



SCOTTISH LAW COMMISSION

MEMORANDUM NO 10

**EXAMINATION OF THE COMPANIES
(FLOATING CHARGES) (SCOTLAND) ACT 1961**

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Scottish Law Commission

Examination of the Companies (Floating Charges)(Scotland) Act 1961

1. Following upon a request which we received from the President of the Board of Trade to consider and advise on the provisions of the Companies (Floating Charges)(Scotland) Act 1961 we set up in March 1967 a Working Party under the Chairmanship of Professor J.M. Halliday with the following terms of reference:-

To examine the working of the Companies (Floating Charges) (Scotland) Act 1961 and to report with proposals for amending or new legislation.

2. The members of the Working Party were Mr. D.G. Antonio, of the British Linen Bank, Edinburgh, Mr. W.A. Cook, Solicitor, Glasgow, Mr. A.G.M. Duncan, Lecturer in the Department of Conveyancing in the University of Edinburgh, Mr. A.I. Mackenzie, Chartered Accountant, Glasgow and Mr. G.R.H. Reid, Solicitor, Glasgow. Mr. Gavin Douglas, Advocate, assisted the Working Party in drafting the Bill appended to its Report and Mr. Robert Brodie, a member of the legal staff of the Commission, was its Secretary.

3. The Working Party has now completed its work and has submitted a Report which we publish in this Memorandum. We would like to take this opportunity of recording our thanks to the members of the Working Party.

4. Before we submit our own Report to the President of the Board of Trade, we would welcome comments on the Working Party's proposals. In this connection we draw attention particularly to (1) paragraph 27 of the Report in which it is suggested that views should be sought as to the advisability of providing that the person appointing a receiver should be required to register the appointment in the Register of Inhibitions and Adjudications and (2) paragraph 62 of the Report relating to the desirability of providing for registration of assignments of charges.

5. We would point out that since the Working Party submitted its Report the case of National Commercial Bank of Scotland Ltd., Petitioners, referred to in paragraph 53 on page 18 of the Memorandum has been reported as National Commercial Bank of Scotland Ltd. v. Liquidator of Telford Grier MacKay and Co. Ltd. 1968 (S.L.T. (Note)) 97.

REPORT BY WORKING PARTY

CHAPTER I

Introduction

Terms of Reference

1. We were appointed in March 1967:

To examine the working of the Companies (Floating Charges)(Scotland) Act 1961 and to report with proposals for amending or new legislation.

Meetings and Procedure

2. We have met as a Working Party on 10 days. In addition individual members have had other meetings including meetings with persons representing various bodies and interests.

3. In May and June 1967 we published in the daily, legal, accounting and banking press a statement of our terms of reference and an invitation to interested persons to submit memoranda on the subject. The organisations and individuals from whom we have received memoranda are listed in Appendix A. We wish to thank them all for their suggestions.

4. Throughout our deliberations we have had the benefit of the advice of Mr. L.C.B. Gower, of the Law Commission and we are grateful for his most valuable assistance.

Historical Background

5. In June 1960 the Law Reform Committee for Scotland made its Eighth Report (Cmd. 1017) and recommended (in paragraphs 26 and 32) that the law of Scotland should be changed to permit incorporated companies to create floating charges. It also recommended (in paragraphs 47 and 50) that there should be established a procedure, very similar to that in force for England, for the registration with the registrar of companies of charges (whether floating charges or not) created by companies.

Effect was given to these recommendations in the Companies (Floating Charges) (Scotland) Act 1961 (hereinafter referred to as the 1961 Act).

6. Since the 1961 Act became law the attention of the Board of Trade has been drawn to certain of its provisions which may require amendment and to difficulties which have arisen in the procedure for the registration of charges.

7. The President of the Board of Trade requested the Scottish Law Commission to consider the provisions of the 1961 Act and to make such recommendations as they thought fit.
8. To assist them in doing so the Scottish Law Commission set up our Working Party in March 1967 with the above-mentioned terms of reference.
9. We have found it helpful in formulating our principal recommendations to incorporate them in a draft Bill which has also enabled us to appreciate the legislative problems which they involve. In doing so we have had the assistance of Mr. Gavin Douglas, Advocate, the part-time parliamentary draftsman assigned to the Scottish Law Commission. The draft Bill forms Appendix B. We emphasise that Appendix B is not a definitive draft but is simply a convenient aid to presentation of our recommendations and consideration of them by others.

CHAPTER II

Receivers

10. The Law Reform Committee for Scotland, in its Eighth Report already referred to, considered the desirability of empowering the holder of a floating charge to appoint a receiver or a receiver and manager having the same powers as in England. They considered that for this to be done, it would be necessary first to codify the law in force in England (in paragraph 39) and concluded that the advantages which might follow from the introduction of the office of receiver were outweighed by the complications which would result (in paragraph 40).

11. The Committee of Scottish Bank General Managers and the Industrial and Commercial Finance Corporation Limited, and others who have submitted memoranda to us, have made strong representations that legislation be promoted providing for the appointment of a receiver and manager of a Scottish company by the holder of a floating charge. The Law Reform Committee of the Law Society of Scotland have informed us that they support the representations of the Committee of Scottish Bank General Managers.

12. The two main arguments in favour of introducing receivers into Scotland are:-

- (1) The appointment of a receiver and manager might in some cases revive the fortunes of a company and prevent unnecessary liquidation; and
- (2) The rights of a security holder are weakened by his inability to take possession of and realise the security without liquidation.

13. A subsidiary argument is that a growing feature of business is the holding company structure, which frequently involves companies registered in Scotland being in the same group as companies registered in England. At present the lack of receivership powers in Scotland constitutes a major difference between the two countries in the remedies available to the holder of a floating charge and in the procedure for enforcing the security, and this difference will almost certainly lead

to difficulties in the future where companies in the same group or under the same control are concerned. While it might not be possible to have Scottish and English law identical in all respects, if receivers were introduced into Scots law the two systems would be brought much more into alignment and most, if not all, of the difficulties resulting from the present difference would disappear.

14. The Committee of Scottish Bank General Managers consider that it is not necessary that the English law on receivers should be codified before receivers are introduced in Scotland, and they believe that provision for the appointment of a receiver, or a receiver and manager, of a Scottish company could adequately be made by an Act amending the 1961 Act and incorporating a definition of the rights and duties attaching to the appointment.

15. We have considered the arguments relating to the introduction of receivers, and have come to the conclusion that the holders of floating charges should be empowered to appoint a receiver. We also agree that it is not essential that the English law on receivers should first be codified, and that receivers can be introduced by legislation which defines not only the rights and duties attaching to the appointment but the circumstances in which the appointment may be made and other related matters.

16. The provisions which we consider necessary to govern the appointment, rights, duties, remuneration and discharge of receivers are contained in clauses 1 to 16 inclusive of the draft Bill and form Part I of that Bill. (For convenience of reference we hereinafter refer throughout this Report to the Bill as "the new Bill".)

17. At the outset we found it necessary to decide upon our recommendations as to the scope of the new Bill, particularly in relation to two major matters, namely, (1) whether it would be necessary to provide for appointment of receivers by the court or whether it would be sufficient to make provision only for appointment of receivers out of court and (2) the extent to which it would be desirable to include retroactive provisions which would authorise the appointment of receivers by the

holders of existing floating charges which contain no express powers to do so.

18. In England a receiver of the property of a company may be appointed either by the court or, without the intervention of the court, by virtue of powers conferred by agreement as in the case of most debenture deeds. We are informed that the powers conferred on receivers appointed by the court are generally less ample than those normally contained in debenture deeds and that receivers appointed by the court frequently have to apply to the court for particular powers to enable them to carry out their functions satisfactorily. We are also informed that the great majority of receivers of the property of companies are in practice appointed under powers contained in debenture deeds. Accordingly we consider that it is unnecessary to make provision in Scotland for the appointment by the court of receivers of the property of companies and that it would be sufficient if receivers could be appointed out of court by the holders of floating charges in terms of powers to that effect contained in the deeds creating them (see clause 1(1)).

19. This proposal poses a further problem with regard to existing Scottish floating charges which contain no power to appoint a receiver. To confer such a power upon the holders of these charges would involve retroactive legislation which must have very strong reasons to justify it. We consider that there is sufficient justification for such legislation for the following reasons:-

(1) If the power were not retroactive many holders of floating charges might call up their loans and then grant the loans as of new under the proposed legislation. This would cause needless work and expense.

(2) There would be some benefit to the debtor company in that the holder of the floating charge would be able to crystallise his security without taking the drastic step of liquidation.

We accordingly propose that a receiver may be appointed by the holder of an existing floating charge as well as by the holder of a floating

charge created after the date of the coming into operation of the proposed legislation (see clause 1(1)).

20. In almost all cases in which a receiver would be appointed speed in making the appointment would be essential. Where there is a series of secured debentures we think that it would be desirable in the interests of expedition to define the persons who are entitled to make the appointment. We propose that where, under any trust deed, trustees for the holders of secured debentures have been appointed these trustees should have the power to appoint the receiver subject to any relevant provisions contained in the trust deed (see clause 1(2)(a)). It is assumed that these trustees who act for all the holders of the secured debentures would act in the interests of or in accordance with the wishes of the majority of such holders and it is not considered necessary to state this specifically in the statute. Where no trustees have been appointed we have suggested majorities in clause 1(2)(b) to take account of the two cases where there is a meeting of the debenture holders and where there is no such meeting. The majorities we propose represent, we hope, a fair compromise between the need for speed of appointment on the one hand and protection of minorities on the other. It will also be necessary to make provisions regulating the calling of such meetings and we would suggest that the recommendation contained in paragraph 306(c) of the Report of the Company Law Committee (Cmd. 1749), the Jenkins Report, that provisions on the lines of sections 132, 135, 136, 137 and 138 of the Companies Act 1948 (hereinafter referred to as the 1948 Act) should apply mutatis mutandis to meetings of debenture holders be implemented.

21. We consider that it should be possible for the parties to the debenture to provide in the debenture deed itself for any other procedure they may desire (see clause 1(3)).

22. As there may be cases where charges rank equally and where the respective holders thereof cannot agree to the appointment of a single receiver we consider that each of such holders should be entitled to appoint a receiver, and the receivers would act jointly (see clause 1(4)).

23. In England a body corporate and an undischarged bankrupt are disqualified from acting as a receiver (1948 Act ss. 366 and 367). We propose the same provisions in Scotland. A Scottish firm, unlike an English firm, is a separate legal persona. In conformity with the position in England, we propose that Scottish firms should also be disqualified from acting as receivers (see clause 1(5)).

24. In the case of floating charges created after the proposed legislation provisions will normally be inserted defining, by agreement of parties, the circumstances in which the power of the creditor to appoint a receiver may be exercised. In the case of floating charges already existing before the legislation, or the unusual case where a charge created after the legislation omits to make provision, it is necessary to define with precision the circumstances in which the holder of the charge would be entitled to appoint a receiver. We suggest (in clause 2(1)) the various events upon the occurrence of which we consider it reasonable that the holder of the charge should be entitled to do so. In making these suggestions we have kept in view the principles that (1) the provisions will only be of value if the holder of the floating charge is entitled to appoint a receiver at a stage before his security is seriously prejudiced, but (2) since the provisions would in most cases apply retrospectively and would involve the alteration by statute of existing agreements, the events specified should be of such a character that, if remedial action were not quickly taken, a winding up, which would have the effect of "crystallising" the charge under the present law, would be the probable outcome. We consider that the proposals in clause 2(1) are in accordance with these principles and we believe that the periods of twenty one days and two months prescribed in clause 2(1)(a) and (b) respectively are fair to both parties.

25. We anticipate that there may be circumstances in which the contracting parties make provision for the regulation of the floating charge in a deed separate from the actual deed constituting the charge. We consider that this use of an "ancillary document" should be competent and we have so provided (see clauses 2(1) and 26(2)).

