



Scottish Law Commission
promoting law reform

Report on *Sharp v Thomson*

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965
Laid before the Scottish Parliament by the Scottish Ministers

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SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on *Sharp v Thomson*

To: Mr Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on *Sharp v Thomson*.

(Signed)

JAMES DRUMMOND YOUNG, *Chairman*
GEORGE GRETTON
GERARD MAHER
JOSEPH M THOMSON
COLIN TYRE

Michael Lugton, *Chief Executive*
12 November 2007

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Part 1 Introduction

Terms of reference

1.1 On 27 September 2000 we received the following reference from the Deputy First Minister and Minister for Justice, Mr Jim Wallace, QC, MP, MSP:

"To consider the implications of the decision of the House of Lords in *Sharp v Thomson*, 1997 SC (HL) 66 and to make recommendations as to possible reform of the law."

The facts of *Sharp v Thomson*

1.2 The facts of *Sharp v Thomson* were as follows. In 1989 the Thomsons (a brother and sister) contracted to buy a flat in Aberdeen from Albyn Construction Ltd. The price was paid on or about 12 June 1989, and the keys were handed over. Contrary to normal conveyancing practice, no disposition was delivered at that time. Although the Thomsons had possession, they could not acquire the right of ownership without registering the disposition, and they had no disposition. The disposition was eventually handed over, about 14 months later. Thus for an initial 14-month period, Albyn had (a) the purchase price and (b) the right of ownership of the flat (albeit with an obligation to transfer that right), while the Thomsons had (a) possession and (b) the right to acquire the right of ownership, but not the right of ownership itself.

1.3 Albyn had previously borrowed money from the Bank of Scotland. The loan was secured by a floating charge over its whole "property and undertaking". This charge had been duly registered. A floating charge, unless or until it "attaches" (or, synonymously, "crystallises") continues to "float" over the assets of the debtor without encumbering any of them with a real right. For as long, therefore, as the charge continued to float, there was no danger to the Thomsons. On 10 August 1990 the Bank of Scotland appointed receivers to Albyn, with the result that the floating charge crystallised. The terms of the relevant legislation, section 53(7) of the Insolvency Act 1986, are:

"On the appointment of a receiver under this section, the floating charge by virtue of which he was appointed attaches to the property then subject to the charge; and such attachment has effect as if the charge was a fixed security over the property to which it has attached."

1.4 The legal question that the courts had to determine was whether the flat was caught by the crystallised floating charge. That in turn depended on whether, on 10 August 1990, the flat could be said to form part of the "property then subject to the charge" within the meaning of section 53(7). In fact by then the disposition had finally been delivered to the Thomsons' solicitors. That happened on 9 August. But the disposition was not registered until 21 August, 11 days after the crystallisation of the charge.

1.5 At first instance,¹ and also on a reclaiming motion to the Inner House of the Court of Session,² it was held that the floating charge did attach to the flat. The Thomsons had, indeed, acquired the real right of ownership when they completed title by registering the disposition in the Register of Sasines.³ But their ownership was encumbered by the undischarged floating charge, much as if it had been encumbered by an undischarged standard security. On appeal to the House of Lords, it was held that the charge had not attached to the flat.⁴ The decisions of the Outer House and Inner House were thus reversed and it was held that the Thomsons' right of ownership was unencumbered by the charge.

The ratio of *Sharp v Thomson*

1.6 The ratio of the decision of the House of Lords was uncertain. On one view, it was a broad one: that at a certain stage in a sale, the buyer acquires a "beneficial interest" in the property. This is acquired before the right of ownership is acquired. Once it has been acquired, the property is no longer the property of the seller. As against this, there were those who understood the ratio to be narrower, namely that the expression "property and undertaking", as used in the legislation about floating charges,⁵ and indeed in the charge itself, had a narrow meaning, and that while the flat was still the property of the selling company when the receivership began, it was no longer part of its "property and undertaking" at that date. The narrow view of the ratio would mean that the significance of the decision would be limited to floating charges. It would have no implications for cases where there is no floating charge and so would not have the potential to undermine the established principles of property law. By contrast, the broad explanation of the ratio would have broad implications. It would in effect introduce something like the equitable proprietary rights of English law, with consequences by no means confined to cases involving floating charges. Nor would its consequences be limited to land law. For example, it could mean that unintimated assignments would defeat the claims of the cedent's creditors.⁶

1.7 Another dimension of uncertainty was that it was not clear at what precise stage a buyer would be protected, or, to put it in another way, what exactly was necessary to bring into operation the protection for the buyer. Was it the delivery of the disposition? Or the payment of the price? Or when possession was given? Or perhaps any two of these? Or perhaps all three were necessary? On the facts of *Sharp*, the buyers held all three cards in their hand. Thus the question of which of them was necessary did not have to be focussed.

1.8 Finally, it was doubtful whether the ratio of *Sharp* extended beyond cases of sale. Other transactions, such as the grant of a lease, or the grant of a heritable security, were

¹ 1994 SC 503, 1994 SLT 1068.

² 1995 SC 455, 1995 SLT 837, 1995 SCLR 683.

³ Titles to heritable property are gradually being moved from the Register of Sasines (established by the Registration Act 1617) to the Land Register (established by the Land Registration (Scotland) Act 1979). The county of Aberdeen did not become operational under the 1979 Act until 1 April 1996. Since 1 April 2003, all parts of Scotland have been operational. For the purposes of the present Report, the distinction between the old and new registration systems is not a relevant issue, except in that ARTL (see below) is used only in the new system.

⁴ 1997 SC (HL) 66, 1997 SLT 636, 1997 SCLR 328.

⁵ Companies Act 1985, s 462(1) and s 463(1). These are prospectively repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007, but the same phrase is used in that Act: s 38(1).

⁶ It may possibly be that, as a matter of policy, unintimated assignments should indeed defeat the claims of the cedent's creditors. But if the law is to be changed, it should be done after due deliberation, and not as a mere unintended sidewind from another area of law. In fact, the issue will be examined in our project on the assignment of, and security over, incorporeal moveable property.

probably, though not certainly, outwith the ratio, because in such cases the property itself would presumably continue to be part of the "property and undertaking" of the company. Hence while *Sharp* would protect some grantees, it would probably not protect others. We say "probably" because in the absence of a clear ratio, the implications of the decision cannot be determined with accuracy.

Concerns raised by the case

1.9 Few cases in Scottish legal history have generated so much academic debate as *Sharp*.⁷ Nor was concern limited to academic circles, as the reference to this Commission shows. There were two main areas of concern: risks to purchasers and other grantees (transactional security) and the destabilisation of property law.

1.10 The decision highlighted the fact that the insolvency of a seller can in certain unusual circumstances mean that the buyer loses both the property and the price. It was true that the decision of the House of Lords in *Sharp* had removed the danger in one set of circumstances. But it was unclear whether it would apply in other circumstances. Moreover, even those who agreed that buyers needed more protection were not necessarily happy with the solution devised by the House of Lords.

