industry, 1989)

DTI, *Company Charges*
: Department of Trade and Industry, *Company Law Review: Proposals for Reform of Part XII of the Companies Act 1985*: *a Consultative Document* (1994, URN 94/635)

DTI, *Security over Moveable Property*
: Department of Trade and Industry, *Security over Moveable Property in Scotland: a Consultation Paper* (1994)

Law Com CP No 164
: Law Commission, *Registration of Security Interests: Company Charges and Property other than Land* (Law Com CP No 164, 2002) (www.lawcom.gov.uk)

Palmer's Company Law
: *Palmer's Company Law* (25th edn, 1992, Coordinating Editor: Geoffrey Morse)

Steering Group, *Company Charges*
: Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Registration of Company Charges* (2000, URN 00/1213) (www.dti.gov.uk/cld/charges.pdf)

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

Part 1 Introduction

Our remit

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."

A parallel, but more extensive, reference was received by the Law Commission of England and Wales.[1]

Background

1.2 Until the introduction of floating charges in 1961 rights in security granted by companies were treated in exactly the same way as rights in security by any other debtor and there was no requirement to register with the Registrar of Companies. Indeed it seems doubtful whether without floating charges there would be a system of registration for company securities at all. However, the Companies (Floating Charges) Act 1961 introduced a system of registration, not merely for floating charges, but for certain other types of security as well. The 1961 Act has since been repealed and replaced and the current rules on registration of rights in security are contained in part XII chapter II of the Companies Act 1985. The relevant provisions (sections 410 – 424) are set out in Appendix A to this paper and are summarised below.[2] They are modelled on the equivalent, and much older, provisions for companies registered in England and Wales but with some important differences.[3]

Registration and the publicity principle

1.3 A requirement of registration is an application of a much older principle, sometimes known as the publicity principle, which holds that the creation of real rights should be attended with due publicity. Such publicity may be by registration, by a change of possession, or by some other means. This publicity principle is perhaps a feature more of civil law than of common law systems. Certainly in Scotland it has a long history. A requirement of registration for the principal real rights in land – including both ownership and rights in security – dates from 1617 and the setting up of the Register of Sasines in that

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[1] See para 1.27. And see also *Modernising Company Law* (2002, Cm 5553-I) paras 6.18 – 6.20.
[2] Paras 1.6 – 1.10.
[3] The provisions for England and Wales date originally from 1900 and are now contained in part XII chapter I of the Companies Act 1985.

year. The equivalent rules for moveable property are older still. An assignation of incorporeal property, whether absolutely or in security, is made effective only by intimation to the account debtor. And real rights in respect of corporeal moveables require delivery of the property to the right-holder, a rule departed from only in the case of sale of goods with the enactment of the Sale of Goods Act 1893,[4] in the interests of harmonisation with the law of England and Wales. Except in the case of certain securities over ships, a voluntary right in security over corporeal moveables without a change in possession was unknown in Scotland until the introduction of the floating charge in 1961. Equally unknown are (non-possessory) equitable charges.

1.4 The publicity principle serves two main purposes. In the first place it ensures that a right cannot both be created and at the same time kept secret in order to facilitate a possible later denial. A real right is, in Scotland, a publicly-known fact. Once created it cannot be suppressed. In the second place the principle gives information to those who need it. For a real right affects not merely the parties to the juridical act which brings it into being, but, potentially, an unlimited class of third party. So for example if ownership of property passes from A to B, the change is of concern to the creditors, actual or potential, of both A and B, as well as to anyone proposing to acquire rights in the property in question. And the same is true if the property, instead of being disposed of, is encumbered by a right in security or other subordinate real right.

1.5 The need for publicity is formalised into a rule of constitution. In Scotland it is the very act of publicity which creates the right. So a real right is created by registration in the case of land, by delivery in the case of corporeal moveables, and by intimation in the case of incorporeals; and without the act of publicity there can be no real right. Scotland here follows the Germanic, and not the Romanistic, stream of the civil law tradition.[5] The result has the merit of practical, as well as conceptual, neatness. Thus if publicity is constitutive of the right it becomes possible to avoid the awkwardness of unpublicised creation followed by derogations in the event that publicity is found to be wanting. The need for incentives, or timetables, for publicity is likewise avoided, for if a right is created only by registration, the acquirer will register as promptly as possible. As will be seen, one of the difficulties with chapter II of part XII of the Companies Act is that, almost uniquely in Scots law, it departs from the principle that publicity is constitutive of the right.[6]

The law in summary

1.6 By section 410 of the Companies Act 1985 certain "charges"[7] granted by companies registered in Scotland require to be registered with the Registrar of Companies in Edinburgh. The rules also apply to limited liability partnerships.[8] 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.[9] Only the last is expressed in terms of a

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[4] Now Sale of Goods Act 1979 s 17.
[5] See for these terms K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, trans T Weir, 1998) pp 68 ff.
[6] Para 2.3 ff.
[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.
[8] Limited Liability Partnerships Regulations (SI 2001/1090) reg 4 and sched 2.
[9] 1985 Act s 410(4).

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, assignations in security, and ship and aircraft mortgages. The only consensual security not represented on the list is the 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.[10]

1.7 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.[11] 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.[12]

1.8 Since registration is not needed to create the right, some other means must be found of encouraging registration. Provision is made for three sanctions for non-registration. A security which is not registered is void against the liquidator, administrator, and creditors;[13] the money debt in respect of which the security was granted becomes immediately due;[14] and the company and its officers are liable to a fine for every day of default.[15]

1.9 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.[16] Provision is also made for registration of discharges ("memoranda of satisfaction")[17] and, in the case of floating charges only, of variations ("instruments of alteration").[18]

1.10 In a departure from normal practice in Scotland the deed itself is not registered. Instead the person applying for registration gives certain particulars in a prescribed form, which is then checked by staff at Companies House against a 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.[19] Forms received by the Registrar are retained and constitute a fully searchable record of registered securities. In addition the Registrar is directed to maintain, for each company, a separate register of charges containing particulars derived from the forms.[20] 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.[21] The company must also maintain, as its own

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[10] The words "wherever situated" are used in s 410(4) only in relation to land.
[11] 1985 Act s 410(2). Section 411 modifies the time limit where the property being secured is outside the United Kingdom.
[12] 1985 Act s 420. For a discussion, see G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146 pp 168-71.
[13] 1985 Act s 410(2).
[14] 1985 Act s 410(3).
[15] 1985 Act s 415.
[16] 1985 Act s 416.
[17] 1985 Act s 419, discussed further at paras 2.20 – 2.26.
[18] 1985 Act s 466, discussed further at paras 2.14 – 2.19.
[19] 1985 Act s 418.
[20] 1985 Act s 417.
[21] 1985 Act s 423(1).

register of charges, a list of particulars of all securities it has granted, including those not registrable with the Registrar of Companies. The company's register of charges is open to inspection by any member of the public.[22]

Criticisms of the present law

1.11 The present arrangements for registration of securities granted by companies are widely seen as unsatisfactory and in the following paragraphs we describe briefly the principal criticisms which are advanced.

Registrable securities

1.12 A criticism often made is that the list of registrable securities is illogical and out of date.[23] Such a list, it might be thought, should aim either at completeness, by including all the securities a company is likely to grant, or at simplicity and reduction of transaction costs, by including only those securities that are not sufficiently publicised in some other way. The present list does neither. The list seems never to have been properly explained or justified, and it is difficult to see any common feature uniting the securities selected for registration.

Unreliability

1.13 Another familiar criticism is of unreliability. As the Law Commission observes, "a lot of time and expense is required by the scheme in order to provide public notice of a very limited sort".[24] Certainly by comparison with the Register of Sasines or Land Register it is difficult to rely upon the Register of Charges. The deed itself is not registered but only particulars. Despite the fact that these may be inaccurate or, in the case of a complicated deed, incomplete, the measure of the security is the deed and not the information which appears on the Register. Nor does inaccuracy in the particulars invalidate the registration, for the Registar's certificate is conclusive evidence that the registration requirements have been properly complied with.[25] A further difficulty is that particulars which are accurate when first registered may become out of date without further notice. A change in creditor would not appear on the Register. Nor, except in the case of a floating charge, would a variation in terms. The registration of a discharge is voluntary, and often not done, so that the Register may include securities which have long since been extinguished. In short, the Register is no more than a starting point for further inquiry. No one, our advisory group impressed on us, would take the information set out there at face value. The consequences have been described by Professor McBryde and Mr Allan in the following terms:[26]

> "[O]nce the Registrar's certificate is issued, the creditor is not entitled to rely on the register as to the amount of the debt, the property it covers, the date of the charge or other particulars. Only an examination of the instrument of charge is the safe course for the inquirer. But the Registrar of Companies does not keep his copy of the instrument. A prospective creditor may inspect the register of charges kept by the company, but he is not entitled, as of right, to inspect the copy instrument kept by

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[22] 1985 Act ss 422 and 423(2).
[23] Law Com CP No 164 paras 3.12 – 3.15; G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 147.
[24] Law Com CP No 164 para 3.21. And see also eg Steering Group, *Company Charges* paras 3.18 – 3.19.
[25] 1985 Act s 418(2)(c).
[26] W W McBryde and D M Allan, "The Registration of Charges" 1982 SLT (News) 177, 178-9.

the company at its registered office ... So even with two registers available for consultation a member of the public cannot with certainty rely on the information he finds, and if he suffers as a result of inaccurate information, recovery of his loss will not be easy."

Invisibility period

1.14 A related difficulty occurs right at the beginning of the registration cycle. Section 410(2) requires registration of the particulars "within 21 days after the date of the creation of the charge". This means that for up to 21 days after its creation, particulars of the security may not be on the Register of Charges. Fortunately with most types of securities this invisibility period does not matter very much for, in Scotland at least, their creation is already attended with sufficient publicity.[27] A floating charge, however, is created simply by execution, a unilateral and private act, and is undiscoverable until registration. "Inspection of the register showing that there is no charge", as Professor Diamond pointed out, "means nothing, because there may already be in existence valid charges which may subsequently be registered".[28]

Sanctions for non-registration

1.15 The invisibility period is a symptom of what presently appears to us to be a structural weakness in the current scheme, namely the separation of creation from registration. Another symptom of that weakness is the need for sanctions in the event of non-registration. For if registration were constitutive of the right – if there were no real right until registration – there would neither be an invisibility period nor any need for sanctions. Further, subject to certain qualifications in the case of floating charges, in Scotland priority and creation already coincide, for ranking is by date of the real right. If creation were in turn tied to registration, a creditor would need to register in order to have priority – indeed in order to have a security at all. He would need no further incentive.

1.16 The sanctions can also be criticised on their merits.[29] 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 which may only be done if authorised by a civil court.[30] 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 interpretation, discussed more fully in Appendix B. For the present however we would observe that a rule that a security whose particulars have not been registered is void in most of the cases for which security was sought is very close, in terms of legal policy, to a rule that

[27] Para 1.3 above.
[28] Diamond Report para 26.1.
[29] The sanctions are described in para 1.8.
[30] G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 164.

it is void in all cases – or, in other words, that registration is required for constitution of the security. Put another way, it is a short step from a rule which employs a sanction of invalidity in most cases to a rule that registration is necessary to constitute the security right.

Earlier proposals for reform

1.17 In view of the difficulties just described it is not surprising that there should have been frequent calls for reform, including a number initiated by government. Not long after registration of company securities had been introduced into Scotland in 1961 the Jenkins Committee proposed changes in both England and Wales and Scotland.[31] This Commission examined aspects of the topic in 1970 and again in 1976,[32] the 1970 recommendations being substantially implemented by the Companies (Floating Charges and Receivers) (Scotland) Act 1972. Further provisions in the Companies Bill 1973 were lost, with the Bill, when Parliament was dissolved at the beginning of 1974.[33] The Diamond Report in 1989, while favouring the replacement of securities registration with notice filing,[34] recommended as an interim measure a number of reforms to the existing system of registration.[35] In 1994, a consultative document issued by the Department of Trade and Industry drew attention to problems with the existing law and canvassed various solutions.[36] A second consultative paper relating only to Scotland made further proposals in the context of the introduction of a non-possessory security over moveables and the extension of floating charges to non-corporate debtors.[37] In the interval between Diamond and the DTI papers revised rules for registration of company charges were actually enacted in the Companies Act 1989 but not brought into force. We understand that they were not brought into force mainly because the proposed withdrawal of the Registrar's conclusive certificate was thought to cause insuperable difficulties for the Land Registry.[38] Finally, and recently, the Company Law Review Steering Group conducted a major review of registration of charges although its final report was largely concerned with notice filing.[39] In preparing our own paper we have derived considerable assistance from all of this earlier work, as well as from the written responses to the Steering Group's consultation document.

Guiding principles

1.18 In working up detailed proposals for reform we have been guided by a number of principles which, in our provisional view, form a proper basis of a successful system of registration of rights in security granted by companies. There are six such principles.

1.19 **(1) Publicity.** The importance in Scots law of the publicity principle has already been emphasised.[40] Due publicity is the fundamental objective of the system of registration of company securities and central to any proposals for its reform. In considering the question

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[31] *Report of the Company Law Committee* (1962, Cmnd 1749) paras 300-06.
[32] *Report on the Companies (Floating Charges) (Scotland) Act 1961* (Scot Law Com No 14, 1970); *Law of Rights in Security: Company Law: Registration of Charges: Scotland* (Scot Law Com Con Mem No 33, 1976).
[33] For an account of the Bill as it would have applied to Scotland see E A Marshall, "Between Two Companies Bills: A note on registration of charges" 1974 SLT (News) 161.
[34] For notice filing see paras 1.26 – 1.29.
[35] Diamond Report, part III.
[36] DTI, *Company Charges*.
[37] DTI, *Security over Moveable Property*. The DTI was assisted by an advisory panel chaired by Professor John Murray QC.
[38] DTI, *Company Charges* para 8; Steering Group, *Company Charges* para 1.12.
[39] Steering Group, *Company Charges*; Steering Group, *Final Report,* chap 12.
[40] Paras 1.3 – 1.5.

of publicity there is a tendency to concentrate on those interested in the debtor company, such as purchasers from and lenders to the company. But publicity is also important to those taking rights from the *creditor* – assignees, for example, or purchasers from the creditor (or receiver) following the calling up of the loan. Further, the needs of the two groups may be different. An acquirer from the company will need information on the amount secured and the identity of the creditor. An acquirer from the creditor will be more concerned with the validity of the security, its ranking and its current terms.

1.20 **(2) Efficiency.** A requirement to register at Companies House creates work and carries costs. If a security is already publicised in some other way it should not normally be publicised again by registration in the Register of Charges.

1.21 **(3) Sufficiency.** The Register should sufficiently inform creditors and others who may choose to consult it. In particular it should disclose the type of security, the date of its creation, the property subject to the security, the obligation secured, and the identity of both creditor and debtor.

1.22 **(4) Accuracy.** The information on the Register should be accurate and up-to-date. Significant alterations should not take effect until they in turn are registered.

1.23 **(5) Simplicity.** So far as is consistent with sufficiency and accuracy, the system of registration should be quick and simple. It should not impose an undue burden on either the Registrar of Companies or on those presenting securities for registration.[41] Wherever possible the operations should be computerised.

1.24 **(6) Uniformity.** 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, where it occurs, should require careful justification.

Harmonisation

1.25 Most of the principles set out above would be as acceptable to a lawyer in England and Wales as to a lawyer in Scotland. Some indeed are expressed in the parallel consultation paper published by the Law Commission.[42] But common aims cannot always be achieved by common means. In this area of company law, as in few others, a full harmonisation of rules seems unattainable.[43] There is nothing surprising about this. Registration of rights in security granted by companies is perhaps more a part of the law of rights in security than of company law. At any rate the rules of registration cannot be separated from the underlying law of property, and that underlying law is radically different in the two jurisdictions. Even where, as often under the current legislation, the appearance of harmonisation is achieved, differences in the underlying law have a stubborn tendency to reassert themselves in the manner in which the rules develop and operate in practice. In this paper, therefore, we do not support harmonisation beyond the point where, in our judgment, it ceases to be workable. We would also observe that if English law were to adopt a system of notice filing, which would replace the present scheme of registration of company charges, questions of

[41] Steering Group, *Company Charges* para 3.1.
[42] Law Com CP No 164 para 3.7.
[43] This point was emphasised by the Law Society of Scotland in its response to the Steering Group. See Steering Group, *Final Report* para 12.63.

harmonisation of systems of registration of charges on the present model would be superseded.

Notice filing

1.26 Something more may be said about notice filing. Notice filing is not a direct alternative to a system of registration of company securities, for it is both wider and narrower than that system – wider because it applies to all commercial securities and not merely to those granted by companies, and narrower because it is confined to securities over moveable property. The most characteristic difference between notice filing and traditional systems of registration is that notice filing is parties-specific rather than transaction-specific. What is filed are not the details of a particular security but notice that certain parties have entered into, or may in future enter into, a secured transaction in relation to specified property. This approach has certain implications. A notice may be filed in advance of the transaction and the proposed transaction may never take place. The same notice may serve a series of connected transactions. And the information given on the register is necessarily rather general in character, being an invitation to further inquiry rather than a full account of the right in security. Existing systems of notice filing apply not only to securities in the strict sense but to devices, such as clauses of retention of title or certain types of trust, which, although not in the form of a security, have a functional resemblance to securities. Indeed conventional systems of registration would not easily accommodate such quasi-securities.

1.27 The first, and best-known, legislative enactment of notice filing is article 9 of the Uniform Commercial Code of the United States, which in its original form dates from 1952. Article 9 has been imitated throughout the provinces of Canada and also in New Zealand but not, so far as we are aware, elsewhere.[44] Certainly it has not been adopted by any member of the European Union. In the United Kingdom interest in notice filing has been variable. Its introduction was recommended both by the Crowther Committee in 1971[45] and again by the Diamond Committee almost 20 years later; but a consultation carried out by the DTI in 1994 was strongly against notice filing.[46] Recently interest in notice filing has revived, at least in England and Wales, and the final report of the Company Law Review Steering Group supported its introduction.[47] The parallel DTI reference to the Law Commission includes a request to consider the case for "a new scheme of registration" both for companies and for non-corporate debtors.[48]

1.28 Our own terms of reference do not embrace notice filing. Existing models of notice filing presuppose Anglo-American property law and turn on distinctions between creation, attachment and perfection[49] which are unknown in Scots law or in other systems drawn from the Germanic stream of the civil law tradition.[50] A system of notice filing suited to English

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[44] For references see Law Com CP No 164 paras 1.37 – 1.44.
[45] Report of the Committee on Consumer Credit (1971, Cmnd 4596) (Crowther Report).
[46] Steering Group, *Final Report* para 12.5.
[47] Steering Group, *Final Report* paras 12.11 – 12.19.
[48] Law Com CP No 164 para 1.16.
[49] Diamond Report para 11.4.1; Law Com CP No 164 para 2.5.
[50] See para 1.5 above. The distinction between attachment and perfection is more readily compatible with the Romanistic branch of the civil law tradition. Indeed the only civil law jurisdictions to have introduced notice filing are Quebec and Louisiana. On those jurisdictions see further T A Harrell, "A Guide to the Provisions of Chapter 9 of Louisiana's Commercial Code" (1990) 50 La L Rev 711; M G Bridge, R A Macdonald, R L Simmonds and C Walsh, "Formalism, Functionalism and Understanding the Law of Secured Transactions" (1999) 44 McGill LJ 567.

property law could not readily be modified or adapted to accommodate the very different structures and concepts of Scots property law.[51] While it would no doubt be possible, with patience and care, to devise some form of notice filing suitable for Scotland the task would be a substantial one which would require to address, among others, the familiar but unsolved issue of a non-possessory security over moveables,[52] and the creation of such a form of notice filing cannot sensibly be considered in the context of corporate debtors alone.[53]

1.29 In any event the case for notice filing is likely to be weaker in Scotland than in England and Wales.[54] In Scotland publicity and priority are already substantially secured by other means, the latter by the straightforward principle that real rights rank in order of creation (*prior tempore potior jure*).[55] And there would be a natural hesitation in adopting a system which puts pressure on two of the principles (sufficiency and accuracy) identified earlier as central to the registration of securities.[56] The whole question, however, is too complex for detailed discussion here, and no view is expressed. The issue of notice filing is one to which this Commission, or some other body, may wish to return in the future. We would merely add that if, as is tentatively suggested below, registration of company securities is restricted to floating charges, the way would be open for the later introduction, if thought desirable, of a uniform system of notice filing applying to both corporate and non-corporate debtors.

Our proposals in summary

1.30 In this paper we propose that floating charges should continue to be registrable at Companies House,[57] but that registration should no longer be required for standard securities and for other securities which are already registered elsewhere.[58] Our preliminary view is that assignations in security should also cease to be registrable.[59] Registration, where it is required, should be constitutive of the security,[60] with the result that further sanctions for non-registration should be abandoned as unnecessary.[61] In the case of floating charges, the priority point for ranking should be registration and not crystallisation as at present.[62] Some consideration is given to the introduction of a system of priority notices.[63] Views are invited as to whether particulars of the security should be registered, as at present, or whether there should be registration of the security deed itself.[64] Proposals are made to

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[51] Diamond Report para 8.4.4: "[F]undamental differences of principle between the two legal systems would make it impossible to unify the law so as to have a single piece of legislation applicable to both jurisdictions. It may well be that the Scottish legislation could be much simpler than that for England and Wales." And see also Report of the Committee on Consumer Credit (1971, Cmnd 4596) (Crowther Report) para 5.2.21.

