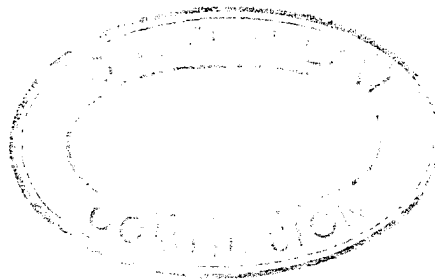




Report on the Companies (Floating Charges) (Scotland) Act 1961

Chairman

The Hon. Lord Kilbrandon, LL.D



*Presented to Parliament by the President of the Board of Trade
by Command of Her Majesty
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To: The Right Honourable Roy Mason, M.P.
President of the Board of Trade

In January 1967 your predecessor requested us under section 3(1)(e) of the Law Commissions Act 1965 to consider and advise on the provisions of the Companies (Floating Charges) (Scotland) Act 1961.

We now have the honour to submit our Report.

C. J. D. SHAW
Chairman

26 January 1970

CHAPTER 1

Introduction

1. In March 1967 we set up a Working Party under the chairmanship of Professor J. M. Halliday with the following terms of reference:

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

2. This Working Party, the membership of which is shown in Appendix A, reported to us in December 1968 and in January 1969 we issued their report in a memorandum entitled *Examination of the Companies (Floating Charges) (Scotland) Act 1961*. (Scottish Law Commission Memorandum No. 10).*

3. In response to our request for comments on this memorandum we have received many observations, involving much careful and detailed work, from the organisations and individuals mentioned in Appendix B and we should like to take this opportunity of recording our gratitude to them.

4. The members of the Working Party have further assisted us in our consideration of the comments received and we wish to record also our great indebtedness to them. Their expert advice and assistance have been invaluable.

5. In June 1960 the Law Reform Committee for Scotland made their Eighth Report (Cmnd. 1017)† and recommended (in paragraphs 26 and 32) that the law of Scotland should be changed to permit incorporated companies to create floating charges. They also recommended (in paragraphs 47 and 50) that there should be established a procedure, very similar to that in force for England, for the registration with the registrar of companies of charges (whether floating charges or not) created by companies. Effect was given to these recommendations by the Companies (Floating Charges) (Scotland) Act 1961 (hereinafter referred to as 'the 1961 Act') which incorporated amendments for Scotland of the registration provisions of the Companies Act 1948 (hereinafter referred to as 'the 1948 Act').

6. We have found it helpful in formulating our principal recommendations to incorporate them in a draft Bill which has also enabled us to appreciate the legislative problems which they involve. The draft Bill, which is simply a convenient aid to presentation of our recommendations, forms Appendix C. (For convenience of reference we refer throughout this Report to the draft Bill as 'the new Bill' and references to clauses and schedule are to the clauses and schedule of the new Bill.)

* Available only from the Scottish Law Commission.

† Eighth report of the Law Reform Committee for Scotland. The constitution of security over moveable property; and floating charges. Cmnd. 1017. 1962 (HMSO)

CHAPTER 2

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

General

7. As a result of the many criticisms made of the 1961 Act we have proposed such extensive changes to that Act that we consider it would be unsatisfactory to give effect to them merely by amending the Act. We propose instead that the 1961 Act be repealed (*clause 30*) and re-enacted with amendments in the new Bill (*clauses 1-4, 6 and 9 and Schedule*).

Power to create floating charges

8. The 1961 Act s. 1 authorises a company to grant a floating charge to secure 'any debt incurred or to be incurred by it'. The restrictive effect of this wording has been criticised by several bodies from whom our Working Party received memoranda. The principal criticisms were:

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

(2) These difficulties are greater when further issues are made under an 'open-ended' debenture stock trust deed or when further subsidiary companies are introduced to provide additional security or as guarantors of the stock.

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

10. The proposed amending legislation might strengthen doubts as to the validity of existing floating charges granted to secure guarantees. We suggest, to avoid any such doubt, that there should be a provision, which would be retroactive, that any floating charge which was subsisting as such at the coming into operation of the proposed legislation and which would be a valid charge if it had been created after the legislation came into effect, should be deemed to have been validly created (*clause 30*).

11. The provisions of the Cautioners Act 1965 c. 5, relating to septennial prescription, introduce an additional element of difficulty into the issue of debenture stock in Scotland by a parent company with guarantees by its subsidiary companies secured by floating charges over their properties. If the issue is documented in the convenient form of a single trust deed by all the companies there may be doubt whether the guarantees by the subsidiary companies and the floating charges which secure them remain valid after the expiry of seven years. It is arguable that the Act of 1695 is inapplicable in the normal case where the debenture stock is subject to redemption on a specified date, since the obligation of the subsidiary companies has a definite term of years extending beyond the septennium, but doubt remains. The problem can be obviated by incorporating the guarantees and charges by the subsidiary companies in separate instruments, but this involves additional documentation and is less convenient. The effect of these doubts and inconveniences is to render unduly difficult the creation of debentures by Scottish companies.

12. We consider that it would be undesirable for any recommendation to be made for a piecemeal amendment of the Act of 1695 whereby cautionary obligations secured by floating charges would form a category exempted from the operation of that statute. We have been considering the whole law of prescription and in our Memorandum No. 9* published in November 1968 we proposed that the septennial prescription should be abolished and replaced by a short prescription applicable to cautionary obligations of all kinds, however constituted, which would run only from the date when the obligation of the guarantor becomes prestable. If this proposal is implemented the problems in relation to floating charges which result from the application of the septennial prescription would be resolved.

Charges over specified items of property

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

* Available only from the Scottish Law Commission.

Scotland should be brought into conformity with that of England (*clauses 1 and 2*).

Interest after liquidation

14. It has recently been decided in the case of *National Commercial Bank of Scotland Ltd. v Liquidators of Telford Grier Mackay & Co. Ltd.* 1969 S.L.T. 306, in the circumstances of that case, that the holder of a floating charge had a secured right to interest at the stipulated rate from the date of liquidation until payment. To obviate any possible doubt on the matter, however, we suggest the insertion of a specific provision having that effect in *clause 1(4)*.

Execution of floating charges

15. A further criticism of the 1961 Act s. 2 is that the requirement that the instrument creating the charge be under seal has caused considerable difficulty, particularly where group arrangements are involved. Scottish procedure requires that a document be executed by every party thereto on each page. Where there is a group arrangement involving a large number of companies the practical difficulties are obvious. One method of surmounting the difficulty is the execution of supplementary deeds, but this involves additional documentation. English companies can execute by attorney and where the same attorney has been appointed by several companies one signature only need be appended to the instrument. We consider that Scots law should conform to that of England, although we consider that it should be provided that the attorney appointed for the purpose of executing the instrument must be appointed by the company by writing under its common seal (*clause 2(2)*).

Conventional ranking clauses

16. The 1961 Act s. 5(2)(c) has been widely criticised on the ground that its effect may be to permit only the complete prohibition in the instrument creating the floating charge of the subsequent creation of fixed securities having priority over or ranking equally with the floating charge. There is some doubt whether it is competent in the instrument creating the floating charge to reserve the right to create a limited amount of fixed security which will rank in priority to or equally with the floating charge as is commonly done in English practice. We consider that all doubt should be removed and that it should be made clear that instruments creating or altering a floating charge may contain provisions prohibiting or restricting the creation of any fixed security or any other floating charge having priority over or ranking equally with the floating charge, or provisions regulating the order in which the charge shall rank with any other subsisting or future floating charges or fixed securities (*clause 5*). We also consider that effect should be given only to those ranking clauses which are registered. We suggest that this object be attained by providing that a ranking clause can only be contained in the instrument creating a floating charge (which must be registered) or in an instrument of alteration (which must be registered when it alters the ranking) (*clause 7(3)* and paragraph 30 below).

Supplementary back letters and agreements

17. It has been judicially decided that in the case of an ex facie absolute

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

18. We suggest that, where the amount secured by a fixed charge is increased by a further back letter or agreement, that back letter or agreement must be registered within 21 days of its execution, the security for the additional sum being effective only from the date of the alteration (*Schedule section 106A(9)*).

Assignment of floating charges

19. In Memorandum No. 10[†] we invited comments concerning the advisability of providing for the registration of assignments of floating charges and of all other registrable charges. Opinion was almost equally divided on the advisability of such a provision and we have come to the conclusion, based on the following factors, that no such provision should be introduced:

(1) The purpose of registration under the Companies Acts is to publish certain information as to companies but the register of charges is not intended to serve as a register of title to charges created by the company.

(2) The information which would be available on registration of assignments is ascertainable from the register of charges kept by the company by virtue of sections 106I and 106J of the 1948 Act.

(3) With regard to the registration of other registrable charges, e.g. fixed securities, we consider that dual registration is, in general, undesirable.

Certificates of charge

20. We received representations to the effect that the certificates of registration of charge which are issued by the registrar of companies following the registration of any charge in conformity with the 1948 Act s. 106D are not sufficiently informative. Where a number of charges are created at the same time in favour of different creditors, it is sometimes difficult to tell which certificate applies to which charge. In particular some forms of certificate give the name of the charging company, but not the name of the creditor, and the only means of identification is the serial number which the registrar of companies places not only on the certificate but also on the copy of the document of charge which he marks and returns with the certificate. We propose that section 106D(2) should be replaced by a separate section providing that the registrar should issue a certificate of registration of any charge

^{*} *Campbell (Archibald), Hope & King Ltd., Petitioners* 1967 SC21.

[†] Available only from the Scottish Law Commission.

registered with him in pursuance of the Act stating the name of the charging company and of the creditor or of the first named creditor where there is more than one or where there is a series of debentures the name of the holder of the first such debenture to be issued (*Schedule section 106E*).