1.11 The second area of concern was the potential of the decision to destabilise property law. In the first place, because the scope of the decision was unclear, a great deal of uncertainty was introduced. Even if the solution was in itself a good one, there was a risk that it would take years, and probably decades, of discussion and litigation to clarify just what the new doctrine was. Moreover, if the wider ratio of the decision were to prevail, then much settled law would have to be discarded. The distinction between real rights and personal rights would become blurred. The reliability of the registers, and in particular of the Land Register, would be called into question. If the decision meant the introduction of equitable proprietary rights, the consequences for property law at large would be far-reaching. While some of the opposition may have had an element of simple reluctance to allow English doctrines to displace Scottish doctrines, there was also a view that the Scottish system of property law was rational and functional and should be retained.

The Discussion Paper

1.12 In July 2001 we published our Discussion Paper,⁸ containing provisional proposals. We took the view that there did exist a problem which needed to be addressed, in the sense that there existed certain pitfalls for buyers and other grantees which ought, so far as was reasonably possible, to be removed. At the same time we took the view that the approach taken by the House of Lords, at least if that approach was interpreted on the basis of the broad ratio, was inappropriate. We proposed that the decision be undone – as far as future cases would be concerned – and that there should be a series of adjustments to the corpus of insolvency legislation instead. The aim of these adjustments would be to reduce the risks posed by a grantor's insolvency to a grantee (such as a buyer) who acts in good faith and

⁷ The literature on *Sharp* and its successor case, *Burnett's Tr v Grainger*, 2002 SC 580, 2002 SLT 699, aff'd [2004] UKHL 8, 2004 SC (HL) 19, 2004 SLT 513, 2004 SCLR 433, being too extensive for a footnote, is listed in Appendix B below.

⁸ Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001).

with reasonable diligence. We had the benefit of many responses, which on the whole were supportive of our approach. We are grateful to all those who responded.⁹

Developments since the Discussion Paper

1.13 Since the Discussion Paper was published, matters have moved on. The four main developments have been (i) the Enterprise Act 2002, (ii) the case of *Burnett's Trustee v Grainger*,¹⁰ (iii) the Bankruptcy and Diligence etc. (Scotland) Act 2007 and (iv) automated registration of title to land (ARTL). Collectively, these developments mean that the situation now is by no means the same as it was in 2001. Accordingly it is necessary to say something about each of these.

Enterprise Act 2002

1.14 The Enterprise Act 2002 provided that floating charges would, with certain exceptions, no longer be enforceable by receivership. The main exception was for floating charges already in existence when the relevant provisions of the Act came into force (15 September 2003), but in certain cases receivership remains competent even in relation to post-2003 floating charges.¹¹ At the same time the law in relation to administration was extensively reformed. One aspect of that reform is that a floating chargeholder can normally enforce the charge by appointing an administrator. The result is that administration (in the form it assumed as a result of the 2002 Act) now discharges the functions that in the past were discharged by receivership. (Though, unlike receivership, administration is competent in the absence of a floating charge.) Thus over time administration is becoming commoner and receivership is in decline. By contrast, when we published our Discussion Paper in 2001, administration was, as we said, "almost unknown" in practice.¹² So whereas in 2001 receivership was a major issue, and administration a marginal one, today administration is a large and growing issue, while receivership is declining in importance and will continue to do so.

*Burnett's Trustee v Grainger*¹³

1.15 Ms Burnett owned a house in Peterculter, Aberdeenshire. In October 1990 she concluded missives to sell it to the Graingers. In November the price was paid, possession given and the disposition delivered. It was not recorded at that time. On 29 May 1991,

⁹ A list of those who submitted responses is in Appendix C. Before completing the Report, we sounded out the views of three organisations on the idea of a general principle of "no attachment without registration" (see Part 5 below): the Committee of Scottish Clearing Bankers, the Institute of Chartered Accountants of Scotland, and the Law Society of Scotland. We are grateful to them for their views. The Law Society of Scotland also played an important role in developing the details of what became s 17 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (below).

¹⁰ 2002 SC 580, 2002 SLT 699, aff'd [2004] UKHL 8, 2004 SC (HL) 19, 2004 SLT 513, 2004 SCLR 433.

¹¹ See sections 72A to 72H of the Insolvency Act 1986, inserted by s 250 of the Enterprise Act 2002. There are two cases, the second dividing into several sub-cases. (1) Where the charge is not over the whole or substantially the whole of the assets – ie what is commonly called a "limited asset" charge. This is because such a receiver would not be an "administrative receiver" in the relevant sense: see s 72A and s 251 of the 1986 Act. (2) Where the charge falls under one of the defined exceptions. There were six, but the number has grown to eight, the two new ones being s 72DA and s 72GA. These eight sub-cases are all rather unusual. Limited asset charges are also unusual. Hence in the typical case a post-2003 charge is not enforceable by receivership. See further J H Greene and I M Fletcher, *The Law and Practice of Receivership* (3rd edn, 2005), para 1.20 and Appendix 14.

¹² Discussion Paper, para 4.2

¹³ 2002 SC 580, 2002 SLT 699, aff'd [2004] UKHL 8, 2004 SC (HL) 19, 2004 SLT 513, 2004 SCLR 433.

Ms Burnett was sequestrated, and on 10 December 1991 Mr Reid, her trustee in sequestration, completed title as trustee by recording a notice of title in the Register of Sasines. On 27 January 1992 the disposition to the Graingers was recorded. The trustee and the Graingers both now claimed to be owners of the property. The trustee raised an action for declarator that the property belonged to him in trust for the creditors. At first instance it was held that the case fell within the broader ratio of *Sharp*, and that accordingly the property was excluded from the sequestration because a beneficial interest had already vested in the Graingers. The trustee appealed to the Inner House, where the decision at first instance was reversed. It was observed that the ratio of *Sharp* was unclear, and the court preferred the narrow interpretation. The purchasers appealed to the House of Lords, which adhered to the decision in the Inner House: the trustee had won. *Sharp* was not overruled but it was settled that the narrow ratio is correct: it is a decision limited to floating charges, without more general implications for property law or insolvency law. Beneficial interest is something that does not exist outside the law of trusts.¹⁴

Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3)

1.16 Section 17 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 will, when in force, implement most of Proposal 4 of the Discussion Paper. It has two prongs¹⁵ aimed at protecting a buyer or other grantee¹⁶ against the danger of the seller's sequestration. The first prong is that if the seller is sequestrated after the delivery of the disposition, the buyer nevertheless has a safe period of 28 days in which to complete title. During that period, neither the trustee in sequestration, nor anyone acquiring from the trustee, can complete title. The 28 days are counted from the date when the notice about the sequestration appears in the Register of Inhibitions.¹⁷ This rule is a race-handicap rule, meaning that in the race to the register one competitor (the trustee) has a handicap which makes it virtually impossible for the trustee to win the race as against a grantee for value acting in good faith and with reasonable diligence.