[52] For the connections here see Scottish Law Commission, *Report by Working Party on Security over Moveable Property* (1986).

[53] Steering Group, *Final Report* para 12.8.

[54] For a sceptical view of the case in England and Wales, see G McCormack, "Personal Property Security Law Reform in England and Canada" [2002] JBL 113.

[55] The position in England and Wales is different: see Law Com CP No 164 paras 1.51 and 2.38 – 2.55.

[56] Paras 1.21 and 1.22.

[57] Part 2.

[58] Part 3.

[59] Paras 4.4 – 4.12.

[60] Paras 2.3 – 2.11. But a different rule might be necessary in respect of assignations in security (assuming they continued to be registrable): see paras 4.31 – 4.36.

[61] Para 2.7.

[62] Paras 2.28 – 2.32.

[63] Paras 2.33 – 2.41.

[64] Paras 5.4 – 5.11.

clarify and improve the rules for registration of variations and discharges,[65] and it is proposed that assignations of floating charges should be registrable.[66]

Which Parliament?

1.31 The registration of rights in security by companies is a reserved matter in terms of the Scotland Act 1998.[67] The underlying law of rights in security is, however, devolved. To this floating charges are a possible exception, on the basis that, while part of Scots private law, they apply only to companies and limited liability partnerships which are themselves reserved matters.[68] However, the view taken in preparing subordinate legislation applying parts of the Companies Act 1985 to limited liability partnerships was that floating charges were devolved and therefore properly the subject of a Scottish Statutory Instrument.[69] In any event our proposals touch on the substantive law of rights in security only incidentally and in the context of registration, so that legislation to give them effect would require to be passed by the United Kingdom Parliament.[70] We do not consider that enactment of any of the proposals in this discussion paper would involve any conflict with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Acknowledgements

1.32 Mr David Guild,[71] our consultant for this project, contributed a detailed 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 two occasions and commented on a draft of this paper. The group comprised Mr Robin Clarkson (Paull & Williamsons), Mr R E M Davidson (Dundas & Wilson CS), Professor G L Gretton (University of Edinburgh), Mr Bruce Patrick (Maclay Murray & Spens) and Mr Charles Smith (Brodies WS). Mr Martin Corbett of the Registers of Scotland advised us on various matters relating to the Land and Sasine Registers. 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 information.

[65] Paras 2.14 – 2.26.
[66] Paras 2.12 and 2.13.
[67] Scotland Act 1998 s 29(2)(b) and sched 5 s C1.
[68] Scotland Act 1998 s 29(4). But it may be noted that floating charges and receivers are excepted from s C2 (Insolvency) of sched 5.
[69] Scotland Act 1998 s 54(2)(a); Limited Liability Partnerships (Scotland) Regulations 2001 (SSI 2001/128) reg 3 and sched 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).
[70] See also para 4.33.
[71] Mr Guild was formerly a partner in Brodies WS and is now a practising member of the Faculty of Advocates.

Part 2 Floating Charges

Introduction

2.1 Around 95% of the securities presented for registration with the Registrar of Companies are either floating charges or standard securities.[1] In any revisal of the rules of registration, therefore, the needs of these two securities should have a central place. In this part of the discussion paper we consider floating charges. Standard securities are discussed in part 3, and assignations in security – the most important of the remaining security types – in part 4.

Loan agreement

2.2 It is helpful at the outset to distinguish the floating charge from the contractual obligation, usually a loan agreement, which the charge secures. As the loan agreement (or other contractual obligation) is personal to the parties concerned, it is not registered, although on registration of particulars of the security it is necessary to state the amount of the loan (or other debt) secured.[2] Further, the agreement, as an independent legal act, is unaffected by any invalidity of the security, whether by initial failure or supervening nullity.[3] Even if the security fails, the debtor company must repay the loan. Nothing further will be said here about the loan agreement except incidentally, and the discussion which follows should be understood as referring to the floating charge alone.

Creation and nullity

2.3 The Companies Act 1985 lacks any general provision about the manner of creation of floating charges,[4] but it is clear from section 410(5) that for one purpose at least – the running of the 21-day period for registration – "creation" occurs on the date of execution; and the generally accepted view is that "creation" for other purposes occurs either on that date or, at latest, on the date on which the deed is delivered to the creditor.

2.4 Normally the "creation" of a security means its constitution as a real right. But a floating charge becomes a real right only on crystallisation (attachment), following the appointment of a receiver or liquidator.[5] Until then there is no specific asset in respect of which a real right could subsist. If, as is usual, the debtor company remains solvent and repays the loan, there will be no crystallisation and no real right. In the absence of a real right, "creation" has only the limited meaning of permitting the creditor to exercise whatever remedies the security allows. In particular, and subject to the Enterprise Bill currently before

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[1] This figure is based on a survey carried out on our behalf by the Registrar of Companies for the period 26 February – 26 March 2002. There were more standard securities (418) than floating charges (332).
[2] Para 5.27.
[3] See 1985 Act s 410(3), which is declaratory of the common law.
[4] Section 462(2), which could be read as such a general provision, was repealed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s 74(1) and sched 8 para 33(6), sched 9.
[5] 1985 Act s 463(1); 1986 Act ss 53(7) and 54(6).

Parliament, it allows the appointment of a receiver;[6] and it holds out the promise of attachment, either on receivership or on liquidation.

2.5 Registration of particulars of the floating charge follows creation, at an interval of up to 21 days. If registration is not accomplished in time, the floating charge remains in existence, in some sense at least, but is void against the liquidator or administrator of the debtor company or against its creditors.[7] This interval between creation and registration is, as Professor Diamond has said, "[t]he most severely criticised aspect of the existing register of charges".[8] It breaches the publicity principle that rights should be publicised at the point of creation[9] and it leads to obvious practical difficulties for third parties transacting in reliance on the Register. A purchaser of land, for example, will carry out a search at Companies House but must then take the risk that no floating charge has been granted in the last 21 days and has subsequently attached. New lenders seeking to establish the creditworthiness of the company, and the ranking of their own security, must similarly take the risk of the 21-day invisibility period. A negative pledge in a floating charge created during this period takes effect from the date of creation and not from the date of subsequent registration.[10]

2.6 Fortunately the difficulty is easily overcome. In 1994 a Consultation Paper by the DTI proposed the elimination of the invisibility period by the simple expedient of postponing creation until registration.[11] Clause 2(1) of the draft bill attached to the DTI Paper reads:[12]

> "A floating charge is created when –
>
> (a) the granter executes a document which bears to grant such a charge; and
>
> (b) the prescribed particulars of the charge are registered."

We gratefully adopt the DTI's proposal. As well as substantially solving[13] the problem of the invisibility period it carries a number of other advantages.

2.7 In the first place, it eliminates altogether the need for time limits for registration or penalties for non-registration. In their absence registration becomes "voluntary", although that adjective is potentially misleading in so far as it might imply that rights are acquired without registration. It is the fact that rights are not so acquired which constitutes the compulsitor for registration. Thus if the rule is that a floating charge is created by registration following on from execution, creditors concerned about priority will carry out both steps as quickly as possible; but if they fail to do so they alone will be the sufferers. For without registration there is no security, and therefore no risk to a third party proceeding in

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[6] 1986 Act s 51.
[7] 1985 Act s 410. For late registration see para 1.7.
[8] Diamond Report para 26.1.
[9] Paras 1.3 – 1.5 and 1.19.
[10] 1985 Act s 464(1A) (priority over any security "created after the date of the instrument" [of floating charge]).
[11] DTI, *Security over Moveable Property* paras 3.6 – 3.10 and 3.13 – 3.15.
[12] And see also cl 23(1) which provides that the date of registration is the date on which the particulars of the security are received.
[13] It does not eliminate the period entirely, however, because of the delay between submission of a security for registration and its appearance on the Register in a searchable form. See para 2.35.

reliance on the Register. In such a new scheme of things a penalty for non-registration would be about as sensible as a penalty for non-execution. The elimination of penalties is particularly welcome in view of the unsatisfactory nature of the current sanctions regime explained earlier.[14] We also note that the Law Commission likewise proposes the abandonment of penalties for non-registration.[15]

2.8 Secondly, a scheme which creates the security only on registration is, at a technical level, to be preferred to one which creates the security on execution but withdraws most of its effectiveness in the event of non-registration. For reasons given later,[16] the "void against the liquidator" formula of the present law is unclear, productive of anomalies, and troublesome for a system of property law which makes a clear distinction between real and personal rights.

2.9 Thirdly, the proposed scheme gives to registration of floating charges the usual role of registration in Scots law as constitutive of the right. As the DTI observed in its Consultation Paper:[17]

> "[T]he simplest, most familiar and efficient way of achieving that objective [of publicity] was seen to be the registration of the prescribed particulars of the charge as part of its creation. This method of creating a right in security would be similar to the creation of a real right in land, through the registration of a deed in the Register of Sasines."

By working with existing concepts the scheme achieves the desired result by the simplest means while ensuring that the means are fully compatible with the underlying system of property law.

2.10 Finally, these advantages seem to come without a price. If there are drawbacks in what is proposed we have been unable to identify them. One reason for this, no doubt, is that, at a functional level, there is little difference between a rule which creates a right only on registration and one which deprives the right of most of its effect in the event of non-registration. Substantial nullity (the result in the second case) comes close to absolute nullity (the result in the first), and so to a rule of constitution. It is true that under the current law the creditor has certain rights[18] in the brief period allowed between execution and registration, rights which will be lost under the proposed new law; but the loss seems too slight to merit further discussion. Later, however, we invite views on whether it should be possible to register a priority notice ahead of the security itself, thus allowing the security to be backdated to the date of registration of the notice.[19]

2.11 In part 5 of this discussion paper we examine whether the instrument creating the floating charge should be registered or whether a statement of particulars would suffice but for the present we make the proposal that

1. Registration should effect the creation of a floating charge.

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[14] Para 1.15.
[15] Law Com CP No 164 paras 4.52 – 4.54.
[16] In Appendix B.
[17] DTI, *Security over Moveable Property* para 3.7.
[18] In particular enforcement rights.
[19] Paras 2.33 – 2.41.

Assignation

2.12 The current provision for updating information on the Register is made only in half measure and is only partly successful. This breaches what we have described as the accuracy principle,[20] for if changes are not recorded the Register will cease to give an accurate picture to the inquirer. Thus under the present law a variation of a security might, or might not, be registered. A security might be discharged without registration so that on the face of the Register the security remains in existence. And if a security is assigned – if, in other words, one creditor replaces another – registration is not only unknown but, it seems, incompetent. Variation and discharge are considered below. This section is concerned with assignation.

2.13 No specific provision is made in the legislation for assignation of a floating charge, but assignation is competent on general principles of law, a position upheld by the court.[21] Assignations, however, are not registrable,[22] so that the change in creditor is effected without any publicity beyond intimation to the company. It is easy to think of cases where this is unsatisfactory. Acquirers of land seeking a certificate of non-crystallisation will rely on the Register for the identity of the creditor. If the security has been assigned they will be misinformed. The same would be true of potential creditors seeking further information as to the state of the company's indebtedness. In the, broadly comparable, case of a standard security, an assignation takes effect only on registration.[23] In our preliminary view the same should be true for a floating charge.[24] We propose therefore that

2. The transfer of a floating charge should take effect only on registration of the assignation.

One effect of the proposal is that an assignee would be unable to appoint a receiver until registration at Companies House.

Variation

2.14 Provision for variation is made by section 466 of the 1985 Act, which applies only to floating charges.[25] As might be expected, the pattern is much the same as for initial creation. Thus variation is effected by execution of the appropriate deed, known as an instrument of alteration;[26] but unless particulars of the deed are then registered within 21 days certain penalties follow. However not all variations require registration. A variation is registrable only if it releases property, increases the amount secured, or affects ranking.[27] More importantly, the usual penalties seem largely, or perhaps even completely, inapplicable, so that the requirement of registration is in practice unenforceable. For a failure to register

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[20] Para 1.22.
[21] *Libertas-Kommerz v Johnson* 1977 SC 191.
[22] In relation to the company's own register of charges, however, there requires to be registered "the names of the persons entitled to" the security (s 422(2)), a requirement which may be sufficiently broad to include assignation. In practice, of course, such registers are rarely maintained or searched against. See para 6.9.
[23] Conveyancing and Feudal Reform (Scotland) Act 1970 s 14(1).
[24] Intimation to the company would however continue to be necessary in respect of the loan agreement. See K G C Reid, *The Law of Property in Scotland* (1996) para 657.
[25] Variations of other securities are not registrable as such, although changes in the amount of the debt or the property secured may be recorded in a memorandum of satisfaction under s 419 (discussed at para 2.20 ff below).
[26] Naturally this is a bilateral deed executed by both debtor and creditor. If ranking is at issue, other affected creditors must also sign. See 1985 Act s 466(1).
[27] 1985 Act s 466(4).

does not attract criminal penalties;[28] and the civil sanction is arranged by an application of section 410 that is so convoluted as to be almost meaningless.[29] Further, the structure of the legislation is such that an unregistered deed is able to release properties from a floating charge and, in some circumstances at least, to alter the effect of a negative pledge clause.[30]

2.15 Rules for variation ought, so far as possible, to replicate those for initial creation, as indeed is the case under the current law. For otherwise a security created under one set of rules could be re-written under a set of rules which was different and, perhaps, less exacting. It follows, therefore, that if, as suggested above,[31] registration should be required for initial creation, it should be required also for subsequent variation. As before, this would bring floating charges into line with standard securities.[32] But the arguments go beyond those of legal consistency. At a practical level the current position is hardly satisfactory.[33] Thus if property can be released without registration, a person acquiring from a receiver has no means of verifying that the asset remains subject to the floating charge. Difficulties also affect an acquirer of the security itself. Insofar as a floating charge can be varied by unregistered deed, an assignee runs the risk that the security acquired has terms which are different from those set out in the original instrument.

2.16 Not all variations are registrable under the present law. The list in section 466 more or less corresponds with those particulars which both require to be registered under section 410 and are in practice likely to be the subject of variation.[34] The underlying principle indeed seems unexceptionable: a variation is registrable only if the term being varied was itself originally registered, or would have been registered if contained in the original deed. In part 5 we invite views as to whether prescribed particulars should continue to form the basis of registration or whether it would be preferable to register the deed itself.[35] The answer will determine the method used for variations. If the instrument of floating charge is to be registered, then any instrument of alteration should likewise be registered. Otherwise the existing rule should be preserved by which variations are registrable only insofar as they concern particulars which were themselves registrable.

2.17 Although an unregistered deed would not, under the rules proposed, vary the floating charge, it would bind the signatories as a matter of contract. Sometimes that would be enough. But if the third parties came to be involved – if the security were assigned, or a secured asset sold by the receiver, or if the debtor company became insolvent – the floating charge would be enforced according to its original terms.

2.18 Our proposal is that

3. A variation of a floating charge should take effect only on registration of the instrument of alteration.

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[28] Section 415 is not applied by s 466.
[29] See the careful analysis by Professor D A Bennett in *Palmer's Company Law* paras 13.410.1 – 13.411.
[30] Release is achieved by using s 419, discussed below at paras 2.20-2.26. See *Scottish & Newcastle plc v Ascot Inns Ltd* 1994 SLT 1140. For negative pledge clauses see *Bank of Ireland v Bass Brewers* 2000 GWD 28-1077.
[31] Paras 2.6 – 2.11.
[32] Conveyancing and Feudal Reform (Scotland) Act 1970 s 16.
[33] The difficulties here are mainly for those taking rights from the creditor rather than the debtor. See para 1.13.
[34] Para 5.23 ff.
[35] Paras 5.4 – 5.11.

2.19 Apart from the floating charge itself, an instrument of alteration is the only means which the legislation provides for displacing the ordinary rules of ranking.[36] An instrument of alteration can therefore be used as a ranking agreement. This special function aside, however, there is little guidance as to the uses of an instrument of alteration, and it may be assumed that instruments can be used for all normal variations. This includes a release of property from the security,[37] a function which in the case of standard securities is performed by a separate deed.[38] If property is to be added rather than released, this is in substance a new security and it is thought that a fresh floating charge is needed in respect of the additional property.[39]

Discharge

2.20 Section 419(1) of the 1985 Act empowers the Registrar, on application (in practice by the debtor company), to enter on the Register a memorandum of satisfaction

> "(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."

It is important to notice what registration under this provision does not do. It does not discharge the security or release the property. Rather it presupposes that these acts – or at least the second of them – have already taken place. The purpose of section 419 is merely to keep the record straight by narrating events that have already occurred. The provision is designed for all securities and not merely for floating charges, and in relation to other securities it makes a certain amount of sense. Other securities have their own rules for discharge and release, involving other deeds and other forms of publicity. The registration of a memorandum of satisfaction is simply a means of clearing the Register of Charges. But in the case of floating charges section 419(1) is less satisfactory.

2.21 It is easier to begin the discussion with paragraph (b). Two separate matters are covered. The first, release, was discussed above.[40] As was seen, section 466 provides for property to be released from a floating charge by execution of an instrument of alteration. The instrument is registrable but is effective without registration. In the result section 466 provides both for a method of release and also for a means of having the release entered on the Register. Paragraph (b) of section 419(1) presupposes the former and duplicates the latter. Any possible case for retaining the provision would be removed if, as suggested earlier, registration of instruments of alteration became a condition of effectiveness.

2.22 The remainder of paragraph (b) deals with a situation – the disposal of property still subject to the security – which, in the case of floating charge, can almost never arise.

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[36] 1985 Act s 466(3).
[37] 1985 Act s 466(4)(c). See para 2.21 for the relationship of instruments used for releases with memoranda of release.
[38] A deed of restriction: see Conveyancing and Feudal Reform (Scotland) Act 1970 ss 15 and 16(1).
[39] Similarly new property cannot be added to a standard security under cloak of a variation: see 1970 Act s 16(1).
[40] Paras 2.14 – 2.18.

2.23 Just as paragraph (b) presupposes a mechanism for release, so also paragraph (a) presupposes a mechanism for discharge. None, however, is provided by the legislation though it seems clear, as with assignation,[41] that a discharge by the creditor is competent as a matter of general law. In fact paragraph (a) approaches discharge only indirectly. The memorandum does not state that the security has been discharged but only that the debt has been paid in whole or in part. That is not the same thing. On the one hand, not all cases of payment are cases of discharge. For if a debt is paid in part the security remains for the remainder; and even if it is paid in whole, the security remains if, as is common in practice, it is for all sums due or to become due. But on the other hand, not all cases of discharge are cases of payment. If a creditor chooses to discharge the security without payment – perhaps on the basis that the debt is also covered by another security – this information is not registrable under either paragraph (a) or paragraph (b).[42]

2.24 It would be possible to amend paragraph (a) so that the Memorandum evidenced discharge rather than repayment (in much the same way as paragraph (b) evidences release). The result, however, would be clumsy. Section 419 adopts neither the customary approach to registration in Scotland (registration of the actual deed) nor the approach generally favoured by part XII of the 1985 Act (registration of particulars). Instead it provides for the preparation of a new document by the Registrar, prepared on the basis of a written application by the debtor and a certification by the creditor. If paragraph (a) were amended so that the Memorandum evidenced discharge, the procedure would require the following separate steps:

(i) execution of discharge by the creditor;

(ii) application to the Registrar by the debtor;[43]

(iii) statutory declaration by the debtor or its electronic equivalent;[44]

(iv) certification by the creditor that the particulars submitted are correct, or alternatively a direction by the court that such certification cannot readily be obtained;[45]

(v) preparation of a memorandum of satisfaction by the Registrar;

(vi) registration of the memorandum of satisfaction;[46] and

(vii) if requested, the furnishing to the debtor of a copy of the memorandum.[47]

2.25 There is, in our view, a much simpler alternative. In the same way as property is released from the security by registration of an instrument of alteration, so the security could be discharged, in whole or in part, by registration of a discharge. There would only be one

[41] Para 2.13.
[42] G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 160-1.
[43] 1985 Act s 419(1).
[44] 1985 Act s 419(1), (1A).
[45] 1985 Act s 419(1B), (3).
[46] 1985 Act s 419(1).
[47] 1985 Act s 419(2).

deed. The creditor need sign only once, on the discharge.[48] And the delay and risk of error which are features of section 419 would be avoided. If the creditor had disappeared or refused to sign, a court procedure could substitute for the executed discharge.[49] Registration of the discharge[50] would have the additional merit of consistency with the rules for creation, assignation and variation proposed earlier. A discharge which was executed and delivered but not registered would bind the creditor personally but would not discharge the security and could not be pled against an assignee. The proposed rule would be without prejudice to other ways in which a floating charge might be extinguished, such as extinction of the debt (in the case of loans or other monetary obligations for a fixed amount)[51] or negative prescription. But experience with standard securities – where the rule is essentially the same as now proposed[52] – suggests that in practice a discharge would usually be registered. That of itself would be a welcome improvement in the accuracy of the Register.

2.26 We provisionally propose that

4. (a) The extinction of a floating charge by deed should take effect only on registration of a deed of discharge.

