



Scottish Law Commission  
*promoting law reform*

| (SCOT LAW COM No 249)

# Report on Moveable Transactions Volume 3: Draft Bill

report





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# Report on Moveable Transactions Volume 3: Draft Bill

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# Moveable Transactions (Scotland) Bill

[DRAFT]

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# MOVEABLE TRANSACTIONS (SCOTLAND) BILL

[DRAFT]

An Act of the Scottish Parliament to make new provision as regards the assignment of claims; to establish a register of such assignments; to make new provision as regards the granting of security over corporeal and incorporeal moveable property; to establish a register of statutory pledges; to end the creation of agricultural charges; and for connected purposes.

## PART 1

### ASSIGNATION

#### CHAPTER 1

##### ASSIGNATION OF CLAIMS, PROTECTION OF DEBTORS AND RELATED MATTERS

###### *Assignment of claims*

#### **1 Assignment of claims: general**

- (1) The assignment of a claim requires that a document assigning it (in this Act referred to as an “assignment document”) be executed or authenticated by the person by whom it is assigned.
- (2) In this Part the person—
  - (a) by whom a claim is assigned, is referred to as the “assignor”,
  - (b) to whom a claim is assigned, is referred to as the “assignee”, and
  - (c) against whom a claim may be enforced, is referred to as the “debtor”.
- (3) The assignment document must identify the claim.
- (4) An assignment document which assigns a number of claims need not identify each claim separately provided that the document identifies the claims in terms of their constituting an identifiable class.
- (5) It is competent to assign a claim which, as at the time the assignment document is granted, is not held by the assignor (whether or not the claim yet exists at that time).
- (6) Subsection (1) is subject to section 4(4).

#### NOTE

Subsection (1) has the effect that a claim must be assigned by means of a document (“assignment document”). See section 42(2) of the Bill for the meaning of “claim”.

Subject to the exception in subsection (6), the assignment document must be signed by or on behalf of the person assigning the claim either in ink if a hard copy (“executed”) or with an electronic signature if an e-

document (“authenticated”). See section 118(1) of the Bill for the meanings of “executed” and “authenticated”.

The exception in subsection (6) relates to an assignation for the purpose of a financial collateral arrangement. The requirement in subsection (1) for the assignation document to be executed or authenticated does not apply to assignations for that purpose: see section 4(2)(a) of the Bill in that respect.

Subsection (2) defines the terms “assignor”, “assignee” and “debtor” for the purposes of Part 1 of the Bill. The assignor is the person assigning the claim, and the debtor is the person against whom the obligation is enforceable (the person to whom the obligation must be performed is also described in the Bill as the “holder” of the claim). The assignee is the person to whom the claim is assigned (who becomes the new holder).

Subsection (3) requires the claim to be identified, but subsection (4) makes it clear that claims do not need to be individually identified in the assignation document provided that these fall within an identifiable class that is identified. Thus, for example, it would be possible for a business to assign all invoices raised against a particular customer, or all invoices rendered in a period specified in the assignation document.

Subsection (5) confirms that a claim that is not held by the assignor at the date of the assignation, including a claim that has not yet come into being, can be assigned. See paragraphs 5.81 to 5.97 of the Report.

Under the existing law, the requirement of intimation to the debtor makes it difficult to assign such “future” claims. For example, a plumbing business may wish to assign to a factor the invoices for work not yet instructed by a customer. It is not possible to complete the assignation by intimating such a claim until the work had been done, and the debtor can be identified. The alternative method of registration in the Register of Assignations as set up under section 19 of the Bill will however enable the assignation of future claims.

See in general paragraphs 4.6 to 4.30 of the Report.

## **2 Assignation of claim subject to a condition**

- (1) An assignation of a claim may be subject to a condition which must be satisfied before the claim is transferred.
- (2) Any such condition must be specified in the assignation document.
- (3) Without prejudice to the generality of subsection (2), such specification may include making reference to another document the terms of which are not reproduced in the assignation document.
- (4) Without prejudice to the generality of subsection (1), the condition referred to in that subsection may be one which depends—
  - (a) on something happening (whether it is certain or not that the thing will happen), or
  - (b) on a period of time elapsing during which something must not happen (whether it is certain or not that the thing will happen at some time).

### **NOTE**

This section makes it clear that an assignation can be made subject to a condition which must be satisfied before the claim is transferred, often referred to as a “suspensive condition”.

Subsection (2) requires that the condition is set out in the assignment document, in order to enable a third party to be able to discover from the document whether there is such a condition (and in the case of a registered assignment a copy of the document will be included in the assignments record).

Subsection (3) enables a condition to be specified by reference to another document, for example the loan agreement that relates to an assignment in security.

Subsection (4) clarifies that a condition may relate to a thing that will happen, or to a thing that must not happen (in either case regardless of whether or not it is certain that the thing will happen). There is a lack of authority in those respects under the law as it stands before this provision comes into force.

See paragraphs 5.73 to 5.80 of the Report.

### **3 Transfer of claims**

- (1) A claim is transferred on the requirements mentioned in subsection (2) all being met.
- (2) Those requirements are that—
  - (a) the assignor is holder of the claim,
  - (b) either—
    - (i) intimation of the assignment is effected under section 9(1), or
    - (ii) the assignment document is registered,
  - (c) the claim is identifiable as a claim to which the assignment document relates, and
  - (d) if the assignment is subject to a condition such as is mentioned in section 2(1), the condition is satisfied.
- (3) Any rule of law as to accretion is to be disregarded in determining any matter which relates to the transfer, by virtue of subsection (1), of a claim such as is mentioned in section 1(5).
- (4) Subsection (1)—
  - (a) is without prejudice to section 1(1), and
  - (b) is subject to subsection (6) and to section 4(2)(a).
- (5) Subsection (2)(b)(ii) is subject to section 26.
- (6) Types of claim may be prescribed in relation to which sub-paragraph (i) of subsection (2)(b) is to be disregarded.

#### **NOTE**

This section provides, together with section 4(2)(a), for the transfer to the assignee (the new holder) of an assigned claim.

Subsection (1) provides that a claim is transferred when the four conditions in subsection (2) are all met.

Subsection (2) has the effect that a claim will transfer when:

- (a) The assignor is the holder of the claim,
- (b) The assignment is intimated (see section 9 of the Bill), or registered in the Register of Assignations (see Chapter 2 of Part 1 of the Bill),

- (c) The claim is identifiable as a claim to which the assignment document relates, and
- (d) Any condition to which the assignment is subject is met.

It follows that if a claim is not identifiable then the transfer is postponed until it becomes so identifiable.

Example 1 Arthur assigns to Barbara his claim to a current debt of £1000 owed by Zoe. Barbara registers the assignment in the RoA. The claim transfers on registration because the claim as constituted by the debt exists and is clearly identifiable.

Example 2 Debra assigns to Excellent Factors claims in respect of customer invoices to be issued by her as described in schedules to be sent from time to time to the factors. Excellent Factors registers the assignment in advance of any such schedule being sent. There is no transfer at the date of registration as no claim can be identified (and might not exist). The claims listed in the first such schedule transfer when that schedule is issued as they exist and can be identified at that time.

Subsection (3) provides that any rule of law as to accretion is to be disregarded in determining any matter which relates to the transfer of such claims as are mentioned in section 1(5) of the Bill (assignment of a claim not yet held by the assignor).

A person cannot convey property which that person does not own (*nemo dat quod non habet*). Accretion may however operate where a person, who has purported to do so, subsequently acquires the property. See paragraphs 5.98 to 5.100 of the Report.

The effect of accretion would be to cure the defect in the title of the assignee. It is however not clear that accretion applies where “future” claims are assigned, so subsection (3) clarifies that it does not, with the effect that the measures in the Bill replace any common law rule.

Subsections (4) and (5) provides for four qualifications as regards the transfer of claims under this section:

- (a) The first qualification has the effect that the assignment document must be formally valid.
- (b) The second qualification relates to subsection (6), which enables the Scottish Ministers to prescribe certain categories of claim which can only transfer by registration.
- (c) The third qualification relates to financial collateral arrangements, with the effect that a claim may also transfer in accordance with section 4(2)(a) of the Bill.
- (d) The fourth qualification concerns registration, with the effect that a claim is only transferred by a registration which is an effective registration for the purposes of section 26 of the Bill.

Subsection (6) enables the Scottish Ministers to prescribe certain categories of claim which can only be transferred by registration of the assignment. For example, in some jurisdictions, assignments in respect of invoices that have yet to be paid must be registered to have third party effect. If registration of assignments of so-called trade receivables was to become required in England and Wales then there may be support for this to be the position in Scotland as well.

See paragraph 5.22 of the Report.



#### **4 Financial collateral arrangements**

- (1) Subsection (2) applies if an assignment document evidences a security financial collateral arrangement or a title transfer financial collateral arrangement in respect of a claim.
- (2) The claim is transferred either—
  - (a) on the requirements mentioned in subsection (3) all being met, or
  - (b) as mentioned in section 3(1).
- (3) Those requirements are that—
  - (a) the assignor is holder of the claim,
  - (b) the financial collateral in question is in the possession, or under the control, of the collateral-taker or of a person authorised to act on the collateral-taker's behalf,
  - (c) the claim is identifiable as a claim to which the assignment document relates, and
  - (d) if the assignment is subject to a condition such as is mentioned in section 2(1), the condition is satisfied.
- (4) If the claim is transferred by virtue of subsection (2)(a), the requirements of section 1(1) as to execution or authentication do not apply.
- (5) Any rule of law as to accretion is to be disregarded in determining any matter which relates to the transfer, by virtue of subsection (2)(a), of a claim such as is mentioned in section 1(5).
- (6) Without prejudice to the generality of subsection (1), for the purposes of that subsection the assignment document may, in the case of a claim transferred by virtue of subsection (2)(a), be created—
  - (a) as writing transcribed by electronic or other means in a durable medium, or
  - (b) as sounds recorded in such a medium.
- (7) This section is to be construed as one with regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226).

#### NOTE

This section provides for an alternative method for the transfer of a claim where the assignment evidences a financial collateral arrangement.

EU law requires that assignments of that kind are capable if desired of being constituted with only minimum formalities: see Directive 2002/47/EC on Financial Collateral Arrangements, which is transposed for the UK by the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226).

A financial collateral arrangement includes both a security financial collateral arrangement and a title transfer financial collateral arrangement, each as defined in the 2003 Regulations (for which see subsection (7)).

Subsections (1) and (2) have the effect that a “financial collateral” claim will transfer either by intimation or registration under section 3 of the Bill, or under the exception for such a claim as provided for by subsection (3).

Subsection (3) has the effect that a “financial collateral” claim will also transfer when all four of the following conditions are met:

- (a) The assignor is the holder of the claim,
- (b) The collateral in question is in the possession, or under the control of, the collateral-taker (the assignee),
- (c) The claim is identifiable as a claim to which the assignment document relates, and
- (d) Any condition to which the assignment is subject is met.

Subsection (4) gives effect to Directive 2002/47/EC by providing that the requirements as to execution or authentication of the assignment document in section 1 of the Bill do not apply to a “financial collateral” claim.

Subsection (5) provides that any rule of law as to accretion is to be disregarded, for which see the notes to section 3 of the Bill.

Subsection (6) gives further effect to Directive 2002/47/EC by providing that the assignment document may be created by writing transcribed by electronic or other means in a durable medium, or by sounds recorded in such a medium. That might include the saving of a document, or the recording of a conversation, on a computer hard drive.

See paragraph 14.43, and Chapter 14 generally, of the Report.

## **5 Assignment of claims: insolvency**

- (1) Subsection (2) applies where, after an assignment document is granted, the assignor becomes insolvent.
- (2) The assignment is ineffective as regards any claim which, though identified by the assignment document as a claim assigned, is not held by the assignor before the assignor becomes insolvent.
- (3) Subsection (2) is subject to subsection (8).
- (4) For the purposes of this section—
  - (a) an assignor who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent when—
    - (i) the assignor’s estate is sequestrated,
    - (ii) the assignor grants a trust deed for creditors or makes a composition or arrangement with creditors,
    - (iii) a voluntary arrangement proposed by the assignor is approved, or
    - (iv) the assignor’s application for a debt payment programme is approved under section 2 of the Debt Arrangement and Attachment (Scotland) Act 2002, and
  - (b) an assignor other than is mentioned in paragraph (a) becomes insolvent when—
    - (i) a decision approving a voluntary arrangement entered into by the assignor has effect under section 4A of the Insolvency Act 1986,

- (ii) the assignor is wound up under Part 4 or 5 of that Act of 1986 or under section 367 of the Financial Services and Markets Act 2000,
  - (iii) an administrative receiver, as defined in section 251 of that Act of 1986, is appointed over all or part (being a part which includes the claim) of the property of the assignor, or
  - (iv) the assignor enters administration (“enters administration” being construed in accordance with paragraph 1(2) of schedule B1 of that Act of 1986).
- (5) Subsection (6) applies where a person who has assigned a claim such as is mentioned in section 1(5) is discharged—
- (a) under section 137, 138 or 140 of the Bankruptcy (Scotland) Act 2016, or
  - (b) by virtue of section 184(3) of that Act.
- (6) The assignation is ineffective, as regards the claim, if by the time of discharge the assignor has not become the holder of the claim.
- (7) The Scottish Ministers may by regulations—
- (a) amend—
    - (i) any sub-paragraph of subsection (4)(a) or (b) (including any sub-paragraph added by virtue of sub-paragraph (ii)), or
    - (ii) subsection (4)(a) or (b) by adding sub-paragraphs which specify further circumstances in which a person becomes insolvent, or
  - (b) amend subsections (5) and (6) by specifying further circumstances by reference to which an assignation is to be ineffective as regards a claim.
- (8) Subsection (2) does not apply as regards a claim in respect of income from property in so far as that claim—
- (a) is not attributable to anything agreed to by, or done by, the assignor after the assignor became insolvent, and
  - (b) relates to the use of property in existence at the time the assignor became insolvent.

NOTE

Subsections (1) and (2) have the effect that an assignation is, subject to subsection (8), ineffective as regards a claim if the assignor is insolvent at the time of becoming the holder of the claim.

Example            A tradesman assigns future invoices to a factor. The tradesman is sequestrated, and then issues an invoice for a new job carried out after the date of sequestration. The claim in respect of that invoice will not transfer to the factor.

Subsection (8) has the effect that an assignation is effective where the claim is in respect of income from property in existence at the time the assignor becomes insolvent, and that is not attributable to anything agreed to be done (or done by) the assignor after the insolvency.

Example 1            A musician has licensed the use of a song in an advert, and assigns the royalties due in respect of that use. The assignation is effective on an insolvency.

Example 2            A landlord assigns the future rent on a property to a bank. The landlord is sequestrated. The assignation remains effective for rents arising after the date of

sequestration because the rents derive from an asset (the property) of, and not from efforts by, the landlord.

Subsection (4) provides for the meaning of insolvency for that purpose, in respect of both individuals and legal persons (such as limited companies).

An assignation that is ineffective under subsection (2) does not become effective if the debtor is discharged from the insolvency.

However, claims that remain effective on an insolvency may become ineffective under subsections (5) and (6) if the debtor is discharged from a sequestration or from a protected trust deed. The effect is that any claim which comes into being after such a discharge is not transferred by the assignation, with the effect that the debtor is helped to make a fresh start after insolvency.

Subsections (5) and (6) will mainly benefit individual debtors, as only a few types of legal person can be sequestered (for example, partnerships). This protection does not otherwise apply to legal persons, and indeed the effect of a corporate insolvency is in nearly all cases the dissolution of the corporation (for example a limited company). See paragraphs 5.10 to 5.112 of the Report.

Subsection (7) gives the Scottish Ministers power to amend the list of insolvency processes in subsection (4), as well as to apply subsections (5) and (6) to circumstances other than sequestration or the granting of a trust deed.

See in general paragraphs 5.105 to 5.109 of the Report.

## **6 Assignation in part**

- (1) A claim may be assigned in whole or in part.
- (2) But subsection (1) is subject to section 7(2).
- (3) And if the claim is not a monetary claim, the claim is only assignable in part where either—
  - (a) the debtor consents, or
  - (b) the claim—
    - (i) is divisible, and
    - (ii) assigning it in part does not result in the obligation to which it relates becoming significantly more burdensome for the debtor.
- (4) Except in so far as the debtor and the assignor otherwise agree, the assignor is liable to the debtor for any expense incurred by the debtor which is attributable to the claim's being assigned in part rather than in whole.

### **NOTE**

Subsection (1) makes it clear that a claim may be assigned in whole or in part. It is based in part on paragraph 5.107 of Chapter 5 of Book III (obligations and corresponding rights) of the DCFR.

Example            Andrew lends £2,000 to Brenda. He then has a claim for repayment of that sum. But he could assign £500 of that claim to Carol and the other £1,500 to Doris. These would be assignations in part.

Subsection (2), as read with section 7(2), has the effect that:

- the account debtor (the person who must perform the obligation which is the subject of the claim) and the holder of the claim can agree, or
- the party whose unilateral undertaking gives rise to the claim can stipulate, that assignation in part is not permissible, or is permissible only in particular circumstances.

Subsection (3) provides that where the claim is not one requiring payment of money, then assignation in part is only permissible in two circumstances.

- (a) The first is where the debtor consents.
- (b) The second is where the claim is divisible, and the assignation in part does not result in a significantly greater burden on the debtor.

Thus say Elaine has an obligation to deliver 30 motor vehicles to Frank. Her obligation may not become significantly more burdensome if Frank assigns part of his claim to one person and the remainder to another. If however Frank assigns the claim to 30 persons then the obligation may well become significantly more burdensome (and therefore not assignable in part in that manner).

Subsection (4) enables the debtor to recover from the assignor, unless agreed otherwise, the expenses attributable to a claim being assigned in part under subsection (1).

**Example**            Sending payments to several partial assignees rather than one assignee may be more costly.

This section does not make provision as to how any consent or agreement for the purposes of this section is to be constituted. It might, for example, be in the agreement which gives rise to the claim or in a subsequent agreement.

See in general paragraphs 4.31 to 4.34 of the Report.

## **7            Limitations as to assignability**

- (1) Section 1 is subject to any other enactment, or any rule of law, by virtue of which the assignation of a claim is of no effect.
- (2) The assignation of a claim is of no effect if and in so far as—
  - (a) the debtor and the holder of the claim had agreed, or
  - (b) the person whose unilateral undertaking gives rise to the claim had stated, that the claim was not to be assigned.
- (3) In subsection (2)(a), “holder of the claim” includes, without prejudice to the generality of that expression, a person who did not become holder of the claim until after the agreement had been made.
- (4) Subsection (2) is subject to any other enactment.

### **NOTE**

Subsection (1) continues the effect of any current enactment or rule of law that prevents the assignation of a claim. For example, the assignation of a claim to certain social security payments is barred by section 187 of the Social Security Administration Act 1992.

Subsection (2) makes it clear that the debtor and the holder of the claim can agree, or a person giving a unilateral undertaking can state, that the claim cannot be assigned whether in whole or in part. This is known as an anti-assignment (or following England and Wales, a non-assignment) clause.

Subsection (3) confirms that the holder of the claim, for the purposes of an agreement under subsection (2), can include a person who is not yet the holder at the time of agreement.

Subsection (4) has the effect that subsection (2) is subject to any enactment which renders anti-assignment clauses ineffective, such as sections 1 and 2 of the Small Business, Enterprise and Employment Act 2015.

As for section 6, this section does not make express provision as to how any agreement or statement is to be constituted.

See paragraphs 13.2 to 13.11 of the Report.

## **8 Claim in respect of wages or salary**

- (1) It is not competent for an individual to assign a claim in respect of wages or salary payable to the individual.
- (2) For the purposes of subsection (1), “wages” and “salary” are, without prejudice to the generality of those expressions, to be taken to include—
  - (a) any—
    - (i) fee,
    - (ii) bonus,
    - (iii) commission,
    - (iv) holiday pay, or
    - (v) other emolument,referable to the individual’s employment (whether or not payable under the individual’s contract of employment),
  - (b) any payment in respect of expenses incurred by the individual in carrying out that employment, and
  - (c) if the individual is dismissed from that employment by reason of redundancy, any payment referable to the redundancy.
- (3) Subsection (1) is without prejudice to any other enactment.

### **NOTE**

This section prevents an individual assigning a claim to payments of wages or salary due to him or her, including for that purpose any associated payments such as bonus and redundancy payments. It clarifies that existing statutory provisions preventing assignment of wages etc. in particular cases will continue to have effect.

See paragraphs 5.101 to 5.104 of the Report.

## **9 Intimation of the assignment of a claim**

- (1) For the purposes of section 3(2)(b)(i), intimation is effected (and is effected only)—

- (a) by there being served on the debtor, by the assignor or the assignee, notice of the assignation, or
- (b) on the occurrence either—
  - (i) of the debtor acknowledging to the assignee that the claim is assigned, or
  - (ii) of intimation to the debtor, in judicial proceedings to which the debtor is a party, that the assignation is founded on in the proceedings.
- (2) Where in respect of any claim there are co-debtors, intimation so effected as respects any one or more of them is, for the purposes of section 3(2)(b)(i), intimation to them all.
- (3) A notice served under subsection (1)(a)—
  - (a) must—
    - (i) set out the name and address both of the assignor and of the assignee and provide details of the claim assigned and, in the case of a claim assigned in part, details also of the part assigned, or
    - (ii) provide (but only if the notice is served as mentioned in subsection (4)(c)) an electronic link to a website, or to a portal, in which the information mentioned in sub-paragraph (i) is set out,
  - (b) need not be executed or authenticated,
  - (c) if the claim is a monetary claim, may (but need not) be in a form prescribed for the purposes of this paragraph, and
  - (d) must consist of, or be contained within, a document (but that document need not be a single document).
- (4) For the purposes of subsection (1)(a), service of a notice must be by—
  - (a) delivering the notice personally to the debtor,
  - (b) sending it—
    - (i) by postal services, or
    - (ii) by any other service which conveys postal packets from one place to another,

either to the proper address of the debtor or to an address for postal communication provided to the assignor by the debtor, or
  - (c) transmitting it to an address for electronic communication so provided.
- (5) Without prejudice to the generality of subsection (3)(d), for the purposes of that subsection “document” includes—
  - (a) an e-mail, and
  - (b) an attachment to an e-mail.
- (6) In subsection (4)(b), “postal packet” and “postal services” have the meanings given to those expressions by section 27(1) and (2) of the Postal Services Act 2011.
- (7) For the purposes of subsection (4)(b), the “proper address” of the debtor is—
  - (a) in the case of a body corporate, the address of the registered or principal office of the body,

- (b) in the case of a partnership, the address of the principal office of the partnership, and
  - (c) in any other case, the last known address of the debtor.
- (8) Where a notice is served—
- (a) as mentioned in subsection (4)(b), or
  - (b) where there has been a determination under subsection (11)(b), as mentioned in that subsection as it applies by virtue of the determination,
- by being sent to an address in the United Kingdom, it is to be taken to have been received 48 hours after it is sent unless it is shown to have been received earlier.
- (9) Where a notice is served as mentioned in subsection (4)(c), it is to be taken to have been received 24 hours after it is transmitted unless it is shown to have been received earlier.
- (10) A determination such as is mentioned in subsection (11) may be made—
- (a) by written agreement between the debtor and the holder of the claim, or
  - (b) where a unilateral undertaking gives rise to the claim, by written statement (whether or not comprised within the undertaking) of the person whose undertaking it was.
- (11) The determination is (either or both)—
- (a) that only certain of the paragraphs and sub-paragraphs of subsection (4) (being paragraphs and sub-paragraphs specified in the determination) are, for the purposes of section 3(2)(b)(i), to apply as respects the claim,
  - (b) that, as respects the claim, subsection (4)(b) is to apply as if, for the reference to sending a notice “either to the proper address of the debtor or to an address for postal communication provided to the assignor by the debtor” there were substituted a reference to sending it to a particular address (being an address specified in the determination).
- (12) In subsection (10)(a), “holder of the claim” includes, without prejudice to the generality of that expression, a person who did not become holder of the claim until after the agreement had been made.
- (13) Any reference in the preceding provisions of this section to—
- (a) a notice being served on the debtor, is to be construed as including a reference to its being served on a person authorised to receive such a notice on behalf of the debtor,
  - (b) the proper address of the debtor, is to be construed as including a reference to the proper address of a person so authorised.

#### NOTE

Section 3 of the Bill sets out that an assigned claim may be transferred by intimation under subsection (1) of this section.

Subsection (1) therefore sets out a new rule on the types of intimation that must be used in order to effect the transfer of a claim. It replaces the existing statutory rules on intimation in the Transmission of Moveable Property (Scotland) Act 1862, which is therefore repealed by section 41 of the Bill.



Subsection (1)(a) provides that either the assignee or the assignor may serve notice of the assignment on the debtor. The effect when read with subsections (3) and (5) is that written notice is required, although it may be in electronic form.

Subsection (1)(b) provides, first, for “constructive” intimation to a debtor who has knowledge of the assignment of the claim.

Example            Having become aware of the assignment other than by notice, the debtor may perform – or promise to perform - to the assignee something which the assigned claim obliges the debtor to perform. The claim is transferred by the performance or the promise without any need for written intimation to the debtor.

Subsection (1)(b) provides, second, for intimation to be given, and the claim transferred, where the debtor is a party to judicial proceedings in which the assignment is founded on.

Example            The assignee raises an action against the debtor for performance of the obligation to which the claim relates. Thus if Andrew lends £2,000 to Brenda, and then he assigns the right to repayment to Carol, intimation to Brenda would be effected by Carol raising proceedings against her founding on the assignment.

Subsection (2) confirms that intimation to any one co-debtor is to be treated as intimation to all the co-debtors, as under the existing law.

Example            Kenneth lends £1,000 to Leslie and Max. If he assigns the right to repayment to Nicola then the claim will be transferred to her by intimation to either Leslie or Max.

Subsections (3) to (12) provide more detail on assignment by notice to the debtor.

Subsection (3) concerns the form and content of the notice. It should be read with section 15 of the Bill which sets out the right of the debtor to seek information about an assignment. The notice must provide (i) the name and address of both the assignor and assignee; and (ii) details of the claim (or part claim) being assigned. In the case of an electronic intimation the required information may be provided through a link to a website or portal.

A notice under subsection (3) need not be signed (in ink or electronically) and need not be set out in a single document. The effect is to authorise the practice of some factors whereby stickers are placed on invoices instructing the debtor to pay the factor, but the stickers are not signed.

Subsection (3) also provides for a power for the Scottish Ministers to prescribe a style form of notice for the assignment of monetary claims. While the style would not be mandatory, it could be helpful to parties involved in assignments to have a clear statutory style.

Subsections (4) to (11) provide for service of the notice, and are based on section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Subsection (4) permits three forms of service: (a) by personal delivery; (b) by post or courier; and (c) by electronic transmission. The Bill deviates from section 26 of the 2010 Act by allowing ordinary post and couriers because modern debt-factoring practice is to use this rather than registered delivery (despite it being harder to prove delivery). Intimation can be made either to the “proper address” of the debtor as defined in subsection (7), or an address supplied by the debtor.

Subsection (5) makes it clear that “document”, for the purposes of a notice under subsection (3), includes an email or an attachment to an email.

Subsection (6) defines certain terms by reference to the Postal Services Act 2011.

Subsection (8) provides that a notice served by post or other postal services in the UK is deemed to be received 48 hours later unless earlier receipt can be shown. Subsection (9) sets out a similar rule for electronic transmission, in that case it is deemed to be received after 24 hours.

The effect is to provide, where required, certainty as to the time of intimation. This is important in a question with third parties, such as creditors carrying out diligence, as the claim will transfer on intimation.

If the notice has not actually reached the debtor (for example, by going missing in the post) then the good faith protection rule in section 11 applies.

Subsections (10) and (11) allow the parties to make a determination that a notice must be served by means of one of the permitted ways (e.g. by electronic means), or to a particular address. In other words, the default rules can be replaced up to a point. Intimation by oral means is not however permitted.

Subsection (12) makes it clear that a determination can be entered into between a debtor and the prospective holder of a claim.

Subsection (13) allows service to be made on a party who is authorised to act on behalf of the debtor for that purpose, such as a solicitor.

See in general paragraphs 5.34 to 5.72 of the Report.

## **10 Warrandice implied in the assignation of a claim**

- (1) Subsections (2) to (4) apply except in so far as the assignor and the assignee otherwise agree.
- (2) In assigning a claim—
  - (a) for value, the assignor is taken to warrant to the assignee that—
    - (i) the assignor is entitled to, or (in the case of any such claim as is mentioned in section 1(5)) will be entitled to, transfer the claim to the assignee,
    - (ii) the debtor is obliged to, or (when performance becomes due) will be obliged to, perform in full to the assignor, and
    - (iii) the assignor has done nothing, and will do nothing, to prejudice the assignation,
  - (b) other than for value, the assignor is taken to warrant to the assignee that the assignor will do nothing to prejudice the assignation.
- (3) In assigning a claim, whether for value or other than for value, the assignor is not taken to warrant to the assignee that the debtor will perform to the assignee.
- (4) Subsections (2) and (3) apply in relation to providing, in a contract or unilateral undertaking, for the assignation of a claim as they apply in relation to assigning a claim.

### **NOTE**

This section provides for the warranties that an assignor is deemed, unless agreed otherwise, to give to the assignee in respect of an assigned claim. It replaces the current law, and clarifies the effect of warrandice. See section 17(1)(d) for the repeal of the current law.

Subsection (2) provides for both assignations for value and for gratuitous (for no value) assignations. In the first case the implied warrandice reflects the common law principle of warrandice *debitum subesse* (the

debt exists). In the second case the implied warrandice reflects the common law principle of warrandice of facts and deeds only.