Issue of copy of certificate of registration to debenture holders

21. In terms of the existing section 106E of the 1948 Act it is necessary for a company, within 30 days of the issue of any debenture or certificate of debenture stock, payment of which is secured by a floating charge, to send to the holder of the debenture or debenture stock a copy of the certificate of registration. These certificates of registration may have to be posted before the actual certificates of debenture stock are ready and the company may incur additional and often substantial postal charges. Moreover, where the company is part of a group of companies which includes English companies and the loan is issued on the security of the undertakings and property of all the companies in the group, compliance with the provisions of section 106E is normally effected by complying with the slightly different provisions relating to English companies as set out in the 1948 Act s. 99. Where the number of subsidiary companies is large, strict compliance with the provisions of section 99 is sometimes impracticable and, where certificates for an issue of debenture stock have been originally printed in bulk and a further issue is made, it may be impossible to endorse the copy of the additional certificate of registration so that the cost of reprinting has to be incurred. It is questionable whether sections 106E or 99 serve a purpose sufficiently important to justify the practical difficulties and expense involved. We consider that they do not, and suggest that section 106E should be repealed. Although it is not within our terms of reference we suggest that consideration should be given to the repeal of section 99 also.

Memorandum of satisfaction

22. The registrar of companies enters the memorandum of satisfaction on the register on the basis of a unilateral declaration by officers of the company that the debt has been satisfied in whole or in part or that the property charged has been released. We understand that the practice in England is similar. We consider that it would be more satisfactory and would obviate the need for additional enquiries if it were provided that the holder of the floating charge or a person authorised to do so on his behalf should certify as correct the particulars given by the company to the registrar of companies relating to satisfaction of the debt or release from the charge. In the event of difficulty being experienced in having the memorandum of satisfaction duly certified when it is impossible to contact the creditor or anyone authorised on his behalf, we think that the court should, on being satisfied of the difficulty in obtaining such certification, be empowered to direct the registrar to register the memorandum. We do not think it necessary, however, to provide that the creditor should grant a formal discharge (*Schedule section 106F*).

23. We have been informed that, when a company which has granted a floating charge is selling part of its property, some solicitors acting for the purchaser have asked that a memorandum of satisfaction be filed by the

vendor company. This requirement has apparently arisen from the use in the 1948 Act s. 106F(b) of the words 'or has ceased to form part of the company's property or undertaking'. It is considered that a memorandum of satisfaction is unnecessary in such circumstances, as any property sold by a company before a floating charge 'crystallises' is immediately and automatically freed from the charge. To avoid any question, however, we suggest that it should be made clear that it is unnecessary to file a memorandum of satisfaction in such circumstances (*Schedule section 106F*).

Registration of charges

24. The Law Reform Committee for Scotland in their Eighth Report* referred to above, drew attention (in paragraph 51) to the fact that in England it was doubtful if registration of restrictions on the power of a company to grant further securities ranking in priority to or *pari passu* with the floating charge being registered constituted actual notice to all persons, and they recommended that specific provision should be made for this in the 1961 Act. Unlike the English provisions, the 1948 Act ss. 106A and 106D require particulars of floating charges registered with the registrar of companies in Scotland to show the restrictions, if any, on the power of a company to grant further securities ranking in priority to or *pari passu* with the floating charge. *Prima facie*, this would appear to constitute actual notice to all concerned, but some doubt has arisen by reason of the provisions of the 1961 Act s. 6 which indicate that registration of a floating charge and the relevant restrictions are for the information of persons considering taking floating charges from a company and make no reference to persons taking fixed securities. We consider that it is sufficiently clear that the effect of registration is to give notice to all concerned including those taking fixed securities and we suggest the deletion of the reference to publication for the information of persons considering taking fixed securities (*clause 6*).

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

* Eighth report of the Law Reform Committee for Scotland. The constitution of security over moveable property; and floating charges. Cmnd. 1017. 1962 (HMSO)

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

27. The Company Law Committee (the Jenkins Committee), in their Report, (1962 Cmnd. 1749*) recommended in paragraph 306(n) that 'the system of registration of charges in England and Scotland should, so far as practicable, be assimilated so as to avoid duplication of entries and to ensure that the entries in the English register, relating to an English company, and those in the Scottish register, relating to a Scottish company, relate to all charges registrable under the law of both countries'.

28. We consider that the recommendations of the Jenkins Committee would in a large measure clarify and solve the present difficulties. We also consider that registration in Scotland should relate to all types of charges on property and that in the case of a foreign company such registration should only be required if the company has established a place of business in Scotland thus bringing the requirements for registration into line with the requirements for registration in England.

29. The method we propose to give effect to these recommendations is to define 'registrar of companies' in the *Schedule section 106A(10)* as the registrar of companies in Scotland and to bring the *Schedule section 106K* more into line with the 1948 Act s. 106. It would also be necessary for appropriate alterations to be made to the relevant English provisions.

Alteration of floating charges

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

* Report of the Company Law Committee. Cmnd. 1749. 1962 (HMSO)

an increase in the amount of the charge which is effected by an instrument so framed as to impose a further charge. We recognise that there are certain alterations to floating charges which are of such a character as not to require registration, but we consider that certain kinds of alteration are of sufficient importance to merit registration. In particular we suggest that increases in the amount secured by a floating charge, alterations which affect the ranking of the charge in relation to other floating charges and/or fixed securities and releases of property from the charge should be registered. Where the instrument effecting the alteration varies the ranking it should be executed by the company, the holder of the charge and the holder of any other charge or fixed security adversely affected by the alteration. Our proposals on these matters are contained in *clause 7*.

Fraudulent preferences

31. The period laid down in the 1948 Act s. 322 for the challenge of a floating charge as, in effect, a fraudulent preference is 12 months. The common law of Scotland, however, permits fraudulent preferences to be challenged without regard to the time which has elapsed since their creation, provided that insolvency at the time of creation and the knowledge of the insolvency on the part of the grantor can be proved.

32. Some doubt exists as to whether a floating charge can only be challenged as a fraudulent preference in terms of section 322 or whether it is still competent to challenge under the common law. We consider that this doubt should be removed, and we recommend that section 322 should be amended to make it clear that, on the winding up of a company registered in Scotland, a floating charge on its undertaking or property should be avoided only under the provisions of the 1948 Act and should not be an alienation or preference avoidable by any other statute or at common law on the ground of insolvency or notour bankruptcy (*clause 8*).

Deduction of security by way of floating charges for voting purposes

33. The 1961 Act s. 7(a) amended the 1948 Act s. 318 by adding at the end of that section a proviso to the effect that the holder of the floating charge need not value and deduct the security for the purpose of voting at meetings of creditors of the company. It is understood that this proviso was inserted because in Scotland the holder is not entitled to appoint a receiver, the charge 'crystallising' only on the liquidation of the company, and it seemed reasonable that he should have a vote at meetings of creditors based on the full amount of the company's indebtedness to him. Our proposals concerning the introduction of receivers to Scotland remove the necessity for this proviso and accordingly we suggest that this provision should not be re-enacted in *clause 9*, the counterpart of the 1961 Act s. 7.

Application to industrial and provident societies

34. Our attention has been directed to Part II of the Industrial and Provident Societies Act 1967 which applies the 1961 Act to industrial and provident Societies registered in Scotland. Section 4 of the 1967 Act requires floating charges created by such a society to be registered with the registrar of such

societies within 14 days after the date of execution of the instrument creating the charge. There seems no special reason why the period of 21 days which has for many years been customary under the Companies Acts should not also be available under the Industrial and Provident Societies Acts, and unnecessary confusion is likely to arise from the distinction. We recommend that the Industrial and Provident Societies Act 1967 should be amended in this respect (*clause 10*).

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

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

In section 4(3), however, all that appears to be required when registering a charge is to lodge with the registrar either a copy of the instrument or an authenticated note of particulars together with the fee, and in practice the registrar only requires a copy of the instrument to be lodged together with the fee. We have been informed that the procedure of the registrar is not merely a matter of practice as no form of note has been prescribed. The drafting of this section is, however, misleading and in view of the wording of section 4(1) which states that unless the copy of the instrument, the note and fee are delivered within the statutory period the charge shall be void against any person other than the Society concerned, we consider that this confusion should be removed by requiring that there should be lodged only a copy or an abstract plus the fee (*clause 10*).

CHAPTER 3

Receivers

Introduction of receivers in Scotland

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

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

(1) the appointment of a receiver and manager might in some cases revive the fortunes of a company and prevent unnecessary liquidation; and

(2) the rights of a holder of a floating charge are weakened by his inability to take possession of and realise the security without liquidation.

38. A subsidiary argument is that a growing feature of business is the holding company structure, which frequently involves companies registered in Scotland being in the same group as companies registered in England. At present the lack of receivership powers in Scotland constitutes a major difference between the two countries in the remedies available to the holder of a floating charge and in the procedure for enforcing the security. This difference will almost certainly lead to difficulties in the future where companies in the same group or under the same control are concerned. While it might not be possible to have Scots and English law identical in all respects, if receivers were introduced into Scots law the two systems would be brought much more into alignment and most, if not all, of the difficulties resulting from the present difference would disappear.

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

40. The provisions which we recommend to govern the appointment, rights, duties, remuneration and discharge of receivers are contained in Part II (*clauses 11 to 28 inclusive*) of the new Bill. We anticipate that there may be

* Eighth report of the Law Reform Committee for Scotland. The constitution of security over moveable property; and floating charges. Cmnd. 1017. 1962 (HMSO)

circumstances in which the contracting parties wish to make provision for the regulation of the foregoing in a deed separate from the actual instrument constituting the charge; we consider that this should be competent and suggest an appropriate provision in the Bill (*Clause 28(3)*).

41. In so far as our recommendations are consonant with the existing English practice we do not comment upon them, but we discuss specifically Scottish problems or proposals which diverge from English practice.

Application and scope of provisions as to receivers

42. At the outset we found it necessary to decide upon our recommendations as to the application and scope of the provisions to be made with regard to receivers particularly in relation to three major matters, namely, (1) the companies to which the provisions should apply, (2) whether it would be necessary to provide for appointment of receivers by the court or whether it would be sufficient to make provision only for appointment of receivers out of court, and (3) the extent to which it would be desirable to include retroactive provisions which would authorise the appointment of receivers by the holders of existing floating charges which contain no express powers to do so.