1.17 The second prong is directed not at the case of settlement on the eve of the seller's sequestration, but at settlement shortly after such a sequestration. Here the problem is that on the date of settlement the buyer may be excusably unaware of the sequestration and yet the sequestration will mean that the seller's power to alienate assets is terminated. The Bankruptcy (Scotland) Act 1985 already had certain provisions aimed at protecting buyers in such a case, but they were limited in scope. Section 17 extends these protections, so that if someone buys from a person who has just been sequestrated, and, acting in good faith, completes title promptly, the title will be good.

1.18 One difference between Proposal 4 in the Discussion Paper and section 17 of the 2007 Act concerns the type of property involved. The second prong of section 17 deals not only with heritable property but also with incorporeal moveable property. The first prong

¹⁴ To some extent it exists also in tax law on account of the strong influence that English law has in that field.

¹⁵ It also adds a new paragraph to s 31(8) of the 1985 Act, making it clear that a debtor's estate includes "any property of the debtor, title to which has not been completed by another person deriving right from the debtor".

¹⁶ We explain the section by reference to the most important case, sale, but the section can also apply to other transactions, such as the grant of a heritable security.

¹⁷ See s 14 of the Bankruptcy (Scotland) Act 1985, which requires that proceedings for the opening of a sequestration be registered forthwith in the Register of Inhibitions, thereby ensuring that third parties have a means of knowing about such proceedings. Section 14 is amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007, but the amendments are merely points of detail.

deals only with heritable property. By contrast, the first prong of Proposal 4 dealt with other types of property as well. Thus section 17 is slightly narrower in its scope than Proposal 4.

1.19 Part 4 of the 2007 Act prospectively abolishes adjudication for debt and replaces it with land attachment. Proposal 9 of the Discussion Paper is therefore now superseded.

ARTL

1.20 ARTL (automated registration of title to land) is a system in which digital rather than physical deeds are used, and in which settlement is effected online between three computing systems: that of the grantor,¹⁸ that of the grantee, and that of the Keeper. Thus in the typical case it almost completely removes the gap between settlement and registration. In doing so, it takes away much of the risk to the buyer. At the time of the Discussion Paper in 2001, ARTL did not yet exist, though it was in contemplation.¹⁹ It began to operate in August 2007. But ARTL does not cover all cases. In the first place, it is not compulsory: parties are free to use paper. In the second place, it is not available for all types of transaction. In particular, it is not available for any transaction which alters the A Section²⁰ or the D Section²¹ of the title sheet. Nor is it available for the Register of Sasines, though the number of Sasine transactions is dwindling because that register is being replaced by the Land Register. Finally, ARTL does not apply to property other than heritable property. Despite these various limitations, ARTL reduces transactional risk in many important types of case.

Trust clauses

1.21 A few words are also necessary about trust clauses. Strictly speaking these are not a development since our Discussion Paper appeared in 2001, since they had begun to be used before that time. A trust clause is a clause in a conveyance in which the grantor declares that the property will be held in trust for the grantee until such time as the latter completes title. If such a trust is valid, it protects the grantee against the grantor's general creditors. (No such clause was used in *Burnett's Trustee*.) Today trust clauses are widely used in dispositions of heritable property, and also in some other cases as well, such as transfers of intellectual property rights. They have not so far been tested in the courts.²² In so far as they prove effective, they tend to improve the grantee's transactional security. But we do not think that they should be considered a reason for not addressing underlying deficiencies in the law.

¹⁸ In most cases the computing systems are those of the solicitors for the parties rather than the parties themselves.

¹⁹ It is discussed in the Discussion Paper at paras 3.9 and 3.10.

²⁰ The A Section is that part of a title sheet that defines the property. So if a building company buys one hectare of land, builds houses, and sells the houses off one by one, ARTL cannot be used, because on each sale the builder's title sheet will have to be changed (by a reduction in the extent of the A Section), and also a new title sheet will have to be created for each plot as it is sold. Moreover, such "split-off" or "break-away" conveyances usually involve changes to the D Section as well.

²¹ The D Section sets out any title conditions affecting the property, and also certain other types of encumbrance.

²² If they are effective, they may nevertheless have adverse consequences for the parties. For discussion of trust clauses, and references to the literature on them, see K G C Reid and G L Gretton, *Conveyancing 2004* (2005) pp 79–85.

Remaining problems and our recommendations in summary

1.22 We consider that there remain four problems for which a legislative solution, aimed at enhancing transactional security, is appropriate. The first is that when a company goes into voluntary liquidation, the period allowed for registration of that fact (15 days) is excessive: it is not acceptable that third parties should be in the dark for such an unnecessarily extended period. We recommend that the registration should be done at once.²³

1.23 The second is that since a compulsory liquidation takes effect retroactively to the date of the petition, any pending petition should be in the public domain. The current provisions in that respect are inadequate since they do not involve any registration at all, but only (and even then merely at the court's option) a newspaper advertisement and a notice in the *Edinburgh Gazette*. Such advertising will reach some parties but not others, and in practice someone dealing with the company may well be unaware of the pending petition. In the interests of transactional security, winding up petitions should be registered at once.²⁴

1.24 The third is that section 25 of the Titles to Land Consolidation (Scotland) Act 1868 creates a risk to grantees, a risk which seldom materialises in practice only because the survival of the provision is not widely known. That is probably also the reason why it has so long remained unrepealed. It should be repealed now.²⁵

1.25 The fourth concerns the attachment (crystallisation) of floating charges. Attachment constitutes the charge as a "fixed" security and thus as a real right. We consider it to be contrary to principle that this should happen without publicity. Those who are to be affected by it – third parties – evidently have a right to be able to find out, but that is possible only if it is in the public domain. There are in the current law rules requiring publicity. Where the attachment is by administration, the current rules are satisfactory: they provide that attachment takes place only upon registration. The same is true for some types of liquidation. But where the attachment happens by receivership, or by most types of liquidation, they are inadequate. We recommend that the "no attachment without registration" principle should apply in all cases.²⁶ However, for reasons of expediency we would apply this principle only to floating charges registered in the Register of Floating Charges under the Bankruptcy and Diligence etc. (Scotland) Act 2007. Floating charges created under the existing law would be unaffected by this reform. Such charges would gradually disappear of their own accord by natural wastage.

The proposals and questions in the Discussion Paper: an overview

1.26 It may be helpful to set out as a table the proposals and questions in the Discussion Paper to show how they are being taken forward in this report.

²³ Para 3.8.
²⁴ Para 3.20.
²⁵ Para 4.6.
²⁶ Part 5.

Discussion Paper

1. The decision of the House of Lords in *Sharp v Thomson* should be reversed by statute. (Paragraph 2.17)

2.(a) Absence of beneficial interest should not, of itself, exclude property from the property or estate of a debtor for the purposes of diligence and insolvency.

(b) But this is without prejudice to any enactment or rule of law which excludes from the property or estate of the debtor any property which is held in trust for another person.