(b) Section 419 of the Companies Act 1985 should cease to apply to floating charges.

Whether section 419 should survive for other types of security, and if so in what form, will depend in the first place on whether registration at Companies House remains a requirement.[53]

Appointment of receiver

2.27 A floating charge becomes a real right only on appointment of a receiver or on the company's going into liquidation, in practice usually the former.[54] The appointment of a receiver is registered with the Registrar of Companies, but a seven-day period is allowed,[55] and a delay or even a failure to register merely attracts a fine and does not affect the validity of the appointment.[56] This arrangement has often been criticised. A real right is created without publicity, with all the usual difficulties which that implies. The problem is most acute for purchasers from the company. Naturally they wish to ensure that the asset acquired is free of the floating charge; but in the absence of reliable information on the Register it is necessary to approach the chargeholder directly for a certificate of non-crystallisation. In our *Discussion Paper on Sharp v Thomson*[57] we invited views as to whether receivership, and therefore crystallisation, should be postponed until registration. In due course we will make recommendations on that question, and we do not consider it further

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[48] In its response to the Steering Group the Committee of Scottish Clearing Bankers emphasised the desirability of having to prepare and sign only one deed.
[49] As in s 419(3)(b) of the 1985 Act. And see also s 18(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970. It has been suggested that the costs should be met by the creditor (if extant): see Steering Group, *Final Report* para 12.42.
[50] Or of its particulars if the current method of registering only particulars is retained: see paras 5.3, 5.4 – 5.11.
[51] *Cameron v Williamson* (1895) 22 R 293.
[52] Conveyancing and Feudal Reform (Scotland) Act 1970 s 17.
[53] See parts 3 and 4.
[54] 1985 Act s 463(1); 1986 Act ss 53(7) and 54(6).
[55] 1986 Act ss 53(1) and 54(3).
[56] 1986 Act ss 53(2) and 54(3).
[57] Scot Law Com DP No 114 (2001).

here. Receivership is a devolved matter under the Scotland Act, so that any legislation to change the current rule would be a matter for the Scottish Executive and the Scottish Parliament.[58] We would add that under the Enterprise Bill receivership will become increasingly rare, with creditors under new floating charges having only limited powers to appoint a receiver.[59]

Priority

2.28 The current rules of priority are set out in section 464(4) of the 1985 Act. Floating charges rank with one another by time of registration; and they rank with fixed securities by date of real right. Since a floating charge does not become real until crystallisation, the effect of the second rule is that floating charges are invariably postponed to fixed securities. As the legislation makes clear these are default rules only. They may be altered either in the original instrument of floating charge or in a later instrument of alteration.[60] In both cases the alterations take effect on execution of the deed and before registration.[61] The legislation distinguishes between alterations affecting existing securities and those affecting future securities. The first – in ordinary language a ranking agreement – requires the consent of the affected creditors. The second, known as a negative pledge clause, preserves priority for the floating charge by prohibiting the creation of any future security which would rank ahead of, or equally with, the floating charge.

2.29 Negative pledge clauses are included in almost all floating charges. Their principal target is fixed securities granted after the date of floating charge but before the charge has crystallised.[62] In the absence of a negative pledge clause the floating charge would be postponed to the fixed securities, on the basis of the second rule of ranking mentioned above. The clause reverses that rule, so that the floating charge ranks first. We suspect that a default rule which is invariably disapplied in practice has probably outlived its usefulness. Our provisional view, therefore, is that the current (second) rule should be replaced by a rule which would do the work of a negative pledge clause and so make such a clause unnecessary.[63] The rule is easy to formulate: a floating charge would rank with a fixed security by date of creation. Earlier we proposed that floating charges should in future be "created" by registration at Companies House.[64] In the case of fixed securities "creation" would carry its usual meaning in part XII, namely constitution as a real right.[65] It will be seen that this is in substance the rule which already governs the ranking as between different floating charges (ie the rule that floating charges rank by time of registration).[66] It would mean that a floating charge would have priority over any fixed security or floating charge created after registration.[67] We note that the Law Commission in England and Wales

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[58] Scotland Act 1998 sched 5 s C2.
[59] Enterprise Bill cl 246, introducing to the 1986 Act new ss 72A – 72G and sched 2A.
[60] 1985 Act s 464(1), (3) (applied to instruments of alteration by s 466(3)).
[61] That at least is the inference from s 464(1A) (applied to instruments of alteration by s 466(3)). The provision does not, however, apply to ranking agreements under s 464(1)(b). It is unclear what effect, if any, a clause would have in the event that the deed was not registered.
[62] Negative pledge clauses may also prohibit the creation of other floating charges in order that the holder may control the appointment of a receiver.
[63] And indeed if s 464(1)(a) were repealed, they would cease to be competent.
[64] Paras 2.6 – 2.11. But if a system of priority notices were to be introduced (see paras 2.33 – 2.41) the relevant date would be the date of registration of the notice.
[65] 1985 Act s 410(5)(b).
[66] 1985 Act s 464(4)(b).
[67] This repeats the description in s 464(1A) of the effect of a negative pledge clause. The only (small) difference is that under our proposal priority would begin with registration and not with execution.

also considers that the priority of a floating charge should be determined by registration rather than by crystallisation.[68]

2.30 The proposed rule could itself be varied by a ranking agreement in the usual way. It is true that a creditor is unlikely to displace a rule which gives priority over subsequent securities. But a creditor who is taking both a floating charge and a standard security may 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.[69] The position is altered in some respects by the Enterprise Bill, which if enacted would reduce the number of preferential debts but introduce a rule whereby a prescribed part of the company's net property is set aside for unsecured debts and is not available to the holder of a floating charge.[70]

2.31 Our proposals would not affect the current rule by which a ranking agreement can be contained either in a floating charge or an instrument of alteration. But, in line with our earlier proposal that deeds should take effect on registration, the agreement would not have "real" effect – would not in other words alter the ranking in a manner binding on third parties – until registration. An unregistered agreement would, however, form the basis of a personal claim against the other signatories. An equivalent rule already operates in the case of standard securities.[71]

2.32 Our proposal is that

5. (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 (and subject to proposal 6), the date on which the instrument was 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 variable by a ranking agreement –

(i) contained in the floating charge or an instrument of alteration, and

(ii) duly registered.

Priority notice

2.33 Where priority is governed by registration there may be a case for a system of priority notices. The basic idea is straightforward. A grantee, or potential grantee, of a floating charge could register a notice in prescribed form in advance of the charge being

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[68] Law Com CP No 164 paras 4.125 – 4.142.
[69] 1985 Act s 464(6); 1986 Act s 175. The categories of preferential debts are set out in sched 6 to the 1986 Act.
[70] Enterprise Bill cls 247 and 248 (the latter inserting a new s 176A into the 1986 Act).
[71] J M Halliday, *Conveyancing Law and Practice* Vol II (2nd edn, 1997) para 57-32(5); D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) p 310.

created. Any charge registered within the appropriate period after the notice would then rank from registration of the notice and not of the charge. This, of course, is a rule of ranking and not a rule of creation. The charge would be created only on the date of its own registration, and no remedies under the security could be exercised before that date; but it would rank from the date of registration of the notice.

2.34 An arrangement along these lines would be unusual in the context of rights in security but would not be new to Scots law. A similar scheme for notices of inhibition has been in place since the nineteenth century. A potential inhibitor gains priority from the date of registration of a preliminary notice provided that the inhibition itself is registered within 21 days of the notice.[72] Under the rules relating to aircraft mortgages a notice may be filed which gives priority of ranking provided the mortgage is registered within 14 days.[73] Broadly equivalent rules exist for shipping mortgages save that the priority period is 30 days.[74] The notice for shipping mortgages can be extended at 30-day intervals, apparently indefinitely, but in the case of aircraft mortgages a fresh notice is required, with the result that the original priority date is lost. Priority notices have some resemblance to notice filing, in respect that the creditor can file a notice, and obtain priority, even before the security is granted; but unlike notice filing, a priority notice has only a limited life and must be followed by registration of the security itself.[75] The Diamond Report advocated the use of priority notices in the Register of Charges.[76]

2.35 A system of priority notices confers certain obvious benefits. A prospective creditor may register while still at the stage of negotiation and thus obtain an advantage over other creditors. Just as important, he can be sure of his ranking before releasing the funds. The problem of the invisibility period in the Register has already been mentioned.[77] While it would be substantially reduced if a floating charge were created only on registration, as previously proposed, it would not be eliminated because until such time as electronic filing is possible there will be a short delay between the submission of a charge for registration and its appearance on the Register in a searchable form. A search is two or three days out of date. If, during that period, a competing security is presented for registration, that security will rank first. A system of priority notices avoids the difficulty. Thus, to take an example, suppose that a creditor registers a notice on day 1 and that the priority period is 21 days. On day 18 a search of the Register shows no competing rights. On the strength of the search the creditor releases the funds and registers the floating charge. Even if it turns out that a rival security was registered on day 16 and did not show up on the search, the priority of the first security will be backdated to day 1 and the security will rank first.

2.36 There are also disadvantages, however. As with notice filing, so with priority notices there is a danger that registration of priority notices may be used too freely and that the Register may be cluttered with notices born of negotiations which failed at an early stage. Indeed if notices were executed unilaterally and could be renewed indefinitely – or registered of new without limit – a determined potential lender might bombard the Register with notices, thus making it impossible for the company to obtain a loan elsewhere.

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[72] Titles to Land Consolidation (Scotland) Act 1868 s 155.
[73] Mortgaging of Aircraft Order 1972 (SI 1972/1268) arts 5 and 14(2)(ii).
[74] Merchant Shipping (Registration of Ships) Regulations 1993 (SI 1993/3138) reg 59.
[75] For notice filing see paras 1.26 – 1.29.
[76] Diamond Report chap 26.
[77] Paras 2.5 and 2.6.

Certainly a new lender might be unwilling to advance funds in the teeth of a priority notice registered by another lending institution.

2.37 There may be problems of confidentiality. For example, a company with an established relationship with one bank but also in negotiations with a second is unlikely to welcome the publicity which would follow from the registration of a priority notice by the second bank.

2.38 A scheme which provides for an element of retroactivity is likely to encounter technical difficulties and would require to be carefully framed. For example, consideration would need to be given to the position where a company becomes insolvent after the registration of the priority notice but before registration of the security.

2.39 If priority notices were permitted, we apprehend that their use is likely to become standard practice. Arguably this would increase the administrative burden on creditors – in breach of what we have called the efficiency rule[78] – but without conferring much in the way of benefit. Certainly universal use would eliminate most of the benefit in terms of ranking, for the order of registration of securities is likely to be anticipated in the order of registration of notices.

2.40 Finally, but importantly, there is a question of legal policy. Why should the benefit of a priority notice be available to holders of floating charges but not to holders of, say, standard securities? And why should priority be given to the grantee of a floating charge but not to the grantee of a disposition? In short, it is not clear why floating charges should be favoured over other real rights.

2.41 We have presently no views as to where the balance of advantage lies on these matters, and merely ask

6. (a) Should a system of priority notices be introduced for floating charges?

(b) If so –

(i) what period should be allowed between registration of the notice and registration of the floating charge?

(ii) should a notice be renewable, and, if so, should there be limitations on renewal?

Trustees

2.42 In Scots law ownership of trust property lies with the trustee alone and not, to any extent, with the beneficiary. In the context of registration of securities, therefore, there appears to be no reason for distinguishing property which a company owns in trust from property to which it is beneficially entitled.[79] Just in the same way as a standard security granted over trust property is registrable in the Land or Sasine Register, so a floating charge over trust property should be registrable at Companies House. Indeed if registration is to be

[78] Para 1.20.
[79] For the position in England and Wales see Law Com CP No 164 paras 5.56 – 5.75.

constitutive of the security, it could hardly be avoided. Under the current law the sanction of the floating charge being void against the liquidator cannot apply in the case of property held in trust, at least where the company is a bare trustee. This is because only the beneficiary is likely to have creditors or to become insolvent, and the security would remain effective against such creditors.[80] However, that aspect disappears with the abandonment of the sanction itself.

2.43 Our proposal is that

7. A floating charge should be registrable notwithstanding that it is granted over property which the company holds in trust.

Foreign assets and foreign companies

2.44 **Assets outside Scotland.** In the case of floating charges section 410 of the 1985 Act operates by security-type rather than by asset-type,[81] so that what is to be registered is simply any "floating charge" granted by the company. This implies that a floating charge would be registrable even if the assets secured were all situated outside Scotland.[82] We have no proposal to change this rule. Indeed the rule seems unavoidable if registration is elevated into a rule of constitution. The issue may often be theoretical because in practice floating charges are granted over the whole property and undertaking of a company, and usually some of that property will be in Scotland. It seems hardly necessary to add that the validity of any real right in security is determined by the law of the country in which the asset is situated, and the fact that a floating charge is properly constituted under the law of Scotland does not guarantee its enforceability in relation to property situated in Germany or the United States of America.[83] Insofar as property is situated in England and Wales there may be some difficulty in integrating a rule of constitutive registration with the system of notice filing which has been provisionally proposed for that jurisdiction by the Law Commission, and we return to this subject later.[84]

2.45 **Foreign companies.** Under the law of Scotland a floating charge may be granted by any incorporated company, including one incorporated outside Great Britain.[85] In respect of foreign companies the legislation distinguishes between those companies, known as "oversea companies",[86] with a place of business in Scotland, and those trading in Scotland without a place of business. A company with a place of business in Scotland must register any floating charge (and other securities) at Companies House in Edinburgh. Floating charges granted by other foreign companies are not registrable at all.[87] One reason for the distinction is that a company with a place of business in Scotland is already under a duty to register that place, and certain other details, with the Registrar of Companies.[88] To register a floating charge is thus simply to add to an existing file. Nonetheless in *NV Slavenburg's Bank*

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[80] Steering Group, *Company Charges* para 3.59.
[81] Para 1.6.
[82] 1985 Act s 410(4)(e). Compare s 410(4)(a): 'a charge on land *wherever situated*'. See also *Arthur D Little (in Administration) v Ableco Finance LLC* [2002] EHWC 701 (Ch).
[83] For a discussion, see Law Com CP No 164 para 5.95 ff.
[84] Paras 6.16 – 6.21.
[85] 1985 Act s 462(1).
[86] 1985 Act s 744. The statement is true as a matter of Scots law. See s 424. Under English law an oversea company is one with a place of business in England and Wales.
[87] 1985 Act s 424.
[88] 1985 Act s 691.

v Intercontinental Natural Resources Ltd,[89] decided on the equivalent English provisions, it was held that the requirement to register a charge was not avoided merely because the company had failed to register its place of business. Accordingly where such a company had registered neither its place of business nor a charge, the charge was void against the liquidator.

2.46 One solution to *Slavenburg* is to stipulate that a security should only be registrable if the oversea company has duly registered its place of business in this country. This is the solution which would have been introduced by the Companies Act 1989,[90] and which continues to find favour with both the Steering Group and the Law Commission.[91] For Scotland, however, and for floating charges,[92] it will hardly do. If, as proposed earlier, a floating charge is to be constituted by registration then registration is unavoidable, even for a foreign company without a place of business in Scotland. Such a company can no more avoid registration of a floating charge in the Register of Charges than it could avoid registration of a standard security in the Land or Sasine Register. In both cases registration is the constitutive act required under the law of Scotland to effect security over assets situated within Scotland.

2.47 At a policy level too it seems desirable that a floating charge by a foreign company should be publicised by registration. The current rules breach the publicity principle by allowing a security without either possession or registration.

2.48 **Companies incorporated in England and Wales.** The existence of parallel Companies Registers in both Scotland and in England and Wales allows for special, and reciprocal, treatment for companies in the sister jurisdiction. A company incorporated in England and Wales is not, under the law of Scotland, an oversea company. There is no requirement to register anything with the Registrar of Companies in Scotland. Thus a floating charge granted by an English company but including or potentially including Scottish assets is registrable at Companies House in Cardiff.[93] The parallel rule for Scottish companies and English assets has already been mentioned.[94] The Law Commission is in favour of preserving this rule,[95] and in principle we agree. But introduction of a system of notice filing in England and Wales would end the equivalence of the existing registers and create some practical difficulties. In particular, the filing of a financing statement in Cardiff – often before any security documentation has been drawn up – would not be compatible either with the existing rules on registration in Scotland or with the replacement rules suggested above.

2.49 We think that the difficulty could be met in either of two ways. First, it would be possible to treat companies incorporated in England and Wales as foreign companies. In that case registration would be needed in Edinburgh, as already mentioned. This would be a return to a system which operated between 1961 and 1982.[96] Alternatively, and in our provisional view preferably, the special status given in Scotland to companies from England

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[89] [1980] 1 WLR 1076.
[90] 1989 Act s 105 and sched 15.
[91] Steering Group, *Final Report* para 12.67; Law Com CP No 164 paras 5.88 – 5.93.
[92] The solution is, however, more attractive in relation to other types of security, and would need to be re-considered in that context in the event that other securities continue to be registrable.
[93] 1985 Act ss 395(1), 396(1)(f).
[94] Para 2.44.
[95] Law Com CP No 164 paras 5.107 – 5.113.
[96] For references see *Palmer's Company Law* para 13.415.

and Wales could be retained, so that registration would continue to be in Cardiff. This has obvious gains of convenience both for those carrying out registration and for those wishing to inspect the register. But the mode of registration would need to be compatible with the rules of Scots law, so that the filing of a financing statement – sufficient for a floating charge insofar as it covers assets in England and Wales – would require to be followed by registration of the charge itself in respect of the Scottish assets.[97]

2.50 We propose that

8. A floating charge should be created –

(i) by registration in Scotland, where it is granted by a company incorporated in Scotland over assets outside Scotland;

(ii) by registration in England and Wales, where it is granted by a company incorporated there and is over assets in Scotland; and

(iii) by registration in Scotland, where it is granted by a company incorporated outside Great Britain and is over assets in Scotland.

Unregistered companies

2.51 Similar issues arise with unregistered companies, that is to say, with companies incorporated in Britain by private Act of Parliament or royal charter or otherwise than by registration under the Companies Act.[98] Securities by unregistered companies are not currently registrable at Companies House, but both the Steering Group and the Law Commission have proposed that the rule be changed.[99] From a Scottish perspective registration would be essential if, as suggested earlier, it became a requirement of constitution. Accordingly we propose that

9. A floating charge by an unregistered company should be created by registration.

Register of Floating Charges

2.52 Mention has been made of oversea companies and unregistered companies. Floating charges may also be granted under the law of Scotland by industrial and provident societies,[100] European Economic Interest Groupings,[101] and by limited liability partnerships;[102] and it is possible that the right to grant floating charges may be further extended in the

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[97] See para 6.16 ff for the position where a security is granted by a Scottish company over assets in England and Wales.
[98] 1985 Act s 718.
[99] Steering Group, *Final Report* para 12.67; Law Com CP No 164 paras 5.121 and 5.122.
[100] Industrial and Provident Societies Act 1967 s 3. An industrial and provident society whose principal object is the provision and sale of agricultural requisites may also grant an agricultural charge under part II of the Agricultural Credits (Scotland) Act 1929.
[101] European Economic Interest Grouping Regulations 1989 (SI 1989/638) reg 18 and sched 4 paras 4 and 13.
[102] Limited Liability Partnerships (Scotland) Regulations 2001 (SSI 2001/128) reg 3 and sched 1 (applying s 462 of the Companies Act 1985).

future, for example to unincorporated businesses.[103] This programme of expansion may argue for a shift from the Register of Charges to a new, dedicated Register of Floating Charges. Indeed this was proposed in a DTI paper in 1994.[104] The case would be stronger still if, as provisionally proposed in this paper, all other securities ceased to be registrable in the Register of Charges. There would then be little value in a Register of Charges as such, and much to be said for a Register of Floating Charges. At this stage we make no formal proposal but would welcome views. The change would be largely one of nomenclature as it is likely that any new register would continue to be administered by the Registrar of Companies.

[103] As suggested in DTI, *Security over Moveable Property* paras 3.2 and 3.3.
[104] DTI, *Security over Moveable Property* para 3.11.

Part 3 Standard and other Registered Securities

Securities other than floating charges

3.1 The introduction of floating charges in 1961 implemented a report by the Law Reform Committee for Scotland,[1] and among the issues considered in that report was publicity.[2] A new security – the floating charge – that did not involve a change in possession would need to be publicised in some other way, preferably by registration. The question was where. Various possibilities were considered and rejected. A register organised by property, such as the Register of Sasines, was unsuitable for a security in which the property changed over time. The only register organised by person, however, – the Register of Inhibitions and Adjudications – was in practice generally searched for a period of five years only and would be inadequate for floating charges, at least without a change in searching practice.[3] In those circumstances, the report continues,[4]

> "We have come to the conclusion that the best procedure would be to use a Register of Charges to be kept by the Registrar of Companies in Edinburgh and to apply to Scottish companies the provisions which at present apply to companies registered in England. This would result in particulars of fixed securities granted by Scottish companies having to be registered with the Registrar of Companies, and we think it desirable to specify the securities which would require registration."