43. Since the appointment of a receiver is in one of its aspects a step in the enforcement of a right in security, we consider that the statutory provisions which we propose should be applicable only to a receiver of the property of a company which the Court of Session has jurisdiction to wind up (*clause 11(1) and (2)*).

44. In England a receiver of the property of a company may be appointed either by the court or, without the intervention of the court, by virtue of powers conferred by agreement as in the case of most debenture deeds. The great majority of receivers of the property of companies are in practice appointed under powers contained in debenture deeds and for that reason our Working Party decided that it would be unnecessary to make provision in Scotland for the appointment by the court of receivers of the property of companies. The Working Party, however, considered the representations received on this point and their advice, with which we concur, is that power should be given to the court to appoint a receiver in order to bring the situation in Scotland into line with that in England and to make complete the statutory provisions with regard to receivers. We so recommend (*clause 11(2)*).

45. The proposal to permit the appointment of receivers in Scotland poses a problem with regard to existing Scottish floating charges which were granted when it was not competent to appoint a receiver. To confer such a power upon the holders of these charges would involve retroactive legislation which must have strong reasons to justify it. We consider that there is sufficient justification for such legislation for the following reasons:

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

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

We accordingly propose that a receiver may be appointed under an existing floating charge as well as under a floating charge created after the date of the coming into operation of the proposed legislation (*clauses 11 and 12*).

46. We propose that where there are two or more floating charges the holder of each, or the court where appropriate, should be entitled to appoint a receiver. We also propose that the holder of a floating charge or the court, as the case may be, may appoint two or more persons as joint receivers (*clause 11*).

Persons disqualified from appointment as receivers

47. In England a body corporate and an undischarged bankrupt are disqualified from acting as a receiver (1948 Act ss. 366 and 367). We propose the same provisions for Scotland. A Scottish firm, unlike an English firm, is a separate legal persona, but, despite this difference, we propose that Scottish firms should also be disqualified from acting as receivers (*clause 11(3)*).

Circumstances in which a receiver may be appointed

48. In the case of floating charges created after the proposed legislation, provisions will normally be inserted defining, by agreement of parties, the circumstances in which the power of the creditor to appoint a receiver may be exercised. In the case of floating charges already existing before the legislation, or the unusual case where a charge created after the legislation omits to make provision, it is necessary to define with precision the circumstances in which the holder of the charge or the court would be entitled to appoint a receiver. We suggest (in *clause 12*) the various events upon the occurrence of which we consider it reasonable that the holder of the charge or the court should be entitled to do so. In making these suggestions we have kept in view the principles that (1) the provisions will only be of value if the holder of the floating charge is entitled to appoint a receiver at a stage before his security is seriously prejudiced, but (2) since the provisions would in most cases apply retrospectively and would involve the alteration by statute of existing agreements, the events specified should be of such a character that, if remedial action were not quickly taken, a winding up, which would have the effect of 'crystallising' the charge under the present law, would be the probable outcome. We consider that the proposals in *clause 12* are in accordance with these principles and we believe that the periods of twenty-one days and two months prescribed in *clause 12(1)(a)* and *(b)* respectively are fair to both parties.

Mode of appointment of receiver by holder of floating charge

49. In almost all cases in which a receiver would be appointed speed in making the appointment would be essential. Where there is a series of secured debentures we think that it would be desirable in the interests of expedition to define the persons who are entitled to make the appointment. We propose that where, under any trust deed, trustees for the holders of secured debentures have been appointed, these trustees should have the power to appoint the receiver subject to any relevant provisions contained in the trust deed (*clauses 13 and 28(2)(b)*). It is assumed that trustees who act for the holders of the

secured debentures would act in the interests of or in accordance with the wishes of the majority of such holders and it is not considered necessary to state this specifically. Where no trustees have been appointed, we have suggested majorities in *clause 28(2)(b)* to take account of the two cases where there is a meeting of the debenture holders and where there is no such meeting. The majorities we propose represent, we hope, a fair compromise between the need for speed of appointment on the one hand and protection of minorities on the other. It will also be necessary to make provisions regulating the calling of such meetings and we suggest that the recommendation, in paragraph 306(c) of the Jenkins Report, that provisions on the lines of sections 132, 135, 136, 137 and 138 of the 1948 Act should apply *mutatis mutandis* to meetings of debenture holders should be implemented. We also propose that, in the interests of expedition, provision should be made for vicarious execution by any person duly authorised in writing (*clause 13*).

Mode of appointment of receiver by the court

50. Suggestions concerning the method to be adopted in appointing a receiver by the court are contained in *clause 14*. We appreciate that it is not for us to make proposals as to procedure which will be regulated by the Court of Session under its own powers, but we have thought it helpful to provide an outline of the possible procedures with provision as to its regulation by the court (*clause 14(7)*).

Date of appointment of receiver

51. The normal practice in England is for the appointment of the receiver to take effect from the date of execution of the deed by which he is appointed. The 1948 Act s. 102(1) requires the person appointing the receiver to give notice of the appointment to the registrar of companies within seven days, but failure to give timeous notice does not invalidate the appointment although it may involve liability for a default fine. It is therefore possible for a receiver to have been validly appointed some time before the appointment is published. We think it undesirable that a creditor should be permitted to appoint a receiver and hold the instrument unpublished for a period, even a short period. We consider that an important procedural step such as the appointment of a receiver should be effective when, and only when, it is made available for publication to all who may be affected by it. We therefore suggest that the appointment of a receiver should take effect only when a duly certified copy of the instrument of appointment has been delivered to the registrar of companies for registration and a certificate of appointment has been issued by the registrar. We propose to retain the requirement of registration of the instrument of appointment within a short period after its execution but, since failure to register it timeously would render the instrument ineffective and not merely involve liability to a fine, we suggest that the period within which registration must be effected should be 14 days after the date of execution of the instrument. Similarly we propose in the case of an appointment by the court that the date of appointment should be the issue of the certificate by the registrar (*clauses 13(5) and 14(5)*).

'Crystallisation' of floating charge on appointment of receiver

52. *Clause 13(6)* provides that the floating charge 'crystallises' on the appoint-

ment of the receiver by the holder of the floating charge and *clause 14(6)* makes a similar provision where the receiver is appointed by the court. (cf. *clause 1(2)* which makes a similar provision when a company is being wound up).

Registration of appointment of receiver in Register of Inhibitions and Adjudications

53. In Memorandum No. 10 comments were invited on the advisability of providing that the appointment of a receiver should be registered in the Register of Inhibitions and Adjudications. After carefully considering the many differing comments received we have decided to recommend that no provisions should be made for such registration. Our principal reasons for this recommendation are:

(1) the appointment is adequately published by registration in the Register of Charges and dual registration is undesirable;

(2) the appointment of a liquidator is not registered in the Register of Inhibitions and Adjudications; and

(3) registration in the Register of Inhibitions and Adjudications is normally authorised by an order of the court, and the acceptance for registration of an instrument of appointment by the holder of a floating charge would place upon the Keeper of the Register of Inhibitions and Adjudications a responsibility for verifying the regularity of an appointment made in the context of company law.

We appreciate that one result of this decision will be that a purchaser of heritable property from a company will, in addition to the normal search in the Register of Sasines and Register of Inhibitions and Adjudications, have to search the company's file in the Companies Office but we do not consider that this is a sufficient reason for recommending the additional registration.

Powers of receivers

54. In England, the charge created by debentures issued by a company usually extends to goodwill and it is therefore usual for a receiver and manager to be appointed. It is, however, competent to appoint a 'bare' receiver and if the charge does not include goodwill then only a 'bare' receiver is appointed. The function of such a receiver is 'merely to get in the assets charged, to collect the rents and profits, to exercise the debentureholders' powers of realisation, and to pay the net proceeds to the holders in reduction of their charge. He has no power, as a receiver, to carry on the business of the company . . .' (Gower, 'Modern Company Law' (3rd edition) page 435).* A receiver and manager, on the other hand, has power to carry on the business of the company. Our Working Party thought that it would be advantageous if the holder of a floating charge over only a part of a company's assets should have the right to appoint a receiver with restricted powers, and they made proposals to that effect. These proposals have been widely criticised and it has been suggested that there is no need to deal separately with a floating charge according as it attaches to the whole undertaking of the company or only to part of it. We and the Working Party considered that these criticisms were well founded

* Gower, L. C. B. *The principles of modern company law*. 3rd ed. Stevens, 1969.

and accordingly we propose that there should be only one category of receiver. The receiver should have the powers specified in *clause 15* but these powers should only be exercisable over such of the company's property as is attached by the charge. It should, of course, be competent for the contracting parties to specify the powers of a receiver by agreement in the instrument creating the charge.

Extent of receiver's powers

55. The powers which we suggest should be conferred upon a receiver are reasonably comprehensive and it may be thought that they are too widely stated. In framing *clause 15* we have included the powers commonly found in modern English debenture deeds on the view that it is desirable in the interests of the efficient performance of his functions that the receiver should not require to resort to the court for authority save in special cases. If it is desired that the receiver's powers should be less ample, the instrument creating the floating charge may restrict them. We appreciate that no such restrictions will exist in the case of existing floating charges, but even in such cases it is generally desirable that a receiver should not be unduly hampered in carrying out his duties.

56. As regards a receiver appointed by the court we suggest that his powers be the same as in the case of a receiver appointed directly by the holder of the floating charge. We are aware that the powers suggested are more ample than those normally conferred upon a receiver appointed by the court in English practice, but it has been represented to us that the need for such a receiver to apply frequently to the court for special powers is a troublesome matter. We consider that, when the court has appointed a responsible person as receiver, he should resort to the court for guidance and authority on matters of peculiar difficulty but should not be compelled to make applications unduly often in order to expiscate or amplify powers which are too narrowly expressed.

Rights of third parties and liquidators

57. It is evident that the powers of a receiver must be subject to the rights of creditors who have effectually executed diligence and the holders of fixed securities or other floating charges having priority or equality of ranking. The necessary qualifications are suggested in *clause 15(2)*.