Subsection (3) makes it clear that the assignee is not held to warrant that the debt will be paid. In other words, the assignor does not guarantee that the debtor is solvent and can pay the debt.

Subsection (4) has the effect that the warranties are, where applicable, implied in any contract relating to the assignation of a claim as well as in the assignation itself.

See paragraphs 13.36 to 13.43 of the Report.

### *Protection of debtors*

#### **11 Protection of debtor who performs in good faith**

- (1) Subsection (2) applies where, after a claim is transferred, the debtor, or any co-debtor, performs to the person last known to the debtor, or that co-debtor, to be the holder of the claim.
- (2) If the performance is in good faith, the debtor is discharged from the claim to the extent of the performance.
- (3) It is not to be taken, by reason only of (any or all of)—
  - (a) an assignation document's having been registered,
  - (b) the application of section 9(8),
  - (c) the application of section 9(9),

that for the purposes of subsections (1) and (2) a debtor, or any co-debtor, has performed other than in good faith.

#### NOTE

Under the existing law, a claim will only transfer if it is intimated to the debtor, but the effect of the changes in the Bill is both to extend the scope of intimation and to enable registration as a method of effecting a transfer of a claim.

The debtor may not know that a claim has been assigned, and may therefore in good faith pay an assignor who is no longer the creditor. This section has the effect that a debtor who does not, and should not, know that a claim has been assigned will still be discharged from the debt to the extent of any payment made to the assignor (or any person nominated by the assignor).

Example	Paul lends Roger £5,000. Paul assigns his right to repayment to Susan, and she registers the assignation in the RoA. The effect is to transfer the claim so that payment is due to Susan. But Roger who knows nothing of the assignation repays Paul, who accepts payment rather than telling Roger to pay Susan. Roger does not require to pay Susan any amount that he has paid in good faith to Paul.
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Subsections (1) and (2) provide for a general rule protecting a debtor who performs in good faith to the assignor where a claim has been assigned in whole or in part.

The “last known holder of the claim” formulation in subsection (1) deals with the fact that there may have been a chain of assignations rather than only one.

Subsection (3) provides that the fact that an assignment has been registered, or that it is deemed to have been intimated, does not of itself mean that the debtor does not perform in good faith. In particular, debtors should not be expected to have to check the RoA.

Good faith is not further defined in this section. But see section 120 which places the onus of showing that the debtor has performed other than in good faith on the person making such an assertion. The concept is to an extent subjective, and whether or not a debtor is in good faith will depend on the facts of the case.

Example Susan might make intimation to Roger by means of sending him a 200-page document dealing with many matters, but including the words of intimation half way down page 172. Roger may be in good faith if he still pays Paul.

See paragraphs 12.2 to 12.9 of the Report.

## **12 Further provision as to protection of debtor**

- (1) Subsection (2) applies where—
  - (a) the holder of a claim purports to assign the claim (or one and the same part of the claim) by means of more than one assignment document, each in favour of a different person,
  - (b) the claim (or part) is transferred as mentioned in section 3(1), or by virtue of section 4(2)(a), to one of those persons,
  - (c) the debtor, or any co-debtor, receives notice from the other of those persons (or as the case may be from another of those persons), ostensibly by virtue of section 9(1)(a) or (b)(ii), of the purported assignment to that other person, and
  - (d) by virtue of such notice the debtor, or any co-debtor, performs to that other person.
- (2) If the performance is in good faith, the debtor is discharged from the claim (or part) to the extent of the performance.
- (3) Subsection (3) of section 11 applies for the purposes of subsections (1) and (2) as it applies for the purposes of subsections (1) and (2) of that section.

### **NOTE**

This section provides protection for debtors who are in good faith where an assignor is not.

Subsection (1) sets out the four criteria which must each be met in order for the protection in subsection (2) to apply:

- (a) The first criterion is that the holder of the claim grants more than one assignment document in respect of the same claim (or part claim),
- (b) The second criterion is that the claim is transferred by one of the assignments to the true holder (typically, by registration of the assignment),
- (c) The third criterion is that the assignee in another of the assignments informs the debtor, either by notice or by being made party to judicial proceedings, that the claim is assigned to that assignee (the purported holder), and

- (d) The fourth criterion is that by virtue of being so informed the debtor performs to the purported holder.

Subsection (2) has the effect that if the performance to the purported holder is in good faith then the debtor is discharged from the claim (or part) to that extent, and does not need to compensate the true holder.

**Example** Liana lends Kimberley £1,000, who then assigns her claim to Monica. Monica registers the assignment in the Register of Assignations (and does not intimate). Kimberley then assigns the same claim again to Neil, who does intimate to Liana. Liana pays Neil, who is not the true holder, but provided she is in good faith she is discharged from the obligation to pay Monica.

Subsection (3) imports the rules that apply under section 11 of the Bill, namely that the debtor is not in bad faith merely because an assignment has been registered in the RoA, or because intimation has been deemed to have taken place.

See also section 120 of the Bill which places the onus of showing that the debtor has performed other than in good faith on the person making such an assertion.

See paragraphs 12.10 to 12.12 of the Report.

### **13 Performance in good faith where claim assigned is of a prescribed type**

- (1) Subsection (2) applies where—
- (a) by virtue only of being of a type prescribed under section 3(6), a claim assigned is not transferred, and
  - (b) the debtor, or any co-debtor, performs in good faith to the assignee.
- (2) The debtor is discharged from the claim to the extent of the performance.
- (3) For the purposes of subsection (1)(b) a debtor, or co-debtor, who knows—
- (a) that the assignment document has not been registered, and
  - (b) that transfer of the claim requires such registration,
- is not to be taken to perform in good faith.

#### **NOTE**

This section protects debtors who in good faith pay the assignee in an assignment that should have been registered (see section 3(6) of the Bill) but was not.

Subsection (1) sets out the two criteria which must each be met in order for the protection in subsection (2) to apply:

- (a) The first criterion is that the assignment relates to a claim of a type prescribed by the Scottish Ministers under section 3(6) of the Bill as being a claim that can only be transferred by registration, and the assignment has not been registered,
- (b) The second criterion is that, despite the claim not having transferred, the debtor performs in good faith to the assignee (perhaps because the assignment has been intimated).

Subsection (2) provides that the debtor is discharged from the claim (or part) to the extent of the performance to the assignee.

Subsection (3) sets out that the debtor will not be in good faith if the debtor knows that the assignment has not been registered, and that registration was required in order to transfer the claim, and still pays the purported assignee (who is not the holder).

See paragraphs 12.13 to 12.15 of the Report.

#### **14 Asserting defence or right of compensation**

- (1) Except in so far as the debtor and the assignor otherwise agree, the debtor, or any co-debtor, may assert against the assignee—
  - (a) any defence which the debtor has the right to assert against the assignor,
  - (b) any right of compensation which, immediately before the time mentioned in subsection (2), was available to the debtor against the assignor.
- (2) That time is the time at which the debtor would no longer have been in good faith had the debtor performed to the assignor.
- (3) Subsection (3) of section 11 applies for the purposes of subsections (1) and (2) as it applies for the purposes of subsections (1) and (2) of that section.
- (4) In so far as it allows for an exception, subsection (1) is without prejudice to any other enactment.
- (5) Without prejudice to the generality of subsection (1)(b), for the purposes of this section a right of compensation includes a right of contractual set-off but only if the basis of the right included is the contract which gives rise to the claim assigned.

#### **NOTE**

This section puts the common law rule *assignatus utitur jure auctoris* (the assignee takes the rights of the assignor) into statutory form. It is also based in part on paragraph 5.116 of Chapter 5 of Book III (obligations and corresponding rights) of the DCFR.

The new rule applies by default, so that it is open to the debtor and the assignor to agree that the debtor may not assert a particular right. This section does not make express provision as to how any agreement is to be constituted, although it will need to pre-date the assignment. See paragraphs 12.35 to 12.38 of the Report.

The effect of subsection (1)(a) is that, unless agreed otherwise, any defences which the debtor can plead against the assignor can also be pled against the assignee.

**Example**            Ona sells goods to Peter at a price of £1,000. The sale is on credit, and Ona assigns her claim for payment to Quentin. It turns out that the goods are defective. If this entitled Peter to refuse to pay Ona then he is equally entitled to refuse to pay Quentin. It does not matter that Quentin is in good faith.

Subsections (1)(b) and (5) provide a special rule for compensation (which includes contractual set-off).

**Example**            Ian owes John £1,000, but John owes Ian £200. Ian is entitled to set-off the £200 debt and only pay John £800. This right to set-off remains valid if John assigns his claim to £1,000 to Kirsten. Ian only has to pay Kirsten £800.

Subsection (2) has the effect that compensation can be pled in respect of any debt becoming due in the period up to the date that the debtor knows that there has been an assignment. This replaces the existing

law that compensation can only be pled in relation to debts which arose prior to the date of intimation of the assignation, and is necessary because under the Bill a claim can transfer by registration.

Subsection (3) applies the rules set out in section 11(3) here too. See the commentary to that provision.

Subsection (4) states that any agreement made by the parties that a defence cannot be asserted against the assignee is subject to a contrary rule in any enactment. For example, a consumer debtor may be protected by the unfair contract terms provisions in the Consumer Rights Act 2015.

See in general paragraphs 12.27 to 12.34 of the Report.

## **15 Right to withhold performance until evidence of, or statement as to, assignation is provided**

- (1) A debtor on whom a notice of assignation of a claim is served under section 9(1)(a) by an assignee may request from the assignee sufficient evidence of the assignation.
- (2) Without prejudice to the generality of subsection (1), for the purposes of that subsection “sufficient evidence” may be the written confirmation of an assignor that an assignation to which that assignor is party has taken place.
- (3) A debtor who, other than by virtue of section 9(1)(a), has reasonable grounds to believe that a claim has been assigned, may state those grounds to the supposed assignor and request that person to provide a written statement as to whether the claim has been assigned.
- (4) If a written statement provided by virtue of subsection (3) is to the effect that the claim has been assigned, that statement must include the name and address of the assignee.
- (5) If—
  - (a) evidence is requested under subsection (1), the debtor may withhold performance until—
    - (i) that evidence is received, or
    - (ii) (whether or not in response to a request under subsection (3)) the debtor receives from the supposed assignor a written statement that the claim has not been assigned, or
  - (b) a written statement is requested under subsection (3), the debtor may withhold performance until that statement (conforming, where it is a statement to the effect mentioned in subsection (4), with the requirements of that subsection) is received.

### NOTE

This section provides protections for debtors who might otherwise pay a purported assignee of a claim rather than the true holder of the claim.

It will often be the case that the debtor has little or no knowledge of an assignee, either before or after an assignation is intimated (given that there is no requirement to include a copy of the assignation document when intimating the assignation).

Subsection (1) applies where notice of an assignation has been given to the debtor, and has the effect that the debtor may request sufficient evidence of the assignation from the assignee.

Example            George owes Henry £500. Henry assigns the claim for payment to Imogen, who registers the assignation in the RoA, and then assigns to Jay who intimates to George. George can request sufficient evidence of the Imogen/Jay assignation.

Subsection (2) gives an example of “sufficient evidence”, namely written confirmation of the assignation from the assignor. There is no express requirement to provide a copy of the assignation document as it may contain information confidential to the assignor/assignee or a third party.

Subsections (3) and (4) apply where the debtor has not received a formal notice of the assignation, but has reasonable grounds to believe that the claim has been assigned. The debtor may state those grounds to the supposed assignor, and require that party to confirm the position in writing. If the claim has been assigned then the assignor must provide the name and address of the assignee.

A request for evidence, or a statement of grounds, need not be in writing.

Subsection (5) sets out the remedy where no reply is received to an enquiry in either of the above cases. The debtor is entitled to withhold performance from each of the assignor and the assignee until the evidence or a statement is provided.

Subsection (5)(a)(ii) prevents performance being withheld where the assignor confirms that there has been no assignation. This deals with the situation where the “assignee” is a fraudster who wants to prejudice the holder of the claim by making a fake intimation.

The right to withhold performance under this section is a free-standing right and separate from the protections provided for by sections 11 to 13 of the Bill.

See paragraphs 12.17 to 12.26 of the Report.

### *Accessory security rights*

#### **16      Accessory security rights**

- (1) Subsections (2) and (3)—
  - (a) apply in relation to any claim assigned in whole, and
  - (b) do not apply in relation to any claim assigned in part,but are subject to any express provision to the contrary in the assignation document.
- (2) Without prejudice to subsection (3), the assignee acquires, by virtue of the assignation, any security (in so far as the security is transferable) which relates to, and only to, the claim assigned.
- (3) Where the performance of some act by the assignor is requisite for the transfer of the security to the assignee, the assignor must as soon as reasonably practicable perform that act.
- (4) In this section, “security” means both—
  - (a) a right in security, and
  - (b) the correlative right in respect of a cautionary obligation.



## NOTE

It is an existing rule of Scots law that where a claim is assigned the assignee is entitled to the benefit of any accessory rights enjoyed by the assignor. This section puts the rule onto a statutory footing as regards accessory security rights.

Subsection (1) provides for this section to apply to a claim assigned in whole. It makes it clear that the rule in subsection (2) is a default rule, leaving it open to the parties to an assignation to agree that a right will not be acquired.

If only part of the claim is assigned then it is less clear whether, and to what extent, the assignee should acquire an accessory right. Any such right may for example relate to the whole obligation, and it is expected that the parties will make their own provision in such cases. If they do not then the partial assignation will not carry the security right.

Subsection (2) has the effect that the assignation will transfer any security which relates to the claim assigned, and is restricted to that claim.

Example 1      David lends Edgar £100,000. Edgar grants a standard security over his house in respect of the £100,000 debt. If David assigns the right to repayment of the £100,000 to Flora then she acquires the security unless agreed otherwise.

Example 2      As for example 1, but the standard security is granted for all sums due and that may become due. The assignation of the right to repayment of the £100,000 does not carry the security unless agreed otherwise, because the security is not restricted to the £100,000.

Example 3      Same as for example 2, but the assignation document expressly states that the all sums security is carried. Flora acquires the security.

In terms of subsection (3), if the assignee acquires a security under this section then the assignor is required as soon as reasonably practicable to perform any steps necessary to transfer the security. For example, in the case of a standard security, an assignation under section 14 of the Conveyancing and Feudal Reform (Scotland) Act 1970 would require to be registered in the Land Register of Scotland to be effective.

Subsection (4) defines “security” as including both a right in security (see section 42(3) of the Bill) and cautionary obligations (such as a personal security or guarantee).

See paragraphs 13.26 to 13.33 of the Report.

### *Abolition of certain rules of law*

#### **17 Abolition of certain rules of law**

- (1) The following rules of law are abolished—
  - (a) any rule whereby a mandate may operate as an assignation of a claim,
  - (b) any rule whereby an assignation is rendered ineffective by an instruction to the debtor by an assignee of a claim that the debtor perform to the assignor,
  - (c) any rule whereby an assignee of a claim may sue in the name of an assignor, and
  - (d) any rule as to warrandice to be implied—
    - (i) in assigning a claim, or

- (ii) in providing, in a contract or unilateral undertaking, for the assignation of a claim.
- (2) But subsection (1)(c) is without prejudice to the application of any—
- (a) enactment, or
  - (b) rule of law,
- as respects subrogation.

#### NOTE

Subsection (1) abolishes four common law rules.

The first is any rule that a mandate (personal instruction) to deal with a claim may operate as an assignation of the claim. The existing law is unclear, and abolishing any such rule will therefore clarify the law. See paragraphs 13.14 to 13.20 of the Report.

The second is any rule under which an assignation is made ineffective by an instruction to the debtor by the assignee to continue to perform to the assignor. There is some authority suggestive of such a rule, which is inconvenient in commercial practice. See paragraphs 5.58 to 5.61 of the Report.

The third rule is the one permitting the assignee to sue in the name of the assignor. The effect is that the assignee must raise proceedings in his or her own name. Again, see paragraphs 13.14 to 13.20 of the Report.

The fourth rule is any rule in relation to the warrandice to be implied in an assignation, or a contract relating to an assignation. Section 10 now deals with this matter, and see also paragraph 13.43 of the Report.

Subsection (2) makes it clear that the abolition of the third rule described above is without prejudice to any rule as respects subrogation, which may be regarded as a form of assignation. The effect is to preserve the well-established practice that insurers sue in the name of the insured in personal injury and other insurance cases. Again, see paragraphs 13.14 to 13.20 of the Report.

#### *Saving*

### **18 Saving as respects International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015**

- (1) This Part is without prejudice to the application, as respects the assignment and acquisition of associated rights, of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).
- (2) In subsection (1)—
  - “assignment” has the meaning given to that expression by regulation 5, as read with regulation 35, of those regulations, and
  - “associated rights” has the meaning given to that expression by regulation 5 of those regulations.

## NOTE

This is a saving provision which relates to certain rights (known as “associated rights”) which are governed by the 2015 Regulations (S.I. 2015/912).

The 2015 Regulations implement the 2001 Convention on International Interests in Mobile Equipment (the “Cape Town Convention”). The Convention was agreed under the auspices of the International Institute for the Unification of Private Law, also known as UNIDROIT.

The Cape Town Convention makes provision, amongst other things, for an international security right in respect of aircraft objects as defined in the Convention. There are special rules in relation to the assignment (assignment) of such a right, and the effect of this section is that these rules take precedence over the provisions in Part 1 of the Bill.

For example, regulation 27 of the 2015 Regulations deals with the effect of the assignment of “associated rights” (rights to payment or to other performance) on the related international interest.

See paragraph 13.46 of the Report.

## CHAPTER 2

### REGISTER OF ASSIGNATIONS

#### *Register of Assignations*

#### **19 The Register of Assignations**

- (1) There is to be a public register known as the Register of Assignations.
- (2) The Register of Assignations (in this Part referred to as “the register”) is to be under the management and control of the Keeper.
- (3) Subject to the provisions of this Act the register is to be in such form as the Keeper thinks fit.
- (4) The Keeper is to take such steps as appear reasonable to the Keeper for protecting the register from—
  - (a) interference,
  - (b) unauthorised access, or
  - (c) damage.
- (5) Section 110 of the Land Registration etc. (Scotland) Act 2012 (fees) applies in relation to the register as it applies in relation to any other register under the management and control of the Keeper.

## NOTE

Subsection (1) establishes a new register for the registration of assignments of claims. The register is to be known as the “Register of Assignations” (“RoA”). See paragraphs 6.2 to 6.7 of the Report.

Subsection (2) provides that the register is to be under the management of the Keeper of the Registers of Scotland (see section 118(1) of the Bill for the definition of “Keeper”). See paragraphs 6.8 to 6.10 of the Report.

Subsection (3) states that, subject to the requirements laid down by the Bill, the Keeper has discretion as to the form in which the register is kept. See paragraphs 6.31 to 6.32 of the Report. That will therefore include the RoA being kept in a wholly electronic form.

The RoA, as with the other registers under the Keeper's control, is an important public asset. Subsection (4) therefore provides that the Keeper is to take such steps as appear reasonable to protect the RoA from interference, unauthorised access or damage (for example by hacking).

Subsection (5) enables the Scottish Ministers, in consultation with the Keeper, to set fees in relation to the RoA using their powers in section 110 of the Land Registration etc. (Scotland) Act 2012. See paragraph 6.11 of the Report.

See also section 40 of the Bill, which provides for the Scottish Ministers by regulations to make rules ("RoA Rules") as to the keeping of the RoA and related matters.

### *Structure*

#### **20 The parts of the Register of Assignations**

The Keeper must make up and maintain, as parts of the register—

- (a) the assignations record, and
- (b) the archive record.

#### NOTE

See paragraph 7.2 of the Report.

#### **21 The assignations record of the Register of Assignations**

(1) An entry in the assignations record is to include—

- (a) the assignor's name and address,
- (b) where the assignor is an individual, the assignor's date of birth,
- (c) any number which the assignor bears and which, by virtue of RoA Rules, must be included in the entry,
- (d) the assignee's name and address,
- (e) any number which the assignee bears and which, by virtue of RoA Rules, must be included in the entry,
- (f) where the assignee is not an individual, an address (which may be an e-mail address) to which any request for information regarding the assignation may be sent,
- (g) such description of the claim as may be—
  - (i) required, or
  - (ii) permitted,for the purposes of this subsection by RoA Rules,
- (h) a copy of the assignation document,

- (i) the registration number allocated under section 23(4)(b) to the entry,
  - (j) the date, and time of registration, of the assignment document, and
  - (k) such other data as may be required by virtue of any other section of this Act (including, without prejudice to the generality of this paragraph, such other data as may be specified for the purposes of this subsection by RoA Rules).
- (2) The assignments record is the totality of all such entries.

#### NOTE

This section sets out the information which must be included in an entry in the assignments record, and provides that the assignments record is the totality of such entries.

The details of the assignee will be included in the entry in the assignments record, but a search against the assignee under section 32 of the Bill is not permitted (unless the Scottish Ministers specify in RoA Rules made under section 40 of the Bill that such a search is permitted). It will however be possible for an entitled person as defined in section 36 of the Bill to request information under that section about the assignment from the assignee.

An assignor or assignee may be a legal person with a unique identifying number, such as a UK limited company or limited liability partnership. The Scottish Ministers will be able to specify that these unique numbers are included in the entry in the assignments record: see section 40(1)(c)(ii) of the Bill.

This section provides that an entry in the assignments record must include a copy of the assignment document. The Scottish Ministers may however specify that information in the record, including information in the assignment document, will not be disclosed in a search of the RoA in order to protect confidential information of the parties.

See paragraphs 7.3 to 7.27, and 7.41, of the Report.

## **22 The archive record of the Register of Assignations**

The archive record—

- (a) is the totality of all entries and copy documents transferred from the assignments record under section 28(4)(a) or (b) or 29, and
- (b) includes such other data as may be specified for the purposes of this section by RoA Rules.

#### NOTE

This section sets out that the archive record is the totality, first, of the entries which have been transferred to that record from the assignments record and, second, of any other data required to be entered in the record by RoA Rules.

See paragraphs 11.19 to 11.21 of the Report.

*Applications for registration*

**23 Application for registration of assignment document**

- (1) An application for registration of an assignment document may be made to the Keeper by the assignee.
- (2) The Keeper must accept the application if—
  - (a) it—
    - (i) conforms to such RoA Rules as may relate to the application, and
    - (ii) is submitted with a copy of the assignment document,
  - (b) the Keeper has such data as the Keeper requires, by virtue of section 21(1), to make up an entry for the assignment document, and
  - (c) either—
    - (i) such fee as is payable for the registration is paid, or
    - (ii) arrangements satisfactory to the Keeper are made for payment of that fee.
- (3) If the requirements of any of paragraphs (a) to (c) of subsection (2) are not satisfied, the Keeper must reject the application and inform the applicant accordingly.
- (4) On accepting an application made under subsection (1), the Keeper—
  - (a) must—
    - (i) make up an entry for the assignment document (from that document, the data provided in the application and the circumstances of registration), and
    - (ii) maintain the entry in the assignments record, and
  - (b) must allocate a registration number to the entry.

**NOTE**

Subsection (1) enables the assignee, and only the assignee (or the assignee's agent – see 118(4)), to apply to the Keeper to register an assignment in the Register of Assignations. See paragraphs 6.21 to 6.30 of the Report.

Subsection (2) sets out that the Keeper must accept the application if it is in due form as specified in this section, conforms to RoA Rules, and the fee due to the Keeper is - or will be - paid.

Subsection (3) sets out that the Keeper must reject an application that does not conform to subsection (2). See paragraphs 7.28 to 7.30 of the Report.

Subsection (4) provides that the Keeper must on accepting an application make up and maintain the appropriate entry in the RoA, which includes allocating a registration number (as defined in section 118(1) of the Bill).

See in general paragraphs 7.31 to 7.32 of the Report.

*Verification statement and date and time of registration*

**24 Verification statement as to registration of assignment document**

- (1) The Keeper must after the registration, by virtue of an application made under section 23, of an assignment document, issue to the assignee a written statement verifying the registration.
- (2) That statement must—
  - (a) conform to such RoA Rules as may relate to the statement, and
  - (b) include—
    - (i) the date and time of the registration, and
    - (ii) the registration number allocated to the entry made up for the assignment document.
- (3) Where a statement has been issued under subsection (1), the assignor may request from the assignee a copy of that statement.
- (4) Within 21 days after a request is made under subsection (3), the assignee must supply the assignor with the copy requested.

NOTE

This section provides that the Keeper must, on accepting an application for registration under section 23 of the Bill, send a statement to the applicant verifying what has been done.

See paragraphs 7.33 to 7.40 of the Report.

**25 Date and time of registration of assignment document**

- (1) An assignment document is taken to be registered on the date and at the time which are entered for that document by virtue of section 21(1)(j).
- (2) The Keeper must—
  - (a) deal with applications for the registration of assignment documents in the order in which they are received, and
  - (b) allocate registration numbers to the entries to which those applications relate accordingly.

NOTE

Subsection (1) provides that the date and time of registration of an assignment will be the date and time shown for the relevant registration in the assignments record (for which see section 21(1)(j) of the Bill).

Subsection (2) requires the Keeper to process applications for registration of assignments in the order in which they are received, and number them accordingly. The effect is to protect the priority of registration of an assignment (and therefore of ranking of claims in for example an insolvency).

## *Effective registration*

### **26 Effective registration of assignment document**

- (1) The registration of an assignment document is ineffective if—
  - (a) the entry made up for the assignment document in the assignments record does not include a copy of that document,
  - (b) the data included, by virtue of section 21(1), in that entry contains an inaccuracy which, as at the time of registration, is seriously misleading, or
  - (c) the assignment document is invalid.
- (2) But subsection (1) is subject to section 27(8) to (10).
- (3) A registration ineffective by virtue of subsection (1) becomes effective if and when the entry is corrected.

#### **NOTE**

Subsections (1) and (2) set out three cases in which a purported registration in the assignments record is ineffective, with the result that the claim will not transfer by reason of registration.

The first case is that the entry does not include a copy of the assignment document.

The second case is that the entry contains an inaccuracy which, as at the time of registration is “seriously misleading” (for which see section 27(1)).

The third case is that the assignment document is invalid, for example because it is a forgery.

Subsection (2) qualifies subsection (1), with the effect that a registration may be either wholly or partly effective.

Subsection (3) enables an ineffective registration to become effective by means of a correction. The effect of this provision, when read with section 31(2) of the Bill, is that the registration becomes effective on the date of the correction. See paragraphs 9.33 to 9.34 of the Report.

See in general paragraphs 8.3 to 8.15 of the Report.

### **27 Seriously misleading inaccuracies in entries in the assignments record**

- (1) For the purposes of section 26(1)(b), an inaccuracy in an entry in the assignments record is seriously misleading—
  - (a) if a search of that record in accordance with—
    - (i) section 32(2)(a)(i) for the assignor’s proper name as at the date and time the entry was created, or
    - (ii) section 32(2)(a)(ii) for the assignor’s proper name as at that date and time and the assignor’s date of birth,using the search facility provided under section 33(1)(a), does not disclose the entry, or
  - (b) where the assignor is a person required by RoA Rules to be identified in that record by a unique number, if a search of that record for that number—



- (i) in accordance with section 32(2)(a)(iii), and
  - (ii) using the search facility provided under section 33(1)(a),

does not disclose the entry.
- (2) Subsection (1) is without prejudice to the generality of section 26(1).
- (3) Paragraph (a) of subsection (1) is subject to subsection (4).
- (4) Where a search mentioned in paragraph (b) of subsection (1)—
  - (a) discloses an entry, any search mentioned in paragraph (a) of that subsection which does not disclose the entry is to be disregarded,
  - (b) does not disclose an entry, any search mentioned in paragraph (a) of that subsection which discloses the entry is to be disregarded.
- (5) Subsections (1) to (4) apply in relation to a search for—
  - (a) a co-assignor’s proper name as at the date and time the entry in the assignments record is created,
  - (b) a co-assignor’s proper name as at that date and time and a co-assignor’s date of birth, or
  - (c) a unique number by which a co-assignor is identified,

as they apply in relation to the searches mentioned in subsection (1).
- (6) Without prejudice to section 26(1), in determining whether an inaccuracy in an entry in the assignments record is seriously misleading no account is to be taken of the assignment document for which the entry was made up.
- (7) An inaccuracy in an entry in the assignments record may be seriously misleading irrespective of whether any person has been misled.
- (8) Where an inaccuracy in an entry in the assignments record is seriously misleading in respect of only part of the assigned claim, that inaccuracy does not affect the entry in its application to the rest of the claim.
- (9) Where—
  - (a) the assignor consists of two or more co-assignors, and
  - (b) there is an inaccuracy in an entry in the assignments record, being an inaccuracy which is seriously misleading in respect of a co-assignor but not in respect of both (or all) the co-assignors,

that inaccuracy does not affect the entry in its application to a co-assignor in respect of whom the inaccuracy is not seriously misleading.
- (10) Subsection (9) applies in relation to an assignee which consists of two or more co-assignees as it applies in relation to an assignor which consists of two or more co-assignors.
- (11) The Scottish Ministers may by regulations amend this section by specifying further instances in which, for the purposes of section 26(1)(b), an inaccuracy in an entry is seriously misleading.
- (12) References—
  - (a) in subsection (1) to “the assignor’s proper name”, or

(b) in subsection (5) to “a co-assignor’s proper name”,  
are to the person’s name in the form determined in accordance with rules under section 40(1)(c)(i).

#### NOTE

This section makes further provision as to when an entry in the assignments record will contain an inaccuracy which is seriously misleading for the purposes of determining whether a registration is an effective registration for the purposes of section 26 of the Bill.

Section 42(7) of the Bill provides for the meaning of “inaccuracy” in the assignments record.