In specifying the securities the report repeated, with appropriate changes, the list which already applied to companies incorporated in England and Wales.[5] As modified for Scots law the list comprised heritable securities; securities over uncalled share capital; securities over incorporeal moveable property; and securities over a ship.[6]

3.2 The Law Reform Committee's recommendations on this, as on other matters, were duly implemented by the Companies (Floating Charges) (Scotland) Act 1961. As a result, the floating charge brought with it a whole new regime of registration for securities granted by companies. No reason was given in the report for this far-reaching change, and indeed reasons are not easily found. No doubt if the Register of Inhibitions and Adjudications was deemed inadequate, it made sense to establish a new register for floating charges, on the model pioneered in England and Wales. But it did not follow that registration should then become necessary for *other* securities as well. One could copy the register without copying the list of securities. Nor does publicity seem the explanation, for the securities in question, unlike their English counterparts, were already adequately publicised by other means.[7]

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[1] *Eighth Report of the Law Reform Committee for Scotland: the constitution of security over moveable property; and floating charges* (1960, Cmnd 1017).
[2] *Eighth Report* paras 47 – 50.
[3] It is not explained why such a change would not have occurred.
[4] *Eighth Report* para 50.
[5] Under s 95(2) of the Companies Act 1948.
[6] *Eighth Report* Appendix II para 13.
[7] One suggestion sometimes made is that the extension was unthinking and more or less by accident. See for example Professor David Bennett ("A Judicial Wet Blanket upon the Register of Charges" 1967 SLT (News) 153): "One is tempted to say this was a thoughtless and unnecessary imitation of English provisions".

3.3 The extension of registration beyond floating charges has been criticised. One commentator described it as "an expensive and inconvenient redundancy".[8] Another wondered "why securities granted by a company require to be treated differently … from securities granted by natural persons".[9] In its response to the recent consultation by the Company Law Review Steering Group, the Company Law Committee of the Law Society of Scotland explained that:[10]

> "[T]he principles of Scots law are such that instances where security is granted by a company which is not readily apparent from other enquiries … [are] … few and far between. As in England and Wales there are statutory registers for security over land, ships and aircraft. However in Scotland any security that is not registered in these public registers has no effect as a security. Other forms of security involve some form of notice to other contracting parties. The equitable charge has no equivalent in Scotland … It is acknowledged that the floating charge which is now an accepted part of Scottish security law does require a system of registration but our view is that the decision taken in 1961 to extend the requirement for registration to other forms of security in Scotland was neither necessary nor appropriate."

Much the same view was expressed by the members of our advisory group.

3.4 In this and the immediately following part of the discussion paper we re-consider the question of whether securities other than floating charges ought to be registrable in the Register of Charges. Part 4 reviews the issue in relation to assignations in security. In the current part we discuss standard securities, and other securities with their own system of registration.

Heritable securities

3.5 The only consensual fixed security over land now recognised by Scots law is the standard security.[11] A standard security is created by registration of an executed deed in the Land Register or Register of Sasines.[12] If, however, the granter is a company particulars of the security must also be registered with the Registrar of Companies within 21 days of creation. Otherwise the security is void against the liquidator, administrator and other creditors.[13]

3.6 The procedure is as follows.[14] The deed is sent for registration in the Land Register or Register of Sasines. The application form is marked, at the top of the first page and in red block capitals, "confirmation of registration is required". This alerts the Keeper to the need to confirm the date of registration in the Land or Sasine Register. Once the confirmation has been received, particulars of the security can be entered on form 410, and the form and a copy of the security sent to Companies House. The window for carrying out this task is narrow. Since particulars are not to be sent until the security has been created,[15] the creditor cannot anticipate the Keeper's confirmation of registration. But the 21-day period begins,

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[8] D A Bennett, "A Judicial Wet Blanket upon the Register of Charges" 1967 SLT (News) 153. And see also W W McBryde and D M Allan, "The Registration of Charges" 1982 SLT (News) 177.
[9] G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 147.
[10] The Law Society's views are summarised and acknowledged at para 12.63 of the Steering Group's *Final Report*.
[11] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3).
[12] 1970 Act ss 9(2) and 11(1).
[13] 1985 Act s 410.
[14] *Registration of Title Practice Book* (2nd edn, 2000) paras 5.47 – 5.49. And see also a note by the Keeper at (2002) 47 Journal of the Law Society of Scotland July at 32.
[15] 1985 Act s 410(2) ("within 21 days after the date of the creation of the charge").

not with the date on which the confirmation is received, but earlier, with the date of registration in the Land or Sasine Register. Assuming that the particulars are duly sent and are found to be satisfactory the Registrar of Companies issues a certificate of registration, which must then be sent to the Land Register (though not to the Sasine Register). The certificate issued by the Registrar of Companies is conclusive evidence that compliance has been made with the formalities of registration.[16] If that certificate of registration is not sent to the Keeper within 60 days of the original application, the charge certificate issued by the Keeper under section 5 of the Land Registration (Scotland) Act 1979 will contain an exclusion of indemnity "in respect of any loss which may result from failure to register the above Standard Security in accordance with section 410 of the Companies Act 1985".[17]

3.7 By and large solicitors have become accustomed to this rather clumsy procedure. Nonetheless the scope for accidents is obvious. Two separate time limits are imposed. Failure in respect of the first (21 days for registration) requires an application to the court,[18] failure in respect of the second (60 days for submission of certificate of registration) entails a subsequent application on form 2 for the deletion of the exclusion of indemnity.[19] In view of the need for a court action, a breach of the first time limit will usually lead to a breach of the second. Finally, there is an everpresent danger that a conveyancer, accustomed to registration in the Land or Sasine Register but unfamiliar with commercial practice, will simply overlook registration with the Registrar of Companies.

3.8 A procedure which involves time, expense and, sometimes, difficulty must be weighed against the benefits conferred. In the present case the benefits are not easily identified. Registration in the Register of Charges does not, and probably could not, have the kind of role in respect of creation, transfer, variation and extinction identified in part 2 in the context of floating charges. In the case of standard securities it is registration in the Land Register or Register of Sasines which is the constitutive, or extinctive, event. Publicity, similarly, is already attended to by registration in the Land or Sasine Register. These are public registers, indexed by person as well as by property, and searchable both manually and online.[20] The information which they contain is fuller and more accurate than the information on the Register of Charges – fuller because it includes a copy of the security document itself,[21] and more accurate because the document is the measure of the right. It is also available sooner because registration and creation are simultaneous events and not set apart by 21 days. No one seeking accurate information on standard securities would rely on the Register of Charges in preference to the Land or Sasine Register. Of course it is true that – incomplete as it is in respect both of coverage[22] and of information[23] – the Register of Charges has a certain value to someone seeking a rough and ready overview of a company's financial health. To remove standard securities might necessitate an additional search in the Land or Sasine Register. But the modest inconvenience of an on-line search seems

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[16] 1985 Act s 418.
[17] Land Registration (Scotland) Act 1979 s 12(2).
[18] 1985 Act s 420.
[19] Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 13.
[20] We understand that it will shortly be possible to conduct, through Registers Direct, a single search against a company name in all 33 counties of the Land Register (including the application record) and (from 1993 onwards) of the Register of Sasines. This would disclose any land owned by the company, and, through that ownership, lead to the identification of any securities.
[21] The Register of Sasines is a register of deeds, and any deed referred to on a title sheet in the Land Register (as a standard security would be) is publicly available (Land Registration (Scotland) Act 1979 s 6(5)).
[22] In the sense that some securities are already excluded.
[23] Para 1.13.

insignificant when set against the awkwardness and expense of the current system of companies registration. The efficiency principle alone would suggest that standard securities be removed from the system.[24]

3.9 A further difficulty with the present arrangements was highlighted in the context of the Companies Act 1989. As will be explained later,[25] good reasons exist for dispensing with the conclusive certificate of registration issued by the Registrar of Companies; and the 1989 Act so provided.[26] But in its interaction with title registers such as the Land Register (or the Land Registry in England and Wales) this idea proved unworkable, a fact which goes far to explain why the 1989 Act provisions were not activated.[27] The problem is easily explained. A standard security registered in the Land Register is, by force of law, a good real right.[28] But the right so conferred is virtually extinguished only 21 days later unless the particulars of the security are lodged with the Registrar of Companies. In practice the only way of reconciling this conflict is the Registrar's conclusive certificate. On sight of a certificate the Keeper has the assurance that registration has been properly attended to and that the security is not void. He is then able to issue a charge certificate for the standard security which does not falsely represent its validity. In the absence of a conclusive certificate, indemnity would be excluded on all charge certificates in respect of a possible failure of registration; and the Land Register would fail in its primary duty of showing, beyond doubt, the real rights that affect land. From another point of view, of course, this means that fundamental reform of the Register of Charges is not easily achieved for as long as the Register includes securities over land.

3.10 The exclusion of securities over land would be consistent with the current proposals of the Law Commission for companies registered in England and Wales.[29] And indeed if, as is sometimes argued, land was originally included within the Scottish legislation only because it was already within the English legislation,[30] this would provide an additional reason for its removal.

3.11 So far only standard securities have been considered. Section 410, however, extends to securities over land "wherever situated". It would be awkward to retain a registration requirement for securities over land outside Scotland while abolishing it for land within the jurisdiction. Arguably it would also be unnecessary. The validity of a security over land is governed by the *lex situs*, and foreign law will usually impose a requirement of registration. It seems possible to dispense with additional registration in the Register of Charges.[31]

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[24] Para 1.20.
[25] Paras 5.16-5.20.
[26] The certificate was to be conclusive only as to the date of registration. See 1989 Act s 94 (inserting a new s 397 into the 1985 Act).
[27] Steering Group, *Company Charges* paras 3.12 – 3.17.
[28] Land Registration (Scotland) Act 1979 s 3(1)(a).
[29] Law Com CP No 164 paras 4.199 – 4.211.
[30] Eg G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 148: "The problem which these provisions were introduced to address was an English problem, for in English law the publicity principle was traditionally little regarded, and covert securities were often permissible. Indeed, when the system was introduced in England in 1900, mortgages of land were in most cases unregistered. It is the familiar story of unthinking copying from a different, and not necessarily superior, system: one person ill and another taking the medicine."
[31] The conclusion of the Law Commission is apparently the same: see Law Com CP No 164 para 5.112.

3.12 We propose, therefore, that

10. Securities over land should cease to be registrable with the Registrar of Companies.

Other securities with specialist registers

3.13 There are other cases, too, where registration at Companies House seems merely to duplicate registration in a specialist register. Ship mortgages are registered in the Shipping Register,[32] and aircraft mortgages in the Register of Aircraft Mortgages,[33] while securities over certain categories of intellectual property – patents, trade marks, and registered designs – are registered at the Patent Office.[34] All these registers are public and searchable and, with the exception of the Shipping Register, searchable by person. It is difficult to see what is gained by a second process of registration with the Registrar of Companies; and it seems odd to single out, alone among securities over corporeal moveables, the two cases (ships and aircraft) in which the security is already subject to registration.[35]

3.14 Some doubts affect the chronology of registration. By section 410, registration with the Registrar of Companies must take place within 21 days of the security being constituted as a real right; but whether registration in a specialist register is constitutive of the security, or serves merely to regulate the ranking of securities already constituted by some other means, is unclear. Since aircraft and shipping mortgages are creatures of statute, and since the statute itself provides for registration, it seems a reasonable inference that registration is a requirement of constitution, and hence the final constitutive event. If that is correct, the 21-day period begins with registration in the specialist register. The position is, or may be, different in respect of patents, trade marks, and registered designs. Ordinarily an assignation in security is constituted by intimation to the account debtor or, where there is no debtor (as with intellectual property rights) by delivery of the assignation, and nothing in the legislation on specialist registers seems to displace this familiar rule of the common law. This argues for constitution before registration, and for a 21-day period which begins with delivery. But the position cannot be said to be clear.[36]

3.15 In its recent consultation paper the Law Commission proposes that, for companies registered in England and Wales, securities registrable in a specialist register should no longer be registered with the Register of Companies.[37] In our provisional view the same rule should apply to companies registered in Scotland. We propose, therefore, that

11. Securities registrable in a specialist register should cease to be registrable with the Registrar of Companies.

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[32] Merchant Shipping Act 1995 sched 1 para 7.
[33] Mortgaging of Aircraft Order 1972 (SI 1972/1268) art 4.
[34] Registered Designs Act 1949 s 19; Patents Act 1977 ss 32 and 33; Trade Marks Act 1994 s 25.
[35] By contrast a pledge (which is completed by delivery) is not subject to registration with the Registrar of Companies.
[36] See eg Tom Guthrie and Alistair Orr, "Fixed Security Rights over Intellectual Property in Scotland" [1996] EIPR 597, 598: "For registered intellectual property rights (such as patents and trade marks) the assignation is completed by registration of the assignation in the statutory register and, for unregistered intellectual property rights (such as copyright), it appears that the assignation is completed when the assignee takes delivery of the assignation document".
[37] Law Com CP No 164 paras 4.199 – 4.211.

Specialist registers and floating charges

3.16 One final example of double registration remains. Floating charges are registrable in the Register of Charges and under our proposals would continue to be so registrable. But insofar as they cover patents, trade marks and registered designs they are also registrable at the Patent Office. On this point the legislation is clear. In the case of trade marks, for example, there is registrable "the granting of any security interest (whether fixed or floating)".[38] In practice the requirement is, we understand, usually disregarded and floating charges are registered only at Companies House. The risk is indeed slight. A negative pledge clause would presumably defeat a later security, even one which was registered at the Patent Office;[39] and in any event the fact of registration at Companies House would give constructive notice of the floating charge and so, on one view at least, defeat any priority which registration at the Patent Office might otherwise confer.[40] Nonetheless registration at the Patent Office seems an unnecessary requirement and one which has the potential to cause difficulties. Floating charges, after all, do not appear in other specialist registers such as the Land Register or Register of Aircraft Mortgages.[41] And if the ranking rules for floating charges are re-drawn in the manner suggested earlier in this paper[42] there would be the potential for conflict between the rules which apply to floating charges and the rules which apply to securities registrable at the Patent Office. We propose therefore that

> **12. Floating charges should cease to be registrable at the Patent Office or any other specialist register.**

It would also need to be made clear that the fact that a floating charge was not so registered would not adversely affect its ranking.[43]

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[38] Trade Marks Act 1994 s 25(2)(c). And see also the Registered Designs Act 1949 s 19(1) ("any person … becomes entitled as mortgagee, licensee or otherwise to any other interest in a registered design"), and the Patents Act 1977 s 33(3)(b) ("the granting of security over it").

[39] For negative pledge clauses see paras 2.28 and 2.29.

[40] Notice undermines priority both for patents and trade marks. See Patents Act 1977 s 33(1)(c) and Trade Marks Act 1994 s 25(3). But it is unclear from the legislation whether this extends to constructive notice.

[41] 1985 Act s 462(5); Mortgaging of Aircraft Order 1972 (SI 1972/1268) art 2(2) (definition of "mortgage of an aircraft"). Arguably the position is the same for the Shipping Register, on the basis that (i) only "mortgages" are to be registered (Merchant Shipping Act 1995 sched 1 para 7(3)) and (ii) a "mortgage" in this context means one in the form prescribed by regulations under para 7(2) – which might not include an ordinary floating charge. Under the current regulations a mortgage "shall be in a form approved by the Registrar": see the Merchant Shipping (Registration of Ships) Regulations 1993 (SI 1993/3138) art 57.

[42] Paras 2.28 – 2.32.

[43] Thus s 33(1) of the Patents Act 1997 in its current form would penalise any unregistered security, even if the security were not in fact registrable.

Part 4 Assignations in Security

Introduction

4.1 Under the current legislation, a floating charge or standard security by a company is always registrable with the Registrar of Companies. That is far from being the case for assignations in security. Section 410 of the Companies Act does not mention assignations in security by name but gives a list of those incorporeal moveables in respect of which securities are registrable.[1] Outside this list an assignation in security need not, indeed cannot, be registered. Three of the asset-types listed (patents, trademarks and registered designs) are also registrable in specialist registers and so would be exempt from registration at Companies House under a proposal made earlier.[2] The remaining incorporeal moveables on the list are:

- uncalled share capital
- book debts
- calls made but not paid
- goodwill
- copyright or a licence under a copyright
- a design right or a licence under a design right.

4.2 Of this list, book debts are the most important, but even assignations in security over those are not often encountered.[3] For in practice if incorporeals are the subject of a security at all, the security is usually a floating charge; and indeed the availability for companies of the floating charge has had the effect of making assignations in security less common than with unincorporated borrowers. The relative infrequency of assignations in security should be kept in mind in reviewing the options for reform which follow.

4.3 Sometimes an assignation is granted expressly in security, but the same broad effect is achieved by an unqualified assignation accompanied by a back letter narrating the fact of security. In both cases the assignation is divestitive so that the assignee acquires full title and not merely, as with floating charges and standard securities, a subordinate real right.[4] Ordinarily the real right is acquired only after intimation to the account debtor, but in the case of intellectual property, where there is no account debtor, delivery of the assignation is sufficient.

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[1] 1985 Act s 410(4).
[2] Paras 3.13 – 3.15.
[3] Para 2.1.
[4] eg W M Gloag and J M Irvine, *Law of Rights in Security* (1897) pp 477-8; *Stair Memorial Encyclopaedia* vol 20 para 47.

Justifications for registration

4.4 Assignations in security, like standard securities, were brought within company registration as an incidental result of the introduction of the floating charge.[5] An initial question, therefore, is whether registration at Companies House is sufficiently useful to justify its continuation. The primary justification for registration is publicity, and publicity, as noted earlier, has two main aspects.[6] Publicity prevents latent, and therefore deniable, real rights; and it informs third parties who may have an interest in the affairs of the debtor company.

4.5 In the case of assignations in security the first aspect of publicity (prevention of latent real rights) is already sufficiently provided for by the requirement of intimation. If the assignee-creditor has intimated to the account debtor (a third party to the transaction), the security is in the public domain and cannot later be denied by the assignor company. And if, conversely, there has been no intimation then – in contrast to the position in England and Wales[7] – the security is not effectually constituted. Even in Scotland, however, intimation is not required for the assignation of copyright, goodwill or design rights.

4.6 The second aspect of publicity (informing third parties) is more problematic. In the absence of registration a third party could of course make inquiries of the account debtor. But as well as being a great deal more troublesome than consulting a public register this presupposes that the inquirer knows both of the existence of the debt and the identity of the debtor. A person with merely a general interest in the financial health of a company is unlikely to know either. This point should not be overstated, however. An inquirer either knows about the debt or he does not know. If he knows of the debt, he can make the necessary enquiries. Indeed in practice he would be bound to make such enquiries in order to eliminate the possibility of an outright assignation. This is because only assignations in security are registrable at Companies House: if the company has disposed of the debt rather than merely used it as security, the assignation would not appear on the Register of Charges at all. Conversely, an inquirer who does not know of the debt has no reason to complain that he did not know it was subject to a security. The debt, in this situation, was simply not part of his calculations.

4.7 Underlying this analysis is a broader point. There is no general register of incorporeal moveable property corresponding to the Land Register or Register of Sasines for land. A person seeking to acquire an incorporeal must either make the necessary inquiries or take the chance that the asset has not been extinguished by payment or alienated to someone else. And against this background, matters are little affected, one way or another, by the requirement of section 410 to register one particular right (an assignation in security) in one particular set of circumstances (where the granter is a company incorporated in Scotland).

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[5] Paras 3.1 – 3.4.
[6] Para 1.4.
[7] Thus Scots law has no equivalent of the English equitable assignment, for which see eg P Birks (ed), *English Private Law* (2000) para 8.333.

Current difficulties

4.8 Two other factors may call into question the value of at least the current system of registration. One, mentioned briefly above, is the narrowness of the registration requirement in comparison with other types of security. All floating charges fall to be registered in the Register of Charges, and all standard securities in the Land or Sasine Register. An assignation in security, however, is registrable only if it concerns certain types of asset, and then only if it is granted by a company. Justifications exist for the restriction to certain types of asset, and the topic is pursued more fully later on in this part.[8] The restriction by type of granter, although readily explicable in historical terms, is puzzling as a matter of legal policy. If registration is desirable for assignations in security granted by companies, then why is it not also desirable for assignations granted by other business vehicles, such as partnerships and sole traders? Why indeed is it not desirable for assignations in security in general? This suggests that the registration requirement should either be abolished or extended. A rule that no assignations in security were registrable would be rational and defensible. Indeed, with only minor exceptions, it was the law of Scotland prior to 1961. Equally a rule that all assignations – or at least all assignations of a certain type – were registrable might also be worthy of consideration, and may fall to be considered in due course in the context of the possible introduction of notice filing. But the current rule seems random and illogical.

4.9 The other matter is the legal problems which affect the current system of registration in its application to assignations in security. We advert to these later.[9] Here it is only necessary to refer to the rule, in section 410, that a security which is not registered within 21 days of creation is void against the liquidator, administrator, and creditors. Some difficulties with this rule have already been mentioned.[10] One, however, is peculiar to divestitive securities such as assignations in security. If company A grants an assignation in security to company B, and the assignation is duly intimated, company B is vested in the right and company A is divested. But if registration is then neglected, the assignation becomes, after 21 days, void against the liquidator. The consequences are unclear. One view is that the right reinvests in company A, only to pass once more to company B in the event of late registration, sanctioned by the court under section 420. Another is that the right, having initially passed to company B, must remain there notwithstanding the statutory sanction of invalidity. A third view is that, awkwardly for Scots law,[11] the right is vested in company A for some purposes and in company B for others. Whichever view is correct, however, it is plain that the concept of partial invalidity is not readily compatible with divestitive securities.