26. The normal practice in England is for the appointment of the receiver to take effect from the date of execution of the deed by which he is appointed. The 1948 Act s. 102(1) requires the person appointing the receiver to give notice of the appointment to the registrar of companies within seven days, but failure to give timeous notice does not invalidate the appointment although it may involve liability for a default fine. It is therefore possible for a receiver to have been validly appointed some time before the appointment is published. We think it undesirable that a creditor should be permitted to appoint a receiver and hold the instrument unpublished for a period, even a short period. We consider that an important procedural step such as the appointment of a receiver should be effective when, and only when, it is made available for publication to all who may be affected by it. We therefore suggest that the appointment of a receiver should take effect only upon delivery by or on behalf of the person making the appointment of a duly certified copy of the instrument of appointment to the registrar of companies for registration. We propose to retain the requirement of registration of the instrument of appointment within a short period after its execution but, since failure to register it timeously would render the instrument ineffective and not merely involve liability to a fine, we suggest that the period within which registration must be effected should be fourteen days after the date of execution of the instrument (see clause 2(2)).

27. We also considered the advisability of providing that the person making the appointment should, in addition to being required to deliver a copy of the instrument of appointment to the registrar of companies for registration, also be required to register the appointment in the Register of Inhibitions and Adjudications. By this provision the fact of the appointment would become apparent to a purchaser of heritable property from the company in the course of his normal search in the Register of Sasines and there would therefore be no need for him to search the company's file in the Companies Office. We have not included any such provision in the new Bill but we recommend that comments on this suggestion should be invited.

28. In order to secure uniformity of practice we suggest that provision be made for the mode of execution of an instrument appointing a receiver (see clause 2(3)). In the case of a series of secured debentures we suggest, in the interests of expedition, a provision for vicarious execution by a solicitor duly authorised (see clause 2(4)).

29. Clause 2(6) provides that the floating charge "crystallises" on the appointment of the receiver (cf. the 1961 Act s. 1(2) which makes a similar provision when a company is being wound up).

30. We do not think that during the currency of the appointment of a receiver an unsecured creditor of a company should be able to secure a preference over other such creditors by executing diligence but it should be open to him to put the company into liquidation if he so wishes. (See clause 2(7)).

31. In England the charge created by debentures issued by a company usually extends to goodwill and it is therefore usual for a receiver and manager to be appointed. It is, however, competent to appoint a "bare" receiver and if the charge does not include goodwill then only a "bare" receiver can be appointed. The function of such a receiver is "merely to get in the assets charged, to collect the rents and profits, to exercise the debenture holders' powers of realisation, and to pay the net proceeds to the holders in reduction of their charge. He has no power, as receiver, to carry on the business of the company" (Gower's "Modern Company Law" (2nd edition) page 399). A receiver and manager, on the other hand, has power to carry on the business of the company. It appears to us that it would be advantageous if the holder of a floating charge over only a part of a company's assets should have the right to appoint a receiver with restricted powers: we suggest in clause 3(1) the powers which such a receiver should be able to exercise in respect of the property covered by his charge. The wider powers specified in clause 3(2) are those which we consider a receiver over the whole or substantially the whole of a company's assets should have. It should, of course, be competent for the contracting parties to specify the powers of a receiver by agreement in the instrument creating the charge or an ancillary document.

32. We considered whether it would be necessary or desirable to introduce into Scots law the distinctive terminology of "receiver" (or "bare receiver") and "receiver and manager", the latter being defined with reference to the inclusion of "goodwill" in the property under his charge. We have come to the conclusion that, for the limited purpose of providing for receivers of the property of companies, it would be simpler and more satisfactory to use the term "receiver" as applicable to receivers of both categories. Instead of introducing a definition of "goodwill" we suggest that a receiver should have the wider powers given in clause 3(2) where the floating charge by virtue of which he was appointed included "the whole or substantially the whole of the property and undertaking of the company", a phrase which is already contained in the 1948 Act, e.g. s. 372. We do not envisage any serious confusion as a result of adopting this simplified terminology: a receiver will be aware of the extent of his powers and will normally be vigilant in keeping within them and parties with whom he transacts can resolve any doubt by examination of the floating charge by which he was appointed.

33. It is evident that the powers of a receiver must be subject to the rights of creditors who have effectually executed diligence, the holders of fixed securities or other floating charges having priority or equality of ranking and a liquidator or provisional liquidator who has been previously appointed. The necessary qualifications are included in clause 3(3).

34. In English law a receiver may at different times be regarded as a principal, an agent for the company and an agent for the debenture holders. We understand, however, that the normal practice is for the debenture deed to specify that the receiver is to be an agent for the company. We suggest that to avoid confusion the normal English practice should be adopted and that the new Bill should provide that the receiver is to be the agent of the company (see clause 3(4)).

35. The Law of Property Act 1925 s. 109(4) exonerates a person paying money to the receiver from any duty to enquire as to whether any event

has happened to authorise the receiver to act and we consider that a similar provision should be enacted for Scotland (see clause 3(5)).

36. Difficult administrative problems may arise on the appointment of a receiver and manager of the property and undertaking of a company incorporated in England which owns property in Scotland. We suggest that in such a case the receiver should have the same powers over the company's Scottish property as he has over its English property so far as these powers do not conflict with Scots law (see clause 3(6)). We consider it desirable that reciprocal provisions should be enacted to confer corresponding powers upon a receiver of the property and undertaking of a company incorporated in Scotland over any property of the company situated in England.

37. Our proposals governing the priority of appointment to the office of receiver and the actings of joint receivers are contained in clause 4. While the provision in clause 4(2) that a floating charge which has "crystallised" on the appointment of a receiver should not 're-float' on the appointment of another receiver by the holder of a prior floating charge is, we understand, in conformity with English practice, we have no precedent for the provision in clause 4(1) that the powers of a receiver appointed by the holder of a postponed floating charge should merely be suspended during the currency of the appointment of a receiver appointed by the holder of a prior floating charge. This provision is made to safeguard the interests of the holder of a postponed floating charge particularly on the cessation of the appointment of the receiver appointed by the holder of a prior floating charge.

38. We consider it desirable to make specific provision as to (1) the effect of the appointment of a receiver upon existing contracts of the company and (2) the liability of the receiver in respect of existing and future contracts. We suggest that any contract entered into by the company before the appointment of the receiver should, subject to the terms of contract (which might contain a provision that the contract would terminate on appointment of a receiver), continue to have effect notwithstanding such appointment, the receiver incurring no personal

liability under the contract by virtue only of his appointment. On the other hand the receiver should be personally liable on any contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides, and he should be entitled in respect of that liability to indemnity out of the property in respect of which he was appointed (see clause 5).

39. We consider it desirable that statutory provision be made for fixing the remuneration of a receiver, and our proposals are included in clause 6. We envisage that in most cases the receiver's remuneration will be determined by agreement between the receiver and the holder of the floating charge who appointed him (see clause 6(1)). It would be necessary, however, to provide for the unusual case in which such agreement was not made. Moreover, there are other parties, such as the holder of a postponed floating charge or the company itself or its liquidator, who may be concerned to ensure that the receiver's remuneration is not more than adequate. Accordingly we suggest that, where the receiver's remuneration is not determined by agreement or the amount of it is disputed, it should be fixed by the Auditor of the Court of Session (see clause 6(2)). It would be necessary to provide some time limit for challenge of the remuneration agreed, and this is provided for in clause 6(4). The period has been fixed in relation to the date of the sending or delivery of the receiver's abstract accounts and the 1948 Act s. 372 has been re-enacted with the appropriate amendment in clause 13, to ensure that all parties interested in the appointment of the receiver over the whole or substantially the whole of the property and undertaking of the company receive the abstract (see clause 13(5)). Clause 6(5) is based on the 1948 Act s. 371(2(c)).

40. We consider that it would be desirable to have a clear statement of the receiver's duties as to distribution of monies received by him and our proposals are contained in clause 7. Briefly, the receiver in making distribution must take cognisance of the rights both of creditors having claims which take precedence over the floating charge by virtue of which the receiver was appointed, and of creditors in respect of

charges and expenses incurred by the receiver. Any balance after satisfying these creditors and the holder of the floating charge should be payable to a receiver appointed by the holder of a postponed floating charge, a holder of a fixed security whose security had been realised, the company or its liquidator as the case might be.

41. Where the property of a company attached by a floating charge on the appointment of a receiver includes heritable property which is subject also to a fixed security, there may be difficulties in disburdening the property of the fixed security upon a sale of it by the receiver. Where the fixed security ranks in priority to or equally with the floating charge the condition of realisation by the receiver (apart from any special arrangement with the creditor in the fixed security) is that the amount due under the fixed security is satisfied in full. If the creditor in the fixed security is untraceable or for any reason cannot grant a discharge, it will be necessary to provide machinery for disburdening the property of the fixed security. Where the fixed security is postponed in ranking to the floating charge it may be impracticable for the receiver to make payment in full of the amount secured by it, but he will require to have the property disburdened of it in order to effect a sale. We suggest the provision of machinery to disburden the property in both of these cases (see clause 8(1) and (2)). The holder of the heritable security is not prejudiced. In the case of a prior or pari passu security he would be paid in full: in the case of a postponed security the ordinary rules of law relating to catholic and secondary securities would apply and he would be entitled to rank as a creditor of the company for any unpaid balance (see clause 8(4)).

42. There may also be technical conveyancing difficulty in a receiver granting a conveyance of heritable property or an interest therein to a purchaser in implement of a sale, and that difficulty may be greater where the title stands in the name of an ex facie absolute disponee, especially if the company which granted it has never been infert. To obviate any such difficulty we propose that a specific power to grant a conveyance in such circumstances should be conferred on the receiver

with power to deduce title under the Conveyancing (Scotland) Act 1924 (see clause 8(3) and (5)).

43. Our proposals relating to the cessation of the appointment of a receiver are contained in clause 9. We envisage that a receiver will cease to act either when he has carried out all the duties which he can usefully perform or by reason of his death. We think it desirable to provide also that a receiver may be removed at the instance of the holder of the floating charge by virtue of which he was appointed, but only with the authority of the court upon cause shown (see clause 9(3)). In the case of resignation we propose that the receiver should give one month's notice of his intention to resign to all persons having a right to appoint a receiver and to the company or its liquidator and the holders of any fixed security over the company's property (see clause 9(1)). The objects of this provision are (1) to enable any other person who has right to appoint a receiver to do so timeously in order to protect his interests and (2) to allow the company or its liquidator or the holder of a fixed security to raise any question as to the receiver's actings before he is discharged. Thereafter provision is made for discharge of the receiver by the holder of the floating charge who appointed him (see clause 9(2)). There may be logical doubts as to the provision for discharge of the receiver, who is deemed to be the agent of the company, not by his principal, but by the creditor who appointed him. There is, however, an inevitable dualism in the office of receiver, and there are reasons of practical convenience in having his discharge granted by the creditor who appointed him. Provision is made for notice of the receiver ceasing to act being given to the registrar of companies (see clause 9(4)).

44. The provision in clause 9(5) that the "crystallised" floating charge will "re-float" if, after the expiry of one month after the removal or the ceasing to act as such of the receiver, another receiver has not been appointed differs from the position in England where, we understand, a "crystallised" floating charge will only re-float by express agreement. It is apparently not clear in England whether after

the withdrawal of the receiver the holder of the floating charge is entitled to a fixed charge on any undisposed assets which belonged to the company at the date of "crystallisation". We consider that no doubt should exist as to the effect of the receiver ceasing to act and we further consider that the period of one month given in clause 9(5) is sufficient time to enable the holder of the floating charge to appoint another receiver. If the floating charge were to remain "crystallised" then the company would in effect be unable to recommence business and we do not feel that this could be justified.

45. In the Jenkins Report it was recommended in paragraph 306(d) that the 1948 Act s. 369(1) should be extended to empower the court to give the same directions and make the same orders on the application of a debenture holder as it can now make on the application of a receiver. It has been suggested to us that no case has been made out in support of this recommendation. We can, however, conceive of situations arising where there is a dispute between the receiver and debenture holder and we consider it reasonable that it should be open to both parties to refer the matter to the court for instructions. Section 369(1) applies to England but we consider that a similar provision incorporating the amendment proposed by the Jenkins Committee should be enacted for Scotland (see clauses 3(1)(e) and 10(1)).