(c) In this proposal "insolvency" includes sequestration, winding up, receivership and administration. (Paragraph 2.25)

3. The problem of the insolvent granter highlighted by *Sharp v Thomson* requires a legislative solution. (Paragraph 3.11)

4.(a) Section 32(9)(b) of the Bankruptcy (Scotland) Act 1985 (dealings of the debtor permitted after sequestration) should be extended to include the creation, transfer, variation or extinction of a right in land or other property during the period beginning with the date of sequestration and ending seven days after the registration under section 14(1)(a) of the first order in the personal register, provided that –

- (i) the dealing was for value;
- (ii) the acquirer was unaware of the sequestration at the time of the dealing; and
- (iii) the dealing is of a kind which is completed by registration.

(b) If a dealing is effected by deed, then for the purposes of (a) the date of the dealing is the date on which the deed is delivered.

(c) During the period beginning with the date of sequestration and ending 21 days after the date of registration under section

This Report

As a result of *Burnett's Trustee*, this proposal does not need to be taken forward.

As a result of *Burnett's Trustee*, this proposal does not need to be taken forward.

This report so recommends. (In so far as not already effected by the Bankruptcy and Diligence etc. (Scotland) Act 2007, s 17.)

Most of this proposal was implemented by the Bankruptcy and Diligence etc. (Scotland) Act 2007, s 17. We do not recommend that the remainder be taken forward as part of this project.

14(1)(a) of the first order in the personal register it should not be competent for title to property, vested in the permanent trustee in sequestration by section 31, to be completed by registration –

- (i) by the permanent trustee in sequestration, or
- (ii) by any person deriving title from the permanent trustee. (Paragraph 4.10)

5.(a) A petition for the winding up of a company by the court should, on presentation, be notified forthwith by a clerk of court to

- (i) the Registrar of Companies and
- (ii) the Accountant in Bankruptcy.

(b) The period of 15 days allowed by section 84(3) of the Insolvency Act 1986 for the forwarding of a copy of a resolution for the voluntary winding up of a company to the Registrar of Companies and Accountant in Bankruptcy should be replaced by an obligation on the company to forward the resolution forthwith.

(c) The period of 14 days allowed by section 109(1) of the Insolvency Act 1986 for a liquidator in a voluntary winding up to give notice of his appointment to the Accountant in Bankruptcy should be reduced to a period of 7 days.

(d) Section 25 of the Titles to Land Consolidation (Scotland) Act 1868 (deduction of title by liquidator) should be repealed. (Paragraph 4.26)

6.(a) This proposal applies where –

- (i) by deed a company creates, transfers, varies or extinguishes a right in land or other property;
- (ii) the deed is granted for value;
- (iii) the creation, transfer, variation or extinction requires to be completed by registration; and

This report so recommends.

This report so recommends.

This proposal is not taken forward in this report.

This report so recommends.

This proposal is not taken forward in this report.

(iv) prior to registration a floating charge attaches to the property.

(b) A deed delivered during the period beginning with the date of appointment of a receiver and ending seven days after the registration of the instrument of appointment in the register of charges should not be invalid only because it was executed or delivered by or on behalf of the directors of the company; provided that at the time of delivery the acquirer did not know that a receiver had been appointed.

(c) A deed registered within 14 days of delivery and otherwise valid should take effect as if the floating charge had not attached.

(d) In this proposal, "deed" means –

(i) any written document which creates, transfers, varies or extinguishes rights, and

(ii) any electronic equivalent of such a document. (Paragraph 4.40)

7. Should receivership (and consequent crystallisation) take effect only on the day on which the instrument of appointment or interlocutor is registered with the Registrar of Companies? (Paragraph 4.44)

This report so recommends, though only for floating charges registered in the Register of Floating Charges. (The registration would be of a notice of attachment in the Register of Floating Charges)

8. If a new diligence of land attachment is introduced in place of adjudication, the initial period of litigiousity following registration of a notice of land attachment should be 21 days (and not 14 days). (Paragraph 4.47)

The Bankruptcy and Diligence etc. (Scotland) Act 2007 so provides.²⁷

9. If a new diligence of land attachment is not introduced in place of adjudication, registration in the property register of an extract decree of adjudication should –

Rendered unnecessary by the Bankruptcy and Diligence etc. (Scotland) Act 2007, which prospectively introduces land attachment in place of adjudication.²⁸

(i) render the land litigious for a period of 21 days, and

²⁷ In fact, s 81(4) provides for an even longer period: 28 days.

²⁸ If there were to be extensive delay in bringing Part 4 of the 2007 Act into force, proposal 9 of the Discussion Paper should be implemented, though the period of litigiousity should be 28 rather than 21 days, to keep it in line with policy decisions made in the new Act.

(ii) on the expiry of that period (only), confer on the creditor a real right in security. (Paragraph 4.48)

Legislative competence

1.27 In our view, our recommendations do not affect reserved matters and accordingly fall within the legislative competence of the Scottish Parliament.

European Convention on Human Rights and European Community law

1.28 In our view, our recommendations would not give rise to any breach of the European Convention on Human Rights or of European Community law.

Part 2 *Sharp* in the light of *Burnett's Trustee*

Introduction

2.1 In our Discussion Paper, we proposed that "the decision of the House of Lords in *Sharp v Thomson* should be reversed by statute"¹ and that "absence of beneficial interest should not, of itself, exclude property from the property or estate of a debtor for the purposes of diligence and insolvency."² These proposals attracted the support of most consultees. However, in the light of *Burnett's Trustee*, the need to abrogate *Sharp* in relation to the broad ratio has disappeared. The House of Lords has already done the job.³ But three issues remain outstanding. The first is that, within narrow confines, *Sharp* presumably remains good law, and so it would be desirable to know what precisely it says. As observed in Part 1, even the scope of its narrow ratio is uncertain. The second is whether, given *Burnett's Trustee*, there still exists a case for abrogating what remains of *Sharp*. The third is whether the kinds of reform to insolvency law that we proposed in the Discussion Paper remain appropriate.

What is left of *Sharp*?

2.2 In *Burnett's Trustee* the House of Lords did not overrule *Sharp*. *Sharp* is therefore presumptively still good law, and the two decisions must thus be read together, difficult though that may be. An alternative view would be that nothing is left of *Sharp*: though not expressly overruled, it was impliedly overruled. Whilst this is a possible view, on balance it is not one that we take, for two reasons. In the first place, there seems to be no real basis for it in what was said by their Lordships in *Burnett's Trustee*. In the second place, it is possible to read *Sharp* in a manner that is not inconsistent with *Burnett's Trustee*.

2.3 *Sharp* held that a buyer may be protected from a floating charge even before the right of ownership has passed. It is now clear that this is not because there is a conveyance of a "beneficial" right from seller to buyer. The broad ratio having been rejected, since it is incompatible with the decision in *Burnett's Trustee*, there remains the narrow ratio. The reason for the protection must be that at a certain point in the process of sale the property ceases to be part of the "property and undertaking" of the selling company. The narrow ratio is based not on a general doctrine of property law about the passing of beneficial interest in sale, for there is no such doctrine.⁴ It is based on the interpretation of the phrase "property and undertaking" as it is used in the legislation about floating charges.⁵ Once property ceases to be part of the "property and undertaking" of the selling company, it is no longer subject to the charge, even though the company still has the right of ownership. This narrow

¹ Para 2.17.