If a registration contains an inaccuracy that prevents it being disclosed by a properly formatted search, that inaccuracy should generally be regarded as being seriously misleading.

Subsection (1) sets out the circumstances in which an entry will be seriously misleading, and subsection (2) leaves open the possibility that the assignments record will contain other inaccuracies which are seriously misleading.

For example, there may be an inaccuracy in the name or address of an assignee such that an entitled person is unable to make an information request under section 36 of the Bill. Such an inaccuracy is not covered by subsection (1), but might still in the circumstances be seriously misleading, with the effect that the entry would be ineffective (so that the claim does not transfer).

Subsection (1) has the effect that an entry is seriously misleading where a search of the assignments record under section 32 or 33 of the Bill using the criteria specified in this subsection fails to disclose an assignor or a co-assignor. The specified criteria are - as appropriate - the proper name, proper name and date of birth, or unique number.

The proper name of a person is to be determined by RoA Rules, which might also prescribe a hierarchy of document that could be used to evidence a proper name: for example a passport, driving licence, or a birth certificate.

The point at which the search should be able to disclose an entry is the time at which the entry for the assignment was made up in the RoA. This is necessary given that the Bill does not require (as opposed to permit) the updating of an entry to correct a supervening inaccuracy such as a change of name by the assignor, for example on marriage.

Subsections (3) and (4) applies where a search is carried out against the unique number of the assignor (the “first search”). The effect is to ensure that due weight is given to the further certainty provided by a search that includes the unique number.

If the first search discloses the entry then a second search against the name alone (the “second search”) that does not disclose the entry is to be disregarded, with the result that the entry is not seriously misleading.

If the first search does not disclose the entry, and the second search does, then the second search is to be disregarded with the result that the entry has an inaccuracy which is seriously misleading.

Subsection (5) applies subsections (1) to (4) to searches against co-assignors.

Subsection (6) provides that in determining whether an inaccuracy is seriously misleading the assignment document is not to be considered (although a copy must still be part of the entry in the assignments record). The effect is that the person searching the record does not have to look at the document to determine whether the details in the record are seriously misleading.

**Example** An assignation document assigns a claim to the Iron Bank, but the entry in the assignations record shows the assignee as the Silver Bank. The entry is treated as having a seriously misleading inaccuracy even although the true assignee could be discerned from the document.

Subsection (7) makes it clear that whether an inaccuracy is seriously misleading is to be determined objectively, so that an entry may be misleading whether or not any person was actually misled.

Subsections (8) to (10) deal with an inaccuracy that relates to part of a claim, or to one co-assignor. They have the effect that an entry in the assignations record may be seriously misleading in that respect only, and will therefore be partly effective.

**Example** A single assignation of rents and of other receivables is registered. RoA Rules provide for certain types of claims including rents and receivables to be identified in a tick box on the application form for registration, and for that information to be included in the entry. A failure to tick the rents box would lead to the registration being ineffective as regards the rents, which would not therefore transfer to the assignee. The receivables would however transfer if the relevant box on the application form was ticked.

Subsection (11) enables the Scottish Ministers to make regulations setting out further circumstances in which an inaccuracy is seriously misleading.

Subsection (12) has the effect that a reference in this section to a “proper name” is to a name in the form determined by RoA Rules.

See paragraphs 8.16 to 8.30 of the Report.

### *Corrections*

#### **28 Correction of the assignations record**

- (1) Subsections (2) and (3) apply where the Keeper becomes aware of a manifest inaccuracy in the assignations record.
- (2) The Keeper must correct the record if what is needed to correct it is manifest.
- (3) Where what is needed to correct it is not manifest, the Keeper must note the inaccuracy on the entry in question.
- (4) Where under subsection (2) the Keeper corrects the record by—
  - (a) removing the entry from the assignations record, the Keeper must transfer the entry to the archive record and note on the transferred entry—
    - (i) that the transfer is in consequence of a correction under that subsection, and
    - (ii) the date and time of the removal, or
  - (b) removing or replacing data included in the entry or by replacing a copy document, the Keeper must note on the entry—
    - (i) that it has been corrected, and
    - (ii) the details of the correction (including, without prejudice to the generality of this paragraph, the date and time of the correction),

and in the case of the replacement of the copy document, must transfer the replaced copy to the archive record and retain it there.

- (5) Where under subsection (2) the Keeper effects a correction, the Keeper must notify (in so far as it is reasonable and practicable to do so)—
  - (a) every person specified for the purposes of this subsection by RoA Rules, and
  - (b) any other person whom the Keeper considers it appropriate to notify,that the correction has been effected.

#### NOTE

Subsections (1) and (2) of this section provide for the Keeper to correct a manifest inaccuracy in the assignments record, where what is needed to correct the inaccuracy is also manifest.

Subsection (3) provides for the Keeper to make a note of the inaccuracy on the entry for the assignment in the assignments record, if what is needed to correct the inaccuracy is not manifest.

Subsections (4) and (5) provide for notification of any correction, and for giving effect to the correction as appropriate in the assignments record or archive record.

See paragraphs 9.10 to 9.22 of the Report.

#### **29 Directions for, or in relation to, correction of the assignments record**

- (1) Subsection (2) applies where, in any proceedings, a court determines that the assignments record is inaccurate.
- (2) The court must direct the Keeper to correct the record.
- (3) In connection with any such correction, the court may give the Keeper such further direction (if any) as it considers requisite.
- (4) Where by virtue of subsection (2) the Keeper corrects the record by—
  - (a) removing the entry in question from the assignments record, the Keeper must transfer the entry to the archive record and note on the transferred entry—
    - (i) that the transfer is in pursuance of the direction of a court under subsection (2), and
    - (ii) the date and time of the removal, or
  - (b) removing or replacing data included in the entry or by replacing a copy document, the Keeper must note on the entry—
    - (i) that it has been corrected, and
    - (ii) the details of the correction (including, without prejudice to the generality of this paragraph, the date and time of the correction),and in the case of the replacement of the copy document, must transfer the replaced copy to the archive record and retain it there.
- (5) Where by virtue of subsection (2) the Keeper effects a correction, the Keeper must notify (in so far as it is reasonable and practicable to do so)—
  - (a) every person specified for the purposes of this subsection by RoA Rules, and

(b) any other person whom the Keeper considers it appropriate to notify,  
that the correction has been effected.

#### NOTE

This section provides for a court in appropriate proceedings to be able to direct the Keeper to correct an entry in the RoA, and for the Keeper to comply with such a direction.

Section 118(1) of the Bill sets out that “court” means the Court of Session or the sheriff.

The Bill does not provide for an express right of appeal against, or a review of, a registration decision by the Keeper. An issue relating to the accuracy of the register might be raised in other proceedings, including in a judicial review of such a decision.

Example 1      An assignation document is reduced by the court because it has been forged by one of the purported parties to the document. The court can direct the Keeper to correct the entry in the assignations record.

Example 2      An entry is created in the assignations record for an assignation by P Ltd in favour of Q Ltd. But in the application form for registration of the assignation, Q Ltd erroneously states that Z Ltd is the assignor. Z Ltd could ask the court to correct the entry, although if the inaccuracy is manifest (as is likely) then it might prefer to seek a correction under section 28 of the Bill.

In contrast with section 28 of the Bill, the court does not require to determine whether there is a manifest inaccuracy, or indeed whether what is needed to correct the inaccuracy is manifest. The proper function of the court as provided for by this section is to make a determination, and direct accordingly.

Subsections (4) and (5) provide for notification of any correction, and for giving effect to the correction as appropriate in the assignations record or archive record.

See paragraphs 9.23 to 9.27 of the Report.

### **30 Proceedings involving the accuracy of the assignations record**

The Keeper is entitled to appear and be heard in any civil proceedings, whether before a court or before a tribunal, in which is put in question (either or both)—

- (a) the accuracy of the assignations record,
- (b) what is needed to correct an inaccuracy in that record.

#### NOTE

See paragraphs 9.28 to 9.31 of the Report.

### **31 Correction of assignations record: general**

- (1) In this Part, any reference to “correction” includes (without prejudice to the generality of that expression and except in so far as the context otherwise requires)—
  - (a) the removal of data included in an entry,

- (b) the removal of an entry from the assignments record and the transfer of that entry to the archive record,
  - (c) the replacement of data, or of a copy document, included in an entry,
  - (d) the restoration of data, or of a copy document, to an entry, and
  - (e) the restoration of an entry (whether or not by removing it from the archive record and transferring it to the assignments record);
- and analogous expressions are to be construed accordingly.
- (2) A correction is taken to be made on the date and at the time which are entered for it in the register in pursuance of a provision of this Part of this Act.

#### NOTE

This section deals with some general matters in relation to corrections.

Subsection (1) sets out what is included in a reference to a “correction” in this Part of the Bill.

Subsection (2) sets out that a correction is taken to be made at the date and time for the correction as entered in the RoA. This is particularly important as regards section 26(3) of the Bill, under which an ineffective registration may be made effective by a correction with the result that the claim will transfer. See in that respect paragraphs 9.33 to 9.34 of the Report.

See in general paragraphs 9.8 and 9.9 of the Report.

### *Searches and extracts*

#### **32 Searching the assignments record**

- (1) Any person may search the assignments record provided that—
  - (a) the search accords with—
    - (i) subsection (2), and
    - (ii) such RoA Rules as are made under section 40(1)(h), and
  - (b) either—
    - (i) such fee as is payable for the search is paid, or
    - (ii) arrangements satisfactory to the Keeper are made for payment of that fee.
- (2) The assignments record may be searched only—
  - (a) by reference to any of the following data in the entries contained in that record—
    - (i) the names of assignors,
    - (ii) the names and dates of birth of assignors who are individuals,
    - (iii) the unique numbers of assignors required by RoA Rules to be identified in the assignments record by such a number,
  - (b) by reference to registration numbers allocated, under section 23(4)(b), to entries in that record, or

- (c) by reference to some other factor, or characteristic, specified for the purposes of this paragraph by RoA Rules.

#### NOTE

The RoA is a public register (see section 19(1) of the Bill).

Subsection (1) provides for any person to be able to search the assignments record, in accordance with any RoA Rules, and on payment of any fee or the making of arrangements for payment. See paragraphs 10.11 to 10.17 of the Report.

The Bill does not provide expressly for a person to be able to search the archive record. The Scottish Ministers may however make provision to that effect in RoA Rules made under section 40(1)(h) of the Bill. It is also open to any person to obtain from the Keeper an extract of an entry in either the assignments record or archive record under section 35 of the Bill.

Subsection (2) sets out that only such searches in the assignments record as are specified in that subsection, or are specified under RoA Rules, are permitted.

The restriction on searches in the assignments record in this section has two effects.

First, it reduces the risk of identity theft by ensuring that it will not be possible to search against date of birth alone. In addition, the Scottish Ministers will be able to prevent dates of birth from being disclosed by providing in RoA under section 40(1)(i) of the Bill that such dates are not to be available when searching the RoA.

Second, it reduces the risk of unfair commercial practices by not permitting a search against the assignee (typically, a bank or finance company) which might enable a competitor to obtain a list of customers. This is a common feature of personal security regimes based on UCC-9, although the Scottish Ministers will have power to vary that restriction in RoA Rules made under section 40 of the Bill.

See paragraphs 10.2 to 10.10 of the Report.

### **33 Keeper's duties and powers as regards the provision of facilities for searching the assignments record**

- (1) The Keeper—
  - (a) must for the purposes of section 32 provide a search facility the search criteria of which are specified by RoA Rules, and
  - (b) may provide such other search facilities, with such other search criteria, as the Keeper thinks fit.
- (2) In subsection (1), “search criteria” means the criteria in accordance with which what is searched for must match data in an entry in order to retrieve that entry.

#### NOTE

This section sets out that the Keeper must provide a search facility where the search criteria are as specified in RoA Rules, and may provide for other searches.

See paragraphs 10.22 to 10.29 of the Report.

### **34 Assignations record: printed search results and their evidential status**

A printed search result which relates to a search carried out by means of a search facility provided by the Keeper and which purports to show an entry in the assignations record is admissible in evidence and, in the absence of evidence to the contrary, is sufficient proof of—

- (a) the registration of the assignation document to which the result relates,
- (b) a correction of the entry in the assignations record to which the result relates, and
- (c) the date and time of such registration or correction.

#### NOTE

This section provides for printed search results obtained from the Keeper to be used as evidence of certain matters and, moreover, to prove certain matters unless there is evidence to the contrary.

This section should be read with section 35, which provides for an extract from the RoA, which will provide sufficient evidence of the contents of the relevant entry at the date the extract is issued. It cannot be rebutted by other evidence: but see the liability of the Keeper for errors in extracts under section 37(1)(d) of the Bill.

See paragraphs 10.30 and 10.31 of the Report.

### **35 Register of Assignations: extracts and their evidential status**

- (1) Any person may apply to the Keeper for an extract of an entry in the register.
- (2) The Keeper must issue the extract if either—
  - (a) such fee as is payable for issuing it is paid, or
  - (b) arrangements satisfactory to the Keeper are made for payment of that fee.
- (3) The Keeper may validate the extract as the Keeper considers appropriate.
- (4) The Keeper may issue the extract as an electronic document if the applicant does not request that it be issued as a traditional document.
- (5) The extract is to be accepted for all purposes as sufficient evidence of the contents of the entry as at the date on which and the time at which the extract is issued (being a date and time specified in the extract).

#### NOTE

This section enables any person to obtain from the Keeper an extract of any entry or part of an entry in the RoA, on payment of any fee (or making an arrangement to pay). An extract is sufficient evidence of the contents of an entry at the time the extract is issued, and can be used for the purpose of proving a fact in any court or tribunal proceedings.

See paragraphs 10.32 to 10.34 of the Report.



*Request for information*

**36 Assignee's duty to respond to request for information**

- (1) An entitled person may request the person identified in an entry in the assignments record as the assignee (the person so identified being in this section referred to as "IA") to provide the entitled person with a written statement as to whether—
  - (a) a claim specified by the entitled person is assigned by the assignment document, or
  - (b) a condition—
    - (i) so specified, and
    - (ii) to which the assignment is, under section 2(1), made subject, has been satisfied.
- (2) The following are entitled persons for the purposes of this section—
  - (a) in relation to a request under subsection (1), a person who (depending on who holds the claim) may have a right to execute diligence against the claim, or
  - (b) a person not mentioned in paragraph (a) but who—
    - (i) is prescribed under this paragraph, or
    - (ii) has the consent of the person identified in the entry as the assignor to make a request under paragraph (a) or (b) of subsection (1).
- (3) The reference in subsection (2)(a) to "a person who (depending on who holds the claim) may have a right to execute diligence against the claim" includes a reference to a person authorised to execute a charge for payment who (depending on who holds the claim) may have a right to execute diligence against the claim if and when the days of charge expire without payment.
- (4) Subject to subsection (6), IA must, within 21 days after receiving a request by virtue of subsection (1), comply with that request unless subsection (8) applies.
- (5) IA may recover from the entitled person any costs reasonably incurred in complying with the request.
- (6) The court, if satisfied that in all the circumstances it would be unreasonable to require IA—
  - (a) to comply with the request (whether in whole or in part), may by order, on the application of IA, exempt IA from complying with—
    - (i) the request, or
    - (ii) such part of the request as it may specify in the order, or
  - (b) to comply with the request within the 21 days mentioned in subsection (4), may by order, on such application, extend by such number of days as it may specify in the order the period within which IA must comply with the request.
- (7) If the court is satisfied, on the application of the entitled person, that IA has, without reasonable excuse, failed to comply with subsection (4), it may by order require IA to comply with the request within 14 days.
- (8) This subsection applies—

- (a) where it is manifest that the registration is ineffective as regards the assignment of the claim to which the request relates,
- (b) in the case of a claim specified under subsection (1)(a) (and without prejudice to the generality of paragraph (a)), where it is manifest from the entry for the assignment that the claim is not assigned by the assignment document, or
- (c) where—
  - (i) IA has, within the 3 months immediately preceding IA’s receipt of the request, complied with a request under the same paragraph of subsection (1), by the same person and in relation to the same claim, and
  - (ii) the information contained in the statement issued in relation to the earlier request is still correct.

NOTE

This section provides for an entitled person, as specified in subsections (2) and (3), to be able to request information about a claim from the person identified as the assignee in the assignments record. The request does not require to be in writing, but the response does.

Subsection (1) sets out that the information that may be requested is, first, whether a particular claim is assigned by the assignment and, second, whether a condition to which the assignment is subject has been satisfied. The right to request these types of information is of particular importance where a claim is assigned before it is held by the assignor (a “future” claim). See paragraphs 11.2 to 11.10 of the Report.

Subsections (2) and (3) have the effect that an entitled person is:

- (a) a person who has (or may have) a right to execute diligence against the claim,
- (b) a person who has the consent of the assignor to make the request, and
- (c) any other person prescribed by the Scottish Ministers (see section 118(1) of the Bill for the definition of “prescribed”).

Subsection (4) gives the person named as assignee in the assignments record 21 days to respond, except where subsection (8) applies. See paragraphs 11.11 to 11.17 of the Report.

Subsection (5) allows the reasonable costs of responding to the request to be charged to the person making the request. See paragraph 11.16 of the Report.

Subsection (6) gives the court power either to exempt the person named as assignee from complying with the request, or to grant further time. For example, and depending on the circumstances, 21 days may be too short a period to assemble the necessary information.

Subsection (7) enables the court to order the person named as assignee to comply with the request for information without delay.

Subsection (8) excuses the person named as assignee from providing information in certain circumstances, namely:

- (a) where the position as to whether the claim has been assigned is clear from the register, or
- (b) where the information has been given within the last three months, and it has not changed.

The effect of this section is that persons with a legitimate interest in a claim that may be the subject of an assignment will be able to obtain information that might not otherwise be available by searching the RoA. Information provisions of this type are a common feature of UCC-9 and the PPSA regimes.

Example            D Ltd is a plumbing business. It assigns its “future” customer invoices to B Ltd to be identified on schedules to be sent to B Ltd. D Ltd becomes insolvent. Its liquidator requires to see whether certain invoices have been assigned, and makes an information request under this section.

### *Entitlement to compensation*

## **37 Register of Assignations: liability of Keeper**

- (1) A person is entitled to be compensated by the Keeper for loss suffered in consequence of—
  - (a) an inaccuracy attributable to the Keeper—
    - (i) in the making up, maintenance or operation of the register, or
    - (ii) in an attempted correction of the register,
  - (b) the issue, under section 24(1), of a written statement which is incorrect,
  - (c) the service, under section 28(5) or 29(5), of a notification which is incorrect, or
  - (d) the issue, under section 35, of an extract which is not a true extract.
- (2) But the Keeper has no liability under subsection (1)—
  - (a) in so far as the person’s loss could have been avoided had the person taken measures which it would have been reasonable for the person to take,
  - (b) in so far as the person’s loss is not reasonably foreseeable, or
  - (c) for non-patrimonial loss.

### NOTE

This section provides for the Keeper to compensate any person who has suffered a loss in consequence of a matter specified in subsection (1).

Liability under subsection (1) is strict, in that the person does not have to show that the Keeper is at fault. However, subsection (2) limits the losses that can be recovered by excluding certain types of claim. The limitation is similar to that in section 106 of the Land Registration etc. (Scotland) Act 2012.

See paragraphs 11.22 to 11.34 of the Report.

## **38 Register of Assignations: liability of certain other persons**

- (1) Where a person (in this section referred to as “P”) suffers loss in consequence of—
  - (a) an inaccuracy in an entry in the register (not being an inaccuracy attributable to the Keeper), P is entitled to be compensated for that loss by the person who made the application which gave rise to the entry if, in making it, that person failed to take reasonable care,

- (b) an inaccuracy in information supplied in response to a request under section 36(1), P is entitled to be compensated for that loss by the person who supplied the information if, in supplying it, that person failed to take reasonable care, or
  - (c) a failure, without reasonable cause, to comply with a request under section 36(4), P is entitled to be compensated for that loss by the person whose failure it was.
- (2) But a person has no liability under subsection (1)—
- (a) in so far as P’s loss could have been avoided had P taken measures which it would have been reasonable for P to take,
  - (b) in so far as P’s loss is not reasonably foreseeable, or
  - (c) for non-patrimonial loss.

NOTE

This section provides for certain persons to be liable, on fault shown, for losses suffered by another person in consequence of a matter specified in subsection (1).

Subsection (1)(a) applies where a person suffers loss as a result of an inaccuracy in an entry, where the person who made the application which led to the entry did not exercise reasonable care.

**Example** Bruce maliciously registers a forged assignation bearing to be granted by Claire in an effort to affect her credit rating. Claire has a claim against Bruce if she suffers loss.

Subsection (1)(b) applies where, as a result of a failure to take reasonable care, there is an inaccuracy in responding to an information request under section 36 of the Bill.

**Example** Information is supplied by Brian that a certain claim is not carried by an assignation from Andrew to Brian. But Brian does not take reasonable care, and the information is wrong. The person who receives the information then takes what will be an invalid assignation of the claim from Andrew, because it has already been transferred to Brian. That person will have a claim against Brian.

Subsection (1)(c) applies where a person has failed, without reasonable cause, to provide information under section 36 of the Bill.

**Example** Alan has granted an assignation of certain claims to Bob. The Selkirk Bank is considering whether or not to lend money to Alan, and seeks information from Bob with the consent of Alan about which claims are assigned. Bob does not comply, and the Bank obtains a court order. Bob still does not comply, and the Bank decides not to make the loan. Alan has a claim against Bob for loss suffered due to being unable to obtain a loan from the Bank.

Subsection (2) imposes the same restrictions on liability as those set out in section 37(2) of the Bill.

See paragraphs 11.35 to 11.42 of the Report.

*Service of documents for purposes of certain sections of this Chapter of Part 1*

**39 Service of documents for purposes of certain sections of this Chapter of Part 1**

In the application of section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (service of documents) for the purposes of section 28(5), 29(5) or 36(1)—

- (a) subsection (4) of that section of that Act is to be construed as if, for paragraphs (a) to (c) of the subsection, there were substituted the words “the address given for the person in the entry in question”, and
- (b) where an e-mail address for the person identified as the assignee is contained in the entry in question, the demand, request or notice is to be taken to be served as mentioned in subsection (2)(c) of that section of that Act on being transmitted to the e-mail address.

**NOTE**

Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 makes provision in relation to the service (including sending) of documents for the purpose of measures in an Act of the Scottish Parliament.

This section modifies those provisions for the purposes of certain provisions in Chapter 1 of Part 1 of the Bill.

Paragraph (a) refers to subsection (4) of section 26, which deals with the sending of notices. The effect of paragraph (a) is that a notice should be sent to the address for the person that is given in the entry in the assignments record.

Paragraph (b) refers to subsection (2)(c) of section 26, which deals with electronic communication of notices. The effect of paragraph (b) is that where an e-mail address is given for a person in the entry in the assignments record, the communication should be to that address.

*RoA Rules*

**40 RoA Rules**

- (1) The Scottish Ministers may by regulations make rules (in this Act referred to as “RoA Rules”)—
  - (a) as to the making up and keeping of the register,
  - (b) as to procedure in relation to applications—
    - (i) for registration, or
    - (ii) for corrections,
  - (c) as to the identification, in any such application and in the register, of any person or claim, including—
    - (i) how the proper form of a person’s name is to be determined, and
    - (ii) where the person bears a number (whether of numerals or of letters and numerals) unique to the person, whether that number must (or may) be used in identifying the person,
  - (d) as to the degree of precision with which time is to be recorded in the register,

- (e) as to the manner in which an inaccuracy in the assignments record may be brought to the attention of the Keeper,
  - (f) as to information which, though contained in an assignment document, need not be included in a copy of that document submitted with an application under section 23,
  - (g) as to whether a signature contained in an assignment document need be included in a copy of that document so submitted,
  - (h) as to searches in the register,
  - (i) as to data which, though contained in the register, is not to be—
    - (i) available to persons searching it, or
    - (ii) included in any extract issued under section 35,
  - (j) prescribing the configuration, formatting and content of—
    - (i) applications,
    - (ii) notices,
    - (iii) documents,
    - (iv) data,
    - (v) statements, and
    - (vi) requests,
 to be used in relation to the register,
  - (k) as to when the register is open for—
    - (i) registration, and
    - (ii) searches,
  - (l) requiring there to be entered in the assignments record or the archive record such data as may be specified in the rules, or
  - (m) regarding other matters in relation to registration under this Part, being matters for which the Scottish Ministers consider it necessary or expedient to provide in order to give full effect to the purposes of this Part.
- (2) Before making RoA Rules the Scottish Ministers must consult the Keeper.

#### NOTE

This section sets out that the Scottish Ministers may, by regulations, make rules (RoA Rules) providing for the operation of the Register of Assignations. They must consult the Keeper before doing so.

The power to make RoA Rules includes the powers in paragraphs (f) and (g) of subsection (1) to authorise the redaction of information or signatures from an entry in the RoA, and the power in paragraph (i) to make certain information unavailable to searchers (which might include an individual's date of birth).

See paragraphs 11.43 to 11.49 of the Report.

## CHAPTER 3

### MISCELLANEOUS AND INTERPRETATION OF PART 1

#### *Miscellaneous*

#### **41 Repeal of Transmission of Moveable Property (Scotland) Act 1862**

The Transmission of Moveable Property (Scotland) Act 1862 is repealed.

#### NOTE

The Transmission of Moveable Property (Scotland) Act 1862 makes provision for intimation of claims, is superseded by the Bill, and is therefore repealed by this section.

#### *Interpretation of Part 1*

#### **42 Interpretation of Part 1**

- (1) In this Part (except where the context otherwise requires)—
  - “the archive record” is to be construed in accordance with section 22,
  - “assignment” means an assignment under section 1(1),
  - “assignment document” has the meaning given to that expression by section 1(1),
  - “the assignments record” is to be construed in accordance with section 21(2),
  - “assignee”—
    - (a) is to be construed in accordance with section 1(2)(b), and
    - (b) without prejudice to the generality of the expression, may consist of two or more co-assignees,
  - “assignor”—
    - (a) is to be construed in accordance with section 1(2)(a), and
    - (b) without prejudice to the generality of the expression, may consist of two or more co-assignors,
  - “the register” is to be construed in accordance with section 19(2), and
  - “RoA Rules” has the meaning given to that expression by section 40(1).
- (2) In this Part, a reference to a “claim”—
  - (a) is to a right to the performance of an obligation, but
  - (b) does not include a reference to—
    - (i) a non-monetary right relating to land, or
    - (ii) a negotiable instrument.
- (3) In this Part, “right in security”(except where the context otherwise requires)—
  - (a) means a right in security over property and includes a floating charge, but
  - (b) does not include a right to execute diligence.

- (4) Without prejudice to the generality of paragraph (a) of subsection (2), in that paragraph “performance” includes the fulfilment of an obligation not to do something.
- (5) Any reference, however expressed, in this Part to registering an assignment document, is to be construed as a reference to the Keeper’s carrying out the duties imposed on the Keeper by section 23(4).
- (6) Any reference in this Part to the “proper name” of a person is to that person’s name in the form determined in accordance with rules under section 40(1)(c)(i).
- (7) There is an “inaccuracy” in the assignments record where—
  - (a) data included, by virtue of section 21(1), in an entry in the record is inaccurate,
  - (b) an entry in the record—
    - (i) does not include a copy of the assignment document as required by paragraph (h) of that section, or
    - (ii) includes such a copy but the document copied is invalid, or
  - (c) an entry has incorrectly been removed from that record.

**NOTE**

This section defines key terms used in this Part of the Bill.

Subsection (2) defines “claim” as the right to the performance of an obligation, but excluding for that purpose both non-monetary rights relating to land and negotiable instruments. See paragraph 4.16 of the Report.

Subsection (3) makes it clear that the references in the Bill to “right in security” mean a right in security over property. The meaning of the expression is therefore limited to “true” securities where the secured creditor has a subordinate real right in the asset.

A right in security includes a floating charge, but does not include a right to execute diligence in satisfaction of sums due under a court order (or equivalent).

Subsection (4) confirms that “performance” includes the fulfilment of negative obligations.

**PART 2**

**SECURITY OVER MOVEABLE PROPERTY**

**CHAPTER 1**

**PLEDGE**

*Pledge, secured obligation and encumbered property*

**43 Pledge**

- (1) A pledge is a right in security over moveable property.
- (2) A pledge is created over—
  - (a) corporeal property—



- (i) by delivery of the property to the person in whose favour the pledge is granted provided that the property is the provider's at the time of delivery, or
  - (ii) in a case where the property is not the provider's at the time of such delivery, on the property becoming the provider's subsequent to such delivery,
- (b) corporeal or incorporeal property (or property which is both corporeal and incorporeal), by registration in accordance with section 48 or 49.
- (3) Without prejudice to the application of subsection (2) as respects the creation of a pledge over a financial instrument, a pledge may be created over a financial instrument in a way mentioned in section 50(2)(a).
- (4) A pledge created by registration in accordance with section 48 or 49 or in a way mentioned in section 50(2)(a) is to be known as a "statutory pledge".
- (5) In this Part—
- (a) the person in whose favour the pledge is granted is referred to as the "secured creditor", and
  - (b) the person who grants the pledge is referred to as the "provider".
- (6) Nothing in subsection (2)(a) affects any rule of law in relation to a pledge over a negotiable instrument.

#### NOTE

Subsection (1) confirms that a pledge is a type of right in security over moveable property.

Subsection (2) sets out the main methods by which a pledge is created over corporeal and incorporeal moveable property respectively. See paragraphs 21.1 to 21.3 of the Report.

Corporeal moveable property is property that has physical form, other than land or buildings (which are known as heritable property). It includes whisky, paintings, furniture, and motor vehicles.

Incorporeal moveable property is property that does not have physical form, such as intellectual property or financial instruments.