Evaluation: registration or not?

4.10 As has been seen, the current system of registration of assignations in security can be criticised as illogical, as technically imperfect, and as duplicating the publicity already provided by the requirement of intimation. But it can also be defended as giving useful information for those seeking a quick overview of a company's financial health, as providing

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[8] Paras 4.14 – 4.27.
[9] Para 4.13 ff.
[10] Para 2.8 and Appendix B.
[11] Awkwardly because Scots property law is unititular in character (ie only one person can have title to the property at any one time): see *Sharp v Thomson* 1995 SC 455 at 469F *per* Lord President Hope.

a starting point for more rigorous investigation, and as giving the only form of publicity in those cases, mainly involving intellectual property, where there is no requirement of intimation. Viewed narrowly, these considerations might seem to cancel each other out, and so to argue for the *status quo*; but in the context of the rest of this paper we believe that the balance of argument moves in favour of abolition of the registration requirement. Under proposals already made the Register of Charges would no longer contain either standard securities or any other security with a specialist register.[12] From here it is a short step to saying that the Register should be confined to floating charges alone. Indeed that has already been the proposal of the Company Law Committee of the Law Society of Scotland[13] and of other commentators.[14] Thus in much the same way as the move towards registration in 1961 had the effect of gathering in additional securities, including assignations in security, so a move away from registration would have the effect of relinquishing securities. Indeed in the particular context of incorporeals the alternative would be decidedly awkward. Part 2 of this paper proposes what is in effect a new system of registration for floating charges, properly tailored to the needs of that particular security. To retain a requirement of registration for a small number of assignations in security would be to require, in addition, the retention of much of the current system.

4.11 If the gains from abolition are palpable, the losses seem manageably small. Assignations in security are sufficiently rare that their absence from the Register would make little difference to its value as a source of financial information. And the problem – if indeed it is a problem – that intimation is not needed for certain incorporeals can perhaps be met by alternative forms of publicity, such as the internal register of charges maintained by the company.[15]

4.12 Our provisional proposal is that

13. Assignations in security should cease to be registrable with the Registrar of Companies.

Retaining registration: an alternative scheme

4.13 In the event that consultees do not support the proposal just made, it will be necessary to retain some form of registration for at least some types of assignation in security. In the rest of this part we assume, contrary to our proposal, that registration is to remain, and consider in outline the changes that might be needed to the current system. Three questions in particular require attention. Should any incorporeals be excluded from the current list of registrable securities? Should any be added? And what should be the legal effect of registration (or the sanction for non-registration)?

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[12] See generally parts 2 and 3.
[13] In its response to the recent consultation by the Steering Group. A summary of the response can be found at para 12.63 of the Steering Group's *Final Report*.
[14] G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 147-8. And see also W W McBryde and D M Allan, "The Registration of Charges" 1982 SLT (News) 177 ("The case for excluding fixed securities from the register of charges has presumably long since been lost").
[15] For a discussion see para 6.9 ff.

Exclusions

4.14 Earlier we suggested that securities over patents, trademarks and registered designs should cease to be registrable as they were already registrable at the Patent Office.[16] In this section we examine the remaining incorporeals listed in section 410.

4.15 **Goodwill, copyright, and design rights.** It is not possible to constitute a fixed right in security to heritable goodwill as goodwill of this category is indissolubly linked to the heritable property in question. It is, however, competent to create an assignation in security over moveable trading goodwill,[17] and where this is done the security is registrable with the Registrar of Companies. As with other intellectual property rights, goodwill is not a right against any particular person and so there can be no question of intimation.[18] But in practice a security holder may take an assignation of any restrictive covenants in respect of those responsible for generating the goodwill, and those assignations would normally be intimated. We understand that fixed rights in security over moveable goodwill are rarely taken.

4.16 Also registrable are rights in security over copyright or licences under copyright, and over design rights or licences under design rights. The reference to design rights was added by the Copyright, Designs and Patents Act 1988, which introduced the concept.

4.17 If registration for incorporeals is to be retained at all, it should probably be retained for securities in respect of which there is no ready alternative publicity (whether by intimation or by registration in some other register).

4.18 **Book debts.** A negotiable instrument given to secure the payment of a book debt is not itself a book debt.[19] That much is made clear by section 412.[20] Otherwise the concept of "book debt" is not further defined and is a matter for the general law. The authority is mainly English.[21] A book debt is one that could or would be entered in well-kept books relating to a business,[22] whether actually entered or not.[23] It may include claims for damages, and need not be a trade debt.[24] Contingent debts, however – such as rights arising out of contracts of guarantee, insurance and indemnity – are not entered into a company's books until liability is ascertained and so do not qualify as book debts for the purposes of the legislation.[25] Inevitably there are doubtful cases, such as bank accounts or share dividends, and a cautious view is that registration should be sought. Thus, although a right in security over shares does not require registration under the current system, particulars of shares are often presented for registration in respect of future dividends.

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[16] Paras 3.13 – 3.15.
[17] Gloag & Irvine, *Law of Rights in Security* (1897) p 465; see also *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731, *Lang Bros v Goldwell Ltd* 1980 SC 237, 244-245 and the discussion in *Stair Memorial Encyclopaedia,* vol 18 para 1364.
[18] See *Stair Memorial Encyclopaedia* vol 20 para 55.
[19] And so a security over such a negotiable instrument is not registrable as a security over a book debt.
[20] In its *Final Report* (paras 12.59 and 12.60) the Steering Group recommended that the equivalent of s 410 be retained, and the conclusion of the Law Commission was the same (Law Com CP No 164 para 5.16).
[21] For a detailed analysis, see W J Gough, *Company Charges* (2nd edn, 1996) pp 677 ff.
[22] *Shipley v Marshall* (1863) 14 CB (NS) 566.
[23] *Independent Automatic Sales Ltd v Knowles and Foster* [1962] 1 WLR 974, [1962] 3 All ER 27.
[24] *Coakley v Argent Credit Corporation plc* (Rimer J, June 4 1998 unreported).
[25] *Paul & Frank Ltd v Discount Bank (Overseas) Ltd* [1967] Ch 348.

4.19 By contrast to intellectual property rights, an assignation in security of a book debt is publicised by intimation, and the case for registration with the Registrar of Companies is correspondingly weaker. On the other hand book debts underpin the cash flow of a company[26] and are also the type of incorporeal most commonly used as security.

4.20 **Uncalled or unpaid share capital.** In theory shares can be issued against partial payment, although today that would be unusual. Where this occurs, further payment is initiated by a formal call or calls made by the company.[27] More common is the issue of shares on the basis of payment by instalments. Payment is then due on the day or days fixed for that purpose and does not depend on a call by the company. In that case the share capital is "unpaid" rather than "uncalled". A company has power to grant security over its uncalled share capital provided it is authorised to do so by its constitutional documents.[28] If so, the assignation in security is registrable under section 410. A security is equally registrable if granted over calls made but not yet paid. In both cases registration follows on from intimation to the shareholders in question. Although section 410 mentions only uncalled share capital, the view has been expressed that it applies to unpaid capital also, but the suggestion remains untested.[29]

4.21 Assignations in security over uncalled or unpaid capital are, we understand, rare, and arguably too rare to require special listing. But those who favour universal registration in respect of assignations in security will naturally wish uncalled or unpaid capital to be included, and certainly there is no reason why they should not be included.

4.22 **Question for consultees.** Views are invited on the following question:

14. In the event that assignations in security continue to be registrable with the Registrar of Companies, should registration still be required in respect of securities over –

(i) goodwill, copyright and design rights;

(ii) book debts; and

(iii) uncalled or unpaid share capital?

Additions

4.23 If assignations in security are to continue to be registrable, it seems worth considering whether additions are needed to the list of incorporeals currently set out in section 410. Indeed one of the criticisms made of the current arrangements is that they are outdated and fail to reflect the conditions of the market.

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[26] Steering Group, *Company Charges* para 3.35.
[27] Table A arts 12 – 22 (Companies (Tables A to F) Regulations 1985, SI 1985/805).
[28] W J Gough, *Company Charges* (2nd edn, 1996) p 47. In *Re Mayfair Property Co, Bartlett v Mayfair Property Co* [1898] 2 Ch 28 it was held that uncalled capital which has been constituted as reserve capital under what is now ss 120 and 124 of the Companies Act 1985 cannot be the subject of a valid right in security.
[29] G McCormack, *Registration of Company Charges* (1994) p 35.

4.24 **Shares.** Shares held in another company or companies may be used as the basis of either a fixed or a floating security. A fixed security is not registrable under section 410 although, as mentioned earlier,[30] registration may in fact take place in respect of dividends. The case for registration in respect of the shares themselves is perhaps not very strong. A fixed security over shares in a British company is usually registered, as a condition of validity, in the register of members of the company concerned.[31] This is true both of certificated shares and also of uncertificated shares transferred under the CREST system.[32] Alternatively, under English law – which applies to shares in companies registered in England and Wales – a security can be created by depositing the share certificate and a blank stock transfer form with the creditor.[33] Mention may also be made of bearer shares, where possession of the document of title suffices. In part 3 we argued that the trouble and expense of registration in the Register of Charges should not be imposed if the security was already registered elsewhere or was otherwise sufficiently publicised, and the argument applies with particular force to securities over a changing portfolio of shares, where constant re-registration would be needed. These considerations formed the basis of the provisional decision of the Law Commission that, in the case of England and Wales, charges over shares should remain unregistrable.[34] The same view had earlier been expressed by the Steering Group.[35] We would not dissent. A registration scheme would in any event be incomplete. Assuming that the EU Collateral Directive is enacted along the lines of the current draft, transactions by certain companies would be exempted from registration.[36] Furthermore, a requirement to register securities over shares would not, of itself, cover the case where shares are held indirectly, through a depositary, and where the holder's right is a claim against the depositary rather than shares in the issuing company.[37]

4.25 **Insurance policies.** A company may hold insurance policies such as policies of life insurance or buildings or goods policies. The fact that an insurance policy is contingent in nature removes it from the category of book debts and hence, under the current law, of registrable rights.[38] If, however, book debts are still to be included within the registration scheme, there seems no good reason for excluding securities over what may in practice be a valuable asset. Previous reviews came to a similar conclusion.[39] In supporting the registration of securities over policies of insurance the Diamond Report recommended the exclusion of policies in respect of goods at sea or abroad,[40] and this qualification is supported by both the Steering Group and the Law Commission.[41]

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[30] Para 4.18.
[31] *Palmer's Company Law* para 6.807.
[32] For CREST see The Uncertificated Securities Regulations 2001 (SI 2001/3755).
[33] Law Com CP No 164 para 2.65.
[34] But with the possibility of voluntary notice filing as an alternative to possession or registration. See Law Com CP No 164 paras 5.22 – 5.35.
[35] Steering Group, *Final Report* paras 12.59 and 12.60.
[36] The draft Directive is summarised in Law Com CP No 164 paras 5.25 – 5.27. The Directive would apply to transactions where both the debtor and creditor are a public authority, central bank, financial institution under prudential supervision, or a juristic person whose capital base exceeds EUR 100 million or whose gross assets exceed EUR 1000 million.
[37] Law Com CP No 164 paras 2.66 and 2.67.
[38] Para 4.18.
[39] Diamond Report para 23.5; DTI, *Company Charges* paras 34 and 35; Steering Group, *Company Charges* para 3.38; Steering Group, *Final Report* para 12.60; Law Com CP No 164 paras 5.36 – 5.40.
[40] Diamond Report paras 23.5.3 and 23.5.4.
[41] Steering Group, *Final Report* para 12.60; Law Com CP No 164 para 5.40.

4.26 **Bank accounts.** Whether securities over bank accounts are currently registrable depends on whether they qualify as "book debts", an issue which has never been authoritatively determined.[42] As a matter of legal policy, however, it seems doubtful whether there is much advantage in registration. Professor Diamond was not in favour of registration, at least in the context of the current system. In his view:[43]

> "It has not been shown that there is any need for such registration to prevent people from being misled. Given the way in which bank accounts are conducted in secrecy, the amounts a company has to its credit in its bank accounts are not generally known, and since this is not a visible asset it is unlikely that any creditors are misled by the existence of an unknown charge. The assumption is in many cases that, so far from having credit balances at the bank, a company has an overdraft."

Even if, unusually, a potential creditor[44] sought to take security over the company's account, it may be assumed that proper inquiries would be made of the bank, with the result that any previously intimated assignation in security would be disclosed. The Law Commission's provisional view is against registration,[45] and we are inclined to agree.

4.27 **Question for consultees.** Views are invited on the following question:

15. In the event that assignations in security continue to be registrable with the Registrar of Companies, should registration also be required in respect of securities over –

(i) shares;

(ii) insurance policies; and

(iii) bank accounts?

Universal requirement with exceptions

4.28 If a significant expansion of assignations in security eligible for registration were thought desirable, one way in which this might be achieved would be by adjusting current terminology. In the Diamond Report, for example, it was suggested that "book debts" might be replaced by "receivables", a wider term which could be made wider still by a specially extended definition.[46] More far-reaching, perhaps, is the suggestion of the Steering Group that all securities be registrable unless specifically exempted.[47] The proposed exemptions were:

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[42] Para 4.18.
[43] Diamond Report para 23.4.10.
[44] The creditor must be a third party and not the bank itself. An assignation in security in favour of the bank would extinguish the debt arising from the bank account by confusion. The position in England and Wales appears to be different.
[45] Law Com CP No 164 paras 5.49 – 5.53.
[46] Diamond Report paras 23.9.20 – 23.9.25. The proposed definition was "debts due or to become due to the company in respect of goods supplied or to be supplied or services rendered or to be rendered by the company in the course of the company's business whether entered in a book or not". For later discussion see DTI, *Company Charges* paras 25 and 26, and Steering Group, *Company Charges* paras 3.35 and 3.36.
[47] Steering Group, *Final Report* para 12.60.

- securities covering an issue of debentures;[48]

- the deposit by way of security of a negotiable instrument given to secure the payment of a debt;[49]

- securities over shares;[50]

- securities over (i) marine insurance policies which insure goods which are exported and (ii) insurance policies in respect of goods over which securities are not registrable;[51] and

- contractual liens over sub-freights.[52]

In expressing provisional support for this approach for England and Wales, the Law Commission endorsed these exemptions, other than the first, and suggested that they might be augmented by

- bank accounts;[53]

- Lloyds' trust deeds.[54]

4.29 This approach, of a universal registration requirement but coupled with exceptions, contrasts with the listing of individual securities which is favoured by section 410. The replacement provisions in the Companies Act 1989, had they been brought into force, would similarly have relied on a list of particular securities.[55] There are things to be said in favour of both approaches. Since a list of exceptions is likely to be shorter, and narrower in scope, than a list of inclusions, a requirement of universal registration (with exceptions) will avoid some of the problems of definition mentioned earlier in this part. Practitioners will have a clearer idea of what is, and what is not, registrable, and are less likely to have to resort to registration "just in case". A requirement of universal registration is also more far-reaching. Securities over unusual – and, in the future, new – types of asset will automatically be included. A universal rule would, for example, catch securities over computer software or film negative rights or anticipated income from PFI projects.[56] Equally, however, as the Diamond Report pointed out, such a rule carries the risk of accidental inclusion of assets which ought not to be registrable.[57] Whichever approach is adopted, it would be possible to build in some flexibility by allowing alteration of the list (whether of inclusions or of exceptions) by statutory instrument.

4.30 We express no view as to the respective merits of the two approaches, and simply ask

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[48] Para 6.5.
[49] Para 4.18 n 20.
[50] Para 4.24.
[51] Para 4.25.
[52] Law Com CP No 164 para 5.41.
[53] Law Com CP No 164 paras 5.49 – 5.53. And see para 4.26 above.
[54] Law Com CP No 164 paras 5.78 – 5.94.
[55] 1989 Act s 93 (inserting a new s 396 into the 1985 Act).
[56] Law Com CP No 164 para 5.5.
[57] Diamond Report para 23.1.6.

16. (a) In the event that assignations in security continue to be registrable with the Registrar of Companies, should the legislation proceed by way of

(i) a list of incorporeals in respect of which securities must be registered (as at present); or

(ii) a general rule that all assignations in security are registrable subject to some listed exceptions?

(b) If the favoured option is (ii), what exceptions should there be to the requirement of registration?

Effect of registration and sanctions for non-registration

4.31 **Supervening partial invalidity.** As matters stand, legal consequences attach, not to registration itself, but rather to failure to register. An assignation in security is created by intimation or, if there is no account debtor, by delivery of the deed. Subsequent registration does not improve the right, but failure to register within 21 days results in partial invalidity, the security being void against the liquidator, administrator, and other creditors.[58] The difficulties with the "void against" formula are explored elsewhere in this paper.[59] In part 2 we proposed its abandonment in relation to floating charges,[60] and, subject to the views of consultees, we would have misgivings about its retention in the context of assignations in security.

4.32 **Creation of security.** The solution proposed for floating charges was to make registration constitutive of the right, and consistency would argue for the same solution in respect of assignations in security. Yet there are difficulties. As floating charges can only be granted by companies (or related juristic persons), a rule of constitution by registration at Companies House is a rule which governs all cases. With assignations in security, such a rule would be far from universal. An assignation in security by a natural person or partnership would continue to be constituted by intimation, whether granted in the course of business or not; and indeed an outright assignation would be constituted by intimation in all cases, regardless of the granter. It is not clear that the difference could be justified.

4.33 Another source of difficulty is the relationship of registration to intimation. Intimation is a necessary solemnity of assignation, "till which is done, the cedent is not understood in our law to be denuded".[61] If that were to continue as the law, an assignation would require *both* intimation and registration, with divestiture occurring only on the later of the two events. The result would be to make the Register unreliable. The appearance there of an assignation in security would guarantee neither the date nor the fact of constitution. Instead it would be necessary to make inquiries as to intimation. The problem is avoided if intimation ceased to be a constitutive act (though continuing to be necessary to prevent payment to the cedent). In France, for example, the Dailly Act of 1981 dispenses with intimation for assignations of receivables to a credit institution.[62] A similar rule in

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[58] 1985 Act s 410(2).
[59] Para 4.9 and Appendix B.
[60] Paras 2.3 – 2.11.
[61] Bankton III.1.6.
[62] Statute 81-1 of 2 January 1981. The current legislation is in articles L 313-23 – L 313-35 of the Monetary and Financial Code. French law is of particular interest as a system which usually insists on intimation but has

Scotland might be regarded by the commercial community as helpful, and as avoiding some of the difficulties faced by debt factoring.[63] But whether so far-reaching a change should be introduced for companies alone, and as a by-product of reform of registration procedures, seems open to question. As if to emphasise the point, the law of assignations in security is devolved, so that the abandonment of intimation would be a matter for the Scottish Parliament.

4.34 Timing is a further difficulty. Unless, improbably, intimation and registration are concurrent events, the account debtor may be under a misapprehension as to the true creditor. Thus if intimation occurs in advance of registration, the debtor might pay the assignee at a time when, pre-registration, the right was still held by the cedent. But if it occurs after registration, and on the assumption that intimation ceased to be a constitutive event, there would be the (opposite) danger of payment to the cedent after the right had passed to the assignee. A special rule would be needed, as in some other countries, to protect a debtor who paid in good faith, leaving the rightful creditor with a claim against the party paid in error.[64]

4.35 **Fine for non-compliance.** A third possibility is already present in the current law. By section 415(3) of the 1985 Act

> "If a company makes default in sending to the registrar for registration the particulars of any charge created by the company … 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."

It comes as no surprise to learn that the fine is rarely, if ever, exacted. A default in registration is not usually a public fact. The Registrar of Companies, who knows if an annual return is late, has no means of knowing that a security has been granted but not registered. In practice matters are likely to come to his attention only on an application for late registration[65] or on the insolvency of the debtor company. In the former case, steps are already being taken to remedy the situation and a fine may seem of little help. In the latter, matters have gone beyond the point where a fine would stimulate registration, and a monetary penalty would only serve to deplete the resources available for the company's creditors. If there is any merit in the mechanism of a fine it probably lies in a certain moral pressure to observe the law. Previous enquiries into company registration have usually concluded that this is not enough to justify its retention, at least where some alternative sanction can be found.[66]

4.36 **Question for consultees.** Unless registration has some effect, or a failure to register attracts some sanction, there would be no incentive to proceed to registration. Yet in the case of assignations in security it is difficult to identify any effect, or sanction, which might

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departed from the requirement in the case of assignations of receivables. In a number of other countries, such as Germany or South Africa, intimation has never been a requirement.

[63] In particular the risk that, intimation not having been attempted, the cedent becomes insolvent. A standard way of attempting to meet this risk is to provide that the cedent holds the receivables in trust for the assignee. For a case which succeeded on this basis, see *Tay Valley Joinery Ltd v C F Financial Services Ltd* 1987 SLT 207.

[64] See eg *The Laws of South Africa*, 1st reissue, vol 2 (1993) para 267.

[65] If a fine were to be retained, it would also be necessary to retain a time period for registration (which otherwise would be abandoned: see para 2.7).