² Para 2.25.

³ Indeed, the Inner House of the Court of Session had already done it.

⁴ See generally the opinions of the judges of the Inner House in *Sharp v Thomson*, 1995 SC 455, 1995 SLT 837, 1995 SCLR 683. Those opinions continue to be of great value.

⁵ Companies Act 1985, s 462(1) and s 463(1); Bankruptcy and Diligence etc. (Scotland) Act 2007, s 38(1).

ratio, as well as being developed in the literature, was adopted by the Inner House in *Burnett's Trustee*.⁶ As Lord Coulsfield said, "the decision of the House of Lords should be regarded as a special decision relating only to the wording of the floating charges legislation and in particular based upon the addition of the words 'and undertaking' to the word 'property'."⁷ This analysis of *Sharp* in the Inner House stage of the litigation is of all the more value in as much as the judges of the House of Lords did not say a great deal about the earlier case.

2.4 In *Sharp*, the buyers had paid the price, had been given possession and had been given the disposition. It is uncertain which of these three, or which combination of these three, had the effect of taking the property outwith the scope of the charge, ie which of them is the "protection moment". If emphasis is placed on the word "undertaking" then the most significant of the three is perhaps the transfer of possession. The commonest understanding of *Sharp*, however, is that the protection moment is the delivery of the disposition.

2.5 It would seem that *Sharp* applies only to cases of sale. (This would have been true even if its broad ratio had prevailed.) Thus it would protect a grantee who is a buyer but not a grantee who is acquiring a subordinate real right. For example, on 1 June a company borrows money from Mary and in exchange delivers to her a standard security. She completes title to the security by registration on 3 June. On 2 June the company goes into receivership. *Sharp* does not, it seems, help the grantee in this type of case. On 2 June the property was still subject to the floating charge and so when the charge attached it attached to the property in question. Mary has a valid standard security, but it is postponed to the charge, and thus in practice may be worth nothing.

2.6 Presumably *Sharp* can apply to property other than heritable property. For example, suppose that a company sells a book debt, is paid, and on 1 June delivers to the buyer a deed of assignation. The buyer completes title by intimation on 3 June. A receiver is appointed on 2 June. Presumably the book debt ceased to be subject to the floating charge on 1 June. But the assignee is protected only in respect of the charge. As a result of *Burnett's Trustee*, it is now clear that the assignee is not protected in other respects. For instance, there would be no protection against a creditor of the cedent who arrests before intimation. The possibility that *Sharp* undermines the need for intimation has disappeared as a result of *Burnett's Trustee*.

Is there still a case for abrogating *Sharp*?

2.7 The main argument for abrogating *Sharp* was its potential to subvert key principles of property law. That reason has now disappeared, for what remains of *Sharp* is limited to floating charges. The question is whether what remains - *Sharp* within its narrow ratio - is acceptable.

2.8 One problem which exists even within the narrow ratio is that it creates uncertainty, in receiverships, as to whether a property which is owned by the company can be sold by the receiver. If the right of a receiver can be defeated by an unregistered conveyance, no receiver can be sure of the position, and no acquirer from a receiver can determine as a

⁶ 2002 SC 580, 2002 SLT 699.

⁷ Para 25 of his opinion.

positive fact that the receiver has power to sell.⁸ The negative – that there is no unregistered conveyance – is, naturally, unprovable. This is indeed an unfortunate result, but in practice it does not seem to have caused serious difficulties. Given that fact, and given that receivership is a procedure that is now in decline,⁹ we have come to the conclusion that it does not justify legislative intervention.

2.9 Had the broad ratio of *Sharp* prevailed it might have caused problems not only for receivers but also for all cases where someone is appointed to realise assets, such as trustees in sequestration, company administrators, liquidators, judicial factors and executors. But the scope of *Sharp* is now clearly limited to floating charges and so these further problems have not materialised.

2.10 We have therefore come to the conclusion that nothing now needs to be done about *Sharp*. Its potential to subvert property law has disappeared as a result of *Burnett's Trustee*. What remains of the decision may or may not be regarded as perfectly satisfactory from the standpoint of the law of floating charges, but that would be an issue for a general review of the law of floating charges. We do not consider that the narrow ratio contains any seriously negative implications for transactional security. Hence we make no recommendation for the abrogation of *Sharp*.

Reforms to insolvency law?

2.11 We would not wish to overstate the risks that exist in the current law in relation to the security of transactions. The law is generally sound. Conveyancers are careful. Accidents are rare.¹⁰ Moreover two recent developments, section 17 of the Bankruptcy and Diligence etc. (Scotland) Act and the introduction of ARTL,¹¹ have improved matters further. Yet there is scope for reform. Even if *Sharp* had prevailed in its broad ratio, it would not have achieved the objective of providing complete transactional security. That is partly because it has never been clear at what point in the transaction the buyer's protection is (according to *Sharp*) achieved, and partly because the decision probably never did apply to transactions other than sales. With the whittling down of *Sharp* to its narrow ratio, the need to enhance transactional security has grown. There is now a clear need to improve the position of grantees who act in good faith and with reasonable diligence. It is a question of fairness, but it is also a question of ensuring that a proper framework exists for the functioning of a market economy. Whilst our recommendations cannot cover every conceivable risk, they would bring about a real improvement.

⁸ Cf Discussion Paper, para 2.15.

⁹ Because of the Enterprise Act 2002.

¹⁰ See generally the remarks of Lord Coulsfield in *Burnett's Tr v Grainger*, 2002 SC 580, 2002 SLT 699 at para 28 of his opinion.

¹¹ See Part 1.

Part 3 Liquidation: Improving transparency

Introduction

3.1 A person who deals with a company in a substantial transaction, such as the purchase of heritable property, needs to be able to find out whether the company is in liquidation. This is especially the case if the liquidation is because of insolvency, but even non-insolvency liquidation is relevant to third parties. For instance, the board of directors generally has the power to act for a company, but not once winding up has begun.¹ Information about liquidations therefore needs to be put into the public domain promptly and in an accessible manner. Inadequate publicity inevitably causes problems for those dealing with companies, and thus ultimately increases the costs of doing business. Whilst the current law does impose publicity requirements, the provisional conclusion in the Discussion Paper was that there was room for improvement, and proposals were formulated to achieve that improvement. There was strong support from consultees.

3.2 The changes that we recommend would not breach the overall unity of the law of winding up as between England and Scotland because the notification provisions are already different in the two jurisdictions. As far as legislative competence is concerned, the changes would be to the "process" of winding up (as opposed to "the modes of, the grounds for and the general legal effect of winding up") and so would be within the legislative competence of the Scottish Parliament.²

The two types of liquidation

3.3 There are two types of liquidation or winding up: voluntary liquidation and compulsory liquidation, the latter also being called winding up by the court. The two terms are not easy to understand by those not familiar with this area of law. "Voluntary" means that the liquidation is commenced by the company, and not by the court. "Compulsory" means that it is commenced by the court, though the applicant to the court might in fact be the company itself. Voluntary liquidation divides into members' voluntary liquidation, which happens where the company is solvent, and creditors' voluntary liquidation, which happens when the company is insolvent, or at least not definitely solvent.³ Insolvency is a ground for a compulsory winding up, but there are other grounds too.⁴ Thus both solvent and insolvent companies may be subject to a voluntary liquidation, and the same is true of a compulsory liquidation.