The Bill defines corporeal moveable property, but only to confirm that it does not include money for the purposes of the Bill (see section 116(1) which defines "money" by reference to section 175 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, with the effect that it means cash and banking instruments (such as cheques and postal orders)).

A pledge over corporeal moveable property, sometimes known as a possessory pledge, is with one exception created by delivery of the property to the secured creditor (for which see section 45 of the Bill).

The exception is that where the property is not the provider's when delivered then the pledge is created when the property becomes the provider's.

A pledge over corporeal moveable property can, and a pledge over incorporeal moveable property must (with one exception), be created by registration in the new Register of Statutory Pledges.

Subsection (3) sets out that the exception is for a pledge that evidences a financial collateral arrangement in respect of a financial instrument, for which see section 50 of the Bill.

Section 117 of the Bill has the effect that a reference to registering (however expressed) is a reference to registration of a pledge by the Keeper in the Register of Statutory Pledges under sections 91 and 92 of the Bill.

Subsection (6) sets out that nothing in subsection (2)(a) (creation of a possessory pledge) affects any rule of law in relation to a pledge over a negotiable instrument such as a bill of exchange or cheque.

See also paragraphs 19.8, 19.13 to 19.15, 19.31 to 19.35, and 22.59 to 22.60 of the Report.

#### **44 Secured obligation and encumbered property**

- (1) The obligation secured by a pledge is referred to in this Part as the “secured obligation”.
- (2) The secured obligation—
  - (a) may be any obligation owed, or which will or may become owed,
  - (b) need not be an obligation owed—
    - (i) by the provider, or
    - (ii) to the secured creditor, and
  - (c) includes ancillary obligations owed (as for example to pay interest, damages and the reasonable expense of extra-judicial recovery of interest or damages).
- (3) The property over which a subsisting pledge has been created (and in respect of which that pledge subsists)—
  - (a) is referred to in this Part as the “encumbered property”, and
  - (b) except in so far as the provider and the secured creditor agree otherwise, includes the natural fruits, but not the incorporeal fruits, of the property.
- (4) And that property must, at the time the pledge is created, be transferable (whether or not its transferability is restricted in some way).
- (5) Subsection (3)(b) is without prejudice to sections 75 and 76.

#### **NOTE**

Subsection (1) sets out that the obligation secured by a pledge is referred to in the Bill as a “secured obligation”.

Subsection (2) makes provision for the secured obligation. See paragraphs 19.16 to 19.26 of the Report.

Subsection (2)(a) provides that a pledge can cover both present and future obligations, as is the case for example with a standard security over land or buildings (see section 9(8)(c) of the Conveyancing and Feudal Reform (Scotland) Act 1970 in respect of obligations that can be secured on such heritable property). The effect is that it is competent to grant a pledge securing all sums due and to become due to the creditor.

Subsection (2)(b) provides, first, that a pledge can secure third party debt.

Example	George has an overdraft with the Iron Bank, and the Bank is willing to accept a pledge as security for the debt. But George does not have moveable property of any value, so his friend Holly agrees to pledge her car. Holly is thus a third party providing security for the loan by the Bank to George.
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Subsection (2)(b) provides, second, that the secured obligation may be owed to a party other than the secured creditor. This would be the case where, for example, the secured creditor is a security trustee.

Subsection (2)(c) is influenced by the DCFR IX.–2:401(1), and provides that ancillary obligations are secured by a pledge. The typical ancillary obligation is interest on a debt, but the pledge will cover other obligations such as any obligation to pay the creditor damages for a loss they have suffered (important where non-monetary obligations are secured). A pledge might also secure costs arising from the extra-judicial recovery of interest or damages, such as interest due for the late payment of debts for the purposes of Directive 2000/35/EC on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p 35).

Subsection (3)(b) gives statutory effect to a general rule of law. Unless agreed otherwise, the secured creditor is entitled to the natural fruits of the encumbered property (such as the young of animals), but not entitled to the civil fruits (such as dividends on shares, or rent payments). See paragraphs 19.65 to 19.71 of the Report.

Subsection (4) provides that the encumbered property must be transferable. This reflects general security law, as a security over a non-transferable right has no practical value (as the property could not be sold to satisfy the secured obligation). Sometimes - notably in the case of certain intellectual property licences - the property is transferable subject to restrictions, and it will be possible to take security over such property. See paragraphs 19.62 and 19.63 of the Report.

Subsection (5) provides that the default rule set out in subsection (3)(b) is without prejudice to the secured creditor's right to enforce the security by leasing or licensing the property, and applying the rents or royalty payments to the debt.

### *Possessory pledge*

#### **45 Delivery**

- (1) For the purposes of section 43(2)(a), delivery must be effected—
  - (a) by—
    - (i) physically handing over, or
    - (ii) giving control of,  
the property to the secured creditor or to a person authorised to accept delivery on behalf of the secured creditor,
  - (b) by giving control of the premises in which the property is located to the secured creditor or to a person so authorised,
  - (c) by instructing an independent third party who has direct possession or custody of the property to hold the property on behalf of the secured creditor or of a person so authorised, or
  - (d) by delivering a bill of lading representing the property to the secured creditor or to a person so authorised (and where that bill is to the order of a particular person, by procuring the endorsement of the bill in favour of the secured creditor).
- (2) Property already in the direct possession or custody—
  - (a) of the secured creditor, or
  - (b) of a person authorised to hold the property on behalf of the secured creditor,

when agreement on the creation of the pledge is reached between the provider and the secured creditor, is deemed to have been delivered in accordance with section 43(2)(a).

- (3) This section is without prejudice to section 2 of the Factors Act 1889.

#### NOTE

This section reforms and codifies the law on delivery of property to a secured creditor for the purpose of creating a possessory pledge.

Subsection (1) sets out four options for effecting delivery, at which time the pledge will be created. It makes clear, contrary to the decision in *Hamilton v Western Bank* (1856) 19 D 152, that delivery for the purpose of creating a pledge of corporeal moveable property is not restricted to physical delivery.

Subsection (1)(a) provides for physical delivery, either to the secured creditor or to their representative.

**Example** Peter might decide to offer a watch as security for a loan from Renata, and will create the pledge by handing her the watch for that purpose.

Subsection (1)(b) provides for delivery by means of giving control of the premises in which the encumbered property is kept.

**Example** Sean might decide to offer his yacht as security for a loan from Teddy, and will create the pledge by giving Teddy the only key to the boathouse in which it is stored.

Subsection (1)(c) provides for constructive delivery by means of an instruction to a third party holder of the property.

**Example** Ulrike has stored whisky in a warehouse owned by Val. She decides to offer the whisky as security for a loan by Zebedee. Delivery is effected, and the pledge created, if Ulrike instructs Val to hold the whisky on behalf of Zebedee.

Subsection (1)(d) provides for symbolic delivery by means of delivery of a bill of lading for the property, such as cargo aboard a ship as represented by the bill of lading. A bill is a document of title, and will where necessary require to be endorsed in favour of the secured creditor.

Subsection (2) provides that delivery is not required if the property is already in the direct possession or custody of the prospective secured creditor.

**Example** Joan has borrowed Karen's bicycle. Karen agrees that the bicycle can be pledged as regards a debt owed by her to Joan. The pledge is created when the agreement is made.

Subsection (3) confirms that section 2 of the Factors Act 1889 (which allows mercantile agents to pledge goods by means of handing over documents of title) continues to apply. A mercantile agent, as defined in section 1 of that Act, is an agent having in the customary course of business authority to sell goods, to consign goods for the purpose of sale, to buy goods, or to raise money on the security of goods.

See paragraphs 25.2 to 25.10 of the Report.

## *Statutory pledge*

### **46 Constitutive document**

- (1) A statutory pledge requires a constitutive document.
- (2) The constitutive document must—
  - (a) be executed or authenticated by the provider,
  - (b) identify the property which is to be the encumbered property, and
  - (c) identify the secured obligation.
- (3) For the purposes of subsection (2)(b), the property identified may either be property of, or property to be acquired by, the provider.
- (4) Without prejudice to section 52(2), if the encumbered property is to consist of more than one item the constitutive document need not identify each item separately provided that the document identifies the items in terms of their constituting an identifiable class.

#### NOTE

This section is the first of 18 sections (sections 46 to 63) that make provision for a statutory pledge. This type of pledge does not require delivery of the encumbered property, and is therefore a non-possessory pledge.

Subsection (1) provides that a statutory pledge must have a constitutive document, so that it is not competent to grant an oral non-possessory pledge. There is no equivalent rule for a possessory pledge as a security of that type is created by delivery of the encumbered property.

Subsection (2) requires that the constitutive document is subscribed by the provider using a physical signature (“executed”) or signed electronically (“authenticated”). Section 118(1) of the Bill defines “executed” and “authenticated” for that purpose. There is however an exception to that general rule for documents that evidence a security financial collateral arrangement in respect of a financial instrument, for which see section 50(5) of the Bill.

Subsections (2) and (4) also set out that the document must identify the encumbered property, including by reference to an identifiable class of property (for example, “my computers”), or by reference to a description in another document. This is however subject to section 53(2) of the Bill which has the effect that an individual must generally identify each asset to be subject to the pledge. See in general paragraphs 23.4 to 23.10 of the Report.

An entitled person, as defined in section 110(2) of the Bill, is able to obtain from the secured creditor further information in respect of the encumbered property by making a request to that effect under that section.

Subsection (3) makes it clear that a statutory pledge may be granted over property not owned by the provider at the time the property is identified in the document. This subsection should be read with section 48 of the Bill which has the effect that the pledge is not created until (and if) the property is the provider’s property.

### **47 Competence of creating statutory pledge over certain kinds of property**

- (1) It is not competent to create a statutory pledge over corporeal property if that property is—

- (a) an aircraft in respect of which it is competent to register a mortgage in the Register of Aircraft Mortgages kept by the Civil Aviation Authority,
  - (b) an aircraft object (as defined in regulation 5 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912)), or
  - (c) a ship (or a share in a ship) in respect of which it is competent to register a mortgage in the register of British ships maintained for the United Kingdom under section 8 of the Merchant Shipping Act 1995.
- (2) It is not competent to create a statutory pledge over incorporeal property unless that property is—
- (a) intellectual property,
  - (b) an application for, or licence over, intellectual property,
  - (c) a financial instrument, or
  - (d) of such other kind as may be prescribed.

#### NOTE

This provision sets out the types of moveable property in respect of which it is not competent to grant a statutory pledge.

Subsection (1) has the effect that a statutory pledge is not competent in respect of property that is subject to the alternative security regimes specified in that subsection:

- (a) For aircraft and for certain ships (and shares in ships) it is possible to create an aircraft or ship mortgage (see paragraphs 21.7 to 21.12 of the Report), and
- (b) For aircraft objects it is possible to create an international interest under the Cape Town Convention as implemented - following ratification by the United Kingdom on 27 July 2015 - by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912) (and see paragraphs 21.16 to 21.20 of the Report).

The Cape Town Convention is an international treaty intended to standardise security transactions involving certain types of moveable property, and it creates in particular international standards for security interests, and various legal remedies for default in financing agreements (including repossession).

Subsection (2) limits the scope of a statutory pledge over incorporeal moveable property to the types of property listed in paragraphs (a) to (c) of that subsection. See paragraphs 22.25 to 23.34, and paragraph 22.62, of the Report.

Subsection (2) has the effect of excluding all other types of incorporeal moveable property from the scope of the pledge, unless the property is of a type prescribed by regulations by the Scottish Ministers (see sections 116(1) and 118(1) of the Bill for the definitions of “financial instrument” and “prescribed” respectively).

#### **48 Creation of statutory pledge by registration: general**

- (1) A statutory pledge is created over property on the requirements mentioned in subsection (2) all being met.
- (2) Those requirements are that—
  - (a) the property is the provider's,
  - (b) the statutory pledge is registered, and
  - (c) the property is identifiable as property to which the constitutive document relates.
- (3) Subsection (1) is without prejudice to sections 46(2) and 49(1).
- (4) This section is subject to sections 50(2)(a), 51 and 95.

#### NOTE

Subsection (1) has the principal effect that a statutory pledge is created by registration of the constitutive document in the Register of Statutory Pledges (see section 117 of the Bill for the meaning of references to “registering” or similar expressions).

In addition, as set out in subsection (2), the property must be the provider's property, and it must be identifiable as property subject to the pledge. The pledge is only created when each of the requirements in that subsection is met, regardless of which occurs first. See paragraphs 23.19 and 23.21 to 23.27 of the Report.

It follows for example that a pledge is not created at the time of registration if the property is not the provider's at that time.

**Example** Adam grants a pledge in June to the Haddington Bank over motor vehicles he has recently acquired, to be listed in a schedule to be given to the Bank. The Bank registers the pledge in the RSP in July. Adam sends the schedule to the Bank in August. The statutory pledge is created in August when all three conditions in subsection (2) are met.

Subsections (3) and (4) qualify the effect of this section in four respects:

- (a) Subsection (1) is without prejudice to section 49(1) of the Bill, with the effect of clarifying that property can be added to the pledge by means of an amendment document.
- (b) The section is subject to section 50(2)(a) of the Bill, with the effect that a statutory pledge over a financial instrument can be created coming into the possession of, or under the control of, a collateral-taker.
- (c) The section is subject to section 51 of the Bill, with the effect that a pledge over property yet to be acquired may be ineffective if the property is acquired after the provider becomes insolvent.
- (d) The section is subject to section 95 of the Bill, with the effect that registration is ineffective if the entry in the statutory pledges record kept under section 89 of the Bill does not include a copy of the constitutive document or has a seriously misleading inaccuracy.

#### **49 Creation of statutory pledge over added property**

- (1) Subsection (2) applies where a statutory pledge is amended so as to add property to the encumbered property.
- (2) The statutory pledge is created over the added property on the requirements mentioned in subsection (3) all being met.
- (3) Those requirements are that—
  - (a) the added property is the provider's,
  - (b) the amendment is registered, and
  - (c) the added property is identifiable as property to which the amendment document relates.
- (4) This section is subject to sections 50(2)(a), 51 and 96.
- (5) Subsection (2) is without prejudice to section 60(1).

#### **NOTE**

This section provides for the creation of the security over property added to a statutory pledge.

Subsection (3) has the same effect for property added to a pledge by an amendment document as section 48(2) has for property identified in the constitutive document.

Subsection (4) sets out that this section is subject to sections 50(2)(a) and 51 of the Bill (dealing with financial instruments and insolvency respectively), and to section 96 of the Bill which sets out that registration is ineffective if the entry in the statutory pledges record does not include a copy of the amendment document or has an inaccuracy which is seriously misleading.

See paragraphs 23.21 to 23.27, and 23.33 to 23.40, of the Report.

#### **50 Creation of statutory pledge over financial instrument**

- (1) Subsection (2) applies if a constitutive document, or an amendment document, evidences a security financial collateral arrangement in respect of a financial instrument.
- (2) A statutory pledge is created over the financial instrument either—
  - (a) on the requirements mentioned in subsection (3) all being met, or
  - (b) as mentioned in, as the case may be, section 48 or 49.
- (3) Those requirements are that—
  - (a) the instrument is the property of the provider,
  - (b) the instrument is in the possession, or under the control, of the collateral-taker or of a person authorised to act on the collateral-taker's behalf, and
  - (c) the instrument is identifiable as an instrument to which the constitutive document, or amendment document, relates.
- (4) If a statutory pledge is created by virtue of subsection (2)(a), the requirements of section 46(2), or as the case may be of section 60(1), as to execution or authentication do not apply.



- (5) Without prejudice to the generality of subsection (1), for the purposes of that subsection a constitutive document, or an amendment document, may be evidenced—
  - (a) in writing transcribed by electronic or other means in a durable medium, or
  - (b) in sounds recorded in such a medium.
- (6) This section is to be construed as one with regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226).

NOTE

This section provides for statutory pledges over financial instruments in respect of a security financial collateral arrangement (“SFCA”) for the purposes of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226). The 2003 Regulations implement Directive 2002/47/EC on financial collateral arrangements (OJ L 168. 6.6.2002, p 43). See section 116(1) of the Bill for the definition of “financial instrument”.

The parties to a SFCA must both be non-natural persons, with the effect that this section will not apply to a pledge by an individual provider.

Subsections (2) and (3) have the effect that a statutory pledge in respect of a SFCA can be created by registration, as for any other statutory pledge, or by the encumbered property (the collateral) coming into the possession or under the control of the secured creditor.

Subsection (4) removes the need for a constitutive or amendment document for the purposes of a SFCA to be executed or authenticated, in order to comply with the 2003 Regulations.

Subsection (5) extends the methods by which a constitutive or amendment document for the purposes of a SFCA may be evidenced, also in order to comply with the 2003 Regulations.

See paragraphs 22.25 to 22.34, and 37.3 to 37.5, of the Report.

**51 Creation of statutory pledge: insolvency**

- (1) Subsection (2) applies where, after a statutory pledge is granted, the provider becomes insolvent.
- (2) The statutory pledge is not created over any property which, though identified by the constitutive document (or by an amendment document) as property to be encumbered, is not acquired by the provider before the provider becomes insolvent.
- (3) For the purposes of subsection (2)—
  - (a) a provider who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent when—
    - (i) the provider’s estate is sequestrated,
    - (ii) the provider grants a trust deed for creditors or makes a composition or arrangement with creditors,
    - (iii) a voluntary arrangement proposed by the provider is approved, or
    - (iv) the provider’s application for a debt payment programme is approved under section 2 of the Debt Arrangement and Attachment (Scotland) Act 2002, and

- (b) a provider other than is mentioned in paragraph (a) becomes insolvent when—
  - (i) a decision approving a voluntary arrangement entered into by the provider has effect under section 4A of the Insolvency Act 1986,
  - (ii) the provider is wound up under Part 4 or 5 of that Act of 1986 or under section 367 of the Financial Services and Markets Act 2000,
  - (iii) an administrative receiver, as defined in section 251 of that Act of 1986, is appointed over all or part (being a part to which the constitutive document or any amendment document relates) of the property of the provider, or
  - (iv) the assignor enters administration (“enters administration” being construed in accordance with paragraph 1(2) of schedule B1 of that Act of 1986).
- (4) The Scottish Ministers may by regulations amend—
  - (a) any sub-paragraph of subsection (3)(a) or (b) (including any sub-paragraph added to that subsection by virtue of paragraph (b)), or
  - (b) subsection (3)(a) or (b) by adding sub-paragraphs which specify further circumstances in which a person becomes insolvent.

NOTE

Sections 46(3) and 60(3) of the Bill set out that the property to be encumbered as described in the constitutive document of a statutory pledge, or an amendment document in respect of the pledge, may be property to be acquired by the provider of the pledge.

This section provides for the effect of the intervening insolvency of the provider by setting out that a statutory pledge will not be created over property acquired at a time when the provider is insolvent, as specified in this section.

The effect is that the property in question is treated as an asset of the provider for the purposes of the insolvency. It may for example be sold or realised for the benefit of the creditors as a whole.

Subsection (4) confers a power on the Scottish Ministers to amend subsection (3) by regulations. That power could for example be used to add a further type of insolvency to the list in subsection (3), such as an equivalent foreign insolvency.

See paragraphs 23.28 to 23.32 of the Report.

**52 Providers who are individuals**

- (1) Subsections (2) to (4) apply where the provider of a statutory pledge is an individual.
- (2) The encumbered property must consist only of assets separately identified in the constitutive document (or in any amendment document) and either—
  - (a) be the provider’s property as at the time the document in question is granted, or
  - (b) be acquired by the provider after that time if—
    - (i) the acquisition is financed by credit, and
    - (ii) an obligation to repay that credit is the secured obligation.
- (3) A corporeal asset so identified must, immediately before the document in question is granted, have a monetary value exceeding—

- (a) £1,000, or
  - (b) such other amount as may be prescribed for the purposes of this subsection.
- (4) Except that, where the provider is a sole trader, subsections (2) and (3) are to be disregarded as respects any assets used, or to be used, wholly or mainly for the purposes of the provider's business.

#### NOTE

This section provides debtor protections for individuals granting a statutory pledge over their personal property.

This section sets out that the protections do not apply where the individual is a sole trader, and the pledge is over assets used wholly or mainly for the purposes of the trader's business.

The protections in this section complement the provisions of the Consumer Credit Act 1974, which apply to the grant of any security right by an individual (as defined for the purpose of that Act in section 189(1) of the Act).

Subsection (2) sets out that the assets must be separately identified in the constitutive document and any amendment document. It would not therefore be competent for an individual to grant a statutory pledge by reference to a class of property such as "my books" or "the contents of my garage".

In addition, subsection (2) has the effect that an individual may not normally grant a statutory pledge over an asset he or she has yet to acquire. An exception to this general rule applies where the individual is supplied with credit for the purchase, and the secured obligation is the obligation to repay that credit. Thus where a motor vehicle is to be acquired, a statutory pledge can be granted over that vehicle, to secure funding for the purchase.

Subsection (3) provides that the property to be pledged must have a monetary value exceeding £1,000 (or such other sum as may be prescribed by regulations made by the Scottish Ministers). The effect is that it will not be possible for an individual to grant a statutory pledge over low-value, but essential items, such as clothing or furniture.

See paragraphs 19.50 to 19.55 of the Report.

#### *Restriction on freedom to deal with property encumbered by statutory pledge*

### **53 Restriction on freedom to deal with property encumbered by statutory pledge**

- (1) If the provider of a statutory pledge transfers the encumbered property (or any part of that property) to a third party other than with the consent mentioned in subsection (2), the transferred property remains encumbered by the pledge.
- (2) The consent—
  - (a) is the written consent of the secured creditor—
    - (i) to the particular transfer, and
    - (ii) to the property in question being transferred unencumbered by the pledge, and
  - (b) does not include consent granted more than 14 days before the particular transfer.

- (3) Whether to grant or withhold the consent mentioned in subsection (2) must be at the discretion of the secured creditor.
- (4) The statutory pledge is extinguished if the secured creditor acquiesces, expressly or impliedly, in the provider's transfer of the encumbered property (or any part of that property) to the third party other than with the consent mentioned in subsection (2).
- (5) The Scottish Ministers may by regulations—
  - (a) amend—
    - (i) any paragraph of subsection (2) (including any paragraph added to that subsection by virtue of sub-paragraph (ii)), or
    - (ii) that subsection by adding paragraphs which specify further descriptions of consent by reference to which subsection (1) is to apply, or
  - (b) amend subsection (3) by specifying further matters relevant to the granting or withholding of consent.
- (6) This section is subject to sections 54 to 57.

#### NOTE

The creation of a statutory pledge will in nearly all cases be the result of the registration of the pledge in the Register of Statutory Pledges. The effect is that the provider of the pledge will usually keep possession of the encumbered property.

This section therefore gives statutory effect to a general principle of the law of rights in security, by providing that the statutory pledge will continue to encumber the property if it is transferred without explicit written consent by the secured creditor to the particular transfer.

The secured creditor will not be able to agree in advance that the provider is free to deal with the encumbered property, as that would enable the pledge to operate in the same manner as a floating charge.

Subsection (2) sets out that the consent of the secured creditor must be in writing, and relate to the particular transfer. Thus the consent cannot be to a transfer to any unnamed person, or to a class of persons. It must be a consent to a transfer first to a specific person, and second to that person taking the property unencumbered by the pledge.

Subsection (2) also requires that the consent must be given not more than 14 days before the transfer.

Subsection (3) sets out that the decision on whether or not to give consent must be at the discretion of the secured creditor. Thus a contractual provision under which the secured creditor must consent to any or all disposals would be ineffective.

For subsections (2) and (3), see paragraphs 20.34 to 20.36 and 20.45 of the Report.

Subsection (4) is an anti-avoidance provision, given that section 54 protects acquirers in good faith in the ordinary course of a business. A statutory pledge could become tantamount to a floating charge if the secured creditor acquiesces in the provider dealing with property without consent. If this does happen, the effect of this subsection is to extinguish the statutory pledge. See paragraphs 20.52 and 20.53 of the Report.

Subsection (5) gives the Scottish Ministers power to amend the consent provisions. This would for example enable Ministers to take account of possible future developments under English law, in relation for example to the fixed/floating characterisation of charges in an insolvency.

Subsection (6) makes it clear that the provision is subject to sections 54 to 57 which protect good faith acquirers in certain circumstances.

This section does not apply to possessory (common law) pledge, as the fact that the secured creditor holds the property limits the provider's ability to deal freely with the property.

See in general paragraphs 20.34 to 20.45 of the Report.

### *Acquisition of property unencumbered by a statutory pledge*

#### **54 Acquisition in good faith in ordinary course of business**

- (1) A purchaser of corporeal property which is encumbered property acquires it unencumbered by the statutory pledge, despite the consent mentioned in section 53(2) not having been obtained, if—
  - (a) the person from whom the property is acquired is acting in the ordinary course of that person's business, and
  - (b) at the time of acquisition, the purchaser is in good faith.
- (2) For the purposes of subsection (1)(b), a purchaser is not to be taken to be other than in good faith by reason only of the statutory pledge having been registered.
- (3) This section is subject to sections 55 and 56.

#### **NOTE**

Sections 54 to 57 provide for the circumstances in which a person who acquires corporeal property in good faith will acquire the property unencumbered by the statutory pledge, despite the consent mentioned in section 53(2) of the Bill not having been obtained.

It is not likely to be efficient to grant a statutory pledge over stock-in-trade given that the secured creditor must expressly consent under section 53 of the Bill to each intended transfer. Even so, encumbered property may become part of the inventory of a business. For example, Alistair might grant a statutory pledge over his piano to a bank, and then subsequently sell the instrument to a music shop. A good faith purchaser from the shop should be protected.

Subsection (1) sets out that encumbered property transferred without the consent of the secured creditor will be acquired unencumbered by a statutory pledge if two requirements are met.

First, the transferor must have been acting in the ordinary course of that person's business. For example, a motor dealer which only sells vehicles, would not on the face of it be acting in the ordinary course of business if it sold its office furniture.

Second, the acquirer must be in good faith at the time of the acquisition. The acquirer will not be protected if the acquirer knows that the property is subject to a statutory pledge.

Subsection (2) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because it is registered.

The person who acquires the property may benefit from other measures, in particular if it is acquired in good faith for personal or related purposes (see section 55 of the Bill), or the property is a motor vehicle (see section 56 of the Bill).

See paragraphs 24.23 and 24.24 of the Report.

## **55 Acquisition in good faith for personal, domestic or household purposes**

- (1) An individual who acquires corporeal property which is encumbered property acquires it unencumbered by the statutory pledge, despite the consent mentioned in section 53(2) not having been obtained, if—
  - (a) the value of all that is so acquired does not, as at the time of acquisition, exceed such amount (if any) as may be prescribed for the purposes of this subsection,
  - (b) at the time of acquisition, the acquirer is in good faith,
  - (c) the acquirer gives value for the property acquired, and
  - (d) the property is wholly or mainly acquired for personal, domestic or household purposes.
- (2) This section does not apply in respect of the acquisition of encumbered property which consists of a motor vehicle.
- (3) For the purposes of subsection (1)(b), an acquirer is not to be taken to be other than in good faith by reason only of the statutory pledge having been registered.
- (4) In subsection (2), “motor vehicle” has the same meaning as in section 56.

### NOTE

This section protects an individual who acquires corporeal property of limited value for private or related purposes.

Subsection (1) sets out that an individual who acquires encumbered property without the consent of the secured creditor having been obtained will acquire the property unencumbered if four conditions are met:

- (a) The value of the property at the time of acquisition must not exceed an amount to be specified by the Scottish Ministers in regulations,
- (b) The acquirer must be in good faith,
- (c) The person must give value for the property acquired, normally adequate monetary value (i.e. payment of a purchase price), but also by means say of exchanging other property, and
- (d) The property must be wholly or mainly acquired for personal, domestic or household purposes (business purchasers are not protected).

The effect of applying the protection at the time of acquisition is to make it easier for the individual to prove the value of the asset, and therefore that the pledge is not effective, than would be the case if any other time was fixed for that purpose.

Subsections (2) and (4) have the effect of excluding motor vehicles from the scope of this section, because these are dealt with by section 56 of the Bill.

Subsection (3) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because it is registered. It follows that the individual does not need to search the Register of Statutory Pledges before acquiring the property.

See paragraphs 24.25 to 24.30 of the Report.

## 56 Acquisition in good faith of motor vehicles

- (1) Subsections (2) to (4) apply where—
  - (a) there is a sale agreement (or conditional sale agreement) or a hire-purchase agreement in respect of a motor vehicle,
  - (b) the motor vehicle is encumbered property,
  - (c) the purchaser or hirer is, at the time of entering into the agreement, in good faith, and
  - (d) at that time the purchaser or hirer is not a person carrying on a business described in section 29(2) of the Hire-Purchase Act 1964.
- (2) On the motor vehicle being transferred to the purchaser or hirer in accordance with the agreement, that person acquires it unencumbered by the statutory pledge despite the consent mentioned in section 53(2) not having been obtained.
- (3) And the statutory pledge is not to be enforced against the motor vehicle—
  - (a) while the agreement is extant, and
  - (b) before the motor vehicle is transferred to the purchaser or hirer in accordance with the agreement.
- (4) But if the transferor is, at the time the agreement is entered into, a person carrying on a business described in section 29(2) of the Hire-Purchase Act 1964, the secured creditor is entitled to receive from the transferor the lesser of—
  - (a) the amount outstanding in respect of the secured obligation, and
  - (b) the amount received, or to be received, by the transferor in respect of the acquisition.
- (5) For the purposes of subsection (1)(c), a purchaser or hirer is not to be taken to be other than in good faith by reason only of the statutory pledge having been registered.
- (6) In this section, “conditional sale agreement”, “hire-purchase agreement” and “motor vehicle” have the meanings given to those expressions by section 29(1) of the Hire-Purchase Act 1964.
- (7) The Scottish Ministers may by regulations specify—
  - (a) motor vehicles, or
  - (b) classes of motor vehicle,to which subsections (1) to (6) are not to apply.