46. Clause 10(2) gives effect to recommendation 306(e) of the Jenkins Report and we hope that effect will also be given to this recommendation in England.

47. Clauses 11 to 16 in effect re-enact with the necessary modifications, such provisions of the 1948 Act relating to receivers as we consider desirable.

CHAPTER III

Specific Criticisms of the Companies (Floating Charges) (Scotland) Act 1961 and the Companies Act 1948

Power to Create Floating Charges

48. The 1961 Act s. 1 authorises a company to grant a floating charge to secure "any debt incurred or to be incurred by it". The restrictive effect of this wording has been criticised by several bodies from whom we received memoranda. We summarise the principal criticisms thus:-

- (1) The terms of the section do not authorise the granting of a floating charge by a company to secure the debt of a third party. Subsidiary companies cannot grant floating charges over their property to secure a debt of the parent company and so an issue of debenture stock by the parent company cannot easily be secured by a charge over the property of its subsidiaries. The parent company can grant a floating charge over its own property, including the shares held by it in its subsidiary companies, but that confers no effective preference over the property of the latter in a question with their creditors - a material disadvantage if the parent company is mainly a holding company having few assets other than its shares in the subsidiary companies. In practice the difficulty is often circumvented by the subsidiary companies guaranteeing the debt of the parent company and granting charges to secure the liability under the guarantee but there may be doubt as to whether the guarantee is a debt within the meaning of the section and in certain cases, there may be special reasons why the subsidiary company should not grant a guarantee. In any event the documentation of the transaction is increased.
- (2) These difficulties are greater when further issues are made under an "open-ended" debenture stock trust deed or when

further subsidiary companies are introduced to provide additional security or as guarantors of the stock.

49. We consider that the foregoing criticisms are well founded, and accordingly we propose that the 1961 Act s. 1(1) be amended so that it shall be competent under the law of Scotland for an incorporated company to grant a floating charge in security of any debt or other obligation (including a cautionary obligation) incurred or to be incurred by the company (see clause 17(1)). A company's capacity to grant such a security would, of course, depend on the powers contained in its constitution.

50. The proposed amending legislation might strengthen doubts as to the validity of existing floating charges granted to secure guarantees. We suggest, to avoid any such doubt, that there should be a provision, which will be retroactive, that any floating charge subsisting as such at the coming into operation of the proposed legislation and which would be a valid charge if it had been created after the legislation came into effect shall be deemed to have been validly created (see clause 25).

51. The provisions of the Cautioners Act 1695 c. 5, relating to septennial prescription, introduce an additional element of difficulty into the issue of debenture stock in Scotland by a parent company with guarantees by its subsidiary companies secured by floating charges over their properties. If the issue is documented in the convenient form of a single trust deed by all the companies there may be doubt whether the guarantees by the subsidiary companies and the floating charges which secure them remain valid after the expiry of seven years. It is arguable that this Act is inapplicable in the normal case where the debenture stock is subject to redemption on a specified date since the obligation of the subsidiary companies has a definite term of years extending beyond the septennium, but doubt remains. The problem can be obviated by incorporating the guarantees and charges by the subsidiary companies in separate instruments, but this involves additional documentation and is less convenient. The effect of these doubts

and inconveniences is to render unduly difficult the creation of debentures by Scottish companies.

52. We understand that the Scottish Law Commission have been considering the whole law of prescription and the proposals contained in their Memorandum No. 9 published in November 1968 may be such as to resolve the problems in relation to floating charges which result from the application of the septennial prescription. In these circumstances, we do not consider it is appropriate to recommend any change in the law in relation specially to floating charges.

Interest After Liquidation

53. It has recently been decided in the case of National Commercial Bank of Scotland Ltd., Petitioners, not yet reported, in the circumstances of that case that the holder of a floating charge was entitled to interest from the date of liquidation until payment. To obviate any possible doubt on the matter, however, we have inserted a specific provision having that effect in clause 17(3).

Charges over Specified Items of Property

54. The 1961 Act s. 2 has been criticised on the grounds that its provisions have the effect that it is only possible to create a floating charge over the whole of the undertaking of the company, or over the undertaking other than specified excepted assets. This is in contrast to the position in England where a floating charge can be created over any part of the assets of a company. It has been represented to us that in practice the wording of the 1961 Act has the effect that in certain cases it is impracticable, or only possible by cumbersome drafting, to create a charge over specified items and that it is doubtful whether it is competent to create a charge over uncalled capital. We consider that the more flexible English procedure is preferable to the present Scottish procedure, and we accordingly propose that the 1961 Act be amended to bring the law of Scotland into conformity with that of England (see clauses 17 and 18).

Execution of Floating Charges

55. A further criticism of the 1961 Act s. 2 which has been made to us is that the requirement that the document creating the charge be under seal has caused considerable difficulty, particularly where group

arrangements are involved. Scottish procedure requires that a document be executed by every party thereto on each page. Where there is a group arrangement involving a large number of companies the practical difficulties are obvious. One method of surmounting the difficulty is the execution of supplementary deeds, but this involves much additional documentation. English companies can execute by attorney and where the same attorney has been appointed by several companies one signature only need be appended to the instrument. We consider that Scots law should conform to that of England, although we consider that it should be provided that the attorney appointed for the purpose of executing a floating charge must be appointed by the company by writing under its common seal (see clause 18).

Conventional Ranking Clauses

56. The 1961 Act s. 5(2)(c) has been widely criticised on the ground that its effect is to permit only the complete prohibition in the instrument creating the floating charge of the subsequent creation of fixed securities having priority over or ranking equally with the floating charge. It is thus impracticable in the instrument creating the floating charge to reserve the right to create a limited amount of fixed security which will rank in priority to or equally with the floating charge as is commonly done in English practice. This view of the effect of section 5(2)(c) is not unanimous, but we consider that all doubt should be removed and that the 1961 Act should be amended to make it clear that floating charges or any ancillary document may contain provisions regulating the order in which the charge shall rank with any other contemporaneous or future floating charges or fixed securities (see clause 19).

Alteration of Floating Charges

57. The 1961 Act contains no specific provision with regard to the registration of alterations to floating charges. Accordingly the only alterations to floating charges which are registrable are those which in effect create new or further charges, such as an addition to the property subject to the charge or an increase in the amount of the

charge which is effected by an instrument so framed as to impose a further charge. We recognise that there are certain alterations to floating charges which are of such a character as not to require registration, but we consider that certain kinds of alteration are of sufficient importance to merit registration. In particular we suggest that increases in the amount secured by a floating charge, alterations which affect the ranking of the charge in relation to other floating charges and/or fixed securities and releases of property from the charge should be registered. Where the instrument effecting the alteration varies the ranking it should be executed by the company, the holder of the charge and the holder of any other charge or fixed security adversely affected by the alteration. Our proposals on these matters are contained in clause 20.

Supplementary Back Letters and Agreements

58. It has been judicially decided that in the case of an ex facie absolute disposition or assignation qualified by a back letter or agreement, it is the constitution of the real right under the ex facie absolute disposition or assignation which creates the charge (Archibald Campbell, Hope & King, Limited, 1967 S.C. 21). The result is that if the back letter or agreement limits the amount for which the security is granted, a further loan cannot be secured by executing an additional back letter or agreement as it is not possible to register the additional back letter or agreement as a charge under the 1961 Act and any such further loan would be unsecured as against a liquidator of the company. In practice it is necessary when a further loan is granted to re-create the security from the beginning by a re-conveyance, a new ex facie absolute disposition or assignation and a new back letter or agreement for the full amount. This is cumbersome and expensive.

59. We have been advised that the 1948 Act s. 95 (which is in substantially the same terms as section 106A of the same Act and governs the situation in England) is interpreted rather differently from the interpretation accorded to section 106A in the case of Archibald Campbell, Hope & King Limited supra. In England if the registrar of companies

certifies that registration has been effected, that is conclusive that the registration provisions have been duly complied with and the charge is valid (1948 Act s. 98(2)). The validity of the registration is not affected by the fact that the amount secured by the charge or the terms of it are subsequently altered - or even that wrong particulars were originally registered; see Re Eric Holmes (Property) Limited, 1965 Ch. 1052; Re Mechanisations (Eaglescliffe) Limited, 1966 Ch. 20. So long as there is a certificate of registration in respect of the charge, the chargee is fully protected and can enforce the charge for the amount actually secured in accordance with its current terms even though these differ from those shown on the register. It would appear that an English court, in a situation comparable to that in the Archibald Campbell, Hope & King Limited case, would have agreed that there could not be registration of the further advance but would have held that the validity of the charge for the increased amount was unaffected. Only if there is a different charge, as when further property is charged to secure the same debt, would further registration be required.

60. We consider that in this matter neither the position in Scotland nor (if we understand it correctly) the position in England is satisfactory. In Scotland the procedure for the creation of a further loan secured by the charge is unnecessarily cumbersome. In England it would appear that it is not always possible to rely upon the register for details of the amount currently secured by a charge even although it is not open-ended.

61. We consider that, where the amount secured by a fixed charge is increased by a further back letter or agreement that back letter or agreement should be registered within 21 days of its execution, the security for the additional sum being effective only from the date of the alteration (see clause 21(1)(d)(iii)).

Assignment of Floating Charges

62. While assignments of floating charges would appear to be competent under the 1961 Act, particularly having regard to the wording of the statutory form of floating charge in Schedule 1 of that Act, no

provision is made for the registration of such assignments. In paragraph 64 of this Report we are recommending that the 1961 Act be amended to provide that a holder of a floating charge or a person authorised to do so on his behalf should certify as correct the particulars relating to the satisfaction of the debt or release from the charge. It would obviate the need for additional enquiries if assignments of floating charges were registered so that the register of charges would disclose the true holder of the charge at any particular time. Furthermore it is thought that the publication of such information could be of advantage to persons dealing with the company. However, if provision were to be made for such registration it would seem logical to provide also for the registration of assignments of all other registrable charges including those which require to be recorded in the Register of Sasines. We recommend that comments on this be invited.

Certificates of Charge

63. We have received representations to the effect that the certificates of registration of charge which are issued by the registrar of companies following the registration of any charge in conformity with the 1948 Act s. 106D are unnecessarily brief. Where a number of charges are created at the same time in favour of different creditors, it is sometimes very difficult to tell which certificate applies to which charge. In particular some forms of certificate give the name of the charging company, but not the name of the creditor, and the only means of identification is the serial number which the registrar of companies places not only on the certificate but on the copy of the document of charge which he marks and returns with the certificate. We propose that section 106D(2) be amended to the effect that every certificate issued by the registrar in pursuance of that subsection should state the name of the charging company and of the creditor or of the first named creditor where there is more than one (see clause 21(1)(d)(v)).

Memorandum of Satisfaction

64. The registrar of companies enters the memorandum of satisfaction on the register on the basis of a unilateral declaration by officers of

the company that the debt has been satisfied in whole or in part or that the property charged has been released. We understand that the practice in England is similar. We consider that it would be more satisfactory and would obviate the need for additional enquiries if the 1961 Act were amended to ensure that the holder of the floating charge or a person authorised to do so on his behalf should certify as correct the particulars given by the company to the registrar of companies relating to the satisfaction of the debt or release from the charge. In the event of difficulty being experienced in getting the memorandum of satisfaction duly certified due to its being impossible to contact the creditor, or anyone authorised on his behalf, we think that the court should, on its being satisfied of the difficulty in obtaining such registration, be empowered to direct the registrar to register the memorandum. We do not think it necessary, however, to provide that the creditor should grant a formal discharge (see clause 21(1)(d)(vi)).

65. We have been informed that, when a company which has granted a floating charge is selling part of its property, some solicitors acting for the purchaser have asked that a memorandum of satisfaction be filed by the vendor company. This requirement has apparently arisen from the use in the 1948 Act s. 106F(b) of the words "or has ceased to form part of the company's property or undertaking". It is considered that a memorandum of satisfaction is unnecessary in such circumstances, as any property sold by a company before a floating charge "crystallises" is immediately and automatically freed from the charge. To avoid any question, however, we suggest that the section should be amended to make it clear that it is unnecessary to file a memorandum of satisfaction in such circumstances (see clause 21(1)(d)(vi)).