58. Our Working Party proposed that, in the case where a liquidator or provisional liquidator had been appointed in a winding up by the court prior to the appointment of a receiver, the receiver should be able to exercise his powers only with the authority of the court. Many of those who commented upon our Memorandum No. 10 criticised that proposal on the principle that the right to appoint a receiver effectively by virtue of an existing floating charge should not be qualified or restricted by the effect of subsequent liquidation proceedings. We and the Working Party accepted that criticism, and we have departed from that proposal.

Exoneration of persons transacting with receiver

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

happened to authorise the receiver to act and we consider that a similar provision should be enacted for Scotland in terms sufficiently wide to include all transactions with the receiver (*clause 15(3)*).

Powers of receiver of English company owning property in Scotland

60. Difficult administrative problems may arise on the appointment of a receiver and manager of the property and undertaking of a company incorporated in England which owns property in Scotland. We suggest that in such a case the receiver should have the same powers over the company's Scottish property as he has over its English property so far as these powers do not conflict with Scots law (*clause 15(4)*). We consider it desirable that reciprocal provisions should be enacted to confer corresponding powers upon a receiver of the property and undertaking of a company incorporated in Scotland over any property of the company situated in England.

Precedence among receivers

61. Our proposals governing the precedence among receivers and the actings of joint receivers are contained in *clause 16*. While the provision in *clause 16(6)* that a floating charge which has 'crystallised' on the appointment of a receiver should not 're-float' on the appointment of another receiver by the holder of a prior floating charge is, we understand, in conformity with English practice, we have no precedent for the provision in *clause 16(4)* that the powers of a receiver appointed by the holder of a postponed floating charge should merely be suspended during the currency of the appointment of a receiver appointed by the holder of a prior floating charge. This provision is made to safeguard the interests of the holder of a postponed floating charge particularly on the cessation of the appointment of the receiver appointed by the holder of a prior floating charge. Where the powers of a receiver have been suspended by the appointment of a receiver by a holder of a floating charge having priority of ranking over the charge by virtue of which the suspended receiver was appointed, we consider that such a receiver should not be required to release any part of the assets of the company until he has received a valid indemnity from the superseding receiver in respect of any expenses and liabilities incurred by him in his functions as receiver (*clause 16(5)*).

Agency and liability of receiver for contracts

62. In English law a receiver may at different times be regarded as a principal, an agent for the company and an agent for the debentureholders. We understand, however, that the normal practice is for the debenture deed to specify that the receiver is to be an agent for the company. We suggest that to avoid confusion the normal English practice should be adopted and that the new Bill should provide that the receiver is to be the agent of the company (*clause 17(1)*).

63. We consider it desirable to make specific provision as to (1) the effect of the appointment of a receiver upon (a) existing contracts of the company, and (b) existing contracts of service, and (2) the liability of the receiver in respect of existing and future contracts. We suggest that any contract (other

than a contract of service) entered into by the company before the appointment of the receiver should, subject to the terms of the contract (which might contain a provision that the contract would terminate on appointment of a receiver), continue to have effect notwithstanding such appointment, the receiver incurring no personal liability under the contract by virtue only of his appointment. On the other hand the receiver should be personally liable on any contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides. In respect of existing contracts of service the receiver should be liable for any obligations incurred by him on or after the continuance or renewal of the contract. He should be entitled in respect of his liability on contracts to indemnity out of the property in respect of which he was appointed (*clause 17*).

Remuneration of receiver

64. We consider it desirable that statutory provision be made for fixing the remuneration of a receiver, and our proposals are contained in *clause 18*. We envisage that in most cases the receiver's remuneration will be determined by agreement between the receiver and the holder of the floating charge who appointed him (*clause 18(1)*). It would be necessary, however, to provide for the unusual case in which such agreement was not made and for the case of a receiver appointed by the court. Moreover, there are other parties, such as the holder of a postponed floating charge or the company itself or its liquidator, who may be concerned to ensure that the receiver's remuneration is not more than adequate. Accordingly we suggest that, where the receiver's remuneration is not determined by agreement or the amount of it is disputed, it should be fixed by the Auditor of the Court of Session (*clause 18(2)*). It would be necessary to provide some time limit for challenge of the remuneration agreed, and a period of one month is suggested in *clause 18(3)*. This period runs from the date of the sending of the receiver's abstract accounts and we suggest the re-enactment of the 1948 Act s. 372 with appropriate amendment to ensure that all parties interested in the remuneration of the receiver receive the abstract (*clause 25(2)*).

Preferential claims

65. *Clause 19*, which deals with the payment of certain debts in preference to claims under a floating charge, is based on the 1948 Act s. 94. We consider however that that section is defective in not providing for a procedure whereby the receiver could advertise for preferential creditors and could exclude any such creditors who did not come forward within the specified time. We suggest provision for this in *clause 19(2)(b)*.

Distribution of monies by receiver

66. We consider that it would be desirable to have a clear statement of the receiver's duties as to distribution of monies received by him and our proposals are contained in *clause 20*. Briefly, the receiver in making distribution must take cognisance of the rights both of creditors having claims which take precedence over the floating charge by virtue of which the receiver was appointed and of creditors in respect of charges and expenses incurred by or on behalf of the receiver. The list contained in *sub-clauses (a) to (e) of clause 20(1)* is

broadly, although not in all cases exactly, in order of priority, since the respective rights of preference may depend upon the terms of instruments. Any balance after satisfying these creditors, the receiver's expenses and remuneration and the holder of the floating charge should be payable to any other receiver of the property subject to the floating charge, a holder of a fixed security over property subject to the floating charge, the company or its liquidator as the case might be.

Disposal of property by receiver—securities or other interests

67. Where the property of a company attached by a floating charge on the appointment of a receiver includes property which is subject also to any security, interest, burden, encumbrance or diligence, there may be difficulty in disburdening the property of that security, interest, burden, encumbrance or diligence upon a sale by the receiver. We envisage that in most cases the person having right to the security or encumbrance will co-operate with the receiver in effecting a sale. There may be circumstances, however, where the consent of that other person may not be obtainable or where he may seek to exploit the 'nuisance value' of his security in order to secure a larger payment than that to which the value of his security would entitle him. We think it desirable to provide machinery to deal with such cases by empowering the receiver to effect a sale with the authority of the court. Our proposals are contained in *clause 21*.

Cessation of appointment of receiver

68. Our proposals relating to the cessation of the appointment of a receiver are contained in *clause 22*. We envisage that a receiver will cease to act either when he has carried out all the duties which he can usefully perform or by reason of his death. We think it desirable to provide also that a receiver may be removed at the instance of the holder of the floating charge by virtue of which he was appointed, but only with the authority of the court upon cause shown (*clause 22(3)*). In the case of resignation, we propose that the receiver should give one month's notice of his intention to resign to the holders of floating charges over all or any part of the property of the company, to the company or its liquidator and to the holders of any fixed security over the company's property (*clause 22(1)*). The objects of this provision are (1) to enable any other person who has right to appoint a receiver to do so timeously in order to protect his interests, and (2) to allow the company or its liquidator or the holder of a fixed security to raise any question as to the receiver's actings before he is discharged. We also suggest that a receiver appointed by the court should be permitted to resign only with the consent of the court (*clause 22(2)*). We think it right that when a receiver ceases to act as such, he should be entitled to be indemnified for all his expenses and liabilities out of the property which is subject to the floating charge by virtue of which he was appointed (*clause 22(4)*). We suggest also that provision should be made for notice of the receiver ceasing to act being given to the registrar of companies (*clause 22(5)*).

69. The provision suggested in *clause 22(6)* that the 'crystallised' floating charge will 're-float' if, after the expiry of one month after the removal or the

ceasing to act as such of the receiver, another receiver has not been appointed differs from the position in England where, we understand, a 'crystallised' floating charge will only 're-float' by express agreement. It is apparently not clear in England whether, after the withdrawal of the receiver, the holder of the floating charge is entitled to a fixed charge on any undisposed assets which belonged to the company at the date of 'crystallisation'. We consider that no doubt should exist as to the effect of the receiver ceasing to act and we further consider that the period of one month given in this clause is sufficient to enable the holder of the floating charge to appoint another receiver. If the floating charge were to remain 'crystallised' then the company would in effect be unable to recommence business, a situation which we should consider unjustifiable.

Powers of the court

70. In the Report of the Jenkins Committee* it was recommended in paragraph 306(d) that the 1948 Act s. 369(1) should be extended to empower the court to give the same directions and make the same orders on the application of a debenture holder as it can now make on the application of a receiver. It has been suggested to us that no case has been made out in support of this recommendation. We can, however, conceive of situations arising where there is a dispute between the receiver and debentureholder and we consider it reasonable that it should be open to both parties to refer the matter to the court for instructions. Section 369(1) applies to England but we consider that a similar provision incorporating the amendment proposed by the Jenkins Committee should be enacted for Scotland (*clauses 15(1)(e) and 23(1)*).

71. We suggest that effect be given to recommendation 306(e) of the Report of the Jenkins Committee (*clause 23(2)*).

Provisions as to notification and information supplied by and to receiver

72. *Clauses 24 to 27* in effect propose the re-enactment, with the necessary modifications, of such other provisions of the 1948 Act relating to receivers as we consider desirable. The 1948 Act contains separate provisions with regard to accounts to be delivered (a) by a receiver of the whole or substantially the whole of the property of the company, and (b) by any other receiver (sections 372 and 374). Since we do not propose to adopt the distinction between those two categories of receivers for any other purpose, we suggest that the provisions of section 372 *mutatis mutandis* should apply to all receivers of the property of Scottish companies (*clause 25*).

* Report of the Company Law Committee. Cmnd. 1749. 1962 (HMSO)

APPENDIX A

**Members of the Working Party on Companies (Floating Charges) (Scotland)
Act 1961**

Professor J. M. Halliday (*Chairman*).

Mr. D. G. Antonio, British Linen Bank, Edinburgh.

Mr. W. A. Cook, C.B.E., Solicitor, Glasgow.

Mr. A. G. M. Duncan, Faculty of Law, University of Edinburgh.