### NOTE

This section protects any person who acquires a motor vehicle that is encumbered property.

It is similar in effect to the measures in section 27 of the Hire-Purchase Act 1964 in respect of motor vehicles hired under a hire-purchase contract, or purchased under a conditional sale agreement.

**Example** D Ltd supplies a motor vehicle to Barry under a hire-purchase agreement with a three-year duration. Barry will not become the owner until he makes the final payment at the end of the three years. But after six months Barry sells the vehicle to Charlotte, who believes that Barry is the owner. Under section 27 of

the 1964 Act, Charlotte will become owner of the vehicle if she is in good faith and is a private purchaser.

This section achieves the same result where Barry is the owner of the vehicle, but grants a statutory pledge over it. Charlotte would take the vehicle unencumbered by the pledge if she is a good faith private purchaser from Barry.

The term “motor vehicle” is defined in section 29 of the 1964 Act as “any mechanically propelled vehicle intended or adapted for use on roads”, and that definition is adopted for the purposes of this section.

Subsection (1) sets out four conditions which must be met if the encumbered property is to be acquired unencumbered, despite the consent of the secured creditor to the transfer not having been obtained.

The purchaser or acquirer must be in good faith, but subsection (5) makes it clear that the purchaser or acquirer is not to be regarded as not being in good faith only because the pledge is registered.

The hirer or purchaser of the encumbered property cannot be carrying on a business described in section 29(2) of the 1964 Act, namely a business which consists of:

- (a) purchasing motor vehicles for the purpose of offering or exposing them for sale, or
- (b) providing finance for purchasing motor vehicles for the purpose of hiring them under hire-purchase agreements or selling them under conditional sale agreements.

Subsection (3) protects the purchaser or hirer by preventing enforcement of the statutory pledge prior to the property being transferred in implementation of an earlier hire or sale agreement.

Subsection (4) entitles the secured creditor to a limited right of compensation against a motor dealer who transfers a vehicle that is unencumbered by the pledge.

**Example** John grants a statutory pledge over his car to the Ayr bank. He then sells the car to a motor dealer without the consent of the Bank. The motor dealer is not protected by subsection (2) because it should have made a search in the Register of Statutory Pledges against John and/or the car. But if the motor dealer then sells the car to a private purchaser who is protected then the Bank is entitled to be compensated by the dealer.

Subsection (7) provides for the Scottish Ministers to be able to exclude by regulations certain classes of vehicle from the application of this section.

**Example** The Driver and Vehicle Licensing Agency requires UK registered vehicles to have a vehicle identification number (VIN). If RSP Rules make it compulsory for an entry in the RSP to include the VIN, making it easier to check whether a particular vehicle is subject to a pledge, then Ministers might consider that the protection should not apply (say) to commercial vehicles.

See paragraphs 24.31 to 24.43 of the Report.

## **57 Acquisition of certain financial instruments in ordinary course of trading**

- (1) Subsection (2) applies where—
  - (a) a person, in the ordinary course of trading on a specified financial market, acquires a financial instrument of a specified kind, and
  - (b) that financial instrument is encumbered property.



- (2) The person acquires the instrument unencumbered by the statutory pledge, despite the consent mentioned in section 53(2) not having been obtained, provided that—
  - (a) at the time of acquisition the person does not know of the statutory pledge, and
  - (b) the acquisition takes place in accordance with the rules of the specified financial market.
- (3) In subsections (1)(a) and (2)(b), “specified” means specified, for the purposes of those provisions, by the Scottish Ministers by regulations.
- (4) Regulations under subsection (3) may specify different markets, or descriptions of market, in relation to different kinds of financial instrument.

#### NOTE

This section enables the Scottish Ministers by regulations to specify certain types of financial instruments and markets in respect of which a good faith acquirer for value, in the ordinary course of trading on the specified market, will acquire an instrument that is encumbered property free from the statutory pledge.

A financial instrument for the purposes of this section is an instrument as defined in section 116(1) of the Bill, which provides that the term is to be construed in accordance with the definition in regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226). The definition is wide and includes shares in companies, securities equivalent to shares, and bonds tradeable on the capital market.

Subsection (2) sets out the circumstances in which the instrument would be acquired unencumbered by the pledge. They are that at the time of acquisition the acquirer does not know about the pledge, and that the acquisition takes place under the rules of the specified market.

There is therefore no requirement for the acquirer to be in good faith, or for the acquirer to give value. The effect is that this section sets a high threshold for any challenge by the secured creditor of an applicable transaction, in order to protect the interests of the person acquiring the instrument.

See paragraphs 24.44 to 24.48 of the Report.

#### *Occupancy and other rights in matrimonial or family home following grant of statutory pledge*

### **58 Occupancy and other rights in matrimonial or family home following grant of statutory pledge**

- (1) The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (in this section referred to as “the 1981 Act”) and the Civil Partnership Act 2004 (in this section referred to as “the 2004 Act”) are amended in accordance with this section.
- (2) Section 2 of the 1981 Act and section 102 of the 2004 Act are each amended in accordance with subsection (3).
- (3) After subsection (8) there is inserted—
  - “(8A) In subsection (1)(a), “secured loan” includes secured obligation.
  - (8B) And in subsection (8A), “secured obligation” is to be construed in accordance with section 44(1) of the Moveable Transactions (Scotland) Act 2017.”.
- (4) Section 3 of the 1981 Act and section 103 of the 2004 Act are each amended in accordance with subsections (5) and (6).

- (5) At the end of subsection (2) there is added “or the rights of any secured creditor in relation to the non-performance of a secured obligation”.
- (6) After subsection (2) there is inserted—
- “(2A) In subsection (2), “secured creditor” has the meaning given to that expression by section 43(5)(a) of the Moveable Transactions (Scotland) Act 2017 and “secured obligation” is to be construed in accordance with section 44(1) of that Act.”.
- (7) Section 6(2) of the 1981 Act and section 106(2) of the 2004 Act are each amended in accordance with subsection (8).
- (8) In the definition of “dealing”, after the words “heritable security” there is inserted “, the grant of a statutory pledge”.
- (9) In section 8 of the 1981 Act, after subsection (2B) there is inserted—
- “(2C) For the purposes of subsection (2A) above, the time of granting a security, in the case of a statutory pledge is—
- (a) subject to paragraph (b), the date of delivery of the constitutive document of the statutory pledge,
- (b) where the statutory pledge is granted in an amendment document, the date of delivery of that document.”.
- (10) In section 108 of the 2004 Act, after subsection (4) there is inserted—
- “(5) For the purposes of subsection (3), the time of granting a security, in the case of a statutory pledge, is—
- (a) subject to paragraph (b), the date of delivery of the constitutive document of the statutory pledge,
- (b) where the statutory pledge is granted in an amendment document, the date of delivery of that document.”.
- (11) The title of section 8 of the 1981 Act becomes—
- “Interests of creditors”.**
- (12) The title of section 108 of the 2004 Act becomes—
- “Interests of creditors”.**

#### NOTE

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives non-owning (“unentitled”) spouses occupancy rights in their matrimonial home, and in some circumstances the right to use furniture and furnishings in the home.

Section 22 of the 1981 Act defines “matrimonial home” to include a caravan or houseboat. It defines “furniture and furnishings” to mean any article in the home that is reasonably necessary to enable the home to be used as a family residence. Either type of moveable corporeal property as so defined could be encumbered property for the purposes of a statutory pledge.

The Civil Partnership Act 2004 makes the equivalent provision for civil partners as the 1981 Act does for spouses. Section 1 of the 2004 Act sets out that a civil partnership is a relationship between two people of the same sex which is formed when they register as civil partners under that Act.

In both cases, the measures in those Acts apply where one spouse or partner is entitled (or permitted by a third party) to occupy the home, and the other spouse or partner is not.

The effect of subsections (2) to (3) is that, subject to sections 2 and 102 respectively of the 1981 and 2004 Acts, an order granting a spouse or civil partner the possession or use of furniture or furnishings shall not prejudice the rights of any secured creditor in relation to the non-performance of an obligation secured by a statutory pledge. Sections 2 and 102 of those Acts confer ancillary and consequential rights on non-entitled spouses and partners, including the right to make any payment due by the entitled spouse or partner in respect of a secured obligation.

Sections 6 and 106 respectively of the 1981 and 2004 Acts provide that the continued exercise of the rights conferred on a spouse or partner by those Acts shall not be prejudiced by a dealing of the entitled spouse or partner relating to the home. The effect of subsections (4) and (5) is that a dealing will for that purpose include the grant of a statutory pledge over a moveable home, such as a caravan or houseboat.

Sections 8 and 108 respectively of the 1981 and 2004 Acts provide that the rights of a third party with an interest in the home as a creditor under a secured loan shall not be prejudiced by reason only of the rights of a non-entitled spouse or partner under those Acts, provided that in each case the creditor obtains either:

- (a) a declaration from the entitled spouse that there are no occupancy rights, or
- (b) a consent to the granting of the security by the non-entitled spouse.

The effect of subsections (7) to (10) is to provide for the application of those rules to the grant of a statutory pledge over a moveable home.

See paragraphs 27.55 to 27.58, and 27.64 to 27.67, of the Report.

#### *Assignment, amendment, restriction or extinction of statutory pledge*

### **59 Assignment of statutory pledge**

- (1) Except in so far as the provider and the secured creditor otherwise agree, a statutory pledge may be (and subject to subsection (3) may only be) assigned by means of a document executed or authenticated by the secured creditor.
- (2) Subject to the provisions of that document, the assignment conveys to the assignee entitlement to the benefit of any notice served, or enforcement procedure commenced, by the assignor in respect of the statutory pledge before assignment (to the effect that the assignee may proceed as if the assignee served that notice or commenced those procedures).
- (3) A statutory pledge which has been created under section 50(2)(a) but has not been registered, may be assigned by means of an evidenced agreement between the collateral-taker and the assignee.

#### **NOTE**

This section confirms that a statutory pledge may be assigned by means of a document duly executed or authenticated by the secured creditor (with an exception in subsection (3) in the case of an unregistered statutory pledge over a financial instrument).

A pledge is a security rather than a claim, so Part 1 of the Bill does not apply to the assignment of a pledge.

The effect is that it is not competent to register an assignation of a pledge in the new Register of Assignations. The pledge will therefore only transfer if the other requirements of the general law on assignation of rights are met, including where required delivery of the document to the assignee. It would however be possible if desired to correct the RSP to show the assignee as the secured creditor (see sections 100 and 101 of the Bill)

Subsection (2) makes it clear that a statutory pledge which is being enforced can be assigned by the secured creditor, and that the assignee can continue with the enforcement rather than having to re-commence the enforcement procedure or re-serve any notice.

See paragraphs 23.41 to 23.44, and (for subsection (3)) 37.6, of the Report.

## **60 Amendment of statutory pledge**

- (1) Subject to subsections (5) and (8), a statutory pledge—
  - (a) may be amended, and
  - (b) subject to section 61(1)(a), may only be amended,by means of a document (in this Act referred to as an “amendment document”) executed or authenticated by the secured creditor and the provider.
- (2) An amendment document which relates to the addition of property to the encumbered property must identify the property to be added.
- (3) The property so identified may either be property of, or property to be acquired by, the provider.
- (4) Without prejudice to section 52(2), if the property to be added consists of more than one item the amendment document need not identify each item separately provided that the document identifies the items in terms of their constituting an identifiable class.
- (5) An amendment document which relates only to the addition of property to the encumbered property need not be executed or authenticated by the secured creditor.
- (6) Subsection (7) applies—
  - (a) where—
    - (i) the extent of the secured obligation is determinable from the terms alone of the entry for it in the statutory pledges record, and
    - (ii) an amendment document relates to increasing that extent, or
  - (b) where an amendment document relates to the addition of property to the encumbered property.
- (7) Subject to section 96, the statutory pledge is amended only on registration of the amendment.
- (8) Where a statutory pledge has been created under section 50(2)(a) but has not been registered, it may be amended by means of an evidenced agreement between the collateral-taker and the provider.

### **NOTE**

This section provides for the amendment of a statutory pledge by an amendment document (as defined in this section and in section 116(1) of the Bill).

Subsection (1) provides that a statutory pledge may only be amended by an amendment document executed or authenticated by the secured creditor and the provider, subject to three exceptions.

The first exception is that the restriction of a pledge to only part of the encumbered property may be by means of a written statement by the secured creditor (for which see sections 61(1) and 118(2) of the Bill).

The second exception is that an amendment document that only adds property to the encumbered property need not be executed by the secured creditor (as is the case with the constitutive document).

The third exception is that an unregistered statutory pledge over a financial instrument may be amended by an evidenced agreement between the provider and the secured creditor.

Added property must be identified in the amendment document and may, as in the case of the constitutive document for a statutory pledge, be property to be acquired by the provider.

Subsections (6) and (7) have the effect that an amendment document that relates to the addition of property to the encumbered property, or to variation that increases the extent of the secured obligation where that is determinable from the statutory pledges record, is amended only on registration of the amendment document (for which see sections 92(1) and 96 of the Bill).

See paragraphs 23.33 to 23.40, and (for subsection (8)) 37.6, of the Report.

## **61 Restriction or discharge of statutory pledge**

- (1) A statutory pledge may, by means of a written statement by the secured creditor, be—
  - (a) restricted to only part of the encumbered property, or
  - (b) discharged.
- (2) Subsection (1) does not apply in relation to a statutory pledge which—
  - (a) has been created under section 50(2)(a), but
  - (b) has not been registered.

### NOTE

Subsection (1) provides for the secured creditor to be able to either restrict or discharge a statutory pledge by way of a written statement.

Subsection (2) excludes unregistered statutory pledges over financial instruments created under section 50(2)(a) from the scope of this section (but see section 62 in that respect).

See paragraphs 23.49 to 23.54 of the Report.

## **62 Restriction or extinction of statutory pledge created under section 50(2)(a)**

- (1) Subject to the provisions of this section, a statutory pledge created under section 50(2)(a)—
  - (a) is extinguished in relation to the financial instrument over which the pledge is created on the financial instrument ceasing to be in the possession, or under the control—
    - (i) of the collateral-taker, or

- (ii) of a person authorised to act on behalf of the collateral-taker, and
  - (b) may be—
    - (i) restricted to only part of the encumbered property, or
    - (ii) discharged,
- by means of an evidenced statement by or on behalf of the collateral-taker.
- (2) Subsection (1) is to be construed as one with regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226).

#### NOTE

This section provides for the restriction or extinction of a statutory pledge over a financial instrument which has not been registered in the Register of Statutory Pledges.

It has the effect that the pledge is extinguished by the secured creditor (collateral-taker) giving up possession or control of the instrument, and may be restricted or discharged by means of an evidenced statement by the collateral-taker (for which see in addition section 63 of the Bill).

See paragraphs 37.8 to 37.10 of the Report.

### **63 Further provision as regards evidenced agreements and evidenced statements**

Without prejudice to the generality of sections 59(3), 60(8) and 62(1)(b), for the purposes of those provisions an agreement, or as the case may be a statement, may be evidenced—

- (a) in writing transcribed by electronic or other means in a durable medium, or
- (b) in sounds recorded in such a medium.

#### NOTE

This section ensures that the use of evidenced agreements and evidenced statements for the purposes of sections 59 to 62 of the Bill will comply with the requirements of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226). For example, a telephone recording of a conversation may suffice to evidence an agreement to restrict a statutory pledge in respect of a financial instrument.

See paragraphs 37.6 to 37.10 of the Report.

#### *Ranking of pledges etc.*

### **64 Ranking**

- (1) Subject to the provisions of this section or of any other enactment, the priority in ranking of—
- (a) any two pledges, or
  - (b) a pledge and a right in security other than a pledge,
- is determined according to their creation, the earlier created having priority over the later.

- (2) Subsection (3) applies where a provider grants, whether by means of a constitutive document or of an amendment document, two or more statutory pledges over property which, as at the time the pledges are granted, is not the property of the provider.
- (3) The priority in ranking of any two of the pledges is determined, if they are pledges created as mentioned in section 48 or 49, according to the dates on which and times at which they are registered, the earlier registered having priority over the later.
- (4) Where property is subject both to a pledge and to a security arising by operation of law, the security arising by operation of law has priority over the pledge.
- (5) The priority in ranking of a pledge is the same irrespective of whether the secured obligation is an obligation owed or is an obligation which will or may become owed.
- (6) As between—
  - (a) any two pledges, the secured creditors, or
  - (b) a pledge and a right in security other than a pledge, the secured creditor and the holder of that other right,
 may set out in a written agreement that there is no priority in ranking or that any priority in ranking is determined in a way other than would be the case in the absence of such an agreement.
- (7) An agreement under subsection (6)—
  - (a) has effect only as between the parties to it and their successors, and
  - (b) is not registrable.

#### NOTE

This section provides for the priority of payment of secured obligations in a competition between creditors, and applies to both possessory (common law) and statutory pledges.

Subsection (1) sets out the general rule that a pledge will rank against another security according to when the right is created, and is declaratory of the fundamental principle of property law *prior tempore potior jure* (earlier by time stronger by right).

Example	Patrick grants a statutory pledge over his painting to Quentin on day one. On day two, Quentin registers the pledge in the Register of Statutory Pledges. On day three Patrick creates a possessory pledge over the same painting by delivering it to Robert. The statutory pledge ranks before the possessory pledge because the former was created first.
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Subsection (4) regulates the ranking of pledges and of rights in security arising by operation of law (such as the right of a repairer to retain property submitted for repair as security for payment of the bill) so that the right in security has priority. This mirrors the rule between such rights in security and floating charges, as set out in section 464(2) of the Companies Act 1985.

Subsection (5) gives a pledge priority for the entirety of the sums secured, both current and future. It follows that there is no procedure under which a party can limit the priority of the secured creditor in a higher ranking pledge by serving a notice to that effect on the creditor (as is the case for standard securities over land under section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970)).

The effect is that a party seeking a higher ranking security than is otherwise available for sums not yet due under an earlier pledge will have to negotiate a ranking agreement with the creditor in that pledge.

Subsections (6) and (7) provide for it to be possible to have a ranking agreement in respect of a pledge and another security right (including another pledge), but it needs to be in writing. Any such agreement will only have contractual effect, and cannot be registered in the Register of Statutory Pledges.

See Chapter 26 of the Report generally, and in particular paragraphs 26.3 to 26.20, 26.27 to 26.30, and 26.35 to 26.39 of the Report.

## **65 Amendment of Companies Act 1985 and of Insolvency Act 1986**

Both in section 486(1) of the Companies Act 1985 and in section 70(1) of the Insolvency Act 1986, in the definition of “fixed security”—

- (a) the words from “a heritable security” to “1970” become paragraph (a) of the definition, and
- (b) after that paragraph insert—
  - “; or
  - (b) a statutory pledge (“statutory pledge” having the meaning given to that expression by section 43(4) of the Moveable Transactions (Scotland) Act 2017);”.

### **NOTE**

This section amends the Companies Act 1985 and the Insolvency Act 1986 to give effect for statutory pledges to the general rule that a real right in security (broadly, a ‘fixed charge’ for insolvency purposes) will, if created prior to the attachment of a floating charge, rank above the floating charge.

It does so in each case by amending the relevant definitions of “fixed security” in those Acts, with the effect that a fixed security includes a statutory pledge.

See paragraphs 20.15 to 20.26 and 26.21 to 26.23 of the Report.

## **66 Effect of diligence on pledge**

- (1) Subsection (2) applies where diligence is executed in respect of property all or any part of which is encumbered by a pledge.
- (2) The pledge has, in respect of the property or as the case may be in respect of the part, priority in ranking over the diligence except in relation to any part of the secured obligation which consists of a sum—
  - (a) advanced after execution of the diligence, and
  - (b) not required to be advanced by—
    - (i) a contractual agreement, or
    - (ii) an undertaking,entered into before execution of the diligence.
- (3) Subsection (4) applies where a pledge is created over property in respect of all or any part of which diligence has been executed.
- (4) The diligence has, in respect of the property or as the case may be in respect of the part, priority in ranking over the pledge.



## NOTE

This section governs the priority of a pledge as regards a diligence executed against the encumbered property. The basic rule is *prior tempore potior jure* (earlier by time stronger by right). If the diligence is executed first it has priority, and if the statutory pledge is created first it prevails.

Subsection (2) provides for a special rule relating to further voluntary advances made by the secured creditor, and has the effect that an advance made after the diligence is executed does not have priority over the sum attached by the diligence unless there is a prior contractual obligation or undertaking to make the advance.

**Example** Acme Ltd grants a statutory pledge over machinery for all sums due and become due to the Oban Bank, and the Bank advances £20,000 in reliance on the pledge. Louise, an unsecured creditor of Acme Ltd, then attaches the machinery for a £5,000 debt. The next day the Bank advances another £8,000 to Acme Ltd. The Bank's priority over Louise in respect of the value of the pledged property is limited to the £20,000, unless it was contractually bound to lend the further £8,000.

See paragraphs 26.31 to 26.34 of the Report.

### *Enforcement of pledge*

#### **67 The expression “pledge” in sections 68 to 82**

In sections 68 to 82 the expression “pledge” does not include a pledge as defined in section 189(1) of the Consumer Credit Act 1974 (that is to say, does not include a pawnee's rights over an article taken in pawn).

## NOTE

Sections 68 to 82 set out a statutory framework for the enforcement of both possessory and statutory pledges.

This section provides that the expression “pledge” for the purposes of those sections does not include a pledge as defined in section 189(1) of the Consumer Credit Act 1974. The effect is that a 1974 Act pledge (described in that Act as a ‘pawn’) falls to be enforced under the enforcement regime in respect of loans by pawnbrokers in that Act.

See paragraphs 27.14 to 27.17 of the Report.

#### **68 Enforcement of pledge: general**

- (1) A pledge is enforceable in no other way than in accordance with the provisions of this Part.
- (2) A pledge may be enforced—
  - (a) subject to any such agreement as is mentioned in paragraph (b), where there has been a failure to perform the secured obligation, or
  - (b) in such circumstances as are agreed between the provider and the secured creditor.
- (3) Any agreement under subsection (2)(b) must be set out in writing.

- (4) In enforcing a pledge a secured creditor must conform with reasonable standards of commercial practice.
- (5) Subsection (2) is subject to sections 69 and 70.

## NOTE

This section sets out, as a general rule, that a pledge cannot be enforced using a method not provided for by the Bill.

**Example** Barry lends David £1,000, and in exchange David grants a statutory pledge over a vintage car worth £100,000. The Bill does not permit the forfeiture of encumbered property, and it is therefore unlawful for Barry to require in the event of a default that the car is forfeited to him so that he receives a windfall worth £99,000.

Subsections (2) and (3) have the effect that a pledge may be enforced in any lawful manner on default, or in such circumstances as are agreed in writing by the provider and the secured creditor. It is influenced by the DCFR IX.–1:201(5).

Subsection (4) requires the secured creditor to conform to reasonable standards of commercial practice, and is influenced by the DCFR IX.–7:103(4). Similar provision can be found in regulation 24 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912). See in general paragraphs 27.32 to 27.36 of the Report.

What is unreasonable for the purposes of subsection (4) will differ from case to case, but might include taking an excessively long period to complete an enforcement procedure.

Subsection (4) does not however specify to whom is owed a duty to conform to reasonable standards, and so the general law will apply. The duty might for example be owed to any of the provider, the debtor (if different), another creditor, or an office-holder such as the liquidator of a limited company.

See also the analogous duties in sections 73(2), 75(2) and 76(2) on the enforcing creditor to obtain the best reasonably attainable value where encumbered property is sold, let or licensed.

See paragraphs 27.18 to 27.28 and 27.32 to 27.36 of the Report, and – as regards possessory pledge – paragraphs 25.18 to 25.22 of the Report.

## **69 Pledge Enforcement Notice**

- (1) Before taking any other steps to enforce a pledge the secured creditor must serve—
  - (a) on the provider,
  - (b) on the holder of any other right in security over the encumbered property, or over any part of that property,
  - (c) on any creditor who has executed diligence against the encumbered property, or against any part of that property,
  - (d) on any person who has statutory duties in relation to the provider’s estate and is prescribed under this paragraph, and
  - (e) in the case of a statutory pledge, on any occupier of the encumbered property, or of any part of that property, (whether or not that occupier is also the provider),

a notice in, or as nearly as may be in, a form prescribed for the purposes of this subsection.

- (2) Except that—
  - (a) paragraph (b) of subsection (1) is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the right in security mentioned in that paragraph, and
  - (b) paragraph (c) of that subsection is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the diligence executed as mentioned in that paragraph.
- (3) Different forms may be prescribed by virtue of subsection (1) for different categories of provider or occupier.
- (4) A notice served under subsection (1) is to be known as a “Pledge Enforcement Notice”.
- (5) If, by virtue of subsection (1)(e) of section 87 of the Consumer Credit Act 1974, a default notice must be served on the provider, the requirements of that section and of section 88 of that Act must be satisfied before a Pledge Enforcement Notice is served.
- (6) In subsection (5), “default notice” has the meaning given to that expression by section 87(1) of that Act.

#### NOTE

This section provides for a pledge enforcement notice, to be served before any enforcement action by the secured creditor on the provider and other interested persons (if any). A notice would for example require to be served on any person occupying a motorhome or house boat encumbered by a statutory pledge.

The Scottish Ministers are able by regulations to prescribe different forms of notice for different categories of provider or occupier (see section 118(1) for the definition of “prescribed”). For example, a form for individual providers might contain information on how to obtain legal advice, and the information that the creditor will need to obtain a court order before the pledge can be enforced.

The Scottish Ministers are also able by regulations to prescribe that notice must be given to a person who has statutory duties in relation to the provider’s property, as is the case for example in an insolvency.

Subsections (5) and (6) make it clear that the requirement to serve a pledge enforcement notice is subject to sections 87 and 88 of the Consumer Credit Act 1974, which requires a 14-day default notice to be served before the enforcement of any right in security which is subject to that Act.

If the 1974 Act applies then the default notice for the purposes of that Act will have to be served 14 days before the pledge enforcement notice can be served.

See paragraphs 27.37 to 27.45 and 27.59 to 27.63 of the Report.

## **70 Whether court order required for enforcement of pledge**

- (1) In a case where the provider of a pledge is an individual, a court order is required for enforcing the pledge unless—
  - (a) after the pledge becomes enforceable by virtue of section 68(2), the provider agrees in writing to its being enforced without such an order, or

- (b) the provider being a sole trader, enforcement is against property used wholly or mainly for the purposes of the provider’s business.
- (2) And a court order is required for enforcing a statutory pledge in respect of property which is the sole or main residence of an individual unless, after the pledge becomes enforceable by virtue of section 68(2)—
- (a) the secured creditor,
  - (b) the provider, and
  - (c) (in any case where the individual is not the provider) the individual,
- agree otherwise in writing.
- (3) Other than is mentioned in subsection (1) or (2), a court order is not required for enforcing a pledge.
- (4) The court is not to grant an order required by subsection (2) unless satisfied that enforcement is reasonable in all the circumstances of the case.
- (5) Without prejudice to the generality of subsection (4), those circumstances include—
- (a) the nature of, and reason for, the default by virtue of which authority to enforce is sought,
  - (b) whether the person in default has the ability to remedy the default within a reasonable time,
  - (c) whether the secured creditor has done anything to help the person in default remedy the default,
  - (d) where it is, or was, appropriate for the person in default to take part in a debt payment programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002, whether that person is taking part, or has taken part, in such a programme, and
  - (e) whether reasonable alternative accommodation is available for (or can be expected to be available for) the individual whose sole or main residence is the property in question.
- (6) Subsection (3) is subject to section 71(3) and (7) and to section 72(2) and (5).

NOTE

This section has the effect that a court order is required before a pledge is enforced against the individual, unless agreed otherwise by the individual after default. The effect is that an individual cannot agree in advance that a court order is not required.

Subsection (2) deals with property subject to a statutory pledge which is the sole or main residence of an individual, although that will be unusual as a pledge can only be granted over moveable property. A court order is required unless there is a written agreement to enforcement after default between the person in residence, the provider (if a different person) and the secured creditor.

Subsection (3) confirms that a court order is not required in other cases.

Subsection (6) sets out that subsection (3) is subject to sections 71 and 72 of the Bill, and confirms that in the case of a statutory pledge over respectively corporeal moveable property or a financial instrument a court order will be required in the circumstances set out in those sections.

See paragraphs 27.46 to 27.54 and 27.59 to 27.63 of the Report.