Registration of Charges

66. The Law Reform Committee for Scotland in their Eighth Report referred to above, drew attention to the fact (in paragraph 51) that in England it was doubtful if registration of restrictions on the power of a company to grant further securities ranking in priority to or pari passu with the floating charges being registered constituted actual

notice to all persons, and they recommended that specific provision should be made for this in the 1961 Act. Unlike the English provisions, the 1948 Act ss. 106A and 106D require particulars of floating charges registered with the registrar of companies in Scotland to show the restrictions, if any, on the power of a company to grant further securities ranking in priority to or pari passu with the floating charge. Prima facie, this would appear to constitute actual notice to all concerned, but some doubt has arisen by reason of the provisions of the 1961 Act s. 6 which indicate that registration of a floating charge and the relevant restrictions are for the information of persons considering taking floating charges from a company and make no reference to persons taking fixed securities. We consider that the effect of registration should be to give notice to all concerned including those taking fixed securities and we accordingly propose that the 1948 Act s. 6 be appropriately amended (see clause 21(1)(e)(ii)).

67. The different registration requirements imposed by the 1961 Act on a Scottish company as compared with those imposed on an English company by the 1948 Act result in anomalies. These arise from the fact that the 1948 Act s. 106 extends to all types of charges on property in England which are created by a company incorporated outside England which has an established place of business in England, whereas section 106K only extends to floating charges on property in Scotland which are created by an incorporated company registered outside Scotland and applies if the property in question includes heritable property in Scotland or the company has an established place of business in Scotland. Consequently, a company incorporated in England which creates a fixed charge over heritable property in Scotland does not require to register such a fixed charge in the register of charges in Scotland (although, of course, it will appear in the Register of Sasines). Further, the registration provisions of section 106 only apply where a company incorporated outside England has an established place of business in England whereas the registration provisions of section 106K apply not only where a company incorporated outside

Scotland has an established place of business in Scotland but also where the property in question includes heritable property in Scotland.

68. It has been represented to us that the 1961 Act s. 106K requires amendment, in respect that the inclusion of the phrase "and floating charges on property in Scotland which is acquired" is incorrect. It would appear that some inaccuracy has resulted from adopting in section 106K the wording of the 1948 Act s. 106 applicable to English companies. In the case of an English company it is necessary to register charges created by it and, in terms of the 1948 Act s. 97, charges on property acquired by the company, i.e. fixed charges. Section 106 requires companies domiciled outwith England to do likewise if they have a place of business in England. When the 1961 Act was framed recognition was given to the fact that fixed charges created by foreign companies would be discoverable by examination of the Register of Sasines and so the 1961 Act s. 106K was restricted to require the registration of floating charges only. The reference in section 106K to charges on property in Scotland acquired by such companies would appear to be inappropriate, however, since the only charges on property acquired by a Scottish company which require registration with the registrar of companies (in terms of section 106C) are fixed charges. As a result doubt has been expressed whether a company not domiciled in Scotland, when it acquires heritable property or a place of business in Scotland after the creation of a floating charge, must register the charge in Scotland, and it will often be impracticable to do so if more than 21 days have expired since the date of creation of the charge.

69. The Jenkins Committee in their Report recommended in paragraph 306(n) that "the system of registration of charges in England and Scotland should, so far as practicable, be assimilated so as to avoid duplication of entries and to ensure that the entries in the English register, relating to an English company, and those in the Scottish register, relating to a Scottish company, relate to all charges registrable under the law of both countries".

70. We consider that the recommendations of the Jenkins Committee would in a large measure clarify and solve the present difficulties.

We also consider that registration in Scotland should relate to all types of charges on property and that in the case of a foreign company such registration should only be required if the company has established a place of business in Scotland thus bringing the requirements for registration into line with the requirements for registration in England.

71. The method we propose to give effect to these recommendations is to define registrar of companies in the 1961 Act s. 106A(10) as the registrar of companies in Scotland and to amend section 106K to bring it more into line with section 106 (see clause 21(1)(d)(iv) and (vii)). It will also be necessary for reciprocal provisions to be enacted in England.

Deduction of Security by way of Floating Charges for Voting Purposes

72. The 1961 Act s. 7(a) amended the 1948 Act s. 318 by adding at the end of that section a proviso to the effect that the holder of the floating charge need not value and deduct the security for the purpose of voting at meetings of creditors of the company. It is understood that this proviso was inserted because in Scotland the holder is not entitled to appoint a receiver, the charge "crystallising" only on the liquidation of the company, and it seemed reasonable that he should have a vote at meetings of creditors based on the full amount of the company's indebtedness to him. Our proposals concerning the introduction of receivers to Scotland remove the necessity for this proviso and accordingly we propose that it be repealed (see clause 21(1)(e)(iii)).

Fraudulent Preferences

73. The period laid down in the 1948 Act s. 322 for the challenge of a floating charge as, in effect, a fraudulent preference is twelve months, in contrast to the period of six months applicable to fixed securities (1948 Act s. 320). The common law of Scotland, however, permits fraudulent preferences to be challenged without regard to the time which has elapsed since their creation, provided that insolvency at the time of creation and the knowledge of insolvency on the part of the grantor can be proved.

74. Some doubt exists as to whether the 1948 Act ss. 320 and 322 are to be regarded as incorporating the whole law on the question of the avoidance of fraudulent preferences made by a company, or whether it is still competent to challenge under the common law. We consider that this doubt should be removed, and we recommend that section 322 be amended to make it clear that on the winding up of a company registered in Scotland a floating charge on its undertaking or property should be avoided only under the provisions of the 1948 Act and should not be an alienation or preference avoidable by any other statute or at common law on the ground of insolvency or notour bankruptcy (see clause 22).

Application to Industrial and Provident Societies

75. Our attention has been directed to Part II of the Industrial and Provident Societies Act 1967 which applies the 1961 Act to Industrial and Provident Societies registered in Scotland. Section 4 of the Act requires floating charges created by such a society to be registered with the registrar of such societies within fourteen days after the date of execution of the instrument creating the charge. There seems no special reason why the period of twenty-one days which has for many years been customary under the Companies Acts should not also be available under the Industrial and Provident Societies Acts and unnecessary confusion is likely to arise from the distinction. We recommend that the Industrial and Provident Societies Act 1967 be amended in this respect (see clause 23).

76. Our attention has also been drawn to the fact that the Industrial and Provident Societies Act 1967 s. 4(1) states that there shall be delivered to the registrar:-

- (1) a copy of the instrument, authenticated in the prescribed manner;
- (2) a note, so authenticated, of such particulars relating to the charge as may be prescribed; and
- (3) such fee as may be determined in pursuance of section 70 of the principal Act as applied by the Act.

In section 4(3), however, all that appears to be required when

registering a charge is to lodge with the registrar either a copy of the instrument or an authenticated note of particulars together with the fee. We have been informed that in practice the registrar only requires a copy of the instrument to be lodged together with the fee. In view of the wording of section 4(1) which states that unless the copy of the instrument, the note and fee are delivered within the statutory period the charge shall be void against any person other than the Society concerned, we consider that this confusion should be removed by requiring that one should only require to lodge a copy or an abstract plus the fee (see clause 23(iii)).

John M. Halliday (Chairman)

11th December 1968

Appendix A

Organisations and individuals who submitted memoranda and/or suggestions
for reform

Messrs. Ashurst, Morris, Crisp & Co., Solicitors, London.

Mr. W. Blyth, Solicitor, Edinburgh.

The Committee of Scottish Bank General Managers.

Mr. I.J.A. Dyer, Solicitor, Glasgow.

Glenrothes Development Corporation.

Mr. G.R.G. Graham, Solicitor, Glasgow.

Industrial and Commercial Finance Corporation Ltd.

Messrs. Linklaters & Paines, Solicitors, London.

The Law Society of Scotland.

Messrs. McGrigor, Donald & Co., Solicitors, Glasgow.

Messrs. Maclay, Murray & Spens, Solicitors, Glasgow.

Messrs. Slaughter and May, Solicitors, London.

Mr. A. Sutherland, Kirriemuir, Angus.

APPENDIX B

COMPANIES (RECEIVERS AND FLOATING CHARGES) (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

PART I

RECEIVERS

Clause

1. Power to appoint receiver.
2. Mode and effect of appointment.
3. Powers of receiver.
4. Priority of appointment.
5. Liability for contracts.
6. Remuneration of receiver.
7. Distribution of monies.
8. Disposal of interest in property.
9. Cessation of appointment of receiver.
10. Powers of court.
11. Payment of certain debts out of assets subject to floating charge in priority to claims under the charge.
12. Notification that receiver appointed.
13. Provisions as to information where receiver appointed.
14. Special provisions as to statement submitted to receiver.
15. Delivery to registrar of accounts of receiver.
16. Enforcement of duty of receiver to make returns, etc.

PART II

FLOATING CHARGES

17. Amendment of s. 1 of Act of 1961.
18. Amendment of s. 2 of Act of 1961.
19. Ranking of floating charges.
20. Alteration of floating charges.
21. Further amendment of Act of 1961.
22. Floating charge not a fraudulent preference.
23. Amendment of Industrial and Provident Societies Act 1967.

PART III
MISCELLANEOUS PROVISIONS

- 24. Regulations.
- 25. Transitional provisions.
- 26. Construction and interpretation.
- 27. Citation, extent and commencement.

Schedules:

Schedule 1 - Form No. 1. Form of Instrument to
disencumber property or interest of
security ranking prior to or equally
with, a floating charge.

Form No. 2. Form of instrument to disen-
cumber property or interest of security
ranking after a floating charge.

Schedule 2 - The Companies (Floating Charges)(Scotland)
Act 1961 as amended by this Act.

Companies (Receivers and Floating Charges)(Scotland) Bill

D R A F T O F

A

B I L L

To make provision in the law of Scotland for the appointment of receivers in respect of companies which the Court of Session has jurisdiction to wind up and to amend the law of Scotland in relation to floating charges.

Be It Enacted, Etc.

PART I

RECEIVERS

Power to
appoint
receiver

1. - (1) It shall be competent under the law of Scotland for the holder of a floating charge (including a floating charge subsisting as such at the commencement of this Act) over all or any part of the property and undertaking of an incorporated company (whether a company within the meaning of the Act of 1948 or not) which the Court of Session has jurisdiction to wind up to appoint a receiver of the property and undertaking of the company in accordance with the provisions of this Act.

References in this Act to a receiver are references to a receiver appointed by virtue of the power contained in this subsection; and references to a receiver of the property and undertaking of the company include references to a receiver of part only of that property and undertaking.

(2) Where a series of secured debentures containing, or giving by reference to any other instrument, any floating charge to the benefit of which the debenture-holders of that series are entitled *pari passu* has been created by a company, then, for the purposes of the foregoing subsection, the reference in that subsection to the holder of a floating charge -

(a) where trustees for the debenture-holders are acting under and in accordance with a trust deed, shall mean those trustees; and

(b) where no such trustees are acting, shall mean -

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

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

(3) Where a series of debentures such as is mentioned in the last foregoing subsection has been created by a company, a receiver may, notwithstanding the provisions of the last foregoing subsection, be appointed in any manner provided in the series of debentures.

(4) Two or more receivers may be appointed as joint receivers.

(5) There shall be disqualified from being appointed as receivers -

- (a) a body corporate;
- (b) an undischarged bankrupt; and
- (c) a Scottish firm.

2. - (1) A receiver may be appointed on the occurrence of any event which, by the provisions of the instrument creating the charge or of any ancillary document, entitled the holder of the charge to make such appointment and, in so far as not otherwise provided for therein, on the occurrence of any of the following events, namely -

Mode and
effect of
appoint-
ment

- (a) the expiry of a period of 21 days after the making of a demand for payment of the principal sum, or any part thereof, due and payable under the charge, without payment having been made;
- (b) the expiry of a period of two months during the whole of which interest due and payable under the charge has been in arrears;
- (c) the making of an order or the passing of a resolution to wind up the company, provided that, in the case of a winding up by the court, leave is given by the court to appoint a receiver;
- (d) the appointment of a receiver by the holder of a floating charge which ranks equally with or after the charge;

(e) where the court, on the application of the holder of the charge, pronounces itself satisfied that the position of the holder of the charge is likely to be prejudiced if no such appointment is made.