Mr. A. I. Mackenzie, Chartered Accountant, Glasgow.

Mr. G. R. H. Reid, Solicitor, Glasgow.

Mr. R. Brodie, Scottish Law Commission (*Secretary*).

APPENDIX B

Organisations and Individuals who commented on Memorandum No. 10

Messrs. Ashurst, Morris, Crisp & Co., Solicitors, London.
Messrs. Bircham & Co., Solicitors, London.
Mr. R. D. Bertram, Solicitor, London.
Mr. G. Black, O.B.E., Keeper of the Registers of Scotland.
Board of Trade.
The British Institute of International and Comparative Law.
The Chartered Institute of Secretaries.
Confederation of British Industry.
The Committee of Scottish Bank General Managers.
Mr. J. Craig, O.B.E., W.S., Assistant Registrar of Friendly Societies for Scotland.
Mr. J. N. Dandie, C.B.E., M.C., S.S.C., Stirling.
Department of Law, University of Strathclyde.
Faculty of Advocates.
General Council of the Bar of England and Wales.
Mr. L. C. B. Gower, Law Commission.
Professor G. L. F. Henry, W.S., Edinburgh.
The Institute of Chartered Accountants of Scotland.
The Institute of Chartered Accountants in England and Wales (unofficial comments).
The Law Society of Scotland.
Messrs. Linklaters & Paines, Solicitors, London.
The Secretary and Legal Adviser to Livingston Development Corporation.
Lord Chancellor's Office, London.
Mr. J. P. H. Mackay, Q.C., Edinburgh.
Mr. S. D. Musson, C.B., M.B.E., Chief Registrar of Friendly Societies.
Mr. F. R. Ryder, Midland Bank Limited, London.
Scottish Law Agents Society.
The Sheriffs.
Sheriffs Substitute Association.
Messrs. Slaughter and May, Solicitors, London.
The Society of Solicitors in the Supreme Courts of Scotland.
Society of Writers to H.M. Signet.
Mr. E. W. Stent, Barclays Bank Limited, London.
Professor D. M. Walker, Q.C., Glasgow.
Mr. J. J. Wright, T.D., C.A., Edinburgh.

APPENDIX C

Companies (Floating Charges) and Receivers (Scotland) Bill

ARRANGEMENT OF CLAUSES

Part I. Floating charges

Clause

1. Power of incorporated companies to create floating charges
2. Creation of floating charges by Scottish companies
3. Effect of floating charges in relation to heritable property in Scotland
4. Extension of power of court to wind up a company
5. Ranking of floating charges
6. Registration of charges
7. Alteration of floating charges
8. Floating charge not a fraudulent preference
9. Amendment of Act of 1948
10. Amendment of Industrial and Provident Societies Act 1967

Part II. Receivers

11. Power to appoint receiver
12. Circumstances justifying appointment
13. Mode of appointment by holder of charge
14. Mode of appointment by court
15. Powers of receiver
16. Precedence among receivers
17. Agency and liability of receiver for contracts
18. Remuneration of receiver
19. Payment of certain debts out of assets subject to floating charge in priority to claims under the charge
20. Distribution of monies
21. Disposal of interest in property
22. Cessation of appointment of receiver
23. Powers of court
24. Notification that receiver appointed
25. Provisions as to information where receiver appointed
26. Special provisions as to statement submitted to receiver
27. Enforcement of duty of receiver to make returns, etc
28. Interpretation of Part II

Part III. Miscellaneous provisions

29. Regulations
30. Repeal and transitional provisions
31. Interpretation
32. Citation, extent and commencement

SCHEDULE:

Schedule I—Part IIIA of the Act of 1948

Companies (Floating Charges and Receivers) (Scotland) Bill

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TO

RE-ENACT WITH modifications the law of Scotland in relation to floating charges and to make provision in the law of Scotland for the appointment of receivers in respect of incorporated companies which the Court of Session has jurisdiction to wind up; and for purposes connected therewith.

Be It Enacted, etc.

Part I. Floating Charges

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

Power of incorporated companies to create floating charges.

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

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

and, subject as aforesaid, the provisions of the Act of 1948 relating to winding up, except section 327(1)(c) thereof, shall have the effect as if

the charge were a fixed security over the property to which it has attached in respect of the principal of the debt or obligation to which it relates and any interest due or to become due thereon:

Provided that nothing in this subsection shall prejudice the operation of section 319(5) of the Act of 1948 (which provides among other things for the payment of certain debts in certain circumstances out of property comprised in or subject to a floating charge).

(3) Nothing in this section shall derogate from the provisions of sections 13(6) and 14(6) below (attachment of floating charge on appointment of receiver).

(4) For the avoidance of doubt, it is hereby declared that, subject to section 322 of the Act of 1948, interest shall, in respect of a floating charge which after the commencement of this Act attaches to the property of the company, accrue until payment of the sum due under the charge is made.

Creation of floating charges by Scottish companies.

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

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

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

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

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

Extension of power of court to wind up a company.

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

(2) The security of a creditor shall, for the purposes of subsection (1) of this section, be deemed to be in jeopardy if the court is satisfied

that events have occurred or are about to occur which render it unreasonable in the interests of the creditor that the company should retain power to dispose of the property which is subject to the floating charge.

5.—(1) Subject to subsection (2) of this section, the instrument creating a floating charge over all or any part of the company's property under section 2 above or any instrument of alteration under section 7 below may contain:

Ranking of floating charges.

- (a) provisions prohibiting or restricting the creation of any fixed security or any other floating charge having priority over, or ranking equally with, the floating charge; or
- (b) provisions regulating the order in which the floating charge shall rank with any other subsisting or future floating charges or fixed securities over that property or any part of it.

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

(3) Where the order of ranking of the floating charge with any other subsisting or future floating charges or fixed securities over all or any part of the company's property is not regulated by provisions contained in the instrument creating the floating charge or in any instrument of alteration, the order of ranking shall be determined in accordance with the following provisions of this section.

(4) Subject to the foregoing provisions of this section:

- (a) a fixed security, the right to which has been constituted as a real right before a floating charge has attached to all or any part of the property of the company, shall have priority of ranking over the floating charge;
- (b) subject to subsection (5) of this section, floating charges shall rank with one another according to the time of registration in accordance with Part IIIA of the Act of 1948;
- (c) for the purposes of this section floating charges which have been received by the registrar for registration by the same postal delivery shall rank with one another equally.

(5) Where the holder of a floating charge over all or any part of the company's property which has been registered in accordance with Part IIIA of the Act of 1948 has received intimation in writing of the subsequent registration in accordance with that Part of that Act of another floating charge over the same property or any part thereof, the preference in ranking of the first-mentioned floating charge shall be restricted to security for:

- (a) the holder's present advances;
- (b) future advances which he may be required to make under the instrument creating the floating charge or under any ancillary document;

- (c) interest due or to become due on all such advances; and
- (d) any expenses or outlays which may reasonably be incurred by the holder.

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

Registration of charges.

6.—For the purpose of securing the registration in Scotland of charges created by companies the Act of 1948 shall have effect with the addition immediately after section 106 thereof of the provisions set out in the Schedule to this Act as Part IIIA of the Act of 1948; and accordingly Part III of the Act of 1948 shall not extend to Scotland.

Alteration of floating charges.

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

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

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

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

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

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

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

(d) in such manner as may be provided for in the instrument creating the floating charge or any ancillary document.

(3) Subject to the modifications contained in subsection (4) of this section, sections 106A(1) and 106G of the Act of 1948 shall apply to an instrument of alteration under this section which:

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

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

- (c) releases property from the floating charge; or
- (d) increases the amount secured by the floating charge.

(4) Sections 106A(1) and 106G of the Act of 1948 shall apply to an instrument of alteration falling under subsection (3) of this section as if references in said sections to a charge were references to an alteration to a floating charge, and as if, in the said section 106A(1):

- (a) references to the creation of a charge were references to the execution of such alteration; and
- (b) for the words from the beginning to the word ‘applies’ there were substituted the words ‘Every alteration to a floating charge created by a company’.

(5) Any reference (however expressed) in any enactment, including this Act, to a floating charge shall, for the purposes of this section and unless the context otherwise requires, be construed as including a reference to the floating charge as altered by an instrument of alteration falling under subsection (3) of this section.

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

Floating charge not a fraudulent preference.

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

9.—The Act of 1948 shall have effect as if:

Amendment of Act of 1948.

- (a) in section 319(5)(b) after ‘England’ there were inserted ‘or Scotland’;
- (b) in section 455(1), after the definition of ‘financial year’, there were inserted the following definition:
 - “‘floating charge’ includes a floating charge within the meaning of section 31(1) of the Companies (Floating Charges and Receivers) (Scotland) Act 1970”;
- (c) in Schedule 15, after the entry relating to section 106 of the said Act, there were inserted the following entries:
 - ‘106A Registration of charges created by companies.
 - 106B(1) Duty of company to register charges created by company.
 - 106C Duty of company to register charges existing on property acquired.
 - 106K Extension of Part IIIA.’

Amendment
of Industrial
and
Provident
Societies Act
1967.
1967 c.48.
1961 c.46.
1970 c.

10.—The Industrial and Provident Societies Act 1967 shall be amended as follows:

(i) for any reference to the Companies (Floating Charges) (Scotland) Act 1961 there shall be substituted a reference to Part I of the Companies (Floating Charges and Receivers) (Scotland) Act 1970 and for any reference to the Act of 1961 there shall be substituted a reference to Part I of the Act of 1970;

(ii) in section 3(1), for the words from ‘any reference’ to the end of the subsection, there shall be substituted the words ‘that Part of that Act shall, so far as applicable, apply as if:

(a) references therein to a company or an incorporated company were references to a registered society;

(b) references therein to the registrar and the registrar of companies were references to the registrar under this Act; and

(c) references therein, however expressed, to registration of a floating charge, or registration in accordance with Part IIIA of the Act of 1948 or delivery to or receipt by the registrar of particulars for registration were references to the delivery to the registrar of the document required by section 4(1) below to be so delivered.’;

(iii) in section 3(3) for the words ‘5(3) of the Act of 1961’ there shall be substituted the words ‘5(4)(b) of the Act of 1970’;

(iv) in section 4(1):

(a) for paragraph (b) there shall be substituted the words ‘or (b) a note, so authenticated, of such particulars relating to the charge as may be prescribed; and, in either case’; and

(b) for the words from ‘said copy’ to ‘as aforesaid’ there shall be substituted the words ‘foregoing provisions of this subsection are not complied with’;

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

(vi) in the Schedule:

(a) paragraph 5 shall be omitted;

(b) in paragraph 6, for the words ‘Schedule 2’ there shall be substituted the words ‘the Schedule’;

(c) paragraph 7 shall be omitted; and

(d) in paragraph 8, for the words ‘Act of 1961’ there shall be substituted the words ‘Companies (Floating Charges and Receivers) (Scotland) Act 1970’.