[66] Diamond Report para 11.3.9; Steering Group, *Final Report* para 12.48; Law Com CP No 164 paras 4.52 – 4.54.

be regarded as satisfactory. Indeed this very difficulty was one of the reasons for our provisional rejection of registration for assignations in security.[67] Nonetheless we invite views on the following question

17. In the event that assignations in security continue to be registrable with the Registrar of Companies, should the effect of non-registration be that –

(i) the security is void against the liquidator, administrator and creditors;

(ii) the security is not constituted;

(iii) a fine is payable by the company and its officers; or

(iv) some other sanction (please specify) is imposed?

[67] Paras 4.10 – 4.12.

Part 5 Mechanics of Registration

The current system

5.1 A security may be registered by anyone with an interest,[1] but in practice it is the creditor who applies for registration. An application is made by sending to the Registrar of Companies a certified copy[2] of the security deed together with a form 410 summarising the deed by reference to certain prescribed particulars.[3] Form 410 is reproduced in Appendix C. If the security deed is complicated, form 410 is likely to be supplemented by papers apart in which the deed is extensively quoted. The documentation must be sent or delivered in paper form, and fax may not be used. Internet registration is not possible at present but is intended to be available in due course.[4]

5.2 On receipt, an application is scrutinised to ensure that it is timeous, that form 410 is properly completed, and that the particulars in the form correspond with the security deed itself. It is then the turn of the Registrar to summarise the security by reference to equivalent statutory guidelines.[5] This second, and briefer, summary is entered into the company file and constitutes, for that company, the official register of charges.[6] The presenter's own summary (form 410) is also retained at the Register and made available to searchers. The security deed itself, however, is returned to the presenter, together with a certificate of registration which is conclusive evidence that the requirements of registration have been satisfied.[7] Since April 1995 documentation held by Companies House has been scanned into an image bank and may be searched on a subscription basis via an internet service called Companies House Direct. Pre-1995 material is also available on individual request.[8]

5.3 A broadly similar procedure for registration applies in respect of instruments of alteration of floating charges,[9] and of securities already in existence at the time property is acquired by a company.[10] The rules for satisfactions (discharges) are different but, as we have already suggested, might usefully be brought into line with the standard procedure.[11]

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[1] 1985 Act s 415(1).
[2] A copy is certified as a correct copy by the applicant for registration, and the certificate must be signed by or on behalf of the applicant. See the Companies (Forms) Regulations 1985 (SI 1985/854) reg 7.
[3] 1985 Act s 410(2). For the particulars that are prescribed, see para 5.23 ff.
[4] Since 22 December 2000, however, electronic filing has been available for some aspects of memoranda of satisfaction. See 1985 Act s 419(1A), (1B) (inserted by the Companies Act 1985 (Electronic Communications) Order 2000 (SI 2000/3373) art 23).
[5] 1985 Act s 417.
[6] Para 5.12 and Appendix D.
[7] 1985 Act s 418. See paras 5.16 – 5.22.
[8] Further information will be found on the Companies House website (www.companieshouse.gov.uk).
[9] 1985 Act s 466. See paras 2.14 – 2.19.
[10] 1985 Act s 416. See para 6.1.
[11] 1985 Act s 419. See paras 2.20 – 2.26.

Deed or summary?

5.4 A reform sometimes suggested is direct registration of the deed itself.[12] Certainly the result would be more in line with ordinary registration practice in Scotland as exemplified by the Register of Sasines.[13] The presenter, on this model, would submit the principal deed (or perhaps a certified copy), together with a brief application form giving the company name and number and the name of the deed. Proposals made earlier would restrict the class of deeds to floating charges, and to assignations, variations and discharges of floating charges.[14] The deed, which would need to meet the Registrar's requirements in terms of paper size and legibility, would be copied at Companies House, scanned into the image bank, and returned endorsed with the date of registration. There would be no form 410, and no certificate of registration. So far as company securities are concerned, the Companies Register would then be a register of deeds and not a register of particulars.

5.5 **Arguments supporting registration of the deed.** This model has obvious advantages. It would, in the first place, save time and trouble both before and during registration. The presenter would no longer have to summarise the deed on form 410. With complex security documentation this is a potentially difficult and time-consuming task. Similarly, staff at Companies House would be relieved of the need to compare the resultant summary with the deed itself. According to the Steering Group:[15]

> "The present requirements mean that the role and responsibilities of Companies House relating to the registration of company charges differ significantly from those for the registration of other documents, where the Registrar is tasked with registering what is presented and not with verifying the content of the information registered. In practice, Companies House is not fully able to carry out this role."

In some cases the checking of particulars involves an evaluation of security documentation which is scarcely possible without legal training.

5.6 Secondly, the proposal would reduce the chances of error. A system which registers only particulars and not the deed itself runs the risk of the particulars being inaccurate.[16] That risk, at least, would be eliminated by direct registration of the deed.

5.7 Thirdly, the certificate of registration would be replaced by a statement of the date of registration. There would be nothing else to certify. The debate as to whether a certificate should continue to be conclusive as to the proper completion of form 410 – the very issue

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[12] W W McBryde and D M Allan, "The Registration of Charges" 1982 SLT (News) 177, 179-80; G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 155-6.

[13] The Land Register, by contrast, is a register of title. The Keeper enters on the Register, not the deed itself, but its legal effect. Title then flows from the entry on the Register and not from the deed on which the entry was based. There is, of course, no question of converting the Register of Charges into a register of state-guaranteed title.

[14] See generally parts 2 – 4.

[15] Steering Group, *Company Charges* para 3.20.

[16] W W McBryde and D M Allan, "The Registration of Charges" 1982 SLT (News) 177, 178: "[I]n the simple case the [current] procedure of registration involves a minimum of four documents, namely the original charge, a certified copy of the charge, the particulars of the charge, and a certificate of registration. It requires little knowledge of human fallibility to appreciate that sooner or later, rarely or frequently, these four documents will not match each other. Anyone designing a system with built-in hazards for solicitors, typists and civil servants could hardly have done better."

which, above all others, led to the abandonment of the 1989 Act provisions[17] – would cease to matter.[18]

5.8 Finally, by making the security document publicly accessible, the proposed system would provide those searching the register with precisely the information they would wish to have, namely the nature and extent of the security. From the point of view of a third party, a copy of the deed itself is almost always better than an abbreviated summary.[19] While it is true that companies are already bound to make security deeds available for inspection,[20] the duty is owed only to members of the company and creditors, and there is no obligation to supply a copy. In any event it may be assumed that existing creditors would prefer to consult a public, and online, register than to have the inconvenience, and possible embarrassment, of making an approach to the company itself.[21] Potential creditors are not provided for at all under the current law.

5.9 **Arguments supporting registration of particulars.** The main counter-argument is confidentiality.[22] Registration of the deed might reveal more information than the parties to it would wish. Most security documents, admittedly, are short and written in more or less standard form. To register such a document would not be to put confidentiality at risk. But the position may be different where the documentation is more ornate and contains extensive undertakings and provisions of a contractual nature. The difficulty, however – if it is a difficulty – is hardly a new one. For almost 400 years the full text of securities over land in Scotland has been publicly available in the Land or Sasine Register. Confidentiality, if needed, is preserved by the simple expedient of having the contractual arrangements in a separate minute of agreement. Only the security proper – a Form B security, in the terminology of standard securities[23] – is then registered. No doubt a similar approach could be adopted in respect of floating charges.

5.10 Technology may also favour the present system, or at least a modified version of that system. If the system were to require only the completion of a form 410, it would be a relatively simple matter to provide for internet registration. By contrast, internet registration of an actual deed is likely to be more awkward. It may be noted, however, that the current pilot project for automated registration of title to land operates by online registration of deeds.[24]

5.11 **Evaluation.** At least at first sight, the arguments in favour of a move to registration of deeds seem more persuasive than those favouring the *status quo*. Some of the advantages claimed for a new system might, however, be attainable by modification of the existing system. In particular, if the conclusive certificate of registration were to be sacrificed, staff at Register House would no longer need to compare form 410 with the security

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[17] DTI, *Company Charges* para 8; Steering Group, *Company Charges* para 1.12.
[18] See further paras 5.16 – 5.22.
[19] A deed may sometimes be less intelligible than summary particulars. On the other hand, if a deed is sufficiently complex to risk intelligibility, form 410 will probably be supplemented by papers apart which may be equally unintelligible.
[20] 1985 Act ss 421 and 423(1).
[21] The Diamond Report para 22.1.8 quotes the observation of the Davey Committee on Company Law Amendment (1895) that "creditors are not likely to avail themselves of their right of inspection at the Company's office if they desire to retain business connexions with the Company".
[22] Diamond Report para 22.1.9; Steering Group, *Final Report* para 12.81.
[23] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2) and sched 2.
[24] See eg S Brymer, "E-Conveyancing – The future here today?" (2002) 58 Greens Property Law Bulletin 5.

documentation, and the security itself would not be submitted.[25] At this stage we make no proposal but merely ask

18. Should registration be of –

(a) the particulars of a security, as at present, or

(b) the security deed itself?

Separate register of charges

5.12 As well as registering particulars or – it may be in future – the deed itself, the Registrar also maintains for each company a separate register of charges which summarises the security. This is a matter of statutory duty. By section 417 of the 1985 Act the Registrar is required to keep a register into which is entered, in respect of each security, the date of creation, the amount secured, short particulars of the affected property, the grantee, and, in the case of a floating charge, any ranking agreement or negative pledge clause. The form prescribed for this purpose is set out in Appendix D. The abolition of the separate register has been called for by successive reform bodies, for reasons which are easy to understand.[26] On the one hand, the preparation of the register involves work for the staff at Companies House and carries the risk of mistranscription and other errors. Yet on the other hand the register adds nothing to the store of information already available to a person consulting Companies House, beyond the convenience – of limited value in a computer age – of a single entry for each security which discloses later events such as alterations or satisfactions (discharges). Indeed the limited value of the register is candidly acknowledged by the notice, displayed prominently at the top of each page, warning that "Searchers may find it desirable to refer to the documents mentioned in column (2) for more detailed particulars". We doubt whether the duplication of information, and of effort, represented by a separate register can be justified, and our provisional view is therefore that

19. The Registrar of Companies should no longer be required to maintain a separate register of charges.

Registration by whom?

5.13 The 1985 Act imposes a duty to register securities on the company, with a daily fine payable on default; but registration by any person with an interest is also permitted, and such a person can recover the registration fee from the company.[27] The meaning of "interest" is unclear, but the provision for signatures on form 410 presupposes that only the granter (the company) or the grantee will register.[28] The rule is different for memoranda of satisfaction and instruments of alteration, where there is neither a duty nor, apparently, any

[25] Paras 5.16 – 5.22.
[26] Diamond Report para 22.2; Steering Group, *Company Charges* para 3.77; Steering Group, *Final Report* para 12.69; Law Com CP No 164 paras A.51 and A.52.
[27] 1985 Act s 415.
[28] The provision has the status of prescribed particulars for the purposes of s 410(2) of the 1985 Act. See the Companies (Forms) Regulations 1985 (SI 1985/854) reg 4(2) and sched 4 part I.

restriction on who may register.[29] We have already proposed the abolition of the duty to register in respect of securities.[30] It remains to consider where the right to register should lie.

5.14 In practice registration is almost always by the grantee. That the creditor should wish to register a security should cause no surprise. Even under the present law a security is largely ineffective unless it is registered,[31] with the result that few creditors would rely on the company to perform its statutory duty. It may be assumed that creditors will continue to register in the future, particularly if, as proposed, registration becomes a constitutive act.[32] Plainly, therefore, creditors should be allowed to register by the new legislation. The only question is whether the right should be extended to others, and in particular to the granter-company. The rule for the Land Register is that registration is possible only on the application of the grantee, presumably on the basis that, after delivery, the deed is the grantee's to use (or not) as he wishes.[33] If, therefore, a grantee chooses not to register, and so not to acquire a real right, that choice cannot be overturned by the unilateral act of the granter. The point seems largely theoretical, however. We doubt that there would be many cases where the grantee of a floating charge would fail to register, and fewer still where registration would then be carried out by the granter-company. Nonetheless, the Land Register rule seems correct in principle. Further, if registration of particulars is retained but the conclusive certificate abolished, so that an error in form 410 imperils registration itself, grantees will need the assurance that third parties cannot apply for registration.[34] In the case of bilateral deeds, such as an instrument of alteration, either party would qualify as a grantee and so be able to register.

5.15 We propose that

20. Securities (and assignations, variations and discharges of securities) should be registrable only by the grantee.

Error and the conclusive certificate

5.16 Earlier we invited views on whether registration should continue to involve the delivery of prescribed particulars or whether there should instead be direct registration of the deed itself.[35] If the current system is to be retained – as to which we express no view – two further matters require attention. The first, considered immediately below, concerns the effect of error in the filing of particulars, and the status of the certificate of registration. The second is whether there should be changes to the particulars currently prescribed.[36]

5.17 A system which operates by registration, not of the deed itself but of summary particulars of the deed, runs the additional hazard of the particulars being inaccurate.[37] In

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[29] 1985 Act ss 419 and 466.
[30] Para 2.7.
[31] 1985 Act s 410(2).
[32] Paras 2.3 – 2.11.
[33] Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 9(1) ("Any application for registration shall be made by the person in whose favour a real right will be created or affected by registration ...")
[34] Para 5.20.
[35] Paras 5.4 – 5.11.
[36] Discussed at paras 5.23 – 5.39.
[37] If the *deed* is inaccurate, the security may then (and depending on the nature of the inaccuracy) fail – subject to the possibility of rectification under s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. By contrast to the Land Register, registration at Companies House does not cure defects in the deed being registered.

that event it becomes necessary to distribute the liability, and the loss. If particulars turn out to be inaccurate,[38] the fault is almost always that of the grantee-creditor (or at least of the agent acting for that person), for in practice it is the grantee who registers, and hence the grantee who completes form 410. Yet the law exonerates the grantee. The grantee's application is checked at Companies House by comparing the particulars against a copy of the security deed. If the particulars are deemed satisfactory, a certificate of registration is issued which, by statute, is conclusive evidence that the registration requirements have been complied with.[39] Erroneous particulars have no effect on the validity of the registration, and the scope of the security is determined by the deed and not by the registered particulars.[40]

5.18 The position just described is widely regarded as unsatisfactory.[41] It requires of staff at Companies House more legal sophistication than is reasonable to expect. At the same time the very process of checking through applications takes time, delays the appearance of the information on the register, and is incompatible with electronic filing. If, despite this laborious system, errors or omissions go undetected, the law penalises third parties over the grantee by making the deed, and not the published particulars, the measure of the security. The Registrar of Companies, it has been suggested, might incur liability for the error.

5.19 The solution to this problem, it is generally agreed, involves three main elements.[42] In the first place, the conclusive certificate would be abolished. In its place the Registrar would note merely the date of registration. Under the proposed new system, that would be the date on which the security was created.[43] Secondly, in the absence of a conclusive certificate, Companies House would no longer compare the application with the security deed. It would be for the applicant to get matters right. The security deed would no longer accompany the application, thus simplifying the procedure and facilitating electronic filing. Finally, the grantee, having lost the comfort of the conclusive certificate, would be protected against the consequences of error. Except in the case mentioned below, a mistake in form 410 would not invalidate the registration as a whole. Usually indeed it would have no consequence at all, other than a possible fine for filing erroneous information.[44] But where the mistake affected the extent of the property or the obligation secured[45] - crucial information for a third party searching the register - the security would be restricted to whatever property or obligation was included in *both* the security deed *and* the particulars. Thus if form 410 understated the property, the understatement would determine the scope of the security notwithstanding that the deed itself covered a more extensive range of property. If, conversely, the form overstated the property, only the property mentioned in the deed would be affected by the security. No doubt a company-debtor would be unhappy

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[38] The court has a discretion to correct inaccuracies under s 420 of the 1985 Act, but in practice inaccuracies tend to be discovered only on insolvency, by which time it is too late for corrections.

[39] 1985 Act s 418(2)(c).

[40] That at least is the position in England and Wales. See *National Provincial & Union Bank of England v Charnley* [1924] 1 KB 431, and *Re Mechanisations (Eaglescliffe) Ltd* [1966] Ch 20. There is no Scottish authority, but it may be assumed that the law is the same.

[41] *Report of the Company Law Committee* (1962, Cmnd 1749) (Jenkins Committee) paras 300-06; Diamond Report paras 22.1 and 22.3; Steering Group, *Company Charges* paras 3.12 – 3.29; Steering Group, *Final Report* paras 12.80 – 12.82.

[42] To the citations listed in the previous note should be added Law Com CP No 164 paras A.16 – A.27.

[43] In the case of floating charges at least. See paras 2.3 – 2.11.

[44] The Company Law Review Steering Group recommended that it should be an offence knowingly or recklessly to deliver false information to the Registrar of Companies. See para 11.48 of the Group's *Final Report*. This includes information as to rights in security.

[45] This is on the assumption that the obligation secured remains one of the prescribed particulars. For a discussion, see para 5.27. In its *Final Report* (para 12.80) the Steering Group mentions only the security subjects.

at an overstatement of its indebtedness, and a mechanism would be needed for correcting the register.

5.20 A version of this solution was included in the Companies Act 1989 but was not brought into force on the grounds of incompatibility with the Land Register.[46] That difficulty, however, is removed by our proposal that securities over land should cease to be registrable at Companies House.[47] A second, much smaller, difficulty is likewise removed by the proposal that only grantees should be able to apply for registration.[48] The danger here is of inept filing by the company-granter with adverse consequences for the validity or scope of the grantee's security.

5.21 A point must arise at which particulars are so error-strewn that it would be an abuse of language to describe the result as registration.[49] In that case registration should fail, and the security fail with it. The issue seems best approached by deciding which parts of form 410 are so fundamental to the registration process that any material error should be fatal to validity. The particulars currently prescribed for registration are considered in the next section. Errors in respect of particulars of the property secured have already been dealt with in another way. In our preliminary view only four other particulars can be regarded as fundamental, namely the type of security, the description of the company-granter, the description of the grantee-creditor, and the signature by or on behalf of the grantee-creditor.[50] The effect of our proposal would be for an application to fail if it described a fixed security as a floating charge, or identified the grantee as X company and not as Y company.

5.22 Our proposal is that

21. (a) In the event that registration continues to be by reference to particulars –

(i) the particulars should no longer be checked at Companies House against a copy of the security deed;

(ii) a copy of the deed should no longer accompany the application; and

(iii) the Registrar of Companies should no longer certify the validity of registration but only the date on which registration took place.

(b) Where or to the extent that particulars overstate –

(i) the property subject to the security, or

(ii) the obligation secured,

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[46] 1989 Act ss 95 and 97. See further para 1.16.
[47] Paras 3.5 – 3.12.
[48] Para 5.14.
[49] This point is not, however, mentioned in earlier reviews of the law.
[50] This presupposes that signature is to be kept as a requirement, as to which see para 5.31.

the scope of the security should be governed by the terms of the security deed.

(c) Where or to the extent that particulars understate –

(i) the property subject to the security, or

(ii) the obligation secured,

the scope of the security should be governed by the particulars.

(d) Registration should fail if particulars are unsigned or contain a material error in respect of –

(i) the type of security, or

(ii) the description of the granter or grantee.

Prescribed particulars

5.23 **Basic particulars.** The particulars currently required are those set out in form 410 for new securities and in form 416 for securities over property newly acquired.[51] Form 416 largely follows form 410 and will not be considered separately here.[52] Form 410 is reproduced in Appendix C. Among the particulars required the following at least seem so basic to any system of registration that they could hardly be dispensed with:

- name and number of company granting the security;
- a description of the security deed;
- name and address of the grantee/creditor; and
- short particulars of the property secured.

They will not be discussed further here, save to mention that we are aware of concerns[53] that the public disclosure of the name and address of the grantee/creditor may hamper borrowing ability where potential lenders are vulnerable to intimidation from groups opposed to the type of business being carried on by the borrowing company. This risk seems intrinsic to any system of publicity and probably has to be accepted. The omission of the grantee's details would disable a third party from making independent inquiries, and so greatly reduce the value of the register. We would however welcome the views of consultees.

5.24 **Particulars made unnecessary by earlier proposals.** If proposals made earlier were adopted, it would no longer be necessary to give the date on which the security was created. This is partly because, in the absence of a time limit for registration, the date of creation would cease to mark the beginning of the permitted period; but it is mainly because, in

[51] Companies (Forms) Regulations 1985 (SI 1985/854) reg 4(2) and sched 4 part I.
[52] It would disappear if, as proposed, registration is confined to floating charges. See para 6.2.
[53] Steering Group, *Final Report* para 11.46; Law Com CP No 164 para 4.23.

respect of floating charges at least, the date of registration would itself be the date of creation.[54]

5.25 Our proposals on the ranking of floating charges would, if adopted, have the effect of making negative pledge clauses unnecessary or even incompetent.[55] Either way negative pledge clauses should cease to be included among the prescribed particulars.

5.26 **Other particulars currently prescribed.** The remaining particulars currently prescribed require more careful examination.