(2) The appointment of a receiver shall be by means of a validly executed instrument in writing a copy (certified to be a correct copy) whereof shall be delivered by or on behalf of the person making the appointment to the registrar of companies for registration within 14 days of its execution; and said appointment shall take effect only when such delivery is timeously made in accordance with this subsection.

(3) Such instrument shall be validly executed -

(a) by a company registered in Scotland, if it is executed in accordance with the provisions of section 32(4) of the Act of 1948 or under the hand of a person duly authorised by instrument under the common seal of the company,

(b) by a company registered in England, if it is executed under the common seal of the company or under the hand of a person duly authorised by instrument under the common seal of the company, and

(c) by any other person, if it is executed in the manner required or permitted by the law of Scotland in the case of an attested deed.

(4) Where the receiver is appointed by the holders of a series of secured debentures in accordance with section 1(2)(b) of this Act, the instrument of appointment may be executed on behalf of the holders by a solicitor duly authorised by them to do so.

(5) On receipt of the certified copy of the instrument of appointment, the registrar shall, on payment of such fee as may be specified by regulations made by the Board of Trade, enter the particulars of the appointment in the register of charges.

(6) On the taking of effect under subsection (2) of this section of the appointment of the receiver, the floating charge by virtue of which he was appointed shall attach to the property then subject to the charge; and such attachment shall have effect as if the charge were a fixed security over the property to which it has attached.

(7) Without prejudice to section 3(3)(a) of this Act, when a receiver of the property and undertaking of a company has been appointed, no person shall have power to execute diligence on any such part of the property of the company as is attached by the floating charge by virtue of which the receiver was appointed; but nothing in this subsection shall prevent the commencement of the winding up of the company.

(8) In this and the foregoing section, "secured debentures" includes debentures, debenture stock, bonds and other securities which create a floating charge over the whole or any part of the property and undertaking of a company, but does not include such securities which create no charge other than a fixed security.

3. - (1) Subject to subsection (3) of this section, where the floating charge by virtue of which the receiver was appointed does not include the whole or substantially the whole of the company's property and undertaking, the receiver shall have, in relation to such part of the property of the company as is attached by that charge, the powers, if any, given to him by the instrument creating that charge or by any ancillary document, and, in addition, he shall have under this Act the following powers over that property in so far as these are not inconsistent with any provision contained in that instrument or document, namely -

Powers of receiver.

- (a) power to take possession of, collect and get in the property, and for that purpose to take such proceedings as may seem to him expedient;
- (b) power to sell the whole or any part of the property;
- (c) power to borrow money and grant security therefor over the property but without prejudice to any existing security over the property;
- (d) power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;
- (e) power to apply to the court for directions in connection with the performance of his functions;
- (f) power to bring or defend any action or other legal proceedings in the name and on behalf of the company;

- (g) power to refer to arbitration all questions on claims affecting the company;
- (h) power to effect and maintain insurances in respect of the business and property of the company;
- (i) power to use the company's seal;
- (j) power to do all acts and to execute in name and on behalf of the company any deed, receipt or other document;
- (k) power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
- (l) power to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent;
- (m) power to have carried out to the best advantage any work on the property of the company and in general to do all such other things as may be necessary for the realisation of the property;
- (n) power to make any payment which is necessary or incidental to the performance of his functions;
- (o) where the charge includes the undertaking of any business carried on by the company, power to carry on that business so far as he thinks it desirable to do so; and
- (p) power to do all other things incidental to the exercise of the powers mentioned in this subsection.

(2) Subject to subsection (3) of this section where the floating charge by virtue of which the receiver was appointed does include the whole or substantially the whole of the company's property and undertaking, the receiver shall have, in relation to such part of the property and undertaking of the company as is attached by that charge -

- (a) the powers, if any, given to him by the instrument creating the floating charge or by any ancillary document; and
- (b) the following powers in so far as these are not inconsistent with any provision contained in that instrument or document, namely -
 - (i) such powers as are mentioned in paragraphs (a) to (n) of the foregoing subsection;

- (ii) power to carry on the business of the company so far as he thinks it desirable to do so;
 - (iii) power to grant any lease of the property of the company or any part thereof, and to input and output tenants, and to take on lease any property required or convenient for the business of the company;
 - (iv) power to adjust and settle liabilities of the company to taxation and to recover all taxation overpaid by or on behalf of the company;
 - (v) power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person or company indebted to the company and to receive dividends, and to accede to trust deeds for creditors of any such person;
 - (vi) power to present or defend a petition for the winding up of the company; and
 - (vii) power to do all other things incidental to the exercise of the powers mentioned in this subsection.
- (3) The foregoing provisions of this section shall apply -
- (a) subject to the rights of any person who has effectually executed diligence on the whole or any part of the property and undertaking of the company prior to the appointment of the receiver;
 - (b) subject to the rights of any person who holds over the whole or any part of the property and undertaking of the company a fixed security or floating charge having priority over, or ranking equally with, the floating charge by virtue of which the receiver was appointed; and
 - (c) in a case where a liquidator or provisional liquidator has been appointed in a winding up by the court prior to the appointment of the receiver, only with the authority of the court.

city of
ntaem

(4) Subject to section 5 of this Act, a receiver shall be deemed to be the agent of the company in relation to such property and undertaking of the company as are attached by the floating charge by virtue of which he was appointed.

(5) A person paying money to the receiver shall not be concerned to inquire whether any event has happened to authorise the receiver to act.

(6) A receiver or manager of the property and undertaking of a company incorporated in England which has or acquires property in Scotland shall have in respect of that property the same powers as he has over the property and undertaking of the company in England so far as these powers do not conflict with the law of Scotland.

Priority of
appointment

4. - (1) The powers of a receiver appointed by the holder of a floating charge shall be suspended by, and as from the date of, the taking of effect under section 2(2) of this Act of the appointment of a receiver by the holder of a floating charge having priority of ranking over that charge; and any powers so suspended shall take effect again when the floating charge having priority of ranking ceases to attach to the property then subject to the charge, whether such cessation is by virtue of section 9(5) of this Act or otherwise.

(2) The suspension of the powers of a receiver under the last foregoing subsection shall not cause the floating charge by virtue of which he was appointed to cease to attach to the property to which it attached by virtue of section 2(6) of this Act.

(3) Where two or more floating charges rank with one another equally, the holder of each such charge may appoint a receiver, and, where this results in more than one receiver being appointed, the receivers so appointed shall be deemed to have been appointed as joint receivers.

(4) Receivers appointed, or deemed to have been appointed, as joint receivers shall act jointly unless the respective instruments of appointment expressly provide otherwise.

5. - (1) Subject to section 3(4) of this Act, a receiver (including a receiver whose powers are subsequently suspended under the last foregoing section) shall be personally liable on any contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides.

Liability for contracts

(2) A receiver who is personally liable by virtue of the foregoing subsection shall be entitled to be indemnified out of the property and undertaking in respect of which he was appointed.

(3) Any contract entered into by or on behalf of the company prior to the appointment of a receiver shall, subject to the terms of the contract, continue in force notwithstanding that appointment, but the receiver shall not by virtue only of his appointment incur any personal liability on any such contract.

(4) Any contract entered into by a receiver in the performance of his functions shall, subject to the terms of the contract, continue in force although the powers of the receiver are subsequently suspended under the last foregoing section.

6. - (1) The remuneration to be paid to a receiver shall be determined by agreement between the receiver and the holder of the floating charge by virtue of which he was appointed.

Remuneration of receiver

(2) Where the remuneration to be paid to the receiver has not been determined under the foregoing subsection, or where it has been so determined but is disputed by any of the persons mentioned in paragraphs (a) to (d) of this subsection, it may be fixed instead by the Auditor of the Court of Session on application made to him by -

- (a) the receiver;
- (b) the holder of any floating charge or fixed security over the whole or any specified part of the property and undertaking of the company;
- (c) the company;
- (d) the liquidator of the company.

(3) Subsection (2) of section 1 of this Act shall apply to the holder of the floating charge referred to in subsection (1) or (2) of this section as it applies to the holder of a floating charge referred to in subsection (1) of that section.

(4) Such application to the Auditor of the Court of Session as is mentioned in subsection (2) of this section shall be made in writing not later than one month after the sending or delivery of the abstract of receipts and payments of the receiver mentioned in section 13 or 15 of this Act which discloses the remuneration, if any, payable to the receiver.

(5) Where the receiver has been paid or has retained for his remuneration for any period before the remuneration has been fixed by the Auditor of the Court of Session under subsection (2) of this section any amount in excess of the remuneration so fixed for that period, the receiver or his personal representatives shall account for the excess.

Distribution
of monies.

7. - (1) Subject to the rights of the following categories of persons, namely -

- (a) the holder of any fixed security ranking prior to the floating charge,
- (b) creditors in respect of all charges and expenses incurred by or on behalf of the receiver,
- (c) the receiver in respect of his expenses and fees,
- (d) the preferential creditors,
- (e) creditors in respect of any payments due under section 3 of this Act,

the receiver shall pay monies received by him to the holder of the floating charge by virtue of which the receiver was appointed in or towards satisfaction of the debt secured by the floating charge.

(2) Any balance of monies remaining after the provisions of the foregoing subsection have been satisfied shall be paid to the following persons, as the case may require, namely -

- (a) the receiver appointed by the holder of a subsequent floating charge,
- (b) the holder of a fixed security which has been realised according to his rights and interests,
- (c) the company or its liquidator as the case may be.

(3) Where any question arises as to the person entitled to a payment under the foregoing provisions of this section, or where a receipt or a discharge of a security cannot be obtained in respect of any such payment, the receiver shall consign the amount of such payment in any bank in Scotland incorporated by or under Act of Parliament or Royal Charter in name of the Accountant of Court for behoof of the person or persons entitled thereto.

8. - (1) Where the receiver sells or disposes, or is desirous of selling or disposing, of any interest in property by means of a deed which is registrable in the Register of Sasines and a discharge of any security or interest of a creditor affecting such property cannot be obtained, the receiver -

Disposal of
interest in
property.

1924

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(a) in a case where the security or interest of the creditor ranks prior to, or equally with, the floating charge by virtue of which the receiver was appointed, may consign or cause to be consigned the amount of the payment, if any, being principal sum, interest and expenses, due to such creditor in any bank in Scotland incorporated by Act of Parliament or Royal Charter in name of the Accountant of Court for behoof of the creditor; and

(b) in any other case, may for the purposes of subsection (2) of this section proceed in accordance with that subsection as if the security or interest of the creditor did not exist.

(2) Where the provisions of the foregoing subsection apply, the receiver may expedite and record in the Register of Sasines an instrument as nearly as may be in one or other of the forms set out in Schedule 1 to this Act, and such instrument, on being so recorded, shall have the effect of disencumbering the property of such security or interest as is mentioned in the foregoing subsection.

(3) Where the receiver sells or disposes of any interest in property such as is mentioned in subsection (1) of this section, he may grant a disposition, assignation or other appropriate conveyance in implement of such sale or disposal to the same effect as if he were the proprietor of such interest, and any such conveyance shall be effective

notwithstanding that a person other than the company appears on the record as proprietor of that interest.

(4) Nothing in this section shall prejudice the right of any creditor of the company to rank for his debt on the whole or any part of the property and undertaking of the company.

1924 c. 27 (5) for the avoidance of doubt as to the ability of a receiver to deduce title, it is hereby provided that the first reference in section 5(1) of the Conveyancing (Scotland) Act 1924 to any person shall include a reference to a receiver under this Act.

Cessation of appointment of receiver.