**71 Secured creditor's right to take possession of corporeal property or to ensure it is not disposed of or used in an unauthorised way**

- (1) Subsections (2) to (4) apply in relation to corporeal property in respect of which a secured creditor in a statutory pledge has served a Pledge Enforcement Notice.
- (2) Subject to subsection (3), the secured creditor is entitled—
  - (a) to take possession of the property, or
  - (b) to take any reasonable steps necessary to ensure, whether or not by immobilising the property, that it is not disposed of or used in an unauthorised way.
- (3) The secured creditor may take such possession or such steps—
  - (a) with the consent—
    - (i) of the provider given after the pledge becomes enforceable, and
    - (ii) of any third party who for the time being either is in direct possession of, or has custody of, the property,
  - (b) through the agency of an authorised person, or
  - (c) personally, if authorised to do so by the court.
- (4) The secured creditor is entitled, in taking possession of the property under subsection (2)(a), to remove any individual from that property (but only through such agency as is mentioned in subsection (3)(b)).
- (5) Subsections (2) to (4) are subject to subsections (6) and (7).
- (6) The secured creditor has no entitlement under subsections (2) to (4) if the circumstances are that the property is in the possession of a person who, in respect of the property or of any part of the property—
  - (a) has a right in security which has priority in ranking over, or ranks equally with, the pledge to which the Pledge Enforcement Notice relates, or
  - (b) has executed diligence which has priority in ranking over, or ranks equally with, that pledge.
- (7) But in the circumstances mentioned in subsection (6) the secured creditor may—
  - (a) with the consent of the person who has the right in security over, or has executed diligence against, the property,
  - (b) with the consent of the court, through such agency as is mentioned in subsection (3)(b), or
  - (c) personally, if authorised to do so by the court,take possession of the property or take such steps as are mentioned in subsection (2)(b).
- (8) Subsection (4) applies in relation to taking possession under subsection (7) as it applies in relation to taking possession under subsection (2).
- (9) In subsection (3)(b), “authorised person” means—
  - (a) a messenger-at-arms or sheriff officer,

- (b) a person qualified to act as an insolvency practitioner, or
  - (c) such other person as may be prescribed for the purposes of that subsection.
- (10) Paragraph (b) of subsection (9) is to be construed in accordance with section 390 of the Insolvency Act 1986.
- (11) This section is subject to section 70.

NOTE

This section provides for enforcement of a statutory pledge by the secured creditor following service of a pledge enforcement notice, and where appropriate the obtaining of a court order.

It enables the secured creditor to take possession of the encumbered property from, typically, the provider.

Subsection (2)(b) also enables the creditor to take any reasonable steps necessary to ensure that the property is not disposed of or used in any unauthorised way. It is influenced by the DCFR IX.–7:202(1), and is aimed at larger assets such as machinery where it might be more convenient to sell them on site. The secured creditor may simply want to immobilise the asset, so that it cannot be removed before any planned sale.

Subsection (3) has the effect that possession may only be lawfully taken using one of three methods. First, it may be taken with the consent of the provider or holder of the property. Second, it may be taken by an authorised person for the purposes of this section, such as an insolvency practitioner. Third, it may be taken by the secured creditor personally if authorised by the court.

Subsection (4) enables the secured creditor, acting through an authorised person, to remove any individual from the encumbered property. This might be necessary where the encumbered property is, for example, a motorhome or houseboat.

Subsection (6) restricts the rights of the secured creditor under this section where the property is in the possession of an equal or higher ranking secured creditor, or a creditor who has higher or equivalently ranking diligence against the property. It should however be read with subsection (7).

Subsection (7) allows possession to be taken in those circumstances by consent, or with the authority of the court. Thus it may be that the higher ranking creditor does not wish to enforce its security. In these circumstances the lower ranking statutory pledge holder may seek consent to obtain possession of the property so that their pledge can be enforced.

Subsections (9) and (10) have the effect of defining “authorised person” for the purposes of this section, and enable the Scottish Ministers to prescribe by regulations other persons as an authorised person.

See paragraphs 27.68 to 27.79 of the Report.

**72 Secured creditor’s right to take possession of certificate of financial instrument**

- (1) Subsection (2) applies in relation to a certificated financial instrument in respect of which a secured creditor in a statutory pledge has served a Pledge Enforcement Notice.
- (2) The secured creditor is entitled to take possession of the certificate of the instrument—
  - (a) with the consent—
    - (i) of the provider given after the pledge becomes enforceable, and

- (ii) of any third party who for the time being either is in direct possession of, or has custody of, that certificate,
    - (b) through the agency of an authorised person, or
    - (c) personally, if authorised to do so by the court.
- (3) Subsection (2) is subject to subsection (4).
- (4) The secured creditor has no entitlement under subsection (2) if the certificate is for the time being in the possession of a person—
  - (a) who has a right in security over the instrument, being a right in security which has priority over, or ranks equally with, the pledge to which the Pledge Enforcement Notice relates, or
  - (b) who has executed diligence against the instrument and by virtue of that diligence has priority in ranking over, or ranks equally with, the secured creditor.
- (5) But in the circumstances mentioned in subsection (4) the secured creditor may—
  - (a) with the consent of the person who has the right in security over, or has executed diligence against, the instrument,
  - (b) with the consent of the court, through such agency as is mentioned in subsection (2)(b), or
  - (c) personally, if authorised to do so by the court,
 take possession of the certificate for the instrument.
- (6) In subsection (2)(b), “authorised person” has the meaning given to that expression by subsection (9) of section 71 (as read with subsection (10) of that section).
- (7) This section is subject to section 70.

#### NOTE

This section makes provision for the secured creditor to be able to take possession of a certificated financial instrument (see the definition of “financial instrument” in section 116(1) of the Bill).

A financial instrument is a type of incorporeal moveable property, but ownership of the instrument may be evidenced by (for example) a share certificate. The secured creditor should be able to take possession of any such certificate for the purpose of enforcing a statutory pledge over the instrument.

This section therefore provides for the taking of possession of a certificated instrument in broadly the same manner as section 71 provides for the creditor to take possession of corporeal moveable property.

This section does not however modify or restrict the rights of a collateral-taker under the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226) on the occurrence of an enforcement event, as defined in regulation 3(1A) of those Regulations. See section 84 of the Bill in that respect.

See paragraphs 27.80 and 27.8 of the Report.

### **73 Secured creditor’s entitlement to sell**

- (1) Where a Pledge Enforcement Notice has been served in respect of property, the secured creditor is entitled to sell all or any of that property.

- (2) The secured creditor, in selling property by virtue of subsection (1), must take all reasonable steps to ensure that the price obtained is the best reasonably obtainable.
- (3) Subject to subsection (4), the secured creditor is entitled to purchase all or any of the property but only—
  - (a) in a sale by public auction, and
  - (b) for a price which bears a reasonable relationship to market value.
- (4) If the property is of a kind admitted to trading in a public market in which current market value is verifiable at time of purchase, the secured creditor is entitled to purchase all or any of the property but only—
  - (a) in that market, and
  - (b) for market value.
- (5) Any proceeds obtained by virtue of subsection (1) are to be held in trust by the secured creditor until applied under section 82.
- (6) This section is subject to section 70.

#### NOTE

This section sets out the standard remedy for the secured creditor following service of a pledge enforcement notice (and where appropriate the obtaining of a court order): a right to sell the property at the best reasonably attainable price.

The secured creditor will need to be able to convey the encumbered property to the purchaser, and may first require to take possession of the property under sections 71 or 72 of the Bill.

The secured creditor may purchase the encumbered property, but only in the limited circumstances set out in subsections (3) and (4).

Subsection (5) requires that the secured creditor holds the proceeds of sale in trust until they are distributed under section 82 of the Bill. It is similar in effect to section 27 of the Conveyancing and Feudal Reform (Scotland) Act 1970, which provides for the proceeds of sale under a standard security over land. A standard security is another form of subordinate real right in security.

See paragraphs 28.2 to 28.8 of the Report.

#### **74 Sale effected by virtue of section 73(1): unencumbered acquisition**

- (1) Subsections (2) and (3) apply where a secured creditor sells property by virtue of section 73(1) and transfers the property to the purchaser.
- (2) The purchaser acquires the property unencumbered by—
  - (a) the pledge, and
  - (b) any right in security, or any diligence, ranking equally with or postponed to the pledge.
- (3) But the purchaser acquires the property unencumbered by any—
  - (a) right in security, or
  - (b) diligence,



which has priority in ranking over the pledge only if the holder of the right in security, or as the case may be the creditor who executed the diligence, consented to the sale.

#### NOTE

This section provides for the effect of a sale of the encumbered property on the rights of:

- (a) any creditor under another security that encumbers the property, and
- (b) any unsecured creditor who has attached or arrested the property in connection with enforcing a court order for payment (diligence).

It provides that the purchaser acquires the property free of the pledge that is being enforced, and of any rights in security or diligence which rank equally with or after the pledge.

It provides a separate rule for higher ranking rights in security or diligence. These continue to encumber the property unless the relevant creditor consented to the sale (as influenced by the DCFR IX.-7:213(2)).

See paragraphs 28.9 to 28.13 of the Report.

#### **75 Secured creditor's entitlement to let**

- (1) A secured creditor who by virtue of section 73(1) is entitled to sell corporeal property is entitled to let all or any of that property.
- (2) The secured creditor, in letting property by virtue of subsection (1), must take all reasonable steps to ensure that the income obtained is the best reasonably obtainable.
- (3) Any rental income obtained by virtue of subsection (1) is to be held in trust by the secured creditor until applied under section 82.
- (4) The provider and the secured creditor may agree, whether before or after the pledge becomes enforceable by virtue of section 68(2), that subsection (1) is not to apply as regards the corporeal property or some part of that property.
- (5) Any such agreement must be set out in writing.

#### NOTE

This section has the effect that, where it is lawful to sell encumbered property under section 73 of the Bill, it is also lawful to lease the property. It is influenced by the DCFR IX.-7:207(b).

Subsections (4) and (5) provide for the parties to be able to agree in writing at any time to exclude leasing as a remedy available to the secured creditor on default. For example, the provider may wish to have sale as the sole remedy on the basis that this would pay off the secured debt more quickly (and the creditor may also favour speed).

See paragraphs 28.14 and 28.15 of the Report.

#### **76 Secured creditor's entitlement to grant licence over intellectual property**

- (1) A secured creditor who by virtue of section 73(1) is entitled to sell intellectual property is entitled to grant a licence over all or any of that property (but only if and to the extent that the provider is entitled to grant such a licence).

- (2) The secured creditor, in granting a licence by virtue of subsection (1), must take all reasonable steps to ensure that the income obtained is the best reasonably obtainable.
- (3) Any income obtained by virtue of subsection (1) is to be held in trust by the secured creditor until applied under section 82.
- (4) The provider and the secured creditor may agree, whether before or after the pledge becomes enforceable by virtue of section 68(2), that subsection (1) is not to apply as regards the intellectual property or some part of that property.
- (5) Any such agreement must be set out in writing.

NOTE

A licence of intellectual property is effectively a lease of that type of property (although it is not necessarily exclusive), and this section has therefore a similar purpose and effect for such property as section 75 does for property that can be leased.

See paragraphs 28.16 to 28.18 of the Report.

**77 Secured creditor's entitlement to protect, maintain and manage and to preserve the value of encumbered property**

- (1) A secured creditor who by virtue of section 73(1) is entitled to sell property is entitled to take reasonable steps—
  - (a) to protect, maintain and manage it, and
  - (b) to preserve its value.
- (2) Without prejudice to the generality of subsection (1), the secured creditor may, by virtue of that subsection—
  - (a) where the property consists of, or includes, a financial instrument, exercise any voting rights in relation to the financial instrument,
  - (b) effect or maintain an insurance policy in relation to the property,
  - (c) settle any liability in relation to the property,
  - (d) bring, defend or continue legal proceedings in relation to the property,
  - (e) take such other steps as the provider, whether before or after the pledge becomes enforceable by virtue of section 68(2), has agreed may be taken by the secured creditor.
- (3) Subsection (1) is without prejudice to section 71(2)(b).

NOTE

This section provides for a secured creditor entitled to sell encumbered property under section 73 to be able to take additional measures to protect *etcetera* the property as specified in the section, and to preserve its value.

See paragraphs 28.19 to 28.20 of the Report.

**78 Secured creditor's right to appropriate: general**

- (1) Where a Pledge Enforcement Notice has been served the secured creditor is entitled, subject to subsections (2) and (3), to appropriate any or all of the encumbered property in satisfaction, in whole or in part, of the secured obligation.
- (2) It is not competent to appropriate by virtue of subsection (1)—
  - (a) the property of an individual unless that person is a sole trader and the appropriation is of assets used wholly or mainly for the purposes of the person's business,
  - (b) corporeal property, or a financial instrument payable to bearer, unless that property or instrument is in the possession of the secured creditor, or
  - (c) property the value of which exceeds an amount which is the total of—
    - (i) the amount for the time being remaining due under the secured obligation, and
    - (ii) such expenses as have reasonably been incurred by the secured creditor in enforcing the pledge.
- (3) Except that property the value of which exceeds the total mentioned in paragraph (c) of subsection (2) may be so appropriated (subject to paragraphs (a) and (b) of that subsection) provided that a sum of money equivalent to the amount by which that total is exceeded is set aside by the secured creditor and held in trust until applied under section 82.

**NOTE**

Sections 78 to 81 of the Bill provide the secured creditor who has served a pledge enforcement notice to be able, in specified circumstances, to appropriate the encumbered property on default by the provider.

This is not the same as forfeiture of the property, which is not permitted.

This section provides in subsection (1) for the general right to appropriate. A creditor who appropriates property becomes the owner of the property.

Subsection (2) excludes appropriation in specified cases. In particular it excludes appropriation of:

- (a) Property of an individual, other than in respect of the business assets of a sole trader,
- (b) Corporeal property or bearer bonds that are not possessed by the creditor (for practical reasons), and
- (c) Property the value of which is greater than the amount remaining due under the secured obligation, including reasonable expenses, without reimbursing the excess.

There is the potential for abuse of a right to appropriate encumbered property, as the value of the property could greatly exceed the sum due to the secured creditor. Modern practice, as set out for example in the DCFR, recognises the need to safeguard the interests of the provider of the pledge (for which see the DCFR IX.–7:105 and 7:216).

Subsection (3) therefore provides for the secured creditor to be able to appropriate property the value of which is greater than the sum due to the creditor, but only if the creditor holds a sum representing the excess value in trust pending distribution under section 82 of the Bill.

See paragraphs 28.38 to 28.43 of the Report.

**79 Appropriation where no agreement reached under section 80(1)**

- (1) Before exercising any right to appropriate property by virtue of section 78(1), the secured creditor must serve a notice on—
  - (a) the provider,
  - (b) the debtor in the secured obligation if a person other than the provider,
  - (c) the holder of any other right in security over all or part of the property,
  - (d) any person who has executed diligence against all or part of the property, and
  - (e) any person who has statutory duties in relation to the provider's estate and is prescribed under this paragraph.
- (2) Except that—
  - (a) paragraph (c) of subsection (1) is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the right in security mentioned in that paragraph, and
  - (b) paragraph (d) of that subsection is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the diligence executed as mentioned in that paragraph.
- (3) Any notice served under subsection (1) must—
  - (a) identify the property to be appropriated,
  - (b) specify—
    - (i) the amount for the time being remaining due under the secured obligation, and
    - (ii) the amount to be obtained by the appropriation, and
  - (c) state that, within 14 days after service of the notice, the recipient may object to the appropriation.
- (4) The appropriation is not to proceed unless the amount obtained by it bears a reasonable relationship to the market value of the property appropriated.
- (5) If within 14 days after receiving notice by virtue of subsection (1) a recipient, by means of a written statement to the secured creditor, objects to the appropriation—
  - (a) the appropriation is not to proceed, and
  - (b) the secured creditor must, by written statement and without delay, inform each of the other recipients of a notice under subsection (1) that the appropriation is not to proceed.
- (6) Subsections (1) to (5) are to be disregarded as respects property in relation to which the provider and the secured creditor have reached agreement under section 80(1).

## NOTE

Sections 79 and 80 provide respectively for appropriation without, and with, an agreement to the use of appropriation by the secured creditor as a remedy on default.

Under this section only, given that there is no agreement, the provider is entitled to object in principle to the use of appropriation in respect of the particular encumbered property.

Any appropriation must be for an amount which bears a reasonable relationship to the market value of the property. Thus machinery worth £10,000 cannot be appropriated as being worth £1,000.

Subsection (1) requires notice of the intended appropriation to be given to the parties it will affect. The provision is self-explanatory, except for sub-paragraph (e) which provides for notice to be given to a person who has statutory duties in relation to the provider's estate and is specified for that purpose by the Scottish Ministers by regulations.

Subsection (3) sets out that the notice on intended appropriation must identify the property to be appropriated, and specify both the amount owing to the secured creditor and the amount to be obtained by the appropriation.

Subsection (5) gives the parties to whom the notice is served a right to veto the appropriation, provided they do so within 14 days after receipt of the notice of the intended appropriation.

Subsection (6) disapplies this section where there is a pre-default agreement on appropriation under section 80.

See paragraphs 28.45 to 28.48 of the Report.

### **80 Agreement as to appropriation by virtue of section 78(1)**

- (1) The provider and the secured creditor may, before the pledge becomes enforceable by virtue of section 68(2), agree that the secured creditor is entitled to appropriate by virtue of section 78(1)—
  - (a) the encumbered property, or
  - (b) any part of that property.
- (2) Any agreement under subsection (1) must be set out in writing.
- (3) And property appropriated in accordance with that agreement—
  - (a) must be—
    - (i) a fungible asset that is traded on a specified market, being a market the prices on which are published and widely available (whether on payment of a fee or otherwise), or
    - (ii) if it is not such an asset so traded, property as regards which the provider and the secured creditor have, in the agreement, set out a method of readily determining a reasonable market price, and
  - (b) is appropriated only for the value, at the date of appropriation, of the property's market price—
    - (i) as so published, or
    - (ii) as the case may be, as so determined.

- (4) Before exercising any right to appropriate property by virtue of subsection (1), the secured creditor must serve a notice on—
  - (a) the provider,
  - (b) the debtor in the secured obligation if a person other than the provider,
  - (c) the holder of any other right in security over all or part of the property,
  - (d) any person who has executed diligence against all or part of the property, and
  - (e) any person who has statutory duties in relation to the provider’s estate and is prescribed under this paragraph.
- (5) Except that—
  - (a) paragraph (c) of subsection (4) is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the right in security mentioned in that paragraph, and
  - (b) paragraph (d) of that subsection is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the diligence executed as mentioned in that paragraph.
- (6) A notice under subsection (4) must—
  - (a) identify the property to be appropriated,
  - (b) specify—
    - (i) the amount for the time being remaining due under the secured obligation, and
    - (ii) the amount to be obtained by the appropriation, and
  - (c) state that, within 14 days after service of the notice, the recipient (if a person other than the provider or the debtor) may object to the appropriation.
- (7) If within 14 days after receiving notice by virtue of any of paragraphs (c) to (e) of subsection (4) a recipient, by means of a written statement to the secured creditor, objects to the appropriation—
  - (a) the appropriation is not to proceed, and
  - (b) the secured creditor must, by written statement and without delay, inform each of the other recipients of a notice under subsection (4) that the appropriation is not to proceed.
- (8) In subsection (3)(a)(i)—
  - (a) “fungible asset” means an asset of a nature to be dealt in without identifying the particular asset involved, and
  - (b) “specified” means specified, for the purposes of this section, by the Scottish Ministers by regulations.
- (9) Regulations under subsection (8)(b) may specify different markets, or descriptions of market, in relation to different kinds of fungible asset.

## NOTE

This section allows the provider and the secured creditor to agree in writing, in advance of any default in or enforcement of the secured obligation, that the creditor may subject to certain conditions appropriate the encumbered property. It is influenced by the DCFR IX.-7:105.

The provider and other parties are given notice of the intended appropriation in the same manner as for appropriation without agreement, but the provider (and debtor if a different person to the provider) is not entitled to object.

Subsection (3) has the effect that an agreement to appropriate may only have effect as respects the two types of property specified in this subsection.

The first type is property which is a fungible asset traded on a market specified by the Scottish Ministers by regulations under subsection (8)(b), being a market where prices are published and widely available. “Fungible asset” is itself defined in subsection (8)(a) with the effect that it includes property comprised of individual units which are capable of mutual substitution, for example company shares.

The second type is property which is not traded on a specified market as above, but in respect of which the agreement sets out a method of easily determining a reasonable market price. That might include for example an agreement in relation to appropriation of used cars which states that an average of the prices listed in a specified used car guide is to be used to determine the value on appropriation.

See paragraphs 28.49 to 28.55 of the Report.

### **81 Appropriation by virtue of section 78(1): unencumbered acquisition**

- (1) Subsection (2) applies where a secured creditor appropriates property by virtue of section 78(1).
- (2) The secured creditor acquires the property unencumbered by any right in security or any diligence.

## NOTE

This section provides that any other right in security over or diligence in respect of the encumbered property is extinguished by an appropriation by virtue of section 78 of the Bill.

Any other secured creditor or a creditor who has executed diligence will have been given notice of the intended appropriation under section 79 or 80 of the Bill, unless the creditor did not know – or could not reasonably be expected to know - of the security or diligence.

A creditor who is given notice has the right to object to the proposed appropriation under those sections.

See paragraphs 28.56 and 28.57 of the Report.

### **82 Application of proceeds arising from enforcement of pledge**

- (1) Any proceeds arising from the enforcement of a pledge are to be applied—
  - (a) firstly, in payment of all expenses reasonably incurred by the secured creditor in connection with the enforcement, and
  - (b) secondly, in payment of the amount due to—

- (i) the holder of any right in security over the property from which the proceeds arose, or
  - (ii) any creditor who has executed diligence against that property.
- (2) Any payment made by virtue of subsection (1)(b) is to be made in conformity with the ranking of the right in security or, as the case may be, of the diligence.
- (3) No such payment is to be made—
  - (a) to the holder of a right in security which has priority in ranking over the pledge enforced, or
  - (b) to any creditor who has executed diligence which has such priority,
 unless that holder or creditor consented to the enforcement in question.
- (4) Any residue from the proceeds so arising is to be paid to the provider.
- (5) Where payment falls to be made, by virtue of subsection (1)(b), to more than one person with the same ranking but the proceeds are inadequate to enable those persons to be paid in full, their payments are to abate in equal proportions.
- (6) Subsections (7) to (9) apply where a question arises as to whom a payment under this section is to be made.
- (7) The secured creditor must—
  - (a) consign the amount of the payment (so far as ascertainable) in court for the person appearing to have the best right to that payment, and
  - (b) lodge in court a statement of the amount consigned.
- (8) A consignment made in pursuance of subsection (7)(a) operates as a payment of the amount due.
- (9) A certificate of the court is sufficient evidence of that payment.
- (10) Without prejudice to the generality of subsection (1)(a), the expenses mentioned in that subsection include any that may be incurred under section 71(2) or 77.
- (11) The secured creditor must, as soon as reasonably practicable, present—
  - (a) the provider,
  - (b) the debtor in the secured obligation if a person other than the provider,
  - (c) any person who both—
    - (i) is mentioned in subsection (1)(b), and
    - (ii) has consented to the enforcement in question, and
  - (d) any person who has statutory duties in relation to the provider's estate and is prescribed under this paragraph,
 with a written statement of how the proceeds arising from the enforcement have been applied under this section.
- (12) In a case where, by virtue of—
  - (a) section 75(1), all or any of the property is let by the secured creditor, or
  - (b) section 76(1), the secured creditor grants a licence over all or any of it,



subsection (11) applies as regards any proceeds of the letting or licensing as if, for the words “as soon as reasonably practicable”, there were substituted “every month after the first proceeds arising from the enforcement are received”.

#### NOTE

This section provides for the distribution of any proceeds received by the secured creditor as a result of enforcing a possessory or statutory pledge.

It provides that the secured creditor must first pay the expenses of the enforcement (see subsection (10)), and then pay the sums due to secured creditors or creditors who have executed diligence in accordance with the priority of their claims. Any residue is paid to the provider (see in that respect paragraph (c) of the definition of “provider” in section 116(1) of the Bill).

Payments are to be abated in equal proportions where full payment is not possible.

Example	The encumbered property is sold for £100,000. There are two equal ranking rights in security. Jack is owed £200,000. Jill is owed £50,000. Jack is paid £80,000 and Jill £20,000, which is 40% of what is due to each of them.
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Subsection (3), however, sets out that no payment is to be made to creditors with a higher ranking security or diligence than the pledge being enforced, unless they have consented to the enforcement. If they have not consented then their right still subsists, and that will affect the marketability of the encumbered property (see section 74(3) in that respect). It might mean, for example, that is only practicable for the secured creditor to lease the encumbered property.

Subsections (6) to (9) provide for the situation, likely to be uncommon, where it is unclear who is to be paid or a receipt for payment cannot be obtained (perhaps because a secured creditor cannot be traced). The effect is that the secured creditor must consign an amount in court for the benefit of the person who appears to have the best right to the payment.

Subsections (11) and (12) provide for statements to be made to relevant parties as to how the proceeds as a whole have been distributed. The creditor must give a statement to such persons with relevant statutory duties as are prescribed by the Scottish Ministers (see section 118(1) for the definition of “prescribed”).

See paragraphs 28.21 to 28.37 of the Report.

### **83 Circumstances in which application must be made for removal of an entry from the statutory pledges record**

- (1) Subsection (2) applies where a statutory pledge which has been registered is extinguished by virtue of—
  - (a) the enforcement of the statutory pledge,
  - (b) the enforcement of another right in security over the encumbered property of the statutory pledge, or
  - (c) the execution of diligence against the encumbered property of the statutory pledge.
- (2) The secured creditor must, as soon as reasonably practicable, make an application under section 100(1) for removal of the entry for the statutory pledge from the statutory pledges record.

## NOTE

This section imposes a duty on the secured creditor in a statutory pledge to apply under section 100 of the Bill for the correction of the RSP where the pledge is extinguished by any of the enforcement of the pledge, enforcement of any other secured right, or the use of diligence.

**Example** Adam grants a statutory pledge for a debt of £10,000 to Eve over machinery. Adam then grants a second ranking statutory pledge to Cain for a debt of £5,000 over the same machinery. Adam subsequently defaults on his secured obligation to Cain.

Eve consents to Cain enforcing the second pledge subject to Eve, as higher ranking creditor, being paid from the proceeds. The plant and machinery is sold for £20,000. Cain divides the proceeds so that Eve is paid £10,000, Cain keeps £5,000, and the remaining £5,000 is paid to Adam.

Eve and Cain are both subject to a duty to remove their pledge from the statutory pledges record.

See paragraph 28.58 of the Report.

## **84 Sections 68 to 82: saving**

Nothing in sections 68 to 82 is to be taken to derogate from such rights as a secured creditor may have by virtue of Part 4 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003 No. 3226).

## NOTE

This section applies where a statutory pledge is granted over a financial instrument for the purpose of evidencing a financial collateral arrangement, and has the effect that the enforcement provisions in the Bill are without prejudice to the rights of the secured creditor under Part 4 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226).

See paragraphs 37.13 and 37.14 of the Report.

### *Liability for loss suffered by virtue of enforcement*

## **85 Liability for loss suffered by virtue of enforcement**

- (1) A person (in subsection (2) referred to as “P”) is entitled to be compensated by a secured creditor for loss suffered in consequence of the secured creditor’s failure to comply with any obligation imposed on the secured creditor by any provision of sections 68 to 83.
- (2) But the secured creditor has no liability under subsection (1)—
  - (a) in so far as P’s loss could have been avoided had P taken measures which it would have been reasonable for P to take, or
  - (b) in so far as P’s loss was not reasonably foreseeable.

## NOTE

This section imposes liability on the secured creditor for failing in any duty imposed by the Bill on the creditor in relation to the enforcement of a possessory or statutory pledge.

Subsection (2) restricts liability in the specified cases, but does not exclude liability for non-patrimonial loss. The effect is that there may be circumstances where compensation for pain and suffering (solatium) could be claimed, for example the provider following the taking of possession of a houseboat in an unlawful manner.

See paragraphs 28.59 to 28.64 of the Report.

### *Service of documents for purposes of this Chapter of Part 2*

#### **86 Service of documents for purposes of this Chapter of Part 2**

- (1) In relation to the service of documents for the purposes of this Chapter of Part 2, the provider and the secured creditor may agree (either or both)—
  - (a) that the document may be served on a person by being sent to a specified address (being an address other than is mentioned in subsection (4) of section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010),
  - (b) that service is to be by a specified method (being a method mentioned in subsection (2) of that section).
- (2) The agreement need not refer expressly to that section or to any provision of that section.
- (3) In subsection (1), “specified” means specified in the agreement.
- (4) Any such agreement must be set out in writing.
- (5) Where there is such an agreement but service cannot be effected in accordance with it, the agreement is to be disregarded in applying section 26 of that Act of 2010 for the purposes of this Chapter.

## NOTE

The default rules for service of documents in or under an Act of the Scottish Parliament are set out in section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010.

The section provides for the provider and the secured creditor to be able to agree in writing that service may be in accordance with this section. Thus, for example, the parties might provide that an enforcement notice may only be sent by registered delivery.

An agreement under this section could be (for example) included in the constitutive document for the statutory pledge.

Subsection (4) has the effect that where service cannot be effected in accordance with the agreement then the default rules in the 2010 Act will apply.

See paragraphs 28.65 to 28.67 of the Report.

## CHAPTER 2

### REGISTER OF STATUTORY PLEDGES

#### *Register of Statutory Pledges*

#### **87 The Register of Statutory Pledges**

- (1) There is to be a public register known as the Register of Statutory Pledges.
- (2) The Register of Statutory Pledges (in this Part referred to as “the register”) is to be under the management and control of the Keeper.
- (3) Subject to the provisions of this Act the register is to be in such form as the Keeper thinks fit.
- (4) The Keeper is to take such steps as appear reasonable to the Keeper for protecting the register from—
  - (a) interference,
  - (b) unauthorised access, or
  - (c) damage.
- (5) Section 110 of the Land Registration etc. (Scotland) Act 2012 (fees) applies in relation to the register as it applies in relation to any other register under the management and control of the Keeper.

#### NOTE

Subsection (1) establishes the new register in which statutory pledges can be registered, to be known as the Register of Statutory Pledges (“RSP”). See paragraphs 29.2 to 29.5 of the Report.

Subsection (2) provides that the RSP is to be under the management of the Keeper of the Registers of Scotland (for which see the definition in section 118(1) of the Bill). See paragraphs 29.6 to 29.8 of the Report.

Subsection (3) states that, subject to the requirements laid down by the Bill, the Keeper has discretion as to the form in which the RSP is kept. That would include keeping the RSP in electronic form.