5.27 *Amount secured.* Form 410 requires disclosure of the "amount secured by the charge". The usefulness of the information has been questioned.[56] Most securities are taken for all sums due and to become due, a formula which, when repeated on the form, gives no indication of the company's true indebtedness. Even where, unusually, the security is in respect of a fixed sum, the recording of that sum is potentially misleading to third parties. Thus at the time the register is consulted the sum might not have been advanced in full, or alternatively might have been repaid, whether in whole or in part. Again the sum might have been varied and the variation not registered.[57] The question is whether such, often unhelpful, information is better than no information at all. If the requirement of disclosure of amount is to be retained, it should be re-worded to make clear that it extends to non-pecuniary obligations.[58]

5.28 *Details of the presenter.* Typically the presenter is not the grantee-creditor as such (whose details are already given on form 410) but a solicitor or other agent acting for the grantee-creditor. The Steering Group did not support retention of a separate requirement to name the presenter.[59] Without this information, however, it would be difficult for the Registrar of Companies to follow up queries or to return particulars that are incorrectly completed.

5.29 *Commission, allowance or discount.* There is a special rule for securities granted in association with debentures.[60] Particulars are required of any commission, allowance or discount paid in return for the grantee subscribing to the debentures, although a failure to submit particulars does not affect the validity of the debentures.[61] We have been unable to establish the reason for this requirement, which seems unimportant in practice. Both the Steering Group and the Law Commission supported its omission.[62]

5.30 *Ranking agreements.* Particulars of ranking agreements must be included if they affect floating charges but not otherwise.[63] The Diamond Report noted the view that, as ranking

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[54] Paras 2.3 – 2.11.
[55] Paras 2.28 – 2.32. As to whether ranking agreements should continue to be included among the particulars, see para 5.30 below.
[56] Law Com CP No 164 paras 4.26 and A.10.
[57] Increases in the amount secured are registrable in respect of floating charges and of securities with back letters (in which case the increased amount is regarded as a new security). See, respectively, 1985 Act s 466(4)(d) (discussed at paras 2.14 – 2.19) and s 414(2) (discussed at paras 6.7 and 6.8). Other increases are not registrable.
[58] Thus a floating charge, for example, may be created "for the purpose of securing any debt or other obligation (including a cautionary obligation)". See 1985 Act s 462(1).
[59] Steering Group, *Final Report* para 12.79.
[60] See further para 6.5.
[61] 1985 Act s 413(3).
[62] Steering Group, *Final Report* para 12.79; Law Com CP No 164 para A.14.
[63] A ranking agreement which affected standard securities could of course be registered in the Land or Sasine Register.

agreements concern relations among creditors rather than relations between creditors and the company, there was no reason for registration against the company.[64] On the other hand, if ranking agreements are to have real effect – in the sense of binding the liquidator of any of the creditors – there is much to be said for requiring registration. This subject was touched on earlier.[65]

5.31 *Signatures.* Form 410 is signed on behalf of the party submitting it for registration (in practice the grantee-creditor). A signature is similarly needed for other forms prescribed under the 1985 Act and also for applications for registration in the Land or Sasine Register. It has been argued that the authenticity of a form is a matter of evidence, and that the evidence need not involve a signature.[66] A signature is, however, useful for reasons beyond authentication. It is an assertion that the information in the form is correct. It impresses on the signatory the legal significance of the act of registration, and the importance of accuracy and care. At an organisational level it prevents forms from being submitted by junior employees without proper scrutiny. Finally, the sheer importance of form 410 – an importance which would be further increased if the conclusive certificate, and checks at Company House, were to be abandoned[67] – argues for a signature. Only the practicalities of electronic registration might seem an argument in the opposite direction.

5.32 **Additional particulars.** In its final report the Steering Group suggested that the prescribed particulars be extended to include whether the company is acting as trustee of the property, and whether the security is a market charge.[68] In its recent paper the Law Commission supported the first, but not the second, of these proposals.[69]

5.33 *Company as trustee.* The existence of a trust should not, we have argued, affect registration one way or another. Hence if a company grants a floating charge over property which it holds in trust, the charge should be registrable in the usual way.[70] This raises the question of whether the trust should be disclosed on form 410. Current practice, we understand, is for the Registrar of Companies to note the trust if it is drawn to his attention, but otherwise the trust will not appear on the register.

5.34 In some cases a company might wish to publicise the fact of trust, if only to make clear that the security does not imply uncreditworthiness in respect of such property as is held beneficially.[71] A third party, too might welcome the information that, although a company has title to a property and granted a security over it, any surplus arising on enforcement would be unavailable to its ordinary creditors in a winding up. On the other hand, the fact that a company was carrying on business as a trustee would usually be clear from its filed accounts, and sometimes from its name. Further, a registration requirement involves practical difficulties. Registration is by the grantee, yet a trust affects only the granter. Unless, therefore, the trust is obvious from the title, the grantee might file an inaccurate return in good faith. A trust might also arise later, after the security has been created and registered. The consequences of error are also a matter of difficulty. It seems

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[64] Diamond Report para 22.4.8.
[65] Paras 2.28 – 2.32.
[66] Law Com CP No 164 para A.15.
[67] Paras 5.16 – 5.22.
[68] Steering Group, *Final Report* para 12.79.
[69] Law Com CP No 164 paras 5.72, 5.75 – 5.77, and A.10.
[70] Paras 2.42 and 2.43.
[71] Steering Group, *Company Charges* para 3.61.

harsh that the whole registration of the security should fail merely because the trust was omitted from form 410. But it is not clear what lesser sanction could be imposed, particularly as there could be no question of the trust itself being affected.[72]

5.35 *Market charges.* A market charge is a security, whether fixed or floating, granted in favour of a recognised investment exchange or clearing house for the purpose of securing debts or liabilities arising in connection with the settlement or performance of market contracts.[73] Market charges are given certain privileges on insolvency, especially in relation to administration and receivership.[74] In English law market charges are equitable securities, and we have no information as to whether, or the extent to which, they occur under the law of Scotland.

5.36 *Other particulars.* We would welcome views as to whether any particulars not already mentioned should be registrable.

5.37 **Voluntary filing.** If particulars are listed as registrable, registration is mandatory, while particulars not included on the list may not be registered at all. The Steering Group thought there might be value in an intermediate category of particulars which could be registered at the election of the presenter. Registration would be competent but not mandatory. So far as Scotland is concerned, the only example proposed of voluntary particulars was market charges. In reviewing the list of particulars which follows, consultees may wish to consider whether registration should be compulsory in all cases, as at present, or whether the registration of certain particulars should be a matter of choice.

5.38 **Consequences of error.** This subject has already been touched on in the context of trustees but is of more general application. Under proposals made earlier, an error or omission in respect of certain particulars (description of security, granter or grantee, or signature) invalidates the registration altogether, while an error or omission in respect of the property or obligation secured limits the security to such property or obligation as is included in both the particulars and the security deed.[75] Errors or omission in lesser matters, however, are substantially unpoliced other than by the remote prospect of a fine. This imposes a practical limit on the particulars which the law may usefully require. There may be little point in prescribing particulars in large numbers if there is neither a sanction for error nor a process of checking at Companies House.

5.39 **Questions for consultees.** Drawing together the list of particulars currently registrable but under question with the list of particulars suggested for possible inclusion in the future, we invite views on the following questions

22. (a) In the event that registration continues to be by reference to particulars, which of the following particulars should be registrable:

(i) the amount or nature of obligation secured;

(ii) the name and address of the presenter;

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[72] On the effect of inaccurate particulars see paras 5.19, 5.21 and 5.38.
[73] 1989 Act s 173(1). "Market contract" is defined in s 155. Section 173(1)(c) also extends market charges to cases involving transfer of securities through computer-based systems.
[74] 1989 Act ss 174 and 175.
[75] Paras 5.19 and 5.21.

(iii) particulars as to commission, allowance or discount paid;

(iv) details of any ranking agreement;

(v) the signature of the grantee-creditor;

(vi) whether the granter-company is acting as trustee of the property;

(vii) whether the security is a market charge within section 173 of the Companies Act 1989; and

(vii) any other particulars (please specify)?

(b) Should registration be voluntary in respect of any of the particulars (if so, please specify)?

Part 6 Miscellaneous

Securities affecting acquired property

6.1 Occasionally property acquired by a company is subject to a security which is not to be discharged as part of the current transaction. In that case the company must register particulars of the security within 21 days of settlement of the transaction.[1] Failure to comply attracts a fine but does not invalidate the security, for a creditor is not to be penalised by the alienation of the security subjects or by the debtor's breach of a statutory duty.[2]

6.2 If other proposals in this paper are accepted, the requirement to register pre-existing securities will fall.[3] Certainly it has no place if the only registrable security is the floating charge. This is because, almost always, property is acquired free of floating charges. A floating charge affects the proceeds and not the asset disposed of. Even if a charge had previously crystallised and become a fixed security, its discharge would be a condition of the acquisition from the liquidator or other insolvency practitioner. In the case of receivers, indeed, that discharge is arguably automatic.[4] Perhaps the only example, and a rare one, where property might be acquired subject to an attached floating charge would be if crystallisation occurred after delivery of the disposition or other deed of transfer but before ownership could be acquired by registration or otherwise.[5] Even this possibility, however, would be substantially eliminated by proposals made in our recent discussion paper on *Sharp v Thomson*.[6]

6.3 The position is not very different even if, contrary to our provisional view, registration is retained for assignations in security.[7] This is partly a matter of numbers. An assignation in security, itself uncommon, would almost always be discharged as part of the sale of the incorporeal. If, therefore, continuing assignations in security are virtually unknown in practice, it seems extravagant to provide for their registration. There is also a technical issue. An assignation in security divests the debtor. This means that he cannot sell the incorporeal as such. At best the debtor could sell the reversionary right, that is to say, a right to a retrocession on payment of the debt. It may be assumed that the status of the right being sold would be sufficiently disclosed, both in the assignation itself and in other documentation,[8] so that a requirement of registration is hardly necessary. Finally, there is the question of sanctions. For reasons that are understandable, and probably unavoidable,

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[1] 1985 Act s 416(1). The reference to "settlement" rather than completion of title is presumably to take into account possible delays in the latter. Section 416(2) provides an easier timetable if the property is situated, and the charge created, outside Great Britain. Late registration requires the permission of the court under s 420.
[2] 1985 Act s 416(3).
[3] Para 1.30.
[4] For a discussion, see J H Greene and I M Fletcher, *The Law and Practice of Receivership in Scotland* (2nd edn, 1992) paras 7.74-7.76.
[5] As in *Sharp v Thomson* 1997 SC (HL) 66.
[6] Scot Law Com DP No 114 (2001) paras 4.30 – 4.40. If, however, it were to be retained for standard securities as well, it would probably be necessary to have an equivalent of s 416.
[7] Paras 4.1 – 4.12.
[8] If it were not disclosed in the assignation – if, in other words, the deed bore to assign the incorporeal itself – then, depending on the exact wording, the assignation would be ineffective as granted *a non domino*, and the reversionary right would remain with the cedent.

the fine for non-registration is in practice not exacted.[9] The result, however, is to make the requirement to register unenforceable. There seems no good reason why such a requirement should be perpetuated.

6.4 Our proposal is that

23. It should no longer be necessary to register pre-existing securities affecting property newly acquired.

Rights in security associated with debentures

6.5 A debenture has been described as "a document which either creates a debt or acknowledges it".[10] In Scotland, unlike in England and Wales,[11] a right in security in respect of an issue of debentures is not registrable as such, but the security will be registrable if it falls within one of the classes otherwise listed for registration.[12] The position will be unchanged under our proposals save that the class of registrable securities is much narrower. A special rule is provided by section 413(2) for securities in respect of series of debentures, where the debenture-holders are to rank *pari passu*. The company is relieved of the burden of separate registration, under section 410, for each individual debenture. Instead there can be a single registration for each issue in the series, using a special form (form 413).[13] The 21-day period runs from the execution of the security document or, if there is none, of the first debenture. The evidence to the Company Law Review Steering Group was that securities are no longer given in respect of issues of debentures.[14] Assuming that to be correct, and subject to the views of consultees, we propose that

24. There should no longer be special administrative provision for registration of a security in respect of a series of debentures.

Rights in security qualified by back letters

6.6 Section 414 contains two rules for securities created by way of *ex facie* absolute disposition or by assignation or standard security qualified by a back letter or other agreement. The first, which dates from the introduction of registration in 1961,[15] is directed at the principle of the common law that where, in the case of a security by *ex facie* absolute disposition (only),[16] the back letter comes to be registered, the security is limited to the amount then advanced and does not cover future advances.[17] That principle is displaced by section 414(1) insofar as it might apply to the registration of particulars at Companies House.[18] Given that grants of security by way of *ex facie* absolute disposition ceased to be

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[9] Para 4.35.
[10] *Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260, 264 *per* Chitty J.
[11] For England and Wales, see s 396(1)(a) of the 1985 Act. The Law Commission favours retention of this rule: see Law Com CP No 164 paras 5.14 and 5.15.
[12] The list is in s 410(4) of the 1985 Act.
[13] Companies (Forms) Regulations 1985 (SI 1985/854) art 4(2) and sched 4 part I.
[14] Steering Group, *Final Report* para 12.59.
[15] Companies Act 1948 s 106A(9), as inserted by Companies (Floating Charges) Act 1961 s 6 and sched 2.
[16] The principle does not apply to back letters in other cases. See G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 153.
[17] W M Gloag and J M Irvine, *Law of Rights in Security* (1897) pp 156-7.
[18] This is expressly "for the avoidance of doubt". In fact there is no reason to suppose that a rule developed in respect of recording in the Register of Sasines should apply to the registration of minimal particulars in the Register of Charges.

competent in 1970,[19] section 414(1) is already obsolete, but in any event our proposals would no longer require registration of securities over land.[20]

6.7 The other rule, in section 414(2), was first introduced in 1972,[21] apparently in response to the decision in *Scottish & Newcastle Breweries Ltd v Liquidator of The Rathburne Hotel Co Ltd*.[22] In that case a company granted a security by way of *ex facie* absolute disposition of land in respect of a fixed sum. Details were duly registered with the Registrar of Companies. Later the parties entered into an agreement which increased the sum due. It was held that the additional sum was not covered by the security. The Lord Ordinary's reasoning is not always easy to follow but seems to amount to three propositions. (1) At common law it was always open to parties to agree an increase in the amount covered by an *ex facie* absolute disposition. (2) But the introduction of a system of registration for company securities meant that any such agreement was ineffective until registered.[23] (3) In the absence of a provision for registration of variations, and in the face of the 21-day time limit for registration of the original security, registration could in practice be achieved only by the granting and registration of a new security. That unwelcome result is avoided by section 414(2), which allows the registration of the new amount within 21 days of the agreement, and without the need for a fresh *ex facie* absolute disposition.[24]

6.8 It is unnecessary to carry forward section 414(2) into any new legislation. Insofar as it concerns a problem peculiar to *ex facie* dispositions, that problem has been removed by the phasing out of such securities, as already mentioned. And insofar as there is a wider problem about registration of increases in the amount secured, section 414(2) meets that problem only partially, in respect of those securities with back letters. If a provision is needed at all, it must be more comprehensive in scope. We have already made proposals for variation of floating charges.[25] Whether more than this is required will depend both on whether registration is to extend beyond floating charges, and on whether the prescribed particulars (if indeed they survive at all) are to continue to include details of the loan secured.[26] Plainly if the amount secured is not registered in the first place, there would be no reason to register increases. It seems only necessary to add that securities in respect of fixed amounts are rarely encountered today.

Company's own register of charges

6.9 **Retention or abolition?** A company must also maintain its own, internal, register of charges.[27] Failure to do so may attract a fine for the officers concerned but has no effect on the validity of the securities.[28] The register is available for consultation by members of the public.[29] Like the register at Companies House, the internal register is a register of particulars and not of deeds. Unlike that register, however, it extends to "all charges

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[19] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3).
[20] Paras 3.5 – 3.12.
[21] Companies Act 1948 s 106A(9), as inserted by Companies (Floating Charges and Receivers) (Scotland) Act 1972 s 6 and sched.
[22] 1970 SC 215.
[23] This proposition is perhaps controversial, and is not fully argued. It conflicts with *dicta* in the decision of the First Division in *Archibald Campbell, Hope & King* 1967 SC 21.
[24] This result is achieved by the rather clumsy means of deeming there to be a new security.
[25] Paras 2.14 – 2.19.
[26] Para 5.27.
[27] 1985 Act s 422.
[28] 1985 Act s 422(3).
[29] 1985 Act s 423. Those who are not either members or creditors must pay a nominal fee not exceeding 5 pence.

specifically affecting the property of the company, and all floating charges on any property of the company" and not merely to those securities listed in section 410(4). Thus although the information on the internal register is similar in type, it is wider in scope. In practice, however, this is of theoretical interest only, for most companies do not trouble to maintain an internal register.

6.10 If the internal register merely duplicated, but in a less public and convenient way, information already held at Companies House, there would be little advantage in its retention. Insofar, however, as it yields unique information, it has a certain value – or would have such value if it were maintained in accordance with the statutory obligation. In particular, if only floating charges were to be registrable at Companies House in the future, then the importance of the internal register might be correspondingly enhanced.[30]

6.11 This point should not, however, be over-stated. The case for restricting registration at Companies House to floating charges is that other securities are sufficiently publicised already. Standard securities, for example, are registered in the Land or Sasine Register, and between them floating charges and standard securities account for around 95% of all securities presented for registration at Companies House.[31] It would be unusual to inspect the company's internal register in preference to the Land Register. Furthermore, the neglect of the internal register is a serious practical difficulty.[32] Even where a register is actually kept, it may be inaccurate, either by the omission of securities which ought to have been registered, or because the statutory duty does not in any event extend to the recording of alterations, assignations, and discharges. In the absence of workable incentives, the state of a company's register will depend on the efficiency, and honesty, of its officers. This suggests that a direct inquiry of the company may yield better results than a search of its register. Certainly in practice a potential lender will often request access to accounting records, asset registers and security documentation, supplemented perhaps by enquiries of third parties, and by warranties from the company and undertakings as to future information. Of course, it may be that such requests and enquiries would cease, or at least be much reduced, if the internal register were more robust. It may fairly be said that the matter has not been properly tested. On the other hand, there would be little merit in insisting, with appropriate sanctions, on the maintenance of an accurate register if in the event it was rarely consulted.

6.12 At this stage we express no preference as to whether the internal register should be retained or abolished, and would welcome the views of those with practical experience in this field. If, however, the internal register is to be preserved, two other matters stand in need of discussion.

6.13 **Content.** The statutory duty is to maintain a register of "charges", a term of uncertain meaning, at least in Scotland.[33] "Charge" should presumably be replaced by "right in security", and it should also be made clear that only consensual securities are included, for it would be neither practical, nor probably useful, to register a lien or hypothec. One possible approach would be to have a list of securities, although over time this would become out of date to some extent. If the purpose of the register is to give no more than a general

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[30] Steering Group, *Final Report* para 12.68; Law Com CP No 164 paras 4.69 and A.50.
[31] Para 2.1.
[32] But not a new one. The Diamond Report para 28.3.4 quotes the Davey Committee in 1895 to the effect that "many companies, even amongst the largest and best-managed, keep no register at all".
[33] *Scottish & Newcastle Breweries Ltd v Liquidator of the Rathburne Hotel Co Ltd* 1970 SC 215, 219-20 per Lord Fraser.

impression of financial standing, it would not be necessary to register alterations or, it may be, assignations.[34] Neither, probably, need be registered at present.[35] On the other hand it would be important that a security was deleted if it was discharged or extinguished in some other way.

6.14 **Sanctions and incentives.** A central difficulty is to persuade companies to maintain a register in the first place. The current criminal sanction should presumably remain, for what it is worth. Greater prominence for the register might conceivably increase demand for its inspection, and with it the incidence of complaints to the prosecuting authorities. In its response to the Company Law Review, the Company Law Committee of the Law Society of Scotland suggested a possible new obligation on auditors, as part of preparation of the annual accounts, to satisfy themselves that the register was properly maintained. It may be assumed that companies would not wish their accounts to be qualified in respect of a matter which was so easily within their control. Another suggestion is that the annual return might include a list of current securities, in effect an index to the internal register. An inaccurate register might result in a claim against the company, whether at common law or under a new statutory duty, although if loss were sustained it would usually be because the company was insolvent, so that the claim in practice would be worthless. A radical solution would be to impose personal liability on those officers of the company responsible for the state of the register.

6.15 **Questions for consultees.** Views are invited on the following questions

25. (a) Should companies continue to be under a duty to maintain a register of charges?

(b) If the answer to (a) is yes –

(i) what information should the register contain?

(ii) what sanctions and incentives (if any) should be introduced to encourage its maintenance?