1970 c.

Part II. Receivers

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Power to
appoint
receiver.

11.—(1) It shall be competent under the law of Scotland for the holder of a floating charge (including a floating charge subsisting as such at the commencement of this Act) over all or any part of the property (including uncalled capital) which may from time to time be comprised in the property and undertaking of an incorporated company (whether a company within the meaning of the Act of 1948 or not) which the Court of Session has jurisdiction to wind up to appoint a receiver of such part of the property of the company as is subject to the charge.

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(2) It shall be competent under the law of Scotland for the court on the application of the holder of such a floating charge as is referred to in subsection (1) of this section to appoint a receiver of such part of the property of the company as is subject to the charge.

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(3) There shall be disqualified from being appointed as receivers:

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

(4) In this section, 'receiver' includes joint receivers.

12.—(1) A receiver may be appointed by the holder of the floating charge under section 11(1) above on the occurrence of any event which, by the provisions of the instrument creating the charge, entitles the holder of the charge to make such appointment and, in so far as not otherwise provided for therein, on the occurrence of any of the following events, namely:

Circum-
stances
justifying
appointment.

- (a) the expiry of a period of 21 days after the making of a demand for payment of the whole or any part of the principal sum secured by the charge, without payment having been made;
- (b) the expiry of a period of two months during the whole of which interest due and payable under the charge has been in arrears;
- (c) the making of an order or the passing of a resolution to wind up the company;
- (d) the appointment of a receiver by virtue of any other floating charge created by the company.

(2) A receiver may be appointed by the court under section 11(2) above on the occurrence of any event which, by the provisions of the instrument creating the charge, entitles the holder of the charge to make such appointment and, in so far as not otherwise provided for therein, on the occurrence of any of the following events, namely:

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

(b) any of the events referred to in paragraphs (a) to (c) of subsection (1) of this section.

Mode of appointment by holder of charge.

13.—(1) The appointment of a receiver by the holder of the floating charge under section 11(1) above shall be by means of a validly executed instrument in writing (hereafter in this Part of this Act referred to as the 'instrument of appointment') a copy (certified in the prescribed manner to be a correct copy) whereof shall be delivered by or on behalf of the person making the appointment to the registrar of companies for registration within 14 days of its execution.

(2) The instrument of appointment shall be validly executed:

(a) by a company, if it is executed in accordance with the provisions of section 32 of the Act of 1948 as if it were a contract; and

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

(3) The instrument of appointment may be executed on behalf of the holder of the floating charge by virtue of which the receiver is to be appointed:

(a) by any person duly authorised in writing by the holder to execute the instrument; and

(b) in the case of an appointment of a receiver by the holders of a series of secured debentures, by any person authorised by resolution of the debenture-holders to execute the instrument.

(4) On timeous receipt of the certified copy of the instrument of appointment in accordance with subsection (1) of this section, the registrar shall, on payment of the prescribed fee, enter the particulars of the appointment in the register of charges and shall forthwith issue a certificate of appointment of the receiver.

(5) Notwithstanding the foregoing provisions of this section, the receiver shall be held to be appointed as such only when the registrar issues a certificate of appointment in accordance with subsection (4) of this section.

(6) On the issue of a certificate of appointment of the receiver under subsection (4) of this section, the floating charge by virtue of which he was appointed shall, subject to sections 106A and 322 of the Act of 1948, attach to the property then subject to the charge; and such attachment shall have effect as if the charge were a fixed security over the property to which it has attached.

Mode of appointment by court.

14.—(1) Application for the appointment of a receiver by the court under section 11(2) above shall be by petition to the court which shall be served on the company.

(2) On such application, the court shall, if it thinks fit, issue an interlocutor making the appointment of the receiver on such terms as to caution as the court may think fit.

(3) A copy (certified by the clerk of court to be a correct copy) of the court's interlocutor making the appointment shall be delivered by or on behalf of the petitioner to the registrar of companies for registration within 14 days of the date of the interlocutor or such longer period as the court may allow.

(4) On timeous receipt of the certified copy interlocutor in accordance with subsection (3) of this section and on receipt of a certificate by the appropriate officer of the court that caution as ordered by the court has been found, the registrar shall, on payment of the prescribed fee, enter the particulars of the appointment in the register of charges and shall forthwith issue a certificate of appointment of the receiver.

(5) Notwithstanding the foregoing provisions of this section, the receiver shall be held to be appointed as such only when the registrar issues a certificate of appointment in accordance with subsection (4) of this section.

(6) On the issue of a certificate of appointment of the receiver under subsection (4) of this section, the floating charge by virtue of which he was appointed shall attach to the property then subject to the charge; and such attachment shall have effect as if the charge were a fixed security over the property to which it has attached.

(7) The Court of Session may by Act of Sederunt make rules regulating procedure arising out of the provisions of this section and in particular making special provision for cases which appear to the court to require to be dealt with as a matter of urgency.

15.—(1) Subject to subsection (2) of this section, a receiver shall have, in relation to such part of the property of the company as is attached by the charge by virtue of which he was appointed, the powers, if any, given to him by the instrument creating that charge and, in addition, he shall have under this Act the following powers over that property in so far as these are not inconsistent with any provision contained in that instrument, namely:

Powers of receiver.

- (a) power to take possession of, collect and get in the property from the company or a liquidator thereof or any other person, and for that purpose to take such proceedings as may seem to him expedient;
- (b) power to sell, feu, hire out or otherwise dispose of the property by public roup or private bargain and with or without advertisement;
- (c) power to borrow money and grant security therefor over the property but without prejudice to any existing security or charge over the property;
- (d) power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;
- (e) power to apply to the court for directions in connection with the performance of his functions;

- (f) power to bring or defend any action or other legal proceedings in the name and on behalf of the company;
 - (g) power to refer to arbitration all questions affecting the company;
 - (h) power to effect and maintain insurances in respect of the business and property of the company;
 - (i) power to use the company's seal;
 - (j) power to do all acts and to execute in name and on behalf of the company any deed, receipt or other document;
 - (k) power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
 - (l) power to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and discharge servants;
 - (m) power to have carried out to the best advantage any work on the property of the company and in general to do all such other things as may be necessary for the realisation of the property;
 - (n) power to make any payment which is necessary or incidental to the performance of his functions;
 - (o) power to carry on the business of the company so far as he thinks it desirable to do so;
 - (p) power to grant any lease of the property, and to input and output tenants, and to take on lease any property required or convenient for the business of the company;
 - (q) power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person or company indebted to the company and to receive dividends, and to accede to trust deeds for creditors of any such person;
 - (r) power to present or defend a petition for the winding up of the company; and
 - (s) power to do all other things incidental to the exercise of the powers mentioned in this subsection.
- (2) The foregoing provisions of this section shall apply:
- (a) subject to the rights of any person who has effectually executed diligence on all or any part of the property of the company prior to the appointment of the receiver; and
 - (b) subject to the rights of any person who holds over all or any part of the property of the company a fixed security or floating charge having priority over, or ranking equally with, the floating charge by virtue of which the receiver was appointed.
- (3) A person transacting with a receiver shall not be concerned to inquire whether any event has happened to authorise the receiver to act.

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

16.—(1) Where there are two or more floating charges subsisting over all or any part of the property of the company, a receiver may be appointed under this Act by virtue of each such charge, but a receiver appointed by, or on the application of, the holder of a floating charge having priority of ranking over any other floating charge by virtue of which a receiver has been appointed shall have the powers given to a receiver by section 15 above to the exclusion of any other receiver.

Precedence
among
receivers.

(2) Where two or more floating charges rank with one another equally, and two or more receivers have been appointed by virtue of such charges, the receivers so appointed shall be deemed to have been appointed as joint receivers.

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

(4) Subject to subsection (5) of this section, the powers of a receiver appointed by, or on the application of, the holder of a floating charge shall be suspended by, and as from the date of, the appointment of a receiver by, or on the application of, the holder of a floating charge having priority of ranking over that charge; and any powers so suspended shall take effect again when the floating charge having priority of ranking ceases to attach to the property then subject to the charge, whether such cessation is by virtue of section 22(6) below or otherwise.

(5) The suspension of the powers of a receiver under subsection (4) of this section shall not have the effect of requiring him to release any part of the property (including any letters or documents) of the company from his control until he receives from the receiver superseding him a valid indemnity (subject to the limit of the value of such part of the property of the company as is subject to the charge by virtue of which he was appointed) in respect of any expenses, charges and liabilities he may have incurred in the performance of his functions as receiver.

(6) The suspension of the powers of a receiver under subsection (4) of this section shall not cause the floating charge by virtue of which he was appointed to cease to attach to the property to which it attached by virtue of section 13(6) or 14(6) above.

(7) Nothing in this section shall prevent the same receiver being appointed by virtue of two or more floating charges.

17.—(1) A receiver shall be deemed to be the agent of the company in relation to such property of the company as is attached by the floating charge by virtue of which he was appointed.

Agency and
liability of
receiver for
contracts.

(2) Subject to subsection (1) of this section, a receiver (including a receiver whose powers are subsequently suspended under section 16 above) shall be personally liable on any contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides.