For subsections (3) and (4), see paragraphs 29.22 to 29.23 of the Report.

The RSP, like the other registers under the Keeper’s control, is an important public asset. Subsection (4) therefore provides that the Keeper is to take such steps as appear reasonable to protect the register from interference, unauthorised access, or damage.

Subsection (5) enables the Scottish Ministers, in consultation with the Keeper, to prescribe fees in relation to the RSP.

#### *Structure*

#### **88 The parts of the Register of Statutory Pledges**

The Keeper must make up and maintain, as parts of the register—

- (a) the statutory pledges record, and

- (b) the archive record.

#### NOTE

This section provides for the RSP to be kept in two parts, being the statutory pledges record and the archive record conform to sections 89 and 90 of the Bill.

See paragraph 30.2 of the Report.

### **89 The statutory pledges record of the Register of Statutory Pledges**

- (1) An entry in the statutory pledges record is to include—
  - (a) the provider's name and address,
  - (b) where the provider is an individual, the provider's date of birth,
  - (c) any number which the provider bears and which, by virtue of RSP Rules, must be included in the entry,
  - (d) the secured creditor's name and address,
  - (e) any number which the secured creditor bears and which, by virtue of RSP Rules, must be included in the entry,
  - (f) where the secured creditor is not an individual, an address (which may be an e-mail address) to which any request for information regarding the statutory pledge may be sent,
  - (g) such description of the encumbered property as may be—
    - (i) required, or
    - (ii) permitted,for the purposes of this subsection by RSP Rules,
  - (h) a copy of the constitutive document of the statutory pledge,
  - (i) the registration number allocated under section 91(4)(b) to the entry for the statutory pledge,
  - (j) where the statutory pledge has been amended in pursuance of section 60(7), a copy of the amendment document,
  - (k) the date and time of registration of—
    - (i) the statutory pledge, and
    - (ii) any amendment to the statutory pledge, and
  - (l) such other data as may be required by virtue of any other section of this Act (including, without prejudice to the generality of this paragraph, such other information as may be specified for the purposes of this subsection by RSP Rules).
- (2) The statutory pledges record is the totality of all such entries.

## NOTE

This section provides for the information to be included by the Keeper in an entry for a statutory pledge in the statutory pledges record, and for the record to be comprised of the totality of such entries.

Some of that information will be as specified in, or determined under, rules made by the Scottish Ministers by regulations under section 114 of the Bill (“RSP Rules”).

See paragraphs 30.4 to 30.10 of the Report.

## **90 The archive record of the Register of Statutory Pledges**

The archive record—

- (a) is the totality of all entries transferred from the statutory pledges record—
  - (i) under section 100(6), 101(11) or (12), 102(4) or 103(4), or
  - (ii) by virtue of section 99(1)(a), and
- (b) includes such other data as may be specified for the purposes of this section by RSP Rules.

## NOTE

This section has the effect that the archive record will comprise the totality of all entries formerly in the statutory pledges record which are archived in accordance with Chapter 2 of Part 2 of the Bill.

The archive record may also include such other data as is specified by the Scottish Ministers in RSP Rules.

See paragraphs 35.50 to 35.52 of the Report.

### *Applications for registration*

## **91 Application for registration of statutory pledge**

- (1) An application for registration of a statutory pledge may be made to the Keeper by the secured creditor.
- (2) The Keeper must accept the application if—
  - (a) it—
    - (i) conforms to such RSP Rules as may relate to the application, and
    - (ii) is submitted with a copy of the constitutive document,
  - (b) the Keeper has such data as the Keeper requires, by virtue of section 89, to make up an entry for the statutory pledge, and
  - (c) either—
    - (i) such fee as is payable for the registration is paid, or
    - (ii) arrangements satisfactory to the Keeper are made for payment of that fee.

- (3) If the requirements of any of paragraphs (a) to (c) of subsection (2) are not satisfied, the Keeper must reject the application and inform the applicant accordingly.
- (4) On accepting an application made under subsection (1), the Keeper—
  - (a) must—
    - (i) make up an entry for the statutory pledge (from the constitutive document, the data provided in the application and the circumstances of registration), and
    - (ii) maintain the entry in the statutory pledges record, and
  - (b) must allocate a registration number to the entry.

#### NOTE

This section provides for the secured creditor to be able to apply to the Keeper for registration of a statutory pledge in the RSP.

Subsections (2) and (3) have the effect that the Keeper must accept an application that is conform to this section, and reject an application that does not so conform. See paragraphs 29.13 and 29.14 of the Report, as regards the constitutive document.

Subsection (4) imposes a duty on the Keeper to make up an entry in the statutory pledges record for an application that is accepted, and to allocate a registration number to the entry.

See paragraphs 30.11 to 30.16 of the Report.

## **92 Other applications for registration**

- (1) A secured creditor may apply to the Keeper for registration of an amendment to a statutory pledge—
  - (a) to add property to the encumbered property, or
  - (b) to increase the extent of the secured obligation.
- (2) The Keeper must accept the application if—
  - (a) it conforms to such RSP Rules as may relate to the application,
  - (b) it is submitted with a copy of the amendment document,
  - (c) the Keeper has such data as the Keeper requires, by virtue of section 89, to revise the entry to which the application relates, and
  - (d) either—
    - (i) such fee as is payable for the registration is paid, or
    - (ii) arrangements satisfactory to the Keeper are made for payment of that fee.
- (3) If the requirements of any of paragraphs (a) to (d) of subsection (2) are not satisfied, the Keeper must reject the application and inform the applicant accordingly.
- (4) If the application is accepted, the Keeper must revise the entry for the statutory pledge accordingly.

#### NOTE

This section provides for the secured creditor to be able to apply to the Keeper for registration in the RSP of an amendment of a statutory pledge, as specified in subsection (1).

Section 60(1) of the Bill has the effect that a statutory pledge may only be amended by an amendment document as defined in that section. It follows that where an amendment is registered the application to register should be submitted with a copy of the amendment document.

Separately, the pledge may be restricted or discharged off-register by way of a written statement under section 61(1) of the Bill. The RSP may be corrected for any such change by an application under section 100 of the Bill. The Keeper may also correct the RSP under section 102 if she becomes aware of a manifest inaccuracy in the RSP (and see section 116(4) of the Bill for the meaning of “inaccuracy”).

Subsections (2) and (3) have the effect that the Keeper must accept an application that is conform to this section, and reject an application that does not so conform. See paragraphs 29.13 and 29.14 of the Report, as regards the amendment document.

See in general paragraphs 30.17 to 30.20 of the Report.

#### *Verification statement and date and time of registration*

### **93 Verification statement as to registration of statutory pledge or of amendment to statutory pledge**

- (1) The Keeper must, after the registration, by virtue of an application made—
  - (a) under section 91(1), of a statutory pledge, or
  - (b) under section 92(1), of an amendment to a statutory pledge,issue to the applicant a written statement verifying the registration.
- (2) That statement must—
  - (a) conform to such RSP Rules as may relate to the statement, and
  - (b) include—
    - (i) the date and time of the registration, and
    - (ii) the registration number allocated to the entry to which the application relates.
- (3) Where a statement has been issued under subsection (1), the provider may request from the secured creditor a copy of that statement.
- (4) Within 21 days after a request is made under subsection (3), the secured creditor must supply the provider with the copy requested.

#### **NOTE**

This section provides for the Keeper to issue a verification statement to the applicant after registering or amending a statutory pledge under sections 91 or 92 of the Bill.

The statement must be conform to any requirement prescribed in RSP Rules, and the provider may request a copy of the statement from the secured creditor.

See paragraphs 30.22 to 30.24 of the Report.



**94 Date and time of registration of statutory pledge or of amendment to statutory pledge**

- (1) A statutory pledge is taken to be registered on the date and at the time which are entered for it by virtue of section 89(1)(k)(i).
- (2) An amendment to a statutory pledge is taken to be registered on the date and at the time which are entered for it by virtue of section 89(1)(k)(ii).
- (3) The Keeper must—
  - (a) deal with applications for the registration of statutory pledges in the order in which they are received, and
  - (b) allocate the unique registration numbers of the entries to which those applications relate accordingly.

NOTE

Subsections (1) and (2) have the effect that a statutory pledge, or an amendment of a pledge, is deemed to have been registered or entered on the date and time entered in the entry for the pledge in the statutory pledges record.

Subsection (3) sets out that the Keeper must deal with applications for registration in the order in which they are received, and allocate registration numbers accordingly. The effect is that pledges which rank by registration will rank in date order.

See paragraph 30.25 of the Report.

*Effective registration*

**95 Effective registration of statutory pledge**

- (1) The registration of a statutory pledge is ineffective if—
  - (a) the entry made up for the statutory pledge in the statutory pledges record does not include a copy of the constitutive document,
  - (b) the data included, by virtue of section 89(1), in that entry contains an inaccuracy which, as at the time of registration, is seriously misleading, or
  - (c) the constitutive document is invalid.
- (2) But paragraph (b) of subsection (1) is subject to section 98(7) to (9).
- (3) A registration ineffective by virtue of subsection (1) becomes effective if and when the entry is corrected.

NOTE

This section provides for the registration of a statutory pledge in the RSP to be ineffective if the entry in the statutory pledges record does not include a copy of the constitutive document, if at the time of registration the entry contains an inaccuracy that is seriously misleading, or if the constitutive document is invalid (for example, because it is a forgery).

The effect of determining whether or not an entry is seriously misleading as at the time of registration is that a supervening inaccuracy will not render the entry ineffective (although see section 97 of the Bill in that respect).

The effect of a registration being ineffective is that the statutory pledge is not created by the purported registration.

Section 98(1), (2) and (6) of the Bill provides for the meaning of the term “seriously misleading”.

Subsection (2) makes subsection (1) subject to section 98(7) to (9), with the effect that a registration may be partially effective as regards the encumbered property or co-providers or co-creditors.

Subsection (3) has the effect that if a registration that is ineffective at the time of registration can be made effective by correction under this Chapter, then at that point the pledge is created.

See paragraphs 31.2 to 31.4, and 33.35 to 33.37, of the Report.

## **96 Effective registration of amendment to statutory pledge**

- (1) The registration of an amendment to a statutory pledge is ineffective if—
  - (a) the entry, in the statutory pledges record, for the statutory pledge does not include a copy of the amendment document,
  - (b) the data included, by virtue of section 89(1), in that entry contains, in consequence of the amendment, an inaccuracy which is seriously misleading, or
  - (c) the amendment document is invalid.
- (2) But paragraph (b) of subsection (1) is subject to section 98(7) to (9).
- (3) A registration ineffective by virtue of subsection (1) becomes effective if and when the entry as amended is corrected.

### **NOTE**

This section makes the same provision for the registration of an amendment of a statutory pledge as section 95 of the Bill does for registration of the pledge.

See paragraphs 31.5 and 31.6, and 33.35 to 33.37, of the Report.

## **97 Supervening inaccuracies: protection of third parties**

- (1) Subsection (2) applies where—
  - (a) a statutory pledge is registered effectively over property (not being property bearing a number which must or may, by virtue of section 114(1)(c)(ii), be used in identifying it),
  - (b) at some time after the statutory pledge is so registered, the statutory pledges record comes to contain an inaccuracy—
    - (i) in the entry for the statutory pledge, being an inaccuracy which is seriously misleading (whether or not in respect of all the encumbered property), or
    - (ii) by virtue of the removal of the entry for the statutory pledge (whether or not on transfer of that entry to the archive record), and

- (c) during the period in which the record contains that inaccuracy, a person acquires, for value, in good faith and exercising reasonable care—
  - (i) some or all, or
  - (ii) a right in some or all,
 of the encumbered property in respect of which the inaccuracy is seriously misleading.
- (2) On the acquisition the statutory pledge is extinguished as regards the property—
  - (a) acquired, or
  - (b) in which the right is acquired.

NOTE

This section protects a person who in good faith acquires encumbered property, or a right in encumbered property, in circumstances where the entry in the statutory pledges record comes to include after registration:

- (a) an inaccuracy that is seriously misleading, or
- (b) an inaccuracy by reason of the removal of an entry from the record.

This could be the case where, for example, the provider marries after the pledge is registered and changes his or her name.

The effect of this section is that the pledge will be extinguished as regards so much of the encumbered property as is property in respect of which the inaccuracy is seriously misleading upon the property being transferred.

**Example**            In year 1 Rachel Smith grants a statutory pledge to Mark over any piano she might acquire. Mark registers the pledge, and in year 2 Rachel acquires a piano which becomes encumbered property. She also marries, and changes her name to Rachel Jones. In year 3 Rachel sells the piano to Luke, who is in good faith, and does not know that Rachel Jones was once known as Rachel Smith. A search against Rachel Jones will not reveal the pledge, and so he will acquire the piano unencumbered by the pledge.

This protection does not apply where the encumbered property is property that is required by RSP Rules to be identified by a unique number, such as a vehicle identity number (VIN). Any person intending to acquire such an asset could readily obtain information about the pledge by searching the statutory pledges record against the VIN.

See paragraph 32.51, and Chapter 32 generally, of the Report.

**98 Seriously misleading inaccuracies in entries in the statutory pledges record**

- (1) For the purposes of section 95(1)(b), 96(1)(b) or 97(1), an inaccuracy in an entry in the statutory pledges record is seriously misleading—
  - (a) if a search of that record in accordance with—
    - (i) section 106(2)(a)(i) for the provider’s proper name, or

- (ii) section 106(2)(a)(ii) for the provider's proper name and the provider's date of birth,

using the search facility provided under section 107(1)(a) does not disclose the entry, or
  - (b) where the provider is a person required by RSP Rules to be identified in that record by a unique number, if a search of that record for that number—
    - (i) in accordance with section 106(2)(a)(iii), and
    - (ii) using the search facility provided under section 107(1)(a),

does not disclose the entry, or
  - (c) in respect of so much of the encumbered property as bears a unique number which must, by virtue of RSP Rules, be included in the statutory pledges record if a search of that record for that number—
    - (i) in accordance with section 106(2)(a)(iv), and
    - (ii) using the search facility provided under section 107(1)(a),

does not disclose the entry.
- (2) Subsection (1)—
- (a) is subject to subsection (3), and
  - (b) is without prejudice to the generality of sections 95(1)(b), 96(1)(b) and 97(1).
- (3) Where a search such as is mentioned in paragraph (b) of subsection (1)—
- (a) discloses an entry, it is immaterial that a search such as is mentioned in paragraph (a) of that subsection does not disclose the entry,
  - (b) does not disclose an entry, it is immaterial that a search such as is mentioned in paragraph (a) of that subsection discloses the entry.
- (4) Subject to subsection (8), subsections (1) to (3) apply in relation to a search for—
- (a) a co-provider's proper name,
  - (b) a co-provider's—
    - (i) proper name, and
    - (ii) date of birth, or
  - (c) a unique number by which a co-provider is identified,
- as they apply in relation to the searches mentioned in subsection (1)(a) or (b).
- (5) Without prejudice to section 95(1)(a), in determining whether an inaccuracy in an entry in the statutory pledges record is seriously misleading no account is to be taken of the constitutive document, or of any amendment document, included in the entry.
- (6) An inaccuracy in an entry in the statutory pledges record may be seriously misleading irrespective of whether any person has been misled.
- (7) Where an inaccuracy in an entry in the statutory pledges record is seriously misleading in respect of only part of the encumbered property, that inaccuracy does not affect the entry in its application to the rest of the property.
- (8) Where—

- (a) the provider consists of two or more co-providers, and
  - (b) there is an inaccuracy in an entry in the statutory pledges record, being an inaccuracy which is seriously misleading in respect of a co-provider but not in respect of both (or all) the co-providers,
- that inaccuracy does not affect the entry in its application to a co-provider in respect of whom the inaccuracy is not seriously misleading.
- (9) Subsection (8) applies in relation to a secured creditor which consists of two or more co-secured creditors as it applies in relation to a provider which consists of two or more co-providers.
  - (10) The Scottish Ministers may by regulations amend this section by specifying further instances in which, for the purposes of section 95(1)(b), 96(1)(b) or 97(1)(b), an inaccuracy in an entry is seriously misleading.
  - (11) References—
    - (a) in subsection (1)(a) to “the provider’s proper name”, or
    - (b) in subsection (4)(a) or (b) to “a co-provider’s proper name”,
 are to the person’s name in the form determined in accordance with rules under section 114(1)(c)(i).

NOTE

This section makes further provision for the meaning of “seriously misleading” inaccuracy for the purposes of sections 95 to 97 of the Bill. The “seriously misleading” test is a feature of analogous schemes for security over moveables, such as UCC-9.

If a registration contains an inaccuracy that prevents it being disclosed by a properly formatted search, the inaccuracy should generally be regarded as being seriously misleading. This section sets out some of the circumstances in which an entry will be seriously misleading, but leaves open the possibility that the statutory pledges record will contain other types of seriously misleading inaccuracy.

For example, there may be an inaccuracy in the name or address of a secured creditor such that an entitled person is unable to make an information request under section 110 of the Bill. Such an inaccuracy is likely to be seriously misleading, with the effect that the entry is ineffective and the pledge is not created by registration.

Subsections (1) and (2) have the effect that an entry in the statutory pledges record is seriously misleading if a search using any of the criteria specified in this subsection fails to disclose the entry. The criteria are:

- (a) The proper name of the provider,
- (b) The unique number of any provider that is required by RSP Rules to be identified by such a number (which might include for example the registration number of a limited company), or
- (c) The unique number for encumbered property that is required by RSP Rules to be identified by such a number (which might include for example a vehicle identification number or the registration number for a patent or trademark).

The search must be in accordance with searches of the RSP as permitted under section 106 of the Bill, which the Keeper is required by section 107 of the Bill to make available to any person requiring such a search.

Subsection (5) has the effect that in determining whether an entry is seriously misleading no account is to be taken of the constitutive document or any amendment document. This is needed because a search under sections 106 and 107 will not extend to the content of those documents.

Subsection (6) provides that the test for whether an inaccuracy is seriously misleading is an objective test, in that no account is to be taken of whether any persons has in fact been misled by an entry.

Subsections (7) to (9) provide for entries that are misleading only in some respects, and have the effect that a registration may be partly effective.

Subsection (10) enables the Scottish Ministers by regulations to specify further instances in which an entry will have a seriously misleading inaccuracy for the purposes of this section.

Subsection (9) has the effect that the proper name of a person for the purpose of this section will be determined in accordance with RSP Rules.

See paragraphs 31.7 to 31.18 of the Report.

### *Duration*

#### **99 Power of Scottish Ministers as regards duration of statutory pledge**

- (1) The Scottish Ministers may by regulations—
  - (a) specify a period from the creation (or renewal by virtue of paragraph (b)) of an entry in the statutory pledges record, being a period at the end of which, unless the entry has during that period been—
    - (i) renewed (or as the case may be further renewed) by virtue of that paragraph, or
    - (ii) removed,the statutory pledge to which the entry relates will be extinguished and the entry removed, and
  - (b) enable application to be made by the secured creditor for the renewal of an entry which would otherwise fall to be removed by virtue of paragraph (a).
- (2) Different provision may be made by virtue of subsection (1) for different cases or for different classes of case.
- (3) Before exercising powers under this section, the Scottish Ministers must consult the Keeper.

#### NOTE

This section provides for the Scottish Ministers, in consultation with the Keeper of the Registers of Scotland, to be able by regulations to specify a period at the end of which an entry in the statutory pledges record will be deleted and the statutory pledge extinguished.

This power could be used, for example, in the event that a large number of pledges believed to have been extinguished or restricted off-register continue to appear in the record many years after registration. Similar powers are seen in comparator legislation in other jurisdictions.

See paragraphs 35.20 to 35.29 of the Report.

## *Corrections*

### **100 Application to Keeper by secured creditor for correction of statutory pledges record**

- (1) An application may be made to the Keeper for the correction of an entry in the statutory pledges record, being an entry as regards which the applicant is the secured creditor (whether or not identified as such in the entry).
- (2) The Keeper must accept an application under subsection (1) provided that—
  - (a) the application conforms to what is prescribed, for the purposes of this section, in RSP Rules, and
  - (b) either—
    - (i) such fee as is payable for the correction in question is paid, or
    - (ii) arrangements satisfactory to the Keeper are made for payment of that fee.
- (3) If the requirements of either of paragraphs (a) and (b) of subsection (2) are not satisfied, the Keeper must reject the application and inform the applicant accordingly.
- (4) On accepting, by virtue of subsection (2), an application for the correction of the statutory pledges record, the Keeper must—
  - (a) correct the entry accordingly, and
  - (b) issue to the applicant and to the provider a written statement verifying the correction.
- (5) That statement must—
  - (a) conform to such RSP Rules as may relate to the statement, and
  - (b) include—
    - (i) the date and time of the correction, and
    - (ii) the registration number allocated to the entry.
- (6) Where, under subsection (4), the Keeper corrects the record by—
  - (a) removing the entry, the Keeper must transfer the entry to the archive record and note on the transferred entry—
    - (i) that the transfer is in consequence of a correction under that subsection, and
    - (ii) the date and time of the removal, or
  - (b) removing or replacing data included in the entry or by replacing a copy document, the Keeper must note on the entry—
    - (i) that it has been corrected, and
    - (ii) the details of the correction (including, without prejudice to the generality of this paragraph, the date and time of the correction),and in the case of the removal of the copy document, must transfer the copy to the archive record and retain it there.
- (7) Without prejudice to the generality of subsection (1), in that subsection “secured creditor” includes, if the statutory pledge has been assigned, the person who was the secured creditor before the assignment.

## NOTE

Subsection (1) enables the secured creditor, and only the creditor, to apply to the Keeper for correction of an entry for a statutory pledge in the statutory pledges record.

The secured creditor does not for that purpose need to be identified as such in the entry in the statutory pledges record. There are a number of reasons why the creditor might not be so identified, including an error at the time of registration, a change of name, or an assignation of the pledge (see section 59 of the Bill).

So for example an assignee as a successor in title to the right of the secured creditor (see section 116(1) of the Bill) may apply for correction. Alternatively, subsection (7) has the effect that the assignor of a pledge can also apply for a correction.

The Keeper must accept an application that conforms to subsection (2), and reject one that does not.

Subsections (4) and (5) provide that the Keeper must on accepting an application correct the entry (and note in the entry that this has been done), and issue to the applicant a verification statement in the form required by RSP Rules.

Subsection (6) provides for the Keeper to correct the record as required to give effect to an application for correction that is accepted by the Keeper.

See paragraphs 33.11 to 33.22 of the Report.

### **101 Demand that application be made for a correction to the statutory pledges record by the removal of an entry or of data included in an entry**

- (1) A person (in this section referred to as “D”)—
  - (a) identified as the provider, or as a co-provider, of a statutory pledge in an entry in the statutory pledges record, or
  - (b) with a right in property identified as the encumbered property in an entry in the statutory pledges record,and who considers that the circumstances are as mentioned in subsection (2), may issue a demand in a prescribed form to the person identified in that entry as the secured creditor (the person so identified being in this section referred to as “ISC”), that ISC apply to the Keeper for the correction of the statutory pledges record.
- (2) Those circumstances are, that—
  - (a) D is neither the provider, nor a co-provider, of the statutory pledge, or
  - (b) all or part of the property identified in the entry as the encumbered property is not encumbered property.
- (3) A demand issued under subsection (1) is to specify a period (being a period of not less than 21 days after it is received) within which it is to be complied with.
- (4) ISC may not charge a fee for such compliance.
- (5) If ISC fails to comply with the demand within the period specified by virtue of subsection (3), D may apply to the Keeper for the correction of the statutory pledges record.



- (6) Any application under subsection (5) must conform to such RSP Rules as may relate to the application.
- (7) On receiving an application under subsection (5) the Keeper must—
  - (a) serve a notice on ISC stating that the Keeper intends to correct the record on a date specified in the notice (being a date no fewer than 21 days after the date of the notice),
  - (b) note on the entry that the application has been received and include in that note—
    - (i) the details of the correction sought, and
    - (ii) the date on which the application was received,
  - (c) issue to D a written statement verifying that the application has been received, and
  - (d) notify the person identified in the entry as the provider (if a different person from D) that the notice mentioned in paragraph (a) has been served on ISC.
- (8) ISC—
  - (a) may, before the date specified under subsection (7)(a), apply opposing the making of the correction to the court, and
  - (b) on making any such application must notify the Keeper accordingly.
- (9) Subject to subsection (10), the court, on an application under (8)(a), may if satisfied that the correction—
  - (a) is not justified, direct that no change be made to the record in consequence of the application under subsection (5), or
  - (b) is justified in whole or in part, direct that the record be corrected accordingly.
- (10) The court is not to make a direction under subsection (9) unless satisfied that before the date specified under subsection (7)(a) the Keeper received notification, under subsection (8)(b), of the application.
- (11) If the Keeper does not receive before the date specified under subsection (7)(a) notification, under subsection (8)(b), of an application under subsection (8)(a) opposing the making of the correction, the Keeper is on that date to make the correction.
- (12) Where, by virtue of subsection (9)(b) or under subsection (11), the Keeper corrects the record by—
  - (a) removing the entry from the statutory pledges record, the Keeper must transfer the entry to the archive record and note on the transferred entry—
    - (i) that the transfer is in consequence of a correction by virtue of (or as the case may be, under) the subsection in question, and
    - (ii) the date and time of the removal of the entry from the , or
  - (b) removing data included in the entry or removing a copy document, the Keeper must note on the entry—
    - (i) that it has been corrected, and
    - (ii) the details of the correction (including, without prejudice to the generality of this paragraph, the date and time of the correction),

and in the case of the removal of the copy document, must transfer the copy to the archive record and retain it there.

- (13) Where, by virtue of subsection (9)(b) or under subsection (11), the Keeper effects a correction, the Keeper must notify (in so far as it is reasonable and practicable to do so)—
- (a) every person specified for the purposes of this subsection by RSP Rules, and
  - (b) any other person whom the Keeper considers it appropriate to notify,
- that the correction has been effected.

#### NOTE

This section enables a person with a specified interest in the accuracy of the statutory pledges record, and who maintains that the record is inaccurate, to be able to:

- (a) demand that the secured creditor apply to the Keeper within at least 21 days for a correction of the record under section 100 of the Bill, and
- (b) if no application is made, for that person to be able to apply for the correction.

Subsections (1) and (2) have the effect that a person identified in the record as the provider or a co-provider, or a person with a right in property identified as the encumbered property, can make a demand on the secured creditor if they assert that they are not a provider or the property is not encumbered property.

**Example 1** An entry states that a statutory pledge has been created over the car with VIN 12345. In fact, the statutory pledge was created over the car with VIN 12335. The owner of the car with VIN 12345 can demand a correction.

**Example 2** An entry states that a statutory pledge has been created over a car with VIN 12335. This was accurate as at the date of registration, but the secured creditor has subsequently been discharged off-register. The provider can demand correction.

In the event an application is made following a failure to comply then the Keeper must serve a notice on the secured creditor intimating that the record will be corrected on a specified date. The secured creditor may apply to the court before that date opposing the making of the correction (for which see subsections (8) to (11)).

The Keeper cannot make any correction until the application to the court has been determined. The Keeper can if desired enter the court process (see section 104 of the Bill).

Subsections (12) and (13) provide for notification of any correction, and for giving effect to the correction as appropriate in the statutory pledges record or archive record.

The person identified as the secured creditor in the entry in the statutory pledges record may no longer be the creditor because the pledge has been assigned. This section does not impose an express duty on any such person either to inform the person making the demand that they are not the true creditor, or to inform the true creditor (if known) that a demand has been made. However, a failure to do so may under the general law cause the apparent creditor to be liable for any loss sustained as a result of the Keeper making a correction that was not required.

See paragraphs 33.23 to 33.34 of the Report.

**102 Correction of statutory pledges record where Keeper becomes aware of manifest inaccuracy**

- (1) This section applies where the Keeper becomes aware of a manifest inaccuracy in the statutory pledges record.
- (2) The Keeper must correct the record if what is needed to correct it is manifest.
- (3) Where what is needed to correct it is not manifest, the Keeper must note the inaccuracy on the entry in question.
- (4) Where under subsection (2) the Keeper corrects the record by—
  - (a) removing the entry from the statutory pledges record, the Keeper must transfer the entry to the archive record and note on the transferred entry—
    - (i) that the transfer is in consequence of a correction under that subsection, and
    - (ii) the date and time of the removal, or
  - (b) removing or replacing data included in the entry or by replacing a copy document, the Keeper must note on the entry—
    - (i) that it has been corrected, and
    - (ii) the details of the correction (including, without prejudice to the generality of this paragraph, the date and time of the correction),and in the case of the replacement of the copy document, must transfer the replaced copy to the archive record and retain it there.
- (5) Where under subsection (2) the Keeper effects a correction, the Keeper must notify (in so far as it is reasonable and practicable to do so)—
  - (a) every person specified for the purposes of this subsection by RSP Rules, and
  - (b) any other person whom the Keeper considers it appropriate to notify,that the correction has been effected.

**NOTE**

Subsections (1) and (2) of this section provide for the Keeper to correct a manifest inaccuracy in the statutory pledges record, where what is needed to correct the inaccuracy is also manifest.

Subsection (3) provides for the Keeper to note any inaccuracy that cannot be corrected.

Subsections (4) and (5) provide for notification of any correction, and for giving effect to the correction as appropriate in the statutory pledges record or archive record.

See paragraphs 33.6 and 33.7 of the Report.

**103 Directions for, or in relation to, correction of the statutory pledges record**

- (1) This section applies where, in any proceedings, a court determines that the statutory pledges record is inaccurate.
- (2) The court must direct the Keeper to correct the record.