¹ There are qualifications to this principle. For instance, in a compulsory liquidation the court has a power to validate acts by the board: Insolvency Act 1986, s 127(1), proviso.

² Scotland Act 1998, Sch 5, Part II, Head C2.

³ Insolvency Act 1986, s 90.

⁴ Insolvency Act 1986, s 122.

Voluntary liquidation

3.4 A voluntary liquidation takes effect from the date that the winding-up resolution is passed in the General Meeting.⁵ The current publicity requirement is that the company must notify both the Registrar of Companies and the Accountant in Bankruptcy within 15 days.⁶ In terms of the nature of publicity, that provision is satisfactory. Conveyancers can readily obtain the necessary information. But in terms of promptitude, the provision is unsatisfactory. It is unacceptable that such vital information should remain concealed from third parties for up to 15 days. No justification exists for such a long delay or indeed for any delay. In compulsory liquidations the rule is that there must be immediate publicity.⁷ Reform would therefore bring voluntary liquidations into line with compulsory liquidations, thus simplifying the law as well as improving it. Some consultees suggested that a specific time period be stated, but most agreed that the requirement should simply be that the notification should be "forthwith", as we provisionally proposed in the Discussion Paper. The term "forthwith" is one that is used in connection with compulsory liquidation⁸ and in practice it does not appear that any problems have arisen as to its meaning.

3.5 An attractive alternative approach would be to provide that liquidation does not begin until registration. This would, for instance, deal with the difficult case of the company that simply fails to comply with its obligation to register, whether forthwith or otherwise. Such an approach could also be extended to other insolvency processes.⁹ But we consider that such a change would be a step too far in the context of the present limited exercise, even for sequestration,¹⁰ and even more so for liquidation, where a high degree of uniformity has traditionally existed as between England and Scotland.¹¹ Shortening a time-limit is one thing: changing the rule as to how liquidation (or sequestration) begins is another. Whilst we think that there is much to be said for the idea, its implications would need to be carefully reviewed in the context of a project on insolvency law. It may be added that it is uncertain whether such a change, in relation to liquidation, would be within the legislative competence of the Scottish Parliament.¹²

3.6 Our recommendation is limited to Scottish companies, ie to companies registered in Scotland. Non-Scottish companies, such as English companies, may have assets in Scotland but the alteration of rules about liquidations for non-Scottish companies is not possible in this project. In so far as our recommendation will facilitate dealings with companies, the result would be that the benefits would not extend to English or other non-Scottish companies.

3.7 It remains to add that we do not make any recommendations about other time-limits in connection with publicity for voluntary liquidations, such as section 85(1) of the Insolvency

⁵ Insolvency Act 1986, s 86.

⁶ 1986 Act, s 84(3) and Companies Act 2006, ss 29 and 30 (replacing Companies Act 1985, s 380) read with Scotland Act 1998, Sch 8, para 23(2), (3).

⁷ Insolvency Act 1986, s 130(1).

⁸ Insolvency Act 1986, s 130(1) provides that when a winding up order is made, a copy must be sent "forthwith" to the Registrar of Companies.

⁹ It was suggested to us by Professor McBryde in respect of sequestrations: see Discussion Paper para 4.6. Indeed, this is what we are recommending for receiverships proceeding upon floating charges that have been registered in the Register of Floating Charges: see Part 5 below.

¹⁰ Discussion Paper para 4.6.

¹¹ Discussion Paper para 4.19.

¹² The answer depends on what is meant by "process" in the Scotland Act 1998, Sch 5, Part II, Head C2.

Act 1986 (14 days allowed for notification of the winding up resolution to the Gazette), section 89(3) of that Act (15 days allowed for notification of declaration of solvency) or – a point discussed below in Part 6 – section 109(1) of that Act (notification of appointment of the voluntary liquidator). All these provisions might well merit re-examination, but if our recommendations are taken forward it is not necessary to re-examine those other provisions within the context of the present project.

3.8 Accordingly we recommend:

- 1. The period of 15 days allowed for the forwarding of a copy of a resolution for the voluntary winding up of a Scottish company to the Registrar of Companies for Scotland and the Accountant in Bankruptcy should be replaced by an obligation on the company to forward it forthwith.**

(Draft Bill s 6)

Compulsory liquidation

3.9 As already noted, the current rules about giving publicity to winding up orders are better than the corresponding rules for voluntary liquidations because winding up orders must be notified "forthwith."¹³ Nevertheless there are two shortcomings. The first is that the obligation is placed on the company itself, not on the clerk of court. The company has only a limited incentive to comply, and may not even know of the obligation. We return to this issue below. The second is that a compulsory liquidation has retroactive effect. That is to say, the liquidation is deemed to have begun not when the winding up order is in fact made, but when the petition for winding up was submitted to the court.¹⁴ This means, for example, that a third party can verify on 20 June that a company is not in liquidation, and transact on that basis, but on 21 June the court may make an order whereby the company is deemed to have been in liquidation since 1 June.

3.10 It is true that the court has a power to validate acts done by a company after its winding up is deemed to have begun,¹⁵ and that where the third party has transacted in good faith and for value it can be expected that the court will exercise its power in favour of that party.¹⁶ But the transactional security of such a party ought to be a matter of right, not a matter of discretion. Moreover, it should not have to be established by a procedure - judicial validation - which may be protracted and expensive.

3.11 To protect third parties it is evidently necessary that winding up petitions be readily discoverable. Whilst the current law makes such provision, it is inadequate for ordinary purposes. The provision is that the petition may be advertised in the *Edinburgh Gazette* and in one or more such newspapers as the court directs.¹⁷ "May" is used rather than "must" because the court has a discretion not to order such notices, and we are informed that in

¹³ Insolvency Act 1986, s 130(1).

¹⁴ Insolvency Act 1986, s 129(2). Section 129(1A), inserted by the Enterprise Act 2002, Sch 17, para 16, is an exception.

¹⁵ Insolvency Act 1986, s 127, proviso.

¹⁶ See Discussion Paper para 4.18.

¹⁷ Rules of the Court of Session (SI 1994/1443), r 74.22.(1)(c); Sheriff Court Company Insolvency Rules 1986 (SI 1986/2297), r 19(6). Information could also be obtained from the court itself.

practice it can happen that no publicity at all is ordered. If notices are published in the *Edinburgh Gazette* and a newspaper, that will, no doubt, inform some parties. But it is hit-or-miss whether these are the parties who need the information because they are transacting with the company. Conveyancers do not search the *Edinburgh Gazette* or the newspapers, and indeed such searches would in practice be slow and expensive to carry out, in contrast to the quick and relatively cheap system of searching public registers, a system that nowadays is largely digital. What is therefore required is immediate registration of the petition. This has long been the law for sequestrations, where precisely the same issue exists. If a sequestration petition is successful, the sequestration is deemed to open not on the day when the award of sequestration is made, but on the day when the petition was presented to the court.¹⁸ Whilst there are also provisions about notice in the *Edinburgh Gazette*, there is the more practical requirement that the petition be publicly registered.¹⁹ Thus third parties can readily check whether the persons they are transacting with are subject to a pending sequestration petition. The same solution should be adopted for compulsory liquidations.