(3) Where, on the appointment of a receiver of a company, an existing contract of service with the company is continued or renewed by him, it shall be deemed to have been continued or renewed by the company; but the receiver shall be personally liable on any such contract in respect of obligations incurred by him on or after the continuance or renewal of the contract.

(4) A receiver who is personally liable by virtue of subsection (2) or (3) of this section shall be entitled to be indemnified out of the property in respect of which he was appointed.

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

(6) Any contract entered into by a receiver in the performance of his functions shall, subject to the terms of the contract, continue in force although the powers of the receiver are subsequently suspended under section 16 above.

Remuneration of receiver.

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

(2) Where the remuneration to be paid to the receiver has not been determined under subsection (1) of this section, or where it has been so determined but is disputed by any of the persons mentioned in paragraphs (a) to (d) of this subsection, it may be fixed instead by the Auditor of the Court of Session on application made to him by:

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

(3) Such application to the Auditor of the Court of Session as is mentioned in subsection (2) of this section shall be made in writing not later than one month after the sending of the abstract of receipts and payments of the receiver mentioned in section 25 below which discloses the remuneration, if any, payable to the receiver.

(4) Where the receiver has been paid or has retained for his remuneration for any period before the remuneration has been fixed by the Auditor of the Court of Session under subsection (2) of this

section any amount in excess of the remuneration so fixed for that period, the receiver or his personal representatives shall account for the excess.

19.—(1) Where a receiver is appointed and the company is not at the time of the appointment in course of being wound up, the debts which fall under subsection (2) of this section shall be paid out of any assets coming to the hands of the receiver in priority to any claim for principal or interest by the holder of the floating charge by virtue of which the receiver was appointed.

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

(2) Debts falling under this subsection are debts which satisfy the conditions of this subsection, that is to say, they are debts:

(a) which in every winding up are, under the provisions of Part V of the Act of 1948 relating to preferential payments, to be paid in priority to all other debts; and

(b) which, by the end of a period of six months after advertisement by the receiver for claims in the Edinburgh Gazette and in a newspaper circulating in the district where the company carries on business, either:

(i) have been intimated to him; or

(ii) have become known to him.

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

(4) The periods of time mentioned in the said provisions of Part V of the Act of 1948 shall be reckoned from the date of the appointment of the receiver under section 13(5) or 14(5) above.

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

20.—(1) Subject to section 21 below and to the rights of any of the following categories of persons, namely:

Distribution of monies.

(a) the holder of any fixed security which is over property subject to the floating charge and which ranks prior to, or equally with, the floating charge;

(b) all persons who have effectually executed diligence on any part of the property of the company which is subject to the charge by virtue of which the receiver was appointed;

(c) creditors in respect of all liabilities, charges and expenses incurred by or on behalf of the receiver;

(d) the receiver in respect of his liabilities, expenses and remuneration; and

- (e) the preferential creditors entitled to payment under section 19 above;

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

(2) Any balance of monies remaining after the provision of subsection (1) of this section and section 21 below have been satisfied shall be paid in accordance with their respective rights and interests to the following persons, as the case may require, namely:

- (a) any other receiver;
- (b) the holder of a fixed security which is over property subject to the floating charge;
- (c) the company or its liquidator, as the case may be.

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

Disposal of interest in property.

21.—(1) Where the receiver sells or disposes, or is desirous of selling or disposing, of any property or interest in property of the company which is subject to the floating charge by virtue of which the receiver was appointed and which is:

- (a) subject to any security or interest of, or burden or encumbrance in favour of, a creditor the ranking of which is prior to, *pari passu* with, or postponed to the floating charge; or
- (b) property or an interest in property affected or attached by effectual diligence executed by any person;

and the receiver is unable to obtain the consent of such creditor or, as the case may be, such person to such a sale or disposal, the receiver may apply to the court for authority to sell or dispose of the property or interest in property free of such security, interest, burden, encumbrance or diligence.

(2) On such application to the court as is mentioned in subsection (1) of this section, the court may, if it thinks fit, authorise the sale or disposal of the property or interest in question free of such security, interest, burden, encumbrance or diligence, and such authorisation may be on such terms or conditions as the court thinks fit:

Provided that such authorisation shall not be given where a fixed security over the property or interest in question which ranks prior to the floating charge has not been met or provided for in full.

(3) Where any sale or disposal is effected in accordance with the authorisation of the court under subsection (2) of this section, the receiver shall grant to the purchaser an appropriate document of

transfer or conveyance of the property or interest in question, and that document shall have the effect, or, where recording, intimation or registration of that document is a legal requirement for completion of title to the property or interest, then that recording, intimation or registration, as the case may be, shall have the effect, of:

(a) disencumbering the property or interest of the security, interest, burden or encumbrance affecting it; and

(b) freeing the property or interest from the diligence executed upon it.

(4) Nothing in this section shall prejudice the right of any creditor of the company to rank for his debt in the winding up of the company.

22.—(1) A receiver appointed by the holder of a floating charge under section 11(1) above may resign on giving one month's notice thereof to: Cessation of appointment of receiver.

(a) the holders of floating charges over all or any part of the property of the company;

(b) the company or its liquidator; and

(c) the holders of any fixed security over property of the company which is subject to the floating charge by virtue of which the receiver was appointed.

(2) A receiver appointed by the court under section 11(2) above may resign only with the authority of the court and on such terms and conditions, if any, as may be laid down by the court.

(3) Subject to subsection (4) of this section, a receiver may, on application to the court by the holder of the floating charge by virtue of which he was appointed, be removed by the court on cause shown.

(4) Where a receiver ceases to act as such, he shall, in respect of any expenses, charges or other liabilities he may have incurred in the performance of his functions as receiver, be entitled to be indemnified out of the property which is subject to the floating charge by virtue of which he was appointed.

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

If the receiver or the holder of the floating charge, as the case may require, makes default in complying with the requirements of this subsection, he shall be liable to a fine of £5 for every day during which the default continues.

(6) If by the expiry of a period of one month following upon the removal of the receiver or his ceasing to act as such no other receiver

has been appointed, the floating charge by virtue of which the receiver was appointed:

- (a) shall thereupon cease to attach to the property then subject to the charge; and
- (b) shall again subsist as a floating charge.

Powers of court.

23.—(1) A holder of a floating charge by virtue of which a receiver was appointed may apply to the court for directions in any matter arising in connection with the performance by the receiver of his functions.

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

Notification that receiver appointed.

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

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

Provisions as to information where receiver appointed.

25.—(1) Where a receiver is appointed then, subject to the provisions of this section and section 26 below:

- (a) he shall forthwith send notice to the company of his appointment; and
- (b) there shall, within 14 days after receipt of the notice, or such longer period as may be allowed by the court or in writing by the receiver, be made out and submitted to the receiver in accordance with section 26 below a statement in the prescribed form as to the affairs of the company; and
- (c) the receiver shall within two months after receipt of the said statement send:
 - (i) to the registrar of companies and to the court, a copy of the statement and of any comments he sees fit to make thereon and in the case of the registrar of companies also a summary of the statement and of his comments (if any) thereon; and

- (ii) to the company, a copy of any such comments as aforesaid or, if he does not see fit to make any comment, a notice to that effect; and
- (iii) to the holder of the floating charge by virtue of which he was appointed, to any trustees for the debenture-holders on whose behalf he was appointed and, so far as he is aware of their addresses, to all such debenture-holders, a copy of the said summary.

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

- (a) the registrar of companies;
- (b) the company;
- (c) the holder of the floating charge by virtue of which he was appointed;
- (d) any trustees for the debenture-holders of the company on whose behalf he was appointed;
- (e) all such debenture-holders (so far as he is aware of their addresses); and
- (f) the holders of all other floating charges or fixed securities over property of the company;

an abstract in the prescribed form showing his receipts and payments during that period of 12 months or, where he ceases to act as aforesaid, during the period from the end of the period to which the last preceding abstract related up to the date of his so ceasing, and the aggregate amounts of his receipts and of his payments during all preceding periods since his appointment.

(3) Where the receiver is appointed by the holder of the floating charge under section 11(1) above, this section shall have effect:

- (a) with the omission of the references to the court in subsection (1); and
- (b) with the substitution for the references to the court in subsection (2) of references to the Board of Trade;

and in any other case references to the court shall be taken as referring to the court by which the receiver was appointed.

(4) Subsection (1) of this section shall not apply in relation to the appointment of a receiver to act with an existing receiver or in place of a receiver dying or ceasing to act, except that, where that subsection applies to a receiver who dies or ceases to act before it has been fully complied with, the references in paragraphs (b) and (c) thereof to the receiver shall (subject to subsection (5) of this section) include references to his successor and to any continuing receiver.

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

(5) Where the company is being wound up, this section and section 26 below shall apply notwithstanding that the receiver and the liquidator are the same person, but with any necessary modifications arising from that fact.

(6) Nothing in subsection (2) of this section shall be taken to prejudice the duty of the receiver to render proper accounts of his receipts and payments to the persons to whom, and at the times at which, he may be required to do so apart from that subsection.

(7) If the receiver makes default in complying with the requirements of this section, he shall be liable to a fine of £5 for every day during which the default continues.

Special provisions as to statement submitted to receiver.

26.—(1) The statement as to the affairs of a company required by section 25 above to be submitted to the receiver (or his successor) shall show as at the date of the receiver's appointment the particulars of the company's assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be prescribed.

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

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

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

(4) Where the receiver is appointed by the holder of the floating charge under section 11(1) above, this section shall have effect with the substitution for the references to the court in subsections (2) and (3) of references to the Board of Trade; and in any other case references to the court shall be taken as referring to the court by which the receiver was appointed.

(5) If any person without reasonable excuse makes default in complying with the requirements of this section, he shall be liable to a fine of £10 for every day during which the default continues.

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

27.—(1) If any receiver:

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

Enforce-
ment of duty
of receiver
to make
returns, etc.

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

(2) In the case of any such default as is mentioned in paragraph (a) of subsection (1) of this section, an application for the purposes of this section may be made by any member or creditor of the company or by the registrar of companies, and in the case of any such default as is mentioned in paragraph (b) of that subsection, the application shall be made by the liquidator, and in either case the order may provide that all expenses of and incidental to the application shall be borne by the receiver.