9. - (1) A receiver may resign on giving one month's notice of his intended resignation to -

- (a) all persons having a right to appoint a receiver,
- (b) the company or its liquidator, and
- (c) the holders of any fixed security over the property and undertaking of the company.

(2) When a receiver ceases to act as such, he may be discharged from such office by the holder of the floating charge by virtue of which he was appointed.

(3) A receiver may, on application to the court by the holder of the floating charge by virtue of which he was appointed, be removed by the court on cause shown.

(4) When a receiver ceases to act as such otherwise than by death he shall, and when a receiver is removed by the court the holder of the floating charge by virtue of which he was appointed shall, within seven days of the cessation or removal, as the case may be, give the registrar of companies notice to that effect, and the registrar shall enter the notice in the register of charges kept by him in accordance with section 106D of the Act of 1948.

If the receiver or the holder of the floating charge, as the case may require, makes default in complying with the requirements of this subsection, he shall be liable to a fine not exceeding £5 for every day during which the default continues.

(5) If by the expiry of a period of one month following upon the removal of the receiver or his ceasing to act as such no other receiver has been appointed, the floating charge by virtue of which the receiver was appointed -

(a) shall thereupon cease to attach to the property then subject to the charge; and

(b) shall again subsist as a floating charge.

10. - (1) A holder of a secured debenture or series of secured debentures created by the company, being the holder of the floating charge by virtue of which the receiver was appointed, may apply to the court for directions in any matter arising in connection with the performance by the receiver of his functions; and the court may give such directions (if any) or make such order (if any) as it thinks fit, having regard to the terms of any instrument creating the floating charge or of any ancillary document and to the provisions of this Act.

Powers of court.

(2) Where a floating charge by virtue of which a person is purported to have been appointed receiver is discovered to be invalid, the court may, if it thinks fit, in whole or in part relieve that person from personal liability in respect of anything done or omitted to be done which, had he been validly appointed, would have been properly done or omitted; and the court may, if it thinks fit, make the person by whom the invalid appointment was made personally liable in respect of anything done or omitted to be done to the extent to which the person purported to have been appointed receiver has been relieved of personal liability.

(3) In this section -

(a) "secured debenture" and "secured debentures" have the meaning assigned to "secured debentures" by section 2(8) of this Act; and

(b) "holder of a secured debenture or series of secured debentures" means -

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

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

Payment of certain debts out of assets subject to floating charge in priority to claims under the charge.

11. - (1) Where, in the case of a company registered in Scotland, a receiver is appointed on behalf of the holder of a floating charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V of the Act of 1948 relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver in priority to any claim for principal or interest by the holder of the floating charge.

(2) In the application of the said provisions, section 319 of the Act of 1948 shall be construed as if the provision for payment of accrued holiday remuneration becoming payable on the termination of employment before or by the effect of the winding up order or resolution were a provision for payment of such remuneration becoming payable on the termination of employment before or by the effect of the appointment of the receiver.

(3) The periods of time mentioned in the said provisions of Part V of the Act of 1948 shall be reckoned from the date of the taking of effect of the appointment of the receiver under section 2(2) of this Act.

(4) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

Notification that receiver appointed.

12. - (1) Where a receiver of the property of a company has been appointed, every invoice, order for goods or business letter issued by or on behalf of the company or the receiver or the liquidator of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.

(2) If default is made in complying with the requirements of this section, the company and any of the following persons who knowingly and wilfully authorises or permits the default, namely, any officer of the company, any liquidator of the company and any receiver, shall be liable to a fine of £20.

(3) In this and the following sections of this Part of this Act references, however expressed, to the appointment of a receiver shall be construed as references to the taking of effect of the appointment of the receiver under section 2(2) of this Act.

13. - (1) Where, in the case of a company registered in Scotland, a receiver of the whole or substantially the whole of the property of the company (hereafter in this section and in the next following section referred to as "the receiver") is appointed then subject to the provisions of this and the next following section -

Provisions
as to infor-
mation where
receiver
appointed.

(a) the receiver shall forthwith send notice to the company of his appointment; and

(b) there shall, within 14 days after receipt of the notice, or such longer period as may be allowed by the receiver, be made out and submitted to the receiver in accordance with the next following section a statement in the prescribed form as to the affairs of the company; and

(c) the receiver shall within two months after receipt of the said statement send -

(i) to the registrar of companies a copy and a summary of the statement and of any comments he sees fit to make thereon; and

(ii) to the company, a copy of any such comments as aforesaid or, if he does not see fit to make any comment, a notice to that effect; and

(iii) to the holder of the floating charge, to any trustees for the debenture holders on whose behalf he was appointed and, so far as he is aware of their addresses, to all such debenture holders a copy of the said summary.

(2) The receiver shall within two months, or such longer period as the Board of Trade may allow after the expiration of the period of 12 months from the date of his appointment and of every subsequent period of 12 months, and within two months or such longer period as the Board of Trade may allow after he ceases to act as receiver of the property of

the company, send to the registrar of companies, to the holder of the floating charge, to any trustees for the debenture holders of the company on whose behalf he was appointed, to the company and (so far as he is aware of their addresses) to all such debenture holders an abstract in the prescribed form showing his receipts and payments during that period of 12 months or, where he ceases to act as aforesaid, during the period from the end of the period to which the last preceding abstract related up to the date of his so ceasing, and the aggregate amounts of his receipts and of his payments during all preceding periods since his appointment.

(3) Subsection (1) of this section shall not apply in relation to the appointment of a receiver to act with an existing receiver or in place of a receiver dying or ceasing to act, except that, where that subsection applies to a receiver who dies or ceases to act before it has been fully complied with, the references in paragraphs (b) and (c) thereof to the receiver shall (subject to the next following subsection) include references to his successor and to any continuing receiver.

Nothing in this subsection shall be taken as limiting the meaning of the expression "the receiver" where used in, or in relation to, subsection (2) of this section.

(4) This and the next following section, where the company is being wound up, shall apply notwithstanding that the receiver and the liquidator are the same person, but with any necessary modifications arising from that fact.

(5) Nothing in subsection (2) of this section shall be taken to prejudice the duty of the receiver to render proper accounts of his receipts and payments to the persons to whom, and at the times at which, he may be required to do so apart from that subsection including a creditor having a floating charge or a fixed security over property of the company.

(6) If the receiver makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding £5 for every day during which the default continues.

14. - (1) The statement as to the affairs of a company required by the last foregoing section to be submitted to the receiver (or his successor) shall show as at the date of the receiver's appointment the particulars of the company's assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be prescribed.

(2) The said statement shall be submitted by, and be verified by affidavit of, one or more of the persons who are at the date of the receiver's appointment the directors and by the person who is at that date the secretary of the company, or by such of the persons hereafter in this subsection mentioned as the receiver (or his successor), subject to the direction of the Board of Trade, may require to submit and verify the statement, that is to say, persons -

- (a) who are or have been officers of the company;
- (b) who have taken part in the formation of the company at any time within one year before the date of the receiver's appointment;
- (c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the receiver capable of giving the information required;
- (d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) Any person making the statement and affidavit shall be allowed, and shall be paid by the receiver (or his successor) out of his receipts, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the receiver (or his successor) may consider reasonable, subject to an appeal to the Board of Trade.

(4) If any person without reasonable excuse makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding £10 for every day during which the default continues.

(5) References in this section to the receiver's successor shall include a continuing receiver.

Delivery to registrar of accounts of receiver.

15. - (1) Except where section 13(2) of this Act applies, every receiver of the property of a company shall, within one month, or such longer period as the registrar of companies may allow, after the expiration of the period of six months from the date of his appointment and of every subsequent period of six months, and within one month after he ceases to act as receiver, deliver to the registrar of companies for registration an abstract in the prescribed form showing his receipts and his payments during that period of six months, or, where he ceases to act as aforesaid, during the period from the end of the period to which the last preceding abstract related up to the date of his so ceasing, and the aggregate amount of his receipts and of his payments during all preceding periods since his appointment.

(2) Every receiver who makes default in complying with the provisions of this section shall be liable to a fine not exceeding £5 for every day during which the default continues.

Enforcement of duty of receiver to make returns, etc.

16. - (1) If any receiver of the property of a company -

- (a) having made default in filing, delivering or making any return, account or other document, or in giving any notice, which a receiver is by law required to file, deliver, make or give, fails to make good the default within 14 days after the service on him of a notice requiring him to do so; or
- (b) has, after being required at any time by the liquidator of the company so to do, failed to render proper accounts of his receipts and payments and to vouch the same and to pay over to the liquidator the amount properly payable to him;

the court may, on an application made for the purpose, make an order directing the receiver to make good the default within such time as may be specified in the order.

(2) In the case of any such default as is mentioned in paragraph (a) of the foregoing subsection, an application for the purposes of this section may be made by any member or creditor of the company or by the registrar of companies, and in the case of any such default as is mentioned in paragraph (b) of that subsection, the application shall be made by the liquidator, and in either case the order may provide that

all expenses of and incidental to the application shall be borne by the receiver.

(3) Nothing in this section shall be taken to prejudice the operation of any enactments imposing penalties on receivers in respect of any such default as is mentioned in subsection (1) of this section.

PART II

FLOATING CHARGES

17. - (1) Section 1(1) of the Companies (Floating Charges) (Scotland) Act 1961 (hereafter in this Act referred to as "the Act of 1961") shall be amended by substituting for the words from "incurred or" to "moveable" the words "or other obligation (including a cautionary obligation) incurred or to be incurred by, or binding upon, the company or any other person, to create in favour of the creditor in the debt or obligation a charge, in this Act referred to as a floating charge, over all or any part of the property (including uncalled capital)".

Amendment of
s. 1 of Act
of 1961.
1961 c. 46

(2) In section 1(2) of the Act of 1961, -

- (a) the words from "shall not" to "undertaking, but" shall be omitted;
- (b) for the words "not being excepted property" there shall be substituted the words "or, as the case may be, in part of that property and undertaking"; and
- (c) after the word "debt" there shall be inserted the words "or obligation".

(3) For section 1(3) of the Act of 1961, there shall be substituted the following subsection -

"(3) For the avoidance of doubt, it is hereby declared that, subject to section 322 of the Act of 1948, interest shall, in respect of a floating charge which after the commencement of the Companies (Receivers and Floating Charges) (Scotland) Act 1969 attaches to the property of the company, accrue until payment of the sum due under the charge is made."

18. In section 2 of the Act of 1961, for the words from "of charge" to "or acknowledgement" there shall be substituted the words "or bond or other written acknowledgement of debt or obligation which purports to create such a charge."

Amendment of
s. 2 of Act
of 1961.

"(2) Execution in accordance with this section includes execution by an attorney authorised for such purpose by the company by writing under its common seal; and any such execution on behalf of the company shall bind the company".

Ranking of
floating
charges.

19. - (1) Subject to subsection (2) of this section, the instrument creating a floating charge under section 2 of the Act of 1961 or any ancillary document may contain provisions regulating the order in which the charge over all or any part of the company's property and undertaking shall rank with any other subsisting or future floating charges or fixed securities over that property or any part of it; but nothing in this subsection shall prejudice the rights of any prior or pari passu creditors of the company.

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

(3) Where the order of ranking of the floating charge with any other such charge or security as is mentioned in subsection (1) of this section is not regulated by provisions contained in the instrument creating the floating charge or in any ancillary document, the order of ranking shall be determined in accordance with the following provisions of this section.

(4) Subject to the foregoing provisions of this section, -

- (a) a fixed security, the right to which has been constituted as a real right before a floating charge registered in accordance with Part III A of the Act of 1948 has attached to all or any part of the property and undertaking of the company, shall have priority of ranking over the floating charge;
- (b) floating charges shall rank with one another according to the time of registration in accordance with Part III A of the Act of 1948;
- (c) for the purposes of this section, floating charges which have been received by the registrar for registration by the same postal delivery shall rank with one another equally.

(5) This section shall be without prejudice to section 319(5) of the Act of 1948 (preferential payments).

20. - (1) The instrument creating a floating charge under section 2 of the Act of 1961 or any ancillary document may be altered by the execution of an instrument of alteration by the company, the holder of the charge and the holder of any other charge (including a fixed security) which would be adversely affected by the alteration.