3.12 Our proposal to that effect in the Discussion Paper attracted general support from consultees. One consultee, however, argued that some liquidation petitions are without any real merit, so that giving them publicity has no value and may harm the company's reputation. This consultee observed that it is in such cases that the court may decide not to order notice in the *Edinburgh Gazette* and a newspaper. While this point has some force, it is not one that alters our conclusion. In the first place, so long as a possibility exists that a pending liquidation petition will succeed, third parties have a right to know about it. In the second place, the same issue can arise for sequestrations, and yet all sequestration petitions must be publicly registered. We are not aware that significant problems exist as to reputational damage. Those who search public registers almost always have substantial legal and business knowledge, and so know that the fact that a petition for liquidation or sequestration has been lodged does not necessarily mean that it has any real merit. In the third place, whereas a petition for sequestration necessarily involves an assertion that the respondent is insolvent, no such assertion is implied in a liquidation petition, for insolvency is not the only ground on which a company can be wound up. Lastly, it would not be right for third parties to be denied protection in cases where such protection is vitally needed – where the liquidation does in fact go ahead – merely to avoid some possible reputational risk in other cases. We do not suggest that the current rule whereby the court has the discretionary power not to order advertisements should be altered.

3.13 There remains the question of which register. Sequestration petitions go into the Register of Inhibitions. Liquidations must be notified to the Registrar of Companies for Scotland (ie the Companies Register for Scotland) and to the Accountant in Bankruptcy (ie the Register of Insolvencies).²⁰ There may be a case for rationalisation: it is perhaps unsatisfactory that information about possible insolvency should be distributed over three different registers, each kept by a different public officer.²¹ But it would not be appropriate to enter into such matters within the scope of the present limited project. That being the case,

¹⁸ Bankruptcy (Scotland) Act 1985, s 12(4)(b).

¹⁹ Bankruptcy (Scotland) Act 1985, s 14.

²⁰ 1986 Act, s 130(1) read with Scotland Act 1998, Sch 8, para 23(2), (3).

²¹ The Keeper of the Registers of Scotland, the Registrar of Companies in Scotland, and the Accountant in Bankruptcy.

the conclusion must be that a winding up petition must enter the same registers as a winding up order: the Companies Register and the Register of Insolvencies.

3.14 The view is sometimes taken that a Scottish statute or a Scottish statutory instrument cannot impose any duty on a public officer whose functions relate to reserved matters. If that is a correct view of the law, then the recommendation here being made would require Westminster legislation in so far as it relates to the Registrar of Companies for Scotland, because it would impose a duty to accept notices of pending winding up petitions. We do not consider that this is the effect of the Scotland Act 1998.²² But if our reading of the Scotland Act is wrong, then our recommendation could still be implemented in substance without the need for Westminster legislation, because no dispute exists about the competency of a Scottish statute or a Scottish statutory instrument to impose a function on the Accountant in Bankruptcy.

3.15 In sequestration petitions, the obligation to notify falls on the clerk of court.²³ In our view the rule should be the same for liquidation petitions. Here we depart from the current rule on the notification of winding up orders, where the duty falls on the company itself.²⁴ The company does not necessarily have a sufficient incentive to do this, and indeed may not be sufficiently aware of the requirement.

3.16 We noted above that it is unsatisfactory that when a winding up order is made the obligation to notify the Registrar of Companies for Scotland and the Accountant in Bankruptcy falls on the company itself. In principle this ought to be changed. However, the objectives of our project are sufficiently served by the requirement that the petition itself be registered, the obligation to do so falling on the clerk of court. That requirement should suffice to alert buyers and other interested parties to the possibility of a liquidation. Once so alerted, further enquiries can be put in hand. Indeed, the position would be similar to that which exists in sequestrations. In a sequestration, if there is a petition by a creditor, it is only the fact of the petition that appears in the Register of Inhibitions, and not the subsequent award (if any) of sequestration. But this does not cause problems, for the entry is enough to alert the potentially affected parties.²⁵ Given the limited scope of the present reform exercise, we therefore make no formal recommendation that the obligation to notify a winding up order be transferred from the company to the clerk of court.

3.17 A few words are necessary on the international private law aspects. The previous recommendation was about Scottish companies. The present recommendation is about liquidation petitions before the Scottish courts. The reason for the distinction is that it is not always the case that winding up proceedings will happen in the place of incorporation. In appropriate cases, a Scottish company can be wound up elsewhere, and a non-Scottish company can be wound up in Scotland.²⁶ Where a non-Scottish company is subject to

²² Such a policy may underlie Sch 8, para 23. But that provision is limited in scope and it does not appear that the alleged policy is in fact implemented in any general way by the Scotland Act 1998. Although the point is not strictly speaking relevant, it may be noted that there are separate Companies Registrars for England and Wales and for Scotland: Companies Act 2006, s 1060.

²³ Bankruptcy (Scotland) Act 1985, s 14.

²⁴ Insolvency Act 1986, s 130(1).

²⁵ Though to complete the picture, it should be mentioned that sequestrations themselves are publicly registered in the Register of Insolvencies: Bankruptcy (Scotland) Act 1985, s 1A.

²⁶ This can happen in two ways. In the first place, the Scottish courts have a general power to wind up non-Scottish companies (except other UK companies) under Part V of the Insolvency Act 1986, provided that certain requirements are met. Where, however, the company in question is subject to the Insolvency Regulation (Council

winding up proceedings in a Scottish court, it makes sense for there to be the same publicity as in ordinary cases. So our recommendation covers all Scottish petitions, whether involving a Scottish company or not. Conversely, it will not cover any non-Scottish petitions, even if involving a Scottish company. Hence some problems will remain, because such companies may have assets whose situs is Scottish. But the alteration of rules about liquidations in courts outwith Scotland is not a matter for us.

3.18 The recommendation is one that is appropriate to secondary legislation and accordingly is not covered by our draft Bill. The amendments would be to the Rules of the Court of Session (SI 1994/1443) rule 74.22 and the Sheriff Court Company Insolvency Rules 1986 (SI 1986/2297) rule 19.

3.19 It remains to add that we do not make any recommendations about other time-limits in connection with publicity for compulsory liquidations, such as section 130(1) of the Insolvency Act 1986 (notification of the making of a winding up order). These provisions may merit re-examination, but to do so would not be appropriate in the present exercise. The recommendation that we make should suffice for the objective of alerting third parties who may wish to enter into property transactions with the company.