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

28.—(1) In this Part of this Act, unless the context otherwise requires, the following expressions shall have the following meanings respectively assigned to them, that is to say:

Interpreta-
tion of
Part II.

'company' means an incorporated company (whether a company within the meaning of the Act of 1948 or not) which the Court of Session has jurisdiction to wind up;

'secured debenture' means a bond, debenture, debenture stock or other security which either itself or by reference to any other instrument creates a floating charge over all or any part of the

property of the company, but does not include a security which creates no charge other than a fixed security;

'series of secured debentures' means two or more secured debentures created as a series by the company in such a manner that the holders thereof are entitled *pari passu* to the benefit of the floating charge.

(2) Where a floating charge, secured debenture or series of secured debentures has been created by the company, then, except where the context otherwise requires, any reference in this Part of this Act to the holder of the floating charge shall:

(a) where the floating charge, secured debenture or series of secured debentures provides for a receiver to be appointed by any person or body, be construed as a reference to that person or body;

(b) where, in the case of a series of secured debentures, no such provision has been made therein but:

(i) there are trustees acting for the debenture-holders under and in accordance with a trust deed, be construed as a reference to those trustees; and

(ii) where no such trustees are acting, be construed as a reference to:

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

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

(3) Any reference in this Part of this Act to a floating charge, secured debenture, series of secured debentures or instrument creating a charge shall, except where the context otherwise requires, include a reference to that floating charge, debenture, series of debentures or instrument as varied by any instrument.

PART III

Miscellaneous Provisions

Regulations. **29.** The powers to make regulations conferred by this Act on the Board of Trade shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

30.—(1) The Companies (Floating Charges) (Scotland) Act 1961 is hereby repealed, but nothing in this subsection shall affect the validity of anything done under that Act prior to the commencement of this Act. Repeal and transitional provisions.
1961 c.46.

(2) Any floating charge which:

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

shall as from the commencement of this Act be deemed to have subsisted as a valid floating charge under this Act as from the date of its creation.

(3) Any provision which:

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

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

31.—(1) In this Act, unless the context otherwise requires, the following expressions shall have the following meanings respectively assigned to them, that is to say: Inter-pretation.

‘Act of 1948’ means the Companies Act 1948;

1948 c.38

‘ancillary document’ means:

- (a) a document which relates to the floating charge and which was executed by the debtor and creditor in the charge before the registration of the charge in accordance with Part IIIA of the Act of 1948; or
- (b) an instrument of alteration such as is mentioned in section 7 above;

‘company’, other than in Part II of this Act, means an incorporated company (whether a company within the meaning of the Act of 1948 or not);

‘the court’, used in relation to a company, means the court having jurisdiction to wind up the company;

‘fixed security’ in relation to any property of a company means any security, other than a floating charge or a charge having the nature of a floating charge, which on the winding up of the company in Scotland would be treated as an effective security over that property, and (without prejudice to that generality) includes a security over that property created by way of an *ex facie* absolute disposition or assignation qualified by a back letter or agreement;

'floating charge' has the meaning assigned to it by section 1 above;

'instrument of appointment' has the meaning assigned to it by section 13(1) above;

'prescribed' means prescribed by regulations made under this Act by the Board of Trade;

'receiver' means a receiver of such part of the property of the company as is subject to the floating charge by virtue of which he has been appointed under section 11 above;

'registrar of companies' means the registrar or other officer performing under the Act of 1948 the duty of registration of companies in Scotland.

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

(3) Except where the context otherwise requires, expressions used in this Act shall have the meanings assigned to those expressions in the Act of 1948.

1961 c.46. (4) Any reference in any enactment other than this Act to any provision in the Companies (Floating Charges) (Scotland) Act 1961 shall be construed as a reference to the corresponding provision in this Act.

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

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

Citation,
extent and
commence-
ment.

32.—(1) This Act may be cited as the Companies (Floating Charges and Receivers) (Scotland) Act 1970.

(2) This Act shall extend to Scotland only.

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

THE SCHEDULE

Section 6.

Part IIIA of Act of 1948 Registration of Charges (Scotland)

Registration of charges with registrar of companies

Registration
of charges
created by
companies.

106A.—(1) Subject to the provisions of this Part of this Act every charge created by a company, being a charge to which this section applies, shall, so far as any security on the company's property or any part thereof is conferred thereby, be void against the liquidator and any creditor of the company unless the prescribed particulars

of the charge together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within 21 days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured; and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges:

- (a) a charge on land wherever situated, or any interest therein, including a charge created by a bond and disposition or assignation in security or by an ex facie absolute disposition or assignation qualified by a back letter or agreement, but not including a charge for any rent, ground annual or other periodical sum payable in respect of the land;
- (b) a security over the uncalled share capital of the company;
- (c) a security over incorporeal moveable property of any of the following categories, that is to say:
 - (i) the book debts of the company;
 - (ii) calls made but not paid;
 - (iii) goodwill;
 - (iv) a patent or a licence under a patent;
 - (v) a trademark;
 - (vi) a copyright or a licence under a copyright;
- (d) a security over a ship or any share in a ship; and
- (e) a floating charge.

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

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

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

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

(7) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall, for the purposes of this section, be sufficient if there are delivered to or received by the registrar, within 21 days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:

- (a) the total amount secured by the whole series; and
- (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and
- (c) a general description of the property charged; and
- (d) the names of the trustees, if any, for the debenture-holders; and
- (e) in the case of a floating charge, a statement of the restrictions, if any, on the power of the company to grant further securities ranking in priority to, or *pari passu* with, the floating charge;

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

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

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

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

(9) For avoidance of doubt it is hereby declared that, in the case of a charge created by way of an *ex facie* absolute disposition or assignation qualified by a back letter or agreement, the compliance with subsection (1) of this section shall not of itself render the charge unavailable as security for indebtedness incurred after the date of the compliance; and where the amount secured by a charge so created is purported to be increased by a further back letter or

agreement, a further charge shall be held to have been created by the ex facie absolute disposition or assignation as qualified by the further back letter or agreement and the provisions of this Part of this Act shall apply to such further charge as if:

- (a) references in this Part of this Act (other than in this subsection) to the charge were references to such further charge; and
- (b) for paragraphs (a) and (b) of subsection (10) of this section there were substituted the words 'references to the date on which the further back letter or agreement was executed'.

(10) In this Part of this Act 'company' (except in section 106K below) means an incorporated company registered in Scotland; 'registrar of companies' means the registrar or other officer performing under this Act the duty of registration of companies in Scotland; and references to the date of creation of a charge are:

- (a) in the case of a floating charge, the date on which the instrument creating the floating charge was executed by the company creating the charge; and
- (b) in the case of any other charge, the date on which the right of the person entitled to the benefit of the charge was constituted as a real right.

106B.—(1) It shall be the duty of a company to send to the registrar of companies for registration the particulars of every charge created by the company and of the issues of debentures of a series requiring registration under section 106A above, but registration of any such charge may be effected on the application of any person interested therein. Duty of company to register charges created by company.

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

(3) If any company makes default in sending to the registrar for registration the particulars of any charge created by the company or of the issues of debentures of a series requiring registration as aforesaid, then, unless the registration has been effected on the application of some other person, the company and every officer of the company who is in default shall be liable to a fine of £50.

106C.—(1) Where a company acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part of this Act, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar of companies for registration in manner Duty of company to register charges existing on property acquired.

required by this Act within 21 days after the date on which the transaction was settled:

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

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

Register of charges to be kept by registrar of companies.

106D.—(1) The registrar of companies shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under this Part of this Act, and shall, on payment of the prescribed fee, enter in the register with respect to such charges:

- (a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in section 106A(7) above;
- (b) in the case of any other charge:
 - (i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property; and
 - (ii) the amount secured by the charge; and
 - (iii) short particulars of the property charged; and
 - (iv) the persons entitled to the charge; and
 - (v) in the case of a floating charge a statement of the restrictions, if any, on the power of the company to grant further securities ranking in priority to, or *pari passu* with, the floating charge.

(2) The register kept in pursuance of this section shall be open to inspection by any person on payment of such fee, not exceeding one shilling for each inspection, as may be prescribed.

Certificate of registration to be issued.

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

106F.—(1) The registrar of companies, on evidence being given to his satisfaction with respect to any registered charge:

Entries of satisfaction and release of property from charge.

- (a) that the debt for which the charge was given has been paid or satisfied in whole or in part; or
- (b) that part of the property charged has been released from the charge or has ceased to form part of the company's property;

may enter on the register a memorandum of satisfaction in whole or in part, regarding that fact, and where he enters a memorandum of satisfaction in whole he shall, if required, furnish the company with a copy thereof.

(2) Without prejudice to the duty of the registrar under this section to require to be satisfied as aforesaid, he shall not be so satisfied unless:

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

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

106G. The court, on being satisfied that the omission to register a charge within the time required by this Act or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be that the omission or mis-statement shall be rectified.

Rectification of register of charges.

Provisions as to company's register of charges and as to copies of instruments creating charges

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

Copies of instruments creating charges to be kept by company.

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

106I.—(1) Every company shall keep at the registered office of the company a register of charges and enter therein all charges

Company's register of charges.

specifically affecting property of the company and all floating charges on any property of the company, giving in each case a short description of the property charged, the amount of the charge, and, except in the case of securities to bearer, the names of the persons entitled thereto.

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

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

106J.—(1) The copies of instruments creating any charge requiring registration under this Part of this Act with the registrar of companies, and the register of charges kept in pursuance of section 106I above, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day shall be allowed for inspection) to the inspection of any creditor or member of the company without fee, and the said register of charges shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, every officer of the company who is in default shall be liable to a fine of £5 and a further fine of £2 for every day during which the refusal continues.

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

Extension of Part IIIA.

106K.—The provisions of this Part of this Act shall extend to charges on property in Scotland which are created, and to charges on property in Scotland which is acquired, by a company incorporated outside Great Britain which has a place of business in Scotland.”

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