Securities over assets in England and Wales

6.16 In its recent consultation paper the Law Commission expressed provisional support for the introduction of notice filing to England and Wales, at first for companies but later for non-corporate debtors as well.[36] Notice filing would encompass a wide range of charges and also quasi-securities such as retention of title clauses and finance leases.[37] Filing would be voluntary in the sense that a failure to file would not attract a penalty,[38] but filing would

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[34] But see *Palmer's Company Law* para 13.411.1.
[35] On assignations see, however, *Libertas-Kommerz v Johnson* 1977 SC 191, 203 *per* Lord Kincraig: "Under section 106(I) of the 1948 Act [now s 422 of the 1985 Act] the company itself was obliged to keep at its registered office a register of charges, and to enter therein all floating charges over the property of the company, giving the relevant particulars, including the names of the persons entitled to the floating charge ... To comply with the provisions of the section the company, in my judgment, would be bound to record any assignation of the floating charge so as to show the names of the persons entitled to it". This *obiter dictum* is doubted in G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 154-5.
[36] Law Com CP No 164 paras 4.233 – 4.236. See paras 1.26 – 1.29 above for a brief description of notice filing.
[37] Law Com CP No 164 parts V and VII.
[38] Law Com CP No 164 paras 4.52 – 4.54.

regulate perfection and priority.[39] A creditor who failed to file a security would thus be at a serious disadvantage. Like the current system of registration of company charges, the new system would apply, not only to securities by companies registered in England and Wales, but also to securities by foreign companies with a registered place of business there.[40]

6.17 It remains to consider the position of Scottish companies under this new system proposed for England and Wales although it should be stressed that this is more a matter for the English law of charges than for the Scottish law of company registers and hence more a matter for the Law Commission, whose consultation paper contains views on the subject.[41] The current rules, in the 1985 Act, give special, and reciprocal, treatment to companies registered in the two jurisdictions. A Scottish company which grants a charge over assets in England and Wales registers at Companies House in Edinburgh, in the usual way, while an English company granting a security over assets in Scotland registers in Cardiff.[42] Earlier we proposed that this system should be retained insofar as it applies to securities over Scottish assets by English companies.[43] In principle, as both the Steering Group and Law Commission acknowledge, the system should equally be retained in the converse situation of charges over English assets by Scottish companies.[44]

6.18 We referred earlier to the prevalence of the floating charge as the instrument employed by Scottish companies for creating securities over property other than land.[45] Usually the property subject to the floating charge will, or may, include assets whose situs is in England and Wales. To require that a Scottish floating charge be registered in both Edinburgh and in Cardiff would, of course, entail additional expense and in our view it is desirable to retain the existing reciprocal arrangements so far as applicable to Scottish floating charges. Although we recognise that whether registration in Edinburgh of a floating charge by a Scottish company can be accommodated in or alongside a system of notice filing is ultimately a matter of English law, we consider that the aim should be to secure the effectiveness in England of a Scottish floating charge without duplication of registration. We therefore propose that

26. A floating charge granted by a Scottish company should continue to be registrable only in Edinburgh, and not in Cardiff, even though the charge is granted over assets in England or Wales.

6.19 While we consider that the effectiveness of a Scottish floating charge can and should be secured on that reciprocal basis, the introduction of a system of notice filing and the resulting increased divergence between the registration systems in the two jurisdictions may create difficulties as respects other types of security (such as a fixed charge) created by Scottish companies over assets (other than land) in England and contracts entered into by Scottish companies which would be treated as quasi-securities in England. Given the present stage of development of the proposed proposals in England, our consideration of the matter at this stage is tentative.

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[39] Law Com CP No 164 para 4.118 ff.
[40] Law Com CP No 164 paras 5.88 – 5.94. However the current rules (for which see 1985 Act ss 409 and 424) require no more than that the company should have a place of business, whether registered or not.
[41] Law Com CP No 164 paras 5.114-5.120.
[42] 1985 Act ss 396(1) and 410(4).
[43] Paras 2.48 – 2.50.
[44] Steering Group, *Final Report* para 12.64; Law Com CP No 164 paras 5.114 – 5.120.
[45] Para 2.1.

6.20 It has been suggested to us that if the Scottish companies were not included among the category of debtors respecting whom a financing statement might be filed, they might suffer a competitive disadvantage in raising finance. If not included in that category, securities granted by them would, we understand, continue to be governed by the existing rules of English law – at least in the first stage, during which notice filing would not be applicable in the case of partnerships, sole traders, or foreign companies without a registered place of business in England or Wales. In legal terms, a lender might see the comparative complexity of those existing rules and the inability to obtain priority from a date earlier than the actual transaction date as disadvantages to him. However, also in legal terms, the existing rules might be seen as more favourable to those entering into transactions with the company where those transactions constitute a quasi-security such as a finance lease. But the perception of lenders may be more important than the balance of legal advantages and disadvantages. We accordingly welcome views on whether Scottish companies would be likely to be competitively disadvantaged if not included among the category of debtors subject to notice filing. If it were thought desirable that Scottish companies should be subject to notice filing as respects securities (other than floating charges, if our proposal No 26 were implemented) over moveable property in England or transactions constituting quasi-securities in England the question then arises as to where notice filing by Scottish companies might take place. There appear to be two broad options. One would be to establish for Scottish companies, but for the purposes of English law, a register of financing statements maintained in Edinburgh. The other possibility might be to treat Scottish companies along lines somewhat similar to the treatment of oversea companies by enabling them to register a place of business in England or Wales.[46]

6.21 We therefore ask

27. (a) Whether, in the event that notice filing is introduced in England and Wales, companies incorporated in Scotland would be at 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 or Wales; and

(b) If so, whether it would be preferable for notice filing to take place in Edinburgh or for Scottish companies to be able to register, for the purpose of notice filing, a place of business in England or Wales with the Registrar of Companies in Cardiff.

[46] Similar arrangements existed until the coming into force of the Companies Act 1981, s 119 and sched 3, para 3.

Part 7 Summary of Provisional Proposals

1. Registration should effect the creation of a floating charge.

(Paragraph 2.11)

2. The transfer of a floating charge should take effect only on registration of the assignation.

(Paragraph 2.13)

3. A variation of a floating charge should take effect only on registration of the instrument of alteration.

(Paragraph 2.18)

4. (a) The extinction of a floating charge by deed should take effect only on registration of a deed of discharge.

(b) Section 419 of the Companies Act 1985 should cease to apply to floating charges.

(Paragraph 2.26)

5. (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 (and subject to proposal 6), the date on which the instrument was 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 variable by a ranking agreement –

(i) contained in the floating charge or an instrument of alteration, and

(ii) duly registered.

(Paragraph 2.32)

6. (a) Should a system of priority notices be introduced for floating charges?

(b) If so –

(i) what period should be allowed between registration of the notice and registration of the floating charge?

(ii) should a notice be renewable, and, if so, should there be limitations on renewal?

(Paragraph 2.41)

7. A floating charge should be registrable notwithstanding that it is granted over property which the company holds in trust.

(Paragraph 2.43)

8. A floating charge should be created –

(i) by registration in Scotland, where it is granted by a company incorporated in Scotland over assets outside Scotland;

(ii) by registration in England and Wales, where it is granted by a company incorporated there and is over assets in Scotland; and

(iii) by registration in Scotland, where it is granted by a company incorporated outside Great Britain and is over assets in Scotland.

(Paragraph 2.50)

9. A floating charge by an unregistered company should be created by registration.

(Paragraph 2.51)

10. Securities over land should cease to be registrable with the Registrar of Companies.

(Paragraph 3.12)

11. Securities registrable in a specialist register should cease to be registrable with the Registrar of Companies.

(Paragraph 3.15)

12. Floating charges should cease to be registrable at the Patent Office or any other specialist register.

(Paragraph 3.16)

13. Assignations in security should cease to be registrable with the Registrar of Companies.

(Paragraph 4.12)

14. In the event that assignations in security continue to be registrable with the Registrar of Companies, should registration still be required in respect of securities over –

(i) goodwill, copyright and design rights;

(ii) book debts; and

(iii) uncalled or unpaid share capital?

(Paragraph 4.22)

15. In the event that assignations in security continue to be registrable with the Registrar of Companies, should registration also be required in respect of securities over –

(i) shares;

(ii) insurance policies; and

(iii) bank accounts?

(Paragraph 4.27)

16. (a) In the event that assignations in security continue to be registrable with the Registrar of Companies, should the legislation proceed by way of

(i) a list of incorporeals in respect of which securities must be registered (as at present); or

(ii) a general rule that all assignations in security are registrable subject to some listed exceptions?

(b) If the favoured option is (ii), what exceptions should there be to the requirement of registration?

(Paragraph 4.30)

17. In the event that assignations in security continue to be registrable with the Registrar of Companies, should the effect of non-registration be that –

(i) the security is void against the liquidator, administrator and creditors;

(ii) the security is not constituted;

(iii) a fine is payable by the company and its officers; or

(iv) some other sanction (please specify) is imposed?

(Paragraph 4.36)

18. Should registration be of –

(a) the particulars of a security, as at present, or

(b) the security deed itself?

(Paragraph 5.11)

19. The Registrar of Companies should no longer be required to maintain a separate register of charges.

(Paragraph 5.12)

20. Securities (and assignations, variations and discharges of securities) should be registrable only by the grantee.

(Paragraph 5.15)

21. (a) In the event that registration continues to be by reference to particulars –

(i) the particulars should no longer be checked at Companies House against a copy of the security deed;

(ii) a copy of the deed should no longer accompany the application; and

(iii) the Registrar of Companies should no longer certify the validity of registration but only the date on which registration took place.

(b) Where or to the extent that particulars overstate –

(i) the property subject to the security, or

(ii) the obligation secured,

the scope of the security should be governed by the terms of the security deed.

(c) Where or to the extent that particulars understate –

(i) the property subject to the security, or

(ii) the obligation secured,

the scope of the security should be governed by the particulars.

(d) Registration should fail if particulars are unsigned or contain a material error in respect of –

(i) the type of security, or

(ii) the description of the granter or grantee.

(Paragraph 5.22)

22. (a) In the event that registration continues to be by reference to particulars, which of the following particulars should be registrable:

(i) the amount or nature of obligation secured;

(ii) the name and address of the presenter;

(iii) particulars as to commission, allowance or discount paid;

(iv) details of any ranking agreement;

(v) the signature of the grantee-creditor;

(vi) whether the granter-company is acting as trustee of the property;

(vii) whether the security is a market charge within section 173 of the Companies Act 1989; and

(vii) any other particulars (please specify)?

(b) Should registration be voluntary in respect of any of the particulars (if so, please specify)?

(Paragraph 5.39)

23. It should no longer be necessary to register pre-existing securities affecting property newly acquired.

(Paragraph 6.4)

24. There should no longer be special administrative provision for registration of a security in respect of a series of debentures.

(Paragraph 6.5)

25. (a) Should companies continue to be under a duty to maintain a register of charges?

(b) If the answer to (a) is yes –

(i) what information should the register contain?

(ii) what sanctions and incentives (if any) should be introduced to encourage its maintenance?

(Paragraph 6.15)

26. A floating charge granted by a Scottish company should continue to be registrable only in Edinburgh, and not in Cardiff, even though the charge is granted over assets in England or Wales.

(Paragraph 6.18)

27. (a) Whether, in the event that notice filing is introduced in England and Wales, companies incorporated in Scotland would be at 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 or Wales; and

(b) If so, whether it would be preferable for notice filing to take place in Edinburgh or for Scottish companies to be able to register, for the purpose of notice filing, a place of business in England or Wales with the Registrar of Companies in Cardiff.

(Paragraph 6.21)

Appendix A

Companies Act 1985

Part XII

Chapter II Registration of charges (Scotland)

s 410 Charges void unless registered

(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.

s 411 Charges on property outside United Kingdom

(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.

s 412 Negotiable instrument to secure book debts

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.

s 413 Charges associated with debentures

(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.

s 414 Charge by way of ex facie absolute disposition, etc

(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.

s 415 Company's duty to register charges created by it

(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.

s 416 Duty to register charges existing on property acquired

(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.

s 417 Register of charges to be kept by registrar of companies

(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.

s 418 Certificate of registration to be issued

(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.

s 419 Entries of satisfaction and relief

(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.

s 420 Rectification of register

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.

s 421 Copies of instruments creating charges to be kept by company

(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.

s 422 Company's register of charges

(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.

s 423 Right to inspect copies of instruments, and company's register

(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.

s 424 Extension of Chapter II

(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, section 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.

Appendix B

Sanctions for non-registration: void against the liquidator

Introduction

1. If a right in security is registrable with the Registrar of Companies, registration must occur within 21 days of creation. Otherwise the security is "void against the liquidator or administrator and any creditor of the company".[1] This formula, which is taken from the parallel English provisions,[2] causes difficulty in Scotland.[3] The law of property works with real rights and with personal rights. It does not, as a rule, work with rights which are stronger than personal rights but weaker than real rights, with rights which are good in some circumstances but not in others.[4] In Scotland a right in security is a real right or it is nothing.[5]

2. As an example of the possible difficulties, this short appendix considers the effect of juridical acts by either the debtor-company or the creditor on the assumptions that (i) a security has been created by the company but not registered and (ii) the company is not in liquidation or administration.

Acts of the debtor-company

3. **Disposal.** If the company sells or otherwise disposes of the secured asset, the invalidity from non-registration is substantially cured, at least in the case of a fixed security, with the result that the security can be enforced in a question both with the acquirer and with the acquirer's creditors. The reason is that an unregistered security is void only in a question with the creditors *of the company*. It is not void in a question with the creditors of a third party. A disposal by the debtor thus cures the defect in the title of the creditor. This "remarkable consequence", as it has been described,[6] occurs even where the acquirer is itself a company but fails to register the security within 21 days as required by section 416. This is because the sanction of invalidity applies only to section 410 and not to section 416. In the result, a double failure in registration has no ultimate effect on the validity of the security. One qualification is necessary. If, prior to disposal, the company had encumbered the asset with a second (registered) security, the holder of the second security could proceed in

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[1] 1985 Act s 410(2).
[2] Currently contained in s 395(1) of the 1985 Act.
[3] But not, apparently, in England and Wales, where the Law Commission proposes its retention. See Law Com CP No 164 para 4.58.
[4] See most recently *Burnett's Tr v Grainger* 2002 SLT 699 where Lord Coulsfield said (at p 704I) that to recognise "some kind of property intermediate between real and personal ... is repugnant to the underlying principles of the law of Scotland".
[5] This statement needs to be qualified in the single case of floating charges, having regard to their provenance in English law. See para 2.4.
[6] G L Gretton, "Registration of Company Charges" (2002) 6 EdinLR 146, 166.

disregard of the first. This is because the holder would be a creditor of the original company and not of the acquirer.

4. **Right in security.** The effect of disposal is clear if unprincipled. The effect of other juridical acts, however, is often a matter of speculation. Thus if the company grants a further security over the same asset, and there is due registration (or registration is not required), the holder of the second security will in principle take free of the first, on the basis that an unregistered security cannot be pled against a creditor of the company. But the position may change if the second creditor has notice of the first security prior to registration. On general principles the second security would then be reducible by the first creditor, at least to the extent of reversing the ranking,[7] but whether this rule survives the wording of section 410 is unclear.[8]

5. **Long lease or proper liferent.** The position is equally unclear where the company burdens the asset with a long lease or proper liferent. The result depends on whether tenants and liferenters are "creditors" of the company within section 410(2). Normal speech would suggest otherwise, and yet unless they are "creditors" they take subject to the security and hence are in a worse position than unsecured creditors, the holders of mere personal rights.[9]

Acts of the creditor

6. Similar difficulties attend juridical acts by the holder of the unregistered security. Suppose, for example, that the security holder calls up the security and sells the secured asset. In a question with the company his right to do so is unchallengeable, and any title acquired by the purchaser would be unchallengeable likewise. But it is arguable that the title could be challenged by the creditors of the company, on the basis that it derives from a security which, in a question with them, was no more than void. If that is correct, however, the power of sale is valueless because no one would enter into a transaction which could immediately be set aside.

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[7] K G C Reid, *The Law of Property in Scotland* (1996) para 697.
[8] The only authorities are *obiter* and inconsistent. Compare *Prior Ptr* 1989 SLT 840 with *Bank of Scotland v T A Neilson & Co* 1991 SLT 8.
[9] On one view, however, an unsecured creditor is protected only by carrying out diligence (and hence becoming a secured creditor). See *In re Ashpurton Estates Ltd* [1983] Ch 110 *per* Lord Brightman at 119A and 123E.

Appendix C

M

CHWP000

COMPANIES FORM No. 410 (Scot)

Particulars of a charge created by a company registered in Scotland

A fee of £10 is payable to Companies House in respect of each register entry for a mortgage or charge

410

Please do not write in this margin

Pursuant to section 410 of the Companies Act 1985

Please complete legibly, preferably in black type, or bold block lettering

To the Registrar of Companies
(Address overleaf – Note 6)

For official use

Company number

Name of company

*****

**Insert full name of company*

Date of creation of the charge (note 1)

Description of the instrument (if any) creating or evidencing the charge (note 1)

Amount secured by the charge

Names and addresses of the persons entitled to the charge

Presentor's name address telephone number and reference (if any):

For official use
Charges Section

Post room

Short particulars of the property charged.

Please do not write in this margin

Please complete legibly, preferably in black type, or bold block lettering

Statement, in the case of a floating charge, as to any restrictions on power to grant further securities and any ranking provision (note 2)

Particulars as to commission, allowance or discount paid (see section 413(3))

A fee of £10 is payable to Companies House in respect of each register entry for a mortgage or charge. (See Note 5)

Signed_ Date _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _

On behalf of [company] [chargee]†

† delete as appropriate

Notes

1. A description of the instrument e.g. "Standard Security" "Floating Charge" etc, should be given. For the date of creation of a charge see section 410(5) of the Act. (Examples – date of signing of an Instrument of Charge; date of recording / registration of a Standard Security; date of intimation of an Assignation.)

2. In the case of a floating charge a statement should be given of (1) the restrictions, if any, on the power of the company to grant further securities ranking in priority to, or *pari passu* with, the floating charge; and / or (2) the provisions, if any, regulating the order in which the floating charge shall rank with any other subsisting or future floating charges or fixed securities over the property which is the subject of the floating charge or any part of it.

3. A certified copy of the instrument, if any, creating or evidencing the charge, together with this form with the prescribed particulars correctly completed must be delivered to the Registrar of Companies within 21 days after the date of the creation of the charge. In the case of a charge created out of the United Kingdom comprising property situated outside the U.K., within 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 U.K. Certified copies of any other documents relevant to the charge should also be delivered.

4. A certified copy must be signed by or on behalf of the person giving the certification and where this is a body corporate it must be signed by an officer of that body.

5. Cheques and Postal Orders are to be made payable to **Companies House.**

6. The address of the Registrar of Companies is:-
Companies House
37 Castle Terrace
Edinburgh EH1 2EB

Appendix D

No. of Company ……..…….. **Form No. 417 (Scot)**

N.B. Searchers may find it desirable to refer to the documents mentioned in column (2) for more detailed particulars

REGISTER

OF

Charges

Alteration to Charges

Memoranda of Satisfaction

AND

Appointments and Cessations

of Receivers

OF

_____

_____**Limited**

N.B. Searchers may find it desirable to refer to the documents mentioned in column (2) for more detailed particulars

REGISTER of Charges, Alterations to Charges,

(1) Date of Registration	(2) Serial Number of Document on File	(3) Date of Creation of each Charge and Description thereof	(4) Date of the acquisition of the Property	(5) Amount secured by the Charge £	(6) Short Particulars of the Property Charged	(7) Names of the Persons entitled to the Charge

Memoranda of Satisfaction and Appointments etc. of Receivers

N.B. Searchers may find it desirable to refer to the documents mentioned in column (2) for more detailed particulars

(8) In the case of a floating charge, a statement of the provisions, if any, prohibiting or restricting the creation by the company of any fixed security or any other floating charge having priority over, or ranking *pari passu* with, the floating charge	(9) In the case of a floating charge, a statement of the provisions, if any, regulating the order in which the floating charge shall rank with any other subsisting or future floating charges or fixed securities over the property the subject of the floating charge or any part of it.	(10) Amount or rate of per cent of the Commis-sion Allowance or Discount	(11) Memoranda of Satisfaction	(12) Receiver		
				Name	Date of Appointment	Date of Ceasing to act

N.B. Searchers may find it desirable to refer to the documents mentioned in column (2) for more detailed particulars

Instruments of Alteration to a Floating Charge					
(13) Date of Execution	(14) Names of the persons who have executed the instrument	(15) The provisions, if any, prohibiting or restricting the creation by the Company of any fixed security or any other floating charge having priority over, or ranking *pari passu* with, the floating charge	(16) The provisions, if any, varying or otherwise regulating the order of the ranking of the floating charge in relation to fixed securities or to other floating charges	(17) Short particulars of any property released from the floating charge	(18) The amount, if any, by which the amount secured by the floating charge has been increased **£**

Issues of Debentures of a Series

N.B. Searchers may find it desirable to refer to the documents mentioned in column (2) for more detailed particulars

Particulars relating to the issues of Debentures of a series							(25) Amount or rate of per cent of the Commission Allowance or Discount	(26) In the case of a floating charge, a statement of the provisions, if any, prohibiting or restricting the creation by the company of any fixed security or any other floating charge having priority over, or ranking *pari passu* with, the floating charge	(27) In the case of a floating charge, a statement of the provisions, if any, regulating the order in which the floating charge shall rank with any other subsisting or future floating charges or fixed securities over the property the subject of the floating charge or any part of it.
(19) Total amount secured by a series of Debentures	(20) Dates and amounts of each issue of the series		(21) Dates of the resolutions authorising the issue of the series	(22) Date of the covering Deed	(23) General description of the property charged	(24) Names of the Trustees for the Debenture Holders			
£	Date	Amount £							