- (3) In connection with any such correction, the court may give the Keeper such further direction (if any) as it considers requisite.
- (4) Where by virtue of subsection (2) the Keeper effects a correction by—
  - (a) removing the entry in question from the statutory pledges record, the Keeper must transfer the entry to the archive record and note on the transferred entry—
    - (i) that the transfer is in pursuance of the direction of a court under subsection (2), and
    - (ii) the date and time of the removal of the entry from the statutory pledges record, or
  - (b) removing or replacing data included in the entry or by replacing a copy document, the Keeper must note on the relevant entry—
    - (i) that it has been corrected, and
    - (ii) the details of the correction (including, without prejudice to the generality of this paragraph, the date and time of the correction),
 and in the case of the replacement of the copy document, must transfer the replaced copy to the archive record and retain it there.
- (5) Where by virtue of subsection (2) the Keeper effects a correction, the Keeper must notify (in so far as it is reasonable and practicable to do so)—
  - (a) every person specified for the purposes of this subsection by RSP Rules, and
  - (b) any other person whom the Keeper considers it appropriate to notify,
 that the correction has been effected.

NOTE

This section ensures both that the courts can where appropriate direct the Keeper to correct an entry in the RSP, and that the Keeper must comply with such a direction.

The Bill does not provide for an express right of appeal against or review of any decision by the Keeper. An issue relating to the accuracy of the register might however be raised in other proceedings, such as a judicial review of a decision by the Keeper, or proceedings in which it is alleged that a constitutive document is a forgery.

Example 1      A constitutive document is reduced by the court because it has been forged by one of the apparent parties. The court can direct the Keeper to correct the entry in the statutory pledges record.

Example 2      An entry has been created in the statutory pledges record for a security by Andrew in favour of Bruce. But in the application form for registration of the assignation Bruce erroneously states that Carol is the creditor. Carol could seek removal of the entry by the court (as an alternative to a demand for a correction).

See paragraphs 33.8 and 33.9 of the Report.

**104 Proceedings involving the accuracy of the statutory pledges record**

The Keeper is entitled to appear and be heard in any civil proceedings, whether before a court or before a tribunal, in which is put in question (either or both)—

- (a) the accuracy of the statutory pledges record,
- (b) what is needed to correct an inaccuracy in that record.

NOTE

See paragraph 33.10 of the Report.

**105 Correction of statutory pledges record: general**

- (1) In this Part, any reference to “correction” includes (without prejudice to the generality of that expression and except in so far as the context otherwise requires)—
  - (a) the removal of data included in an entry,
  - (b) the removal of an entry from the statutory pledges record and the transfer of that entry to the archive record,
  - (c) the replacement of data, or of a copy document, included in an entry,
  - (d) the restoration of data, or of a copy document, to an entry, and
  - (e) the restoration of an entry (whether or not by removing it from the archive record and transferring it to the statutory pledges record);and analogous expressions are to be construed accordingly.
- (2) A correction is taken to be made on the date and at the time which are entered for it in the register in pursuance of a provision of this Part of this Act.

NOTE

This section deals with some general matters in relation to corrections.

Subsection (1) sets out a non-exhaustive list of the various types of correction that are competent, although not all these types are relevant to all of the preceding provisions. See paragraphs 33.4 and 33.5 of the Report.

Subsection (2) sets out what is taken to be the date and time of correction. This is particularly important as regards sections 95 and 96 of the Bill, under which an ineffective registration may be made effective by correction (so creating the pledge). See paragraph 33.38 of the Report.

*Searches and extracts*

**106 Searching the statutory pledges record**

- (1) Any person may search the statutory pledges record provided that—
  - (a) the search accords with—
    - (i) subsection (2), and
    - (ii) such RSP Rules as are made under section 114(1)(h), and
  - (b) either—
    - (i) such fee as is payable for the search is paid, or

- (ii) arrangements satisfactory to the Keeper are made for payment of that fee.
- (2) The statutory pledges record may be searched only—
  - (a) by reference to any of the following data in the entries contained in that record—
    - (i) the names of providers,
    - (ii) the names and dates of birth of providers who are individuals,
    - (iii) the unique numbers of providers required by RSP Rules to be identified in the statutory pledges record by such a number,
    - (iv) if RSP Rules require or permit the encumbered property to be identified (whether by a number unique to that property or in some other way), by reference to such identification,
  - (b) by reference to registration numbers allocated, under section 91(4)(b), to entries in that record, or
  - (c) by reference to some other factor, or characteristic, specified for the purposes of this paragraph by RSP Rules.

NOTE

This section provides that any person may search the statutory pledges record on payment of any search fee, provided that the search accords with RSP Rules, and that it is one of the types of search permitted under subsection (2).

Subsection (2)(a) sets out that a search can be made by reference to the name of the provider, or (in the case of an individual) their name and date of birth, unique number for the provider (where RSP Rules require identification by number) or unique number of the encumbered property (where RSP Rules require or permit identification by number).

Subsection (2)(b) and (c) set out that a search may be against the registration number of the pledge and any other factor or characteristic specified in RSP Rules.

It will not be possible to search against the secured creditor, or to search in the archive record, unless the Scottish Ministers made provision in RSP Rules permitting such searches. It will, however, be possible to obtain an extract of an entry in the archive record under section 109 of the Bill.

It will also not be possible to search against date of birth alone, in order to reduce the risk of fraud through identity theft. The Scottish Ministers will also be able through RSP Rules to prevent dates of birth from being disclosed on the face of the Register, or to limit the number of searches by reference to the same name and different dates of birth that can be made in a particular time period.

See paragraphs 34.2 to 34.9 of the Report.

**107 Keeper’s duties and powers as regards the provision of facilities for searching the statutory pledges record**

- (1) The Keeper—
  - (a) must for the purposes of section 106 provide a search facility the search criteria of which are specified by RSP Rules, and
  - (b) may provide such other search facilities, with such other search criteria, as the Keeper thinks fit.

- (2) In subsection (1), “search criteria” means the criteria in accordance with which what is searched for must match data in an entry in order to retrieve that entry.

#### NOTE

This section sets out that the Keeper must provide a search facility using criteria specified in RSP Rules, and may provide a search facility using other criteria.

The Keeper has in that latter respect the power under section 108 of the Land Registration etc. (Scotland) Act 2012 to provide commercial services, on such terms as may be agreed between the Keeper and those to whom the services are provided.

Sections 95 to 97 of the Bill have the effect that it must be possible to carry out searches for the purposes of the “seriously misleading” test, as provided for under those sections. It will therefore be for Ministers to make such RSP Rules as are needed under this section for those purposes.

Subsection (2) sets out that “search criteria” means the criteria in accordance with which what is searched for must match data in an entry in order to retrieve the entry.

RSP Rules will, amongst other matters, be able to determine whether the search criteria will provide for an exact match or a close match search.

Example	A search against “John A Smith” would return a match against John Smith if RSP Rules set out that the search criteria do not require a match with middle initials. However, it would not return a match against John A Smythe if the criteria require an exact match for the last name.
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See paragraphs 34.10 and 34.11 of the Report.

### **108 Statutory pledges record: printed search results and their evidential status**

A printed search result which relates to a search carried out by means of a search facility provided by the Keeper and which purports to show an entry in the statutory pledges record is admissible in evidence and, in the absence of evidence to the contrary, is sufficient proof of (as the case may be)—

- (a) the registration of—
  - (i) the statutory pledge, or
  - (ii) an amendment to the entry in the statutory pledges record, to which the result relates,
- (b) a correction of the entry in the statutory pledges record to which the result relates, and
- (c) the date and time of such registration or correction.

#### NOTE

This section enables printed search results obtained from the Keeper to be used as evidence of certain matters and, moreover, to have the effect of proving certain matters unless there is evidence to the contrary. There are similar provisions for other jurisdictions in their PPSA schemes.

This section should be read with section 109, which provides for an extract from the Registers, and which would provide conclusive evidence of the contents of the relevant entry at the date the extract is issued.

See paragraphs 34.12 and 34.13 of the Report.

### **109 Register of Statutory Pledges: extracts and their evidential status**

- (1) Any person may apply to the Keeper for an extract of an entry in the register.
- (2) The Keeper must issue the extract if—
  - (a) such fee as is payable for issuing it is paid, or
  - (b) arrangements satisfactory to the Keeper are made for payment of that fee.
- (3) The Keeper may validate the extract as the Keeper considers appropriate.
- (4) The Keeper may issue the extract as an electronic document if the applicant does not request that it be issued as a traditional document.
- (5) The extract is to be accepted for all purposes as sufficient evidence of the contents of the entry as at the date on which and the time at which the extract is issued (being a date and time specified in the extract).

#### NOTE

This section provides for it to be possible to obtain an extract from the Keeper of any entry or part of an entry in the RSP, on payment of any fee (or making an arrangement to pay).

An extract is sufficient evidence of the contents of an entry at the time the extract is issued, and can be used for that purpose in for example any court proceedings.

See paragraphs 34.14 and 34.15 of the Report.

#### *Request for information*

### **110 Secured creditor's duty to respond to request for information**

- (1) An entitled person may request the person identified in the entry for a statutory pledge as the secured creditor (the person so identified being in this section referred to as "ISC") to provide the entitled person—
  - (a) if ISC is the secured creditor, with a written statement (either or both)—
    - (i) as to whether or not property specified by the entitled person is, or is part of, the encumbered property,
    - (ii) describing the secured obligation, or
  - (b) if ISC—
    - (i) is no longer the secured creditor, with information to that effect, with the name and address of the person to whom ISC assigned the statutory pledge and (as the case may be and in so far as known) with the names and addresses of subsequent assignees, or
    - (ii) has never been the secured creditor, with information to that effect.
- (2) The following are "entitled persons" for the purposes of this section—



- (a) a person who has a right in the property so specified,
  - (b) a person who has a right to execute diligence against the property so specified (or who is authorised by decree to execute a charge for payment and will have the right to execute diligence against that property if and when the days of charge expire without payment), and
  - (c) a person who is not mentioned in paragraph (a) or (b) but—
    - (i) is prescribed under this paragraph, or
    - (ii) has the consent of the person identified in the entry as the provider to make a request under paragraph (a) or (b) of subsection (1).
- (3) Subject to subsection (5), ISC must, within 21 days after receiving a request by virtue of subsection (1), comply with that request unless subsection (7) applies.
- (4) ISC may recover from the entitled person any costs reasonably incurred in complying with the request.
- (5) The court, if satisfied that in all the circumstances it would be unreasonable to require ISC—
- (a) to comply with the request (whether in whole or in part), may by order, on the application of ISC, exempt ISC from complying with—
    - (i) the request, or
    - (ii) such part of the request as it may specify in the order, or
  - (b) to comply with the request within the 21 days mentioned in subsection (3), may by order, on such application, extend by such number of days as it may specify in the order the period within which ISC must comply with the request.
- (6) If the court is satisfied on the application of the entitled person that ISC, without reasonable excuse, failed to comply with subsection (3), it may by order require ISC to comply with the request within 14 days.
- (7) This subsection applies—
- (a) where it is manifest that the registration is ineffective as regards the statutory pledge to which the request relates,
  - (b) where it is manifest from the entry for the statutory pledge that the property (or any part of the property) specified under subsection (1) by the entitled person is not encumbered by that pledge,
  - (c) in so far as the request is for a written statement describing the secured obligation, if the extent of that obligation is manifest from the entry for the statutory pledge, or
  - (d) where—
    - (i) ISC has, within the 3 months immediately preceding ISC’s receipt of the request, already complied with a request under subsection (1), by the same person and in relation to the same property, and
    - (ii) the information contained in the statement issued in relation to the earlier request is still correct.
- (8) Subsection (9) applies where an entitled person—
- (a) makes a request under subsection (1),

- (b) is informed by the secured creditor, in a response under paragraph (a) of that subsection to the request, that the property specified under that subsection by the entitled person is neither the encumbered property nor part of that property, and
- (c) within 3 months after being so informed acquires in good faith—
  - (i) the property so specified (or any part of it), or
  - (ii) a right in that property (or part).
- (9) On that acquisition, the statutory pledge is extinguished as regards the property (or part).
- (10) This section applies in relation to any secured creditor whose name and address have, by virtue of subsection (1)(b), been provided to an entitled person by ISC as it applies to ISC.

NOTE

This section enables a person with an interest in the encumbered property (the “entitled person” under subsection (2)) to be able to request from the person identified in the statutory pledges record as the secured creditor a written statement:

- (a) as to whether property specified in the request is encumbered property, or
- (b) describing the secured obligation.

The creditor so identified must - unless exempt under subsection (7) - provide the information within 21 days if they are still the creditor, and if not still the creditor (or they never have been) advise the entitled person accordingly. The creditor may recover their reasonable costs in that respect.

**Example** Adam grants a statutory pledge over his Rolls Royce. A search in the RSP against Adam reveals only the entry for that pledge. A request to the person named as secured creditor as to whether the pledge covers Adam’s yacht is exempt, as it will be clear from the register that it does not.

Subsection (2) provides for the meaning of “entitled person”, with the effect that it covers any person who has a right to the property specified in the request, a right to exercise diligence against that property, the consent of the provider, or is as specified in regulations made by the Scottish Ministers.

Subsection (10) makes it clear that an assignee of the secured creditor may be treated as being the creditor for the purposes of a further request under this section.

The person identified as the secured creditor may ask the court to exempt them from complying with the request, or to allow further time for doing so. The entitled person may if necessary seek an order requiring that person to comply with the request, and a continuing failure to comply would then be a contempt of court.

A duty of this type is also to be found in other schemes for security over moveables, such as the DCFR Book IX. The duty to provide information works to protect third parties who may otherwise lack sufficient information about the scope of a statutory pledge. For example, the encumbered property might be described only by reference to a class, or be intended to include assets to be acquired by the provider, so that in either case it is not clear whether or not any specific asset is encumbered.

Subsections (8) and (9) set out a special rule to protect purchasers of encumbered property, and are also influenced by the DCFR IX.–3:322(1). If a person making a request is advised wrongly by the secured creditor that the particular property is not subject to the pledge, and the person then acquires the property (or a right in it such as a further pledge) in good faith within three months, then the pledge is extinguished.

See paragraphs 35.2 to 35.19 of the Report.

*Entitlement to compensation*

**111 Register of Statutory Pledges: liability of Keeper**

- (1) A person is entitled to be compensated by the Keeper for loss suffered in consequence of—
  - (a) an inaccuracy attributable to the Keeper—
    - (i) in the making up, maintenance or operation of the register, or
    - (ii) in an attempted correction of the register,
  - (b) the issue, under section 93(1) or 100(4)(b), of a written statement which is incorrect,
  - (c) the service, under section 101(13) or 103(6) of a notification which is incorrect, or
  - (d) the issue, under section 109, of an extract which is not a true extract.
- (2) But the Keeper has no liability under subsection (1)—
  - (a) in so far as the person's loss could have been avoided had the person taken measures which it would have been reasonable for the person to take,
  - (b) in so far as the person's loss is not reasonably foreseeable, or
  - (c) for non-patrimonial loss.

**NOTE**

This section provides for the Keeper to compensate any person who has suffered a loss for a reason specified in subsection (1).

The liability under subsection (1) is strict in that the person does not have to show that the Keeper is at fault, but subsection (2) limits the losses that can be recovered by excluding certain types of claim.

The limitation is similar to that in section 37 of the Bill, and in section 106 of the Land Registration etc. (Scotland) Act 2012.

See paragraphs 35.33 and 35.34 of the Report.

**112 Register of Statutory Pledges: liability of certain other persons**

- (1) Where a person (in this section referred to as "P") suffers loss in consequence of—
  - (a) an inaccuracy in an entry in the register (not being an inaccuracy attributable to the Keeper), P is entitled to be compensated for that loss by the person who made the application which gave rise to the entry if, in making it, that person failed to take reasonable care,
  - (b) an inaccuracy in information supplied in response to a request under section 110(1), P is entitled to be compensated for that loss by the person who supplied the information if, in supplying it, that person failed to take reasonable care, or

- (c) a failure, without reasonable cause, to comply with a request under section 110(3), P is entitled to be compensated for that loss by the person whose failure it was.
- (2) But a person has no liability under subsection (1)—
  - (a) in so far as P’s loss could have been avoided had P taken measures which it would have been reasonable for P to take,
  - (b) in so far as P’s loss is not reasonably foreseeable, or
  - (c) for non-patrimonial loss.

NOTE

This section provides for certain persons to be liable, on fault shown, for losses suffered by another person in the circumstances specified in subsection (1).

Subsection (1)(a) applies where a person suffers loss as a result of an inaccuracy in an entry where the person who made the application which led to the entry did not exercise reasonable care.

**Example** Alan maliciously registers a forged constitutive document bearing to be granted by Bruce over property owned by Claire. Claire has a claim against Alan for any loss.

Subsection (1)(b) applies where as a result of a failure to take reasonable care there is an inaccuracy in responding to an information request under section 110 of the Bill.

It should be read with section 110(8) and (9) of the Bill, which provides for certain pledges to be extinguished where property is acquired within 3 months after faulty information is given to an entitled person.

**Example** Information is supplied to Ailsa by Brendan that certain property is not pledged. Brendan does not take reasonable care, and the information is wrong. Ailsa takes a pledge over the property in reliance on that information. She expects that the pledge will be a first ranked security, but it is in fact subject to the existing pledge. Ailsa will have a claim against Brendan.

Subsection (1)(c) applies where a person has failed to provide information under section 110 of the Bill without reasonable cause.

Subsection (2) imposes the same restrictions on liability as those set out in section 111(2) of the Bill.

See paragraphs 35.35 and 35.36 of the Report.

*Service of documents for purposes of certain provisions of this Chapter of Part 2*

**113 Service of documents for purposes of certain provisions of this Chapter of Part 2**

In the application of section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (service of documents) for the purposes of section 101(1), (7)(a) or (c) or (13), 103(6) or 110(1)—

- (a) subsection (4) of that section of that Act is to be construed as if, for paragraphs (a) to (c) of the subsection, there were substituted the words “the address given for the person in the entry in question”, and

- (b) where an e-mail address for the person identified as the secured creditor is contained in the entry in question, the request or notice is to be taken to be served as mentioned in subsection (2)(c) of that section of that Act on being transmitted to that e-mail address.

#### NOTE

Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides for the service (including sending) of documents in Acts of the Scottish Parliament.

This section modifies that section for the purposes of certain provisions in this chapter of the Bill.

Paragraph (a) refers to subsection (4) of section 26, which deals with the sending of notices. The effect of paragraph (a) is that a notice should be sent to the address for the person that is given in the register entry.

Paragraph (b) refers to subsection (2)(c) of section 26, which deals with electronic communication of notices. The effect of paragraph (b) is that where an e-mail address is given for a person in the register entry, the electronic communication should be to that e-mail address.

### *RSP Rules*

#### **114 RSP Rules**

- (1) The Scottish Ministers may by regulations make rules (in this Act referred to as “RSP Rules”)—
  - (a) as to the making up and keeping of the register,
  - (b) as to procedure in relation to applications—
    - (i) for registration, or
    - (ii) for corrections,
  - (c) as to the identification, in any such application and in the register, of any person or of property, including—
    - (i) how the proper form of a person’s name is to be determined, and
    - (ii) where the person or property bears a number (whether of numerals or of letters and numerals) unique to the person or property, whether that number must (or may) be used in identifying the person or property,
  - (d) as to the degree of precision with which time is to be recorded in the register,
  - (e) as to the manner in which an inaccuracy in the statutory pledges record may be brought to the attention of the Keeper,
  - (f) as to information which, though contained in a constitutive document or amendment document, need not be included in a copy of that document submitted with an application under section 91 or 92,
  - (g) as to whether a signature contained in a constitutive document or amendment document need be included in a copy of that document so submitted,
  - (h) as to searches in the register,
  - (i) as to data which, though contained in the register, is not to be—

- (i) available to persons searching it, or
  - (ii) included in any extract issued under section 109,
  - (j) prescribing the configuration, formatting and content of—
    - (i) applications,
    - (ii) notices,
    - (iii) documents,
    - (iv) data,
    - (v) statements, and
    - (vi) requests,
 to be used in relation to the register,
  - (k) as to when the register is open for—
    - (i) registration, and
    - (ii) searches,
  - (l) requiring there to be entered in the statutory pledges record or in the archive record such data as may be specified in the rules, or
  - (m) regarding other matters in relation to registration under this Part, being matters for which the Scottish Ministers consider it necessary or expedient to provide in order to give full effect to the purposes of this Part.
- (2) Before making RSP Rules the Scottish Ministers must consult the Keeper.

NOTE

This section sets out that the Scottish Ministers may, by regulations, make rules (RSP Rules) providing for the operation of the Register of Statutory Pledges. They must consult the Keeper before doing so.

The power to make RSP Rules includes the powers in paragraphs (f), (g) and (i) of subsection (1) to authorise the redaction of information or signatures from an entry in the RSP, or to make certain information unavailable to searchers (which might include an individual's date of birth).

See paragraphs 35.37 and 35.38 of the Report.

### CHAPTER 3

#### MISCELLANEOUS AND INTERPRETATION OF PART 2

##### *Miscellaneous*

#### **115 Competence of creating an agricultural charge**

On the coming into force of this section it ceases to be competent to create an agricultural charge (“agricultural charge” having the meaning given to that expression by section 5 of the Agricultural Credits (Scotland) Act 1929).

## NOTE

This section prevents the creation of a new agricultural charge, which is a form of security right which is little used in practice.

See in general Chapter 38 of the Report.

### *Interpretation of Part 2*

#### **116 Interpretation of Part 2**

(1) In this Part (except where the context otherwise requires)—

“amendment document” has the meaning given to that expression by section 60(1),

“the archive record” is to be construed in accordance with section 90,

“authorised person” is to be construed in accordance with sections 71(9) and 72(6),

“collateral-taker” has the same meaning as in regulation 3 of the Financial Collateral Arrangements (No.2) Regulations 2003 (S.I. 2003/3226)),

“corporeal moveable property” does not include money,

“encumbered property” is to be construed in accordance with section 44(3),

“financial instrument” is to be construed in accordance with the definition of “financial instruments” in regulation 3(1) of the Financial Collateral Arrangements (No.2) Regulations 2003 (S.I. 2003/3226)),

“money” has the meaning given to that expression by section 175(1) of the Bankruptcy and Diligence etc. (Scotland) Act 2007,

“provider”—

(a) is to be construed in accordance with section 43(5)(b),

(b) without prejudice to the generality of the expression, may consist of two or more co-providers, and

(c) includes any successor in title, or representative, of a provider (unless the successor or representative is a person who, by virtue of Chapter 1 of this Part, had acquired the encumbered property unencumbered by the statutory pledge in question),

“the register” is to be construed in accordance with section 87(2),

“RSP Rules” has the meaning given to that expression by section 114(1),

“secured creditor”—

(a) is to be construed in accordance with section 43(5)(a),

(b) without prejudice to the generality of the expression, may consist of two or more co-secured creditors, and

(c) includes any successor in title, or representative, of a secured creditor,

“statutory pledge” has the meaning given to that expression by section 43(4), and

“the statutory pledges record” is to be construed in accordance with section 89(2).

- (2) In this Part, “right in security” (except where the context otherwise requires)—
  - (a) means a right in security over property and includes a floating charge, but
  - (b) does not include a right to execute diligence.
- (3) Any reference in this Part to the “proper name” of a person is to that person’s name in the form determined in accordance with rules under section 114(1)(c)(i).
- (4) There is an “inaccuracy” in the statutory pledges record where that record misstates what the position is, in law or in fact, as regards a statutory pledge.

#### NOTE

This section defines key terms used in this Part.

Subsection (2) defines “right in security” so that it does not include, unless the context requires otherwise, a right to use diligence (the Scots law term for the several methods of enforcing a debt due under a court order (or equivalent)). The effect is that an effectively executed diligence is not to be treated as a security right for the purposes of the Part.

A “right in security” does include, unless the context requires otherwise, a floating charge.

The expression “right in security” can be used in various legal senses, including being limited to “true” securities where the secured creditor has a subordinate real right in the asset. For floating charges, however, there is no such real right prior to attachment (crystallisation) of the charge as a result of the insolvency of the legal person who granted the charge.

See paragraph 21.6 of the Report as regards a pledge over money, and paragraph 19.15 of the Report as regards the provider and the secured creditor.

### **117 References in Part 2 to “registering”**

Any reference (however expressed) in this Part to registering—

- (a) a statutory pledge, is to be construed as a reference to the Keeper’s carrying out the duties imposed on the Keeper by sections 89 and 91,
- (b) an amendment to a statutory pledge, is to be construed as a reference to the Keeper’s carrying out the duties imposed on the Keeper by section 92(2) and (4).

## **PART 3**

### INTERPRETATION OF THIS ACT AND GENERAL

#### *Interpretation of this Act*

### **118 Interpretation of this Act**

- (1) In this Act (except where the context otherwise requires)—

“authenticated” is to be construed in accordance with section 9B(2) of the Requirements of Writing (Scotland) Act 1995,

“court” means Court of Session or sheriff,



“executed” means subscribed as a traditional document in compliance with section 2(1) of the Requirements of Writing (Scotland) Act 1995,

“the Keeper” means the Keeper of the Registers of Scotland,

“prescribed” means prescribed by regulations made by the Scottish Ministers, and

“registration number” means a unique identifier consisting of numerals or of letters and numerals.

- (2) Any reference in this Act to—
  - (a) a “written agreement” (or to an agreement’s being set out “in writing”) is to an agreement,
  - (b) a “written confirmation” is to a confirmation,
  - (c) “written consent” is to consent, or
  - (d) a “written statement” is to a statement,set out either in a traditional document or in a document created as an electronic communication.
- (3) In subsection (2), “electronic communication” has the same meaning as in the Electronic Communications Act 2000.
- (4) Where, under or by virtue of a provision of this Act, however expressed, a person (in this subsection referred to as “P”) may or must proceed in some way, the provision is to be construed as if any reference in it to P includes a reference to any person authorised by P to proceed in such a way on P’s behalf.
- (5) The Scottish Ministers may by regulations modify (either or both)—
  - (a) the definition of “authenticated” in subsection (1),
  - (b) the definition of “executed” in that subsection.

#### NOTE

This is the main interpretation provision in the Bill.

Sections 42, 116 and 117 provide for the interpretation of terms used only in Parts 1 or 2 respectively, or for the definition of terms used for the purposes of particular provisions.

See also section 120 of the Bill which provides for the effect of a reference in the Bill to a requirement for any person to be in good faith.

Only some of the terms in subsection (1) call for explanation.

The definition of “authenticated” refers to the Requirements of Writing (Scotland) Act 1995, and its requirements for execution of electronic documents. But it is also possible for the Scottish Ministers to make alternative provision.

Subsection (2) has the effect that the various types of “written” document provided for by the Bill may be in the form of a hard copy or in an electronic communication (such as an e-mail). In other words, word of mouth is insufficient.

Subsection (5) lets the Scottish Ministers prescribe a different standard for executing paper documents or authenticating electronic documents than those provided for by the Requirements of Writing (Scotland) Act 1995.

### *General*

#### **119 Automated computer system**

- (1) The Keeper may, by means of an automated computer system under the Keeper's management and control, carry out the duties imposed on the Keeper under Chapter 2 of Part 1 and Chapter 2 of Part 2 of this Act.
- (2) Without prejudice to the generality of subsection (1), the Keeper may, under that subsection, enable—
  - (a) the electronic generation and communication of applications under this Act,
  - (b) automated registration under this Act, and
  - (c) the creation of electronic documents (as defined in section 9A of the Requirements of Writing (Scotland) Act 1995).
- (3) The Keeper may impose reasonable conditions for using any computer system provided for the purposes of subsection (1).

#### NOTE

This section authorises the Keeper to operate the Registers provided for under this Act by means of an automated computer system.

The effect is to facilitate the operation of an all-electronic register. See in that respect paragraphs 6.38 and 6.39, 6.40 to 6.45, and 29.22 and 29.23 of the Report.

#### **120 Good faith**

- (1) Subsection (2) applies as respects any provision made in this Act as respects good faith.
- (2) If there is a dispute as to whether a person was in (or acted in) good faith, the burden of proof lies on whoever asserts that the person was not in (or did not act in) good faith.

#### NOTE

This is a general provision relating to good faith provisions in, for example, sections 11 and 12 of the Bill.

The effect is that, where an issue arises as to whether or a person is in good faith for the purposes of a provision in the Bill, then it is for the person asserting a lack of good faith to prove that the person was not in good faith.

#### **121 Ancillary provision**

- (1) The Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitory, transitional or saving provision as they consider appropriate for the purposes of, or in consequence of, or for giving full effect to, any provision made by, under or by virtue of this Act.
- (2) Regulations under subsection (1) may modify any enactment (including this Act).

## NOTE

This section provides for a general regulation-making power, that enables the Scottish Ministers to make provision for consequential and other incidental matters in order to give full effect to the Bill.

The power in this section allows the Scottish Ministers to amend any enactment including the Bill, and any regulations that do so will be subject to affirmative procedure (see section 122 of the Bill).

For the meaning of “enactment” see schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

### **122 Regulations**

- (1) Regulations under section 3(6), 5(7), 36(2)(b)(i), 47(2)(d), 51(4), 52(3), 53(5), 55(1)(a), 99(1), 118(5) or (if modifying an enactment) 121(1) are subject to the affirmative procedure.
- (2) Any other regulations under this Act, other than regulations under section 123(2), are subject to the negative procedure.

### **123 Commencement**

- (1) This section and sections 121, 122 and 124 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Different days may, under subsection (2), be appointed for different purposes.

## NOTE

The provisions in the Bill will, except as provided for here, come into force on the day or days appointed by the Scottish Ministers in regulations made for that purpose under this section.

### **124 Short title**

The short title of this Act is the Moveable Transactions (Scotland) Act 2017.





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