Alteration of floating charges.

(2) Such an instrument of alteration shall be validly executed if it is executed -

(a) by a company, under its common seal or by an attorney authorised for such purpose by the company by a writing under its common seal;

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

(c) where no such trustees are acting, by

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

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

(d) by an attorney duly authorised for the purpose by the persons mentioned in paragraph (c) above.

(3) An instrument of alteration under this section which -

(a) varies the ranking of the charge in relation to fixed securities and to other floating charges, or

(b) releases property from the charge, or

(c) increases the amount secured by the charge, shall be deemed to effect the alteration to the instrument creating the

floating charge or to any ancillary document when the prescribed particulars of the alteration together with a copy (certified in the prescribed manner to be a correct copy) of the instrument by which the alteration is made, are delivered to or received by the registrar of companies for registration in accordance with Part III A of the Act of 1948; but except as aforesaid an instrument of alteration executed under subsection (1) of this section shall not require to be registered with the registrar of companies.

(4) Any reference in any enactment, including this Act, to a charge or a floating charge shall, unless the context otherwise requires, be construed as including a reference to the charge or floating charge as altered by an instrument of alteration which requires to be and has been duly registered with the registrar of companies under the last foregoing subsection; and any reference in any enactment, including this Act, to the creation of a charge shall, for the purposes of this section, be construed as a reference to the making of an alteration to a charge by means of an instrument of alteration which requires to be duly registered under the last foregoing subsection.

(5) Without prejudice to the generality of the last foregoing subsection, the provisions of Part III A of the Act of 1948 shall, so far as applicable, apply mutatis mutandis to an instrument of alteration requiring to be registered under this section as they apply to a charge and a floating charge to which section 106A of the Act of 1948 applies; and, in particular, section 106A(10) of the Act of 1948 shall so apply as if the reference therein to the date of creation of a charge were a reference to the date on which the instrument of alteration was executed.

Further
amendment
of Act of
1961.

21. - (1) Without prejudice to the foregoing provisions of this Part of this Act, the Act of 1961 shall have effect as if -

(a) in section 7(c), for the words "(Floating Charges) (Scotland) Act, 1961" there were substituted the words "(Receivers and Floating Charges) (Scotland) Acts 1961 and 1969";

(b) in section 7(d), after the words "106K Extension of Part III A" there were inserted the words "and the four last foregoing

sections as extended to instruments of alteration by section 20(5) of the Companies (Receivers and Floating Charges) (Scotland) Act 1969.";

(c) in section 8(1)(c), after the words "back letter" there were inserted the words "or agreement";

(d) in Schedule 2 -

(i) in section 106A(1) of the Act of 1948 as there set out, after the word "undertaking" there were inserted the words "or any part thereof,";

(ii) in section 106A(2)(a) of the Act of 1948 as there set out, after the words "back letter" there were inserted the words "or agreement";

(iii) in section 106A(9) of the Act of 1948 as there set out, after the words "back letter" there were inserted the words "or agreement" and for the word "compliance" where that word last occurs there were substituted the words 'compliance'; and where the amount secured by a charge so created is purported to be increased by a further back letter or agreement, a further charge shall be held to have been created by the ex facie absolute disposition or assignation as qualified by the further back letter or agreement and the provisions of this Part of this Act shall apply to such further charge as if -

(a) references in this Part of this Act (other than in this subsection) to the charge were references to such further charge; and

(b) for paragraphs (a) and (b) of the next following subsection there were substituted the words "references to the date on which the further back letter or agreement was executed.";

- (iv) in section 106A(10) of that Act as there set out, there were substituted for the words "the expression" the words "registrar of companies" means the registrar or other officer performing under this Act the duty of registration of companies in Scotland: and "registration" shall be construed accordingly;'
- (v) in section 106D(2) of that Act as there set out, after the word "stating" there were inserted the words "the name of the company and of the person first-named in the charge among the persons entitled to the benefit thereof and";
- (vi) in section 106F of that Act as there set out, there were added at the end the following subsections:-
- "(2) Without prejudice to the duty of the registrar under this section to require to be satisfied as aforesaid, 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.
- "(3) Nothing in this section shall be held to require the registration of a memorandum of satisfaction where the company, having created a floating charge over all or any part of its property and undertaking, disposes of part of the property subject to the floating charge.";

(vii) for section 106K of that Act as there set out,

there was substituted the following section:-

106K. The provisions of this Part of this Act shall extend to charges on property in Scotland which are created, and to charges on property in Scotland which is acquired, by a company (whether a company within the meaning of this Act or not) incorporated outside Great Britain which has a place of business in Scotland."; and

"Extension
of Part
III A.

(e) the following provisions were omitted, namely -

(i) section 5;

(ii) in section 6, the words from "which" to "charge";

(iii) section 7(a); and

(iv) Schedule 1.

(2) Without prejudice to the other provisions of this Act, the Act of 1961 shall, in accordance with sections 17, 18 and 21 of this Act, have effect as set out in Schedule 2 to this Act.

22. Section 322 of the Act of 1948 (Effect of floating charge) shall be amended by inserting a new subsection as follows:-

Floating charge
not a fraudu-
lent preference.

"(3) Where a company is being wound up in Scotland a floating charge over all or any part of its property and undertaking shall not be held to be an alienation or preference voidable by statute (other than by the provisions of this Act) or at common law on the ground of insolvency or notour bankruptcy."

23. The Industrial and Provident Societies Act 1967 shall be amended as follows -

Amendment of
Industrial and
Provident
Societies
Act 1967.

(i) in section 3(3), for the words "sections 1(2)(c) and 5(3) of the Act of 1961" there shall be substituted the words 'section 1(2)(c) of the Act of 1961 and section 19(4)(b) of the Companies (Receivers and Floating Charges)(Scotland) Act 1969 (hereafter in this Act referred to as "the Act of 1969")';

1967 c. 48.

*Application to registered societies of certain provisions of Act of 1969.

(ii) after section 3, there shall be inserted the following section:

3A. Sections 19, 20 (other than subsection (5) thereof) and 26(1) to (3) of the Act of 1969 shall apply to a registered society as they apply to an incorporated company; and accordingly shall apply as if -

- (a) references therein to a company or an incorporated company were references to a registered society;
- (b) references therein to the registrar and the registrar of companies were references to the registrar under this Act; and
- (c) references therein, however expressed, to registration or registration in accordance with Part IIIA of the Act of 1948 were references to the delivery to the registrar of the document required by section 4(1) of this Act to be so delivered.";

(iii) in section 4(1),

- (a) for paragraph (b) there shall be substituted the words "or (b) a note, so authenticated, of such particulars relating to the charge as may be prescribed; and, in either case"; and
- (b) for the words from "said copy" to "as aforesaid" there shall be substituted the words "foregoing provisions of this subsection are not complied with";

(iv) in section 4(1) and (2)(a), for the word "fourteen" there shall be substituted the word "21"; and

(v) in the Schedule, paragraph 5 shall be omitted.

PART III

MISCELLANEOUS PROVISIONS

Regulations. 24. The powers to make regulations conferred by this Act on the Board of Trade shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

25. - (1) Any floating charge created by a company prior to the commencement of this Act, which -

Transition
provisions

- (a) is still subsisting as a floating charge at the commencement of this Act; and
- (b) if it had been created after the commencement of this Act, would have been validly created,

shall as from the commencement of this Act be deemed to have been validly created as from the date of its creation.

(2) Any provision which -

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

shall as from the commencement of this Act be deemed to have been a valid provision as from the date of its making.

26. - (1) This Act shall be construed as one with the Act of 1961.

Construction
and Interpretation.

(2) In this Act, unless the context otherwise requires, "ancillary document" shall mean -

- (a) a document which relates to the floating charge and which was executed in probative form by the debtor and creditor in the charge before the registration of the charge in accordance with Part IIIA of the Act of 1948; or
- (b) an instrument of alteration such as is mentioned in section 20 of this Act.

(3) Any reference in this Act to any enactment shall be construed as a reference to that enactment as amended by or under any other enactment, including this Act.

(4) Nothing in this Act shall be construed as empowering a company to act outwith the powers contained in its Memorandum of Association or Articles of Association.

(5) Section 440 of the Act of 1948 shall apply to any enactment in this Act as it applies to any enactment in that Act.

(6) Part VI of the Act of 1948 (Receivers and Managers) shall not apply to receivers under this Act.

Citation,
extent and
commence-
ment.

1961 c. 46.

27. - (1) This Act may be cited as the Companies (Receivers and Floating Charges)(Scotland) Act 1969; and the Companies (Floating Charges)(Scotland) Act 1961 and this Act may be cited together as the Companies (Receivers and Floating Charges)(Scotland) Acts 1961 and 1969.

(2) This Act shall extend to Scotland only.

(3) This Act shall come into operation at the expiration of a period of one month beginning with the date on which it is passed.

SCHEDULE 1

Section 8.

Form No. 1

FORM OF INSTRUMENT TO DISCUMBER PROPERTY OR INTEREST OF SECURITY RANKING PRIOR TO, OR EQUALLY WITH, A FLOATING CHARGE.

I, A.B. (design), receiver of the property and undertaking (or of the following part of the property and undertaking) (here specify the part) of the C.D. Company (Limited), having sold or disposed of (or being desirous of selling or disposing of) the following property or interest in property subject to recording in the Register of Sasines, namely (here give a brief description of the property or interest in property in question), and having been unable to obtain a discharge of the following security over or interest in the property or interest in property, namely (here describe the security or interest) (which security or interest ranks prior to (or equally with) the floating charge by virtue of which I was appointed), from E.F., the creditor thereof for the time being, do hereby certify that on (insert date), in accordance with section 8(1) of the Companies (Receivers and Floating Charges) (Scotland) Act 1969, I consigned (or caused to be consigned) in the (specify bank or branch of bank in which the money was consigned) the sum of (insert amount consigned) being the cumulo amount (or the balance) of the principal sum, interest and expenses (or as the case may be) due (or remaining due) under the said security or interest conform to deposit receipt dated (insert date) by the said bank for said amount in the name of the Accountant of Court for behoof of the said E.F. (or of G.H., (design), the creditor in the said security or interest).

A.B.

[To be attested.]

Register on behalf of the within-named A.B. as receiver within mentioned in the Register of the County of X (or as the case may be).

A.B.

or J.K., W.S., Edinburgh, Agent.
or L. & M., W.S., Edinburgh, Agents.

Form No. 2

FORM OF INSTRUMENT TO DISENCUMBER PROPERTY OR INTEREST OF SECURITY
RANKING AFTER A FLOATING CHARGE.

I, A.B. (design), receiver of the property and undertaking (or of the following part of the property and undertaking) (here specify the part) of the C.D. Company (Limited), having sold or disposed of (or being desirous of selling or disposing of) the following property or interest in property subject to recording in the Register of Sasines, namely (here give a brief description of the property or interest in property in question), and having been unable to obtain a discharge of the following security over or interest in the property, namely (here describe the security or interest) (which security or interest ranks after the floating charge by virtue of which I was appointed), from E.F., the creditor thereof for the time being, do hereby expedite this instrument for recording in accordance with section 8(2) of the Companies (Receivers and Floating Charges) (Scotland) Act 1969.

A.B.

[To be attested.]

Register on behalf of the within-named A.B., as receiver within mentioned in the Register of the County of X (or as the case may be).

A.B.

or J.K., W.S., Edinburgh, Agent.
or L. & M., W.S., Edinburgh, Agents

SCHEDULE 2

THE COMPANIES (FLOATING CHARGES) (SCOTLAND) ACT 1961 AS AMENDED BY THIS ACT.

[Note: In the provisions set out hereunder words inserted or substituted by this Act are underlined and omissions without substitution are indicated by dots.]

1. - (1) It shall be competent under the law of Scotland for an incorporated company (whether a company within the meaning of the Act of 1948 or not), for the purpose of securing any debt or other obligation (including a cautionary obligation) incurred or to be incurred by, or binding upon, the company or any other person, to create in favour of the creditor in the debt or obligation a charge, in this Act referred to as a floating charge, over all or any part of the property (including uncalled capital), which may from time to time be comprised in its property and undertaking.

(2) A floating charge created by a company shall on the commencement of the winding up of the company, subject to sections 106A and 322 of the Act of 1948 (which relate among other things to the validity of floating charges), attach to the property then comprised in the company's property and undertaking or, as the case may be, in part of that property and undertaking, but subject to the rights of any person who -

- (a) has effectually executed diligence on the property or any part of it, or
- (b) holds a fixed security over the property or any part of it ranking in priority to the floating charge, or
- (c) holds over the property or any part of it another floating charge so ranking;

and, subject as aforesaid, the provisions of the Act of 1948 relating to winding up, except section 327(1)(c) thereof, shall have effect as if the charge were a fixed security over the property to which it has attached in respect of the principal of the debt or obligation to which it relates and any interest due thereon:

Provided that nothing in this subsection shall prejudice the operation of section 319(5) of the Act of 1948 (which provides among other

things for the payment of certain debts in certain circumstances out of property comprised in or subject to a floating charge).

(3) For the avoidance of doubt, it is hereby declared that, subject to section 322 of the Act of 1948, interest shall, in respect of a floating charge which after the commencement of the Companies (Receivers and Floating Charges) (Scotland) Act 1969, attach to the property of the company, accrue until payment of the sum due under the charge is made.

2. - (1) A floating charge may be created, in the case of a company which the Court of Session has jurisdiction to wind up, only by the execution, under the seal of the company, of an instrument or bond or other written acknowledgement of debt or obligation which purports to create such a charge.

Creation of floating charges by Scottish companies.

(2) Execution in accordance with this section includes execution by an attorney authorised for such purpose by the company by writing under its common seal; and any such execution on behalf of the company shall bind the company.

References in this Act to the instrument by which a floating charge was created are, in the case of a floating charge created by words in a bond or other written acknowledgement, references to the bond or, as the case may be, the other written acknowledgement.

3. For the avoidance of doubt it is hereby declared that a floating charge shall, subject to the Act of 1948, have effect in accordance with this Act in relation to any heritable property in Scotland to which it relates, notwithstanding that it is not recorded in the Register of Sasines.

Effect of floating charges in relation to heritable property in Scotland.

4. - (1) Sections 222 and 399(5) of the Act of 1948 (which specify the circumstances in which certain companies may be wound up by the court) shall, in relation to a company which the Court of Session has jurisdiction to wind up, have effect as if they included the following circumstances, that is to say, if there is subsisting a floating charge over property comprised in the company's property and undertaking, and the court is satisfied that the security of the creditor entitled to the benefit of the floating charge is in jeopardy.

Extension of power of court to wind up a company.

(2) The security of a creditor shall, for the purposes of the foregoing subsection, be deemed to be in jeopardy if the court is satisfied that events have occurred or are about to occur which render it unreasonable in the interests of the creditor that the company should retain power to dispose of the property which is subject to the floating charge.

Registration of charges.

.....
6. For the purpose of securing the publication of floating charges created by companies and other charges so created the Act of 1948 shall have effect subject to the amendment set out in Schedule 2 to this Act.

Further amendment to Act of 1948.

7. The Act of 1948 shall have effect as if -
.....

- (b) in section 319(5)(b) after "England" there were inserted "or Scotland";
- (c) in section 455(1), after the definition of "financial year", there were inserted the following definition:-
"floating charge" includes a floating charge within the meaning of the Companies (Receivers and Floating Charges) (Scotland) Acts 1961 and 1969";
- (d) in Schedule 15, after the entry relating to section 106 of the said Act, there were inserted the following entries -
 - "106A Registration of charges created by companies registered in Scotland.
 - 106B(1) Duty of company to register charges created by company (Scotland).
 - 106C Duty of company to register charges existing on property acquired (Scotland).
 - 106K Extension of Part IIIA.

and the four last foregoing sections as extended to instruments of alteration by section 20(5) of the Companies (Receivers and Floating Charges) (Scotland) Act 1969."

8. In this Act unless the context otherwise requires -

Interpre-
tation.
1948 c. 38.

- (a) "Act of 1948" means the Companies Act 1948, as amended by any other Act including this Act;
- (b) "company" means a company to which section 1 of this Act relates;
- (c) "fixed security" in relation to any property of a company means any security, other than a floating charge or a charge having the nature of a floating charge, which on the winding up of the company in Scotland would be treated as an effective security over that property, and (without prejudice to that generality) includes a security over that property created by way of an ex facie absolute disposition or assignation qualified by a back letter or agreement;
- (d) references to registration in relation to a floating charge are references to the delivery to or receipt by the registrar of companies, in accordance with section 106A of the Act of 1948, for registration, of the prescribed particulars of the charge, and "registrar" shall be construed accordingly.

9. - (1) This Act may be cited as the Companies (Floating Charges) (Scotland) Act 1961.

Citation,
extent and
commencement.

(2) This Act shall extend to Scotland only.

(3) This Act shall come into force at the expiration of a period of three months beginning with the date on which it is passed.

S C H E D U L E S

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SCHEDULE 2

REGISTRATION OF CHARGES

The Act of 1948 shall have effect with the addition immediately after section 106 thereof of the following provisions, and accordingly sections 104 and 105 of that Act shall cease to have effect in relation to companies to which the said provisions apply:-

REGISTRATION OF CHARGES (SCOTLAND)

Registration of Charges with Registrar of Companies

Registration
of charges
created by
companies
registered
in Scotland.

106A. - (1) Subject to the provisions of this Part of this Act every charge created after the fixed date by a company registered in Scotland, being a charge to which this section applies, shall, so far as any security on the company's property or undertaking or any part thereof is conferred thereby, be void against the liquidator 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 manner required by this Act within 21 days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured; and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges:-

- (a) a charge on land wherever situated, or any interest therein, including a charge created by a bond and disposition or assignation in security or by an ex facie absolute disposition or assignation qualified by a back letter or agreement, but not including a charge for any rent, ground annual or other periodical sum payable in respect of the land;
- (b) a security over the uncalled share capital of the company;
- (c) a security over incorporeal moveable property of any of the following categories, that is to say -
 - (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;
- (d) a security over a ship or any share in a ship; and
- (e) a floating charge.

(3) 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 shall be substituted for the period of 21 days after the date of the creation of the charge as the time within which, under subsection (1) of this section, the particulars and copy are to be delivered to the registrar.

(4) 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 this section 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.

(5) 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 shall not, for the purposes of this section, be treated as a charge on those book debts.

(6) The holding of debentures entitling the holder to a charge on land shall not for the purposes of this section be deemed to be an interest in land.

(7) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debentureholders of that series are entitled *pari passu* is created by a company, it shall, for the purposes of this section, be sufficient if there are delivered to or received by the registrar, 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:-

- (a) the total amount secured by the whole series; and

- (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; and
- (c) a general description of the property charged; and
- (d) the names of the trustees, if any, for the debenture-holders; and
- (e) in the case of a floating charge, a statement of 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;

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 for entry in the register particulars of the date and amount of each issue; but any omission to do this shall not affect the validity of the debentures issued.

(8) 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 this section shall 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 shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not, for the purposes of this subsection, be treated as the issue of the debentures at a discount.

(9) For 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 agreement, the compliance with subsection (1) of this section shall not of itself render the charge

unavailable as security for indebtedness incurred after the date of the compliance; and where the amount secured by a charge so created is pur-
ported to be increased by a further back letter or agreement, a further
charge shall be held to have been created by the ex facie absolute disposi-
tion or assignation as qualified by the further back letter or agreement
and the provisions of this Part of this Act shall apply to such further
charge as if -

(a) references in this Part of this Act (other than in this
subsection) to the charge were references to such further
charge; and

(b) for paragraphs (a) and (b) of the next following subsection
there were substituted the words "references to the date on
which the further back letter or agreement was executed".

(10) In this Part of this Act "registrar of companies" means the registrar or other officer performing under this Act the duty of regis-
tration of companies in Scotland: and "registration" shall be construed
accordingly; "the fixed date" means the date of coming into operation
of the Companies (Floating Charges) (Scotland) Act 1961, and references
to the date of creation of a charge are -

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

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

106B. - (1) It shall be the duty of a company 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 regis-
tration under the last foregoing section, but registration of any such
charge may be effected on the application of any person interested therein.

Duty of
company to
register
charges
created by
company
(Scotland).

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

(3) If any 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 aforesaid, then, unless the registration has been effected on the application of some other person, the company and every officer of the company who is in default shall be liable to a default fine of £50.

Duty of company to register charges existing on property acquired (Scotland).

106C. - (1) Where a company registered in Scotland acquires any property which is subject to a charge of any such 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 Part of this Act, 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 manner required by this Act within 21 days after the date on which the transaction was settled:

Provided that, if 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 shall be 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.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine of £50.

Register of charges to be kept by registrar of companies (Scotland).

106D. - (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 Part of this Act, and shall, on payment of such fee as may be specified by regulations made by the Board of Trade, enter in the register with respect to such charges -

(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in section 106A(7) of this Act;

(b) in the case of any other charge -

- (i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property; and
- (ii) the amount secured by the charge; and
- (iii) short particulars of the property charged; and
- (iv) the persons entitled to the charge; and
- (v) in the case of a floating charge a statement of 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.

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

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of such fee, not exceeding one shilling for each inspection, as may be specified by regulations made by the Board of Trade.

(4) The powers to make regulations conferred by this section on the Board of Trade shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

106E. - (1) The company shall, within 30 days of the issue by them of any debenture, or certificate of debenture stock, payment of which is secured by a charge requiring registration under this Part of this Act, cause a copy of the certificate of registration given under the last foregoing section in respect thereof to be sent to the holder of the debenture or certificate of debenture stock.

Copy of certificate of registration to be sent to debenture-holder (Scotland).

(2) If default is made in complying with this section the company and any officer thereof who knowingly and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable to a fine not exceeding £100.

Entries of satisfaction and release of property from charge (Scotland).

106F. - (1) The registrar of companies, on evidence being given to his satisfaction 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 or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking,

may enter on the register a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, and where he enters a memorandum of satisfaction in whole he shall, if required, furnish the company with a copy thereof.

(2) Without prejudice to the duty of the registrar under this section to require to be satisfied as aforesaid, 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.

(3) Nothing in this section shall be held to require the registration of a memorandum of satisfaction where the company, having created a floating charge over all or any part of its property and undertaking, disposes of part of the property subject to the floating charge.

Rectification of register of charges (Scotland).

106G. The court, on being satisfied that the omission to register a charge within the time required by this Act or that the omission or misstatement 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 on other grounds it is 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 misstatement shall be rectified.

Provisions as to Company's Register of Charges and as to Copies of Instruments creating Charges

106H. Every company shall cause a copy of every instrument creating any charge requiring registration under this Part of this Act to be kept at the registered office of the company:

Copies of instruments creating charges to be kept by company (Scotland).

Provided that, in the case of a series of uniform debentures, a copy of one debenture of the series shall be sufficient.

106I. - (1) Every company shall keep at the registered office of the company a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company, giving 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 thereto.

Company's register of charges (Scotland).

(2) If any officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding £50.

106J. - (1) The copies of instruments creating any charge requiring registration under this Part of this Act with the registrar of companies, and the register of charges kept in pursuance of the last foregoing section, 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 two hours in each day shall be allowed for inspection) to the inspection of any creditor or member of the company without fee, and the register of charges shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

Right to inspect copies of instruments creating mortgages and charges and company's register of charges (Scotland).

(2) If inspection of the said copies or register is refused, every officer of the company who is in default shall be liable to a fine not exceeding £5 and a further fine not exceeding £2 for every day during which the refusal continues.

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

Extension
of
Part IIIA.

106K. The provisions of this Part of this Act shall extend to charges on property in Scotland which are created, and to charges on property in Scotland which is acquired, by a company (whether a company within the meaning of this Act or not) incorporated outside Great Britain which has a place of business in Scotland.