3.20 Accordingly we recommend:

2. **A petition for the winding up of a company by a court in Scotland should, on presentation, be notified forthwith by the clerk of court to the Accountant in Bankruptcy and to the Registrar of Companies for Scotland.**

Regulation (EC) No 1346/2000), Art 3(1), Part V of the 1986 Act does not apply. But the Insolvency Regulation itself confers powers on the UK courts to wind up companies from elsewhere in the EU, if the UK is the "centre of main interests". (The Regulation does not determine the allocation of jurisdiction internally within the UK, but the effect is that in appropriate cases a Scottish court would have jurisdiction to wind up a non-UK company.) It may be added that the Regulation applies reciprocally, so that Scottish companies can, in appropriate cases, be wound up elsewhere in the EU. Likewise, the general power contained in Part V of the 1986 Act is one which many other countries also adopt, so that a Scottish company could, depending on the circumstances, be wound up outwith Scotland on a basis other than the Insolvency Regulation.

Part 4 Liquidation: The race to the register

4.1 In a sequestration, the debtor's property is vested in the trustee.¹ The trustee acquires a completed title to some types of property simply by virtue of the sequestration itself. For other types of property, a further step is needed for a completed title. In the case of heritable property, that further step is registration in the Land Register (or in the Register of Sasines, if the property happens still to be in that register). Trustees in sequestration do not always complete title in their own name, for as a matter of conveyancing law it is possible to sell without first completing title. But the power is there to be used in appropriate cases. *Burnett's Trustee* was an example of a case where the trustee exercised that power.

4.2 By contrast, in a liquidation there is no vesting in the liquidator. The liquidator's power to realise the company's assets lies in the fact that he or she takes over the role of the board of directors in effecting juridical acts on behalf of the company: the solution is thus based on personality law rather than on property law. Nevertheless, vesting of the company's assets in the liquidator can be done by order of the court.² In practice such vesting orders are seldom, if ever, made.³ A title acquired by a liquidator under section 145 is not a threat to an acquirer who had registered with reasonable expedition. It may be taken for granted that, in a compulsory winding up, a section 145 order would not be made in favour of either a provisional or an interim liquidator, and that only the permanent liquidator could take benefit. This means that the following stages (at least) would have to occur before a title could be completed in the liquidator's name: (i) petition for winding up (ii) intimation, service and advertisement of the petition (iii) a period (normally eight days) for lodging answers⁴ (iv) granting of winding up order and appointment of interim liquidator⁵ (v) meeting of creditors and appointment of (permanent) liquidator⁶ (vi) application by liquidator under section 145 (vii) extracting of the court order and (viii) registration in the Land Register, or in the Register of Sasines.⁷ It is inconceivable that this complex sequence could be completed within the 21 days allowed by the "classic" letter of obligation for registration by the acquirer; and the same seems true even in the case of a creditor's voluntary winding up where stages (i)-(iv) are replaced by a single event, namely the passing of a resolution to wind up the company.

4.3 Whilst section 145 of the 1986 Act cannot be considered as a problem for the conveyancing process, the same cannot be said of section 25 of the Titles to Land Consolidation (Scotland) Act 1868. As amended,⁸ it provides:

¹ Bankruptcy (Scotland) Act 1985, s 31. See generally William W McBryde, *Bankruptcy* (2nd edn, 1995), ch 9.

² Insolvency Act 1986, s 145. This applies only to compulsory liquidations, but s 112 extends it to voluntary liquidations.

³ J St Clair & J Drummond Young, *The Law of Corporate Insolvency in Scotland* (3rd edn, 2004), p 83: "The authors know of no case in which these provisions have been used in Scotland".

⁴ Rules of the Court of Session (SI 1994/1443), r 74.22(2); Sheriff Court Company Insolvency Rules 1986 (SI 1986/2297), r 19(8).

⁵ 1986 Act s 138.

⁶ 1986 Act s 139.

⁷ Conveyancing (Scotland) Act 1924, s 4; Land Registration (Scotland) Act 1979, s 3(6).

⁸ Most recently by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, Sch 12, para 8(9). For some discussion see para 7.32 of our *Report on Abolition of the Feudal System* (Scot Law Com No 168, 1999).

"The liquidator in the winding up of a company shall, for the purposes of sections 3 (disposition etc by person with unrecorded title) and 4 (completion of title) of the Conveyancing (Scotland) Act 1924 (c.27) (including those sections as applied to registered leases by section 24 of that Act), be taken to be a person having right to any land belonging to the company."

4.4 Thus a liquidator (whether in a voluntary or a compulsory winding up) can complete title by registration in the Land Register or Register of Sasines, and can do so forthwith, and without the need for any judicial authorisation. Although this provision is seldom used in practice, it is a potential problem for the conveyancing process, because it enables a liquidator (like a trustee in sequestration) to complete title to heritable property immediately. That means that there could be a race to the register in which the liquidator has an early start. One possible response to this problem would be to introduce a provision based on the one that has been applied to sequestrations by section 17 of the Bankruptcy and Diligence etc. (Scotland) Act 2007,⁹ namely imposing a handicap on the liquidator in the race to the register. But it seems more appropriate simply to repeal section 25. This is what we provisionally proposed in the Discussion Paper, and the proposal received support from almost all consultees. It is anomalous that a liquidator has power to complete title for one type of property but not others. It is anomalous that such a power should exist without any provision that such property is vested in the liquidator in the first place. And it is anomalous that a liquidator should be able simply to disregard the system set up by section 145 of the 1986 Act. It is difficult to escape the conclusion that section 25 is a fossil provision from an earlier era of company law. Its repeal would not mean that liquidators could not complete title to heritable property: they could still do so, through section 145. The repeal would mean that completing title would take longer, but that is precisely what we regard as desirable.

4.5 The repeal concerns the completion of title to heritable property in Scotland and as such is a conveyancing rather than a company law matter. It is thus within the legislative competence of the Scottish Parliament.

4.6 Accordingly we recommend:

- 3. Section 25 of the Titles to Land Consolidation (Scotland) Act 1868 should be repealed.**

(Draft Bill s 7)

⁹ Section 17 is discussed at para 1.16, above.

Part 5 Attachment of floating charges: Improving transparency

5.1 A frequent criticism, not of the floating charge as such, but of the procedure connected with its enforcement, is that it attaches and thus becomes a "fixed security",¹ and hence a real right, without registration and so without publicity. It is true that the instrument of appointment² or the interlocutor of appointment³ is directed to be registered within seven days; however the sanction is a fine, which in itself is no help to third parties, and not invalidity of the attachment. Registration does not mark the commencement of receivership. The problem was criticised by this Commission in 1970.⁴ In our Discussion Paper we raised the issue again.⁵ But we did so only in relation to receivership. At that time (2001) administration was not a route whereby a floating charge could attach. As for liquidation, we took the view that although attachment by liquidation is possible, it is uncommon, and so did not give cause for concern.⁶

5.2 Consultees were divided on the question of whether a "no attachment without registration" principle should be introduced. Some, especially conveyancers, were in favour. Others, such as banking lawyers, were opposed. The arguments were familiar. Those who favoured the change argued that it is unacceptable that a real right in security in land can come into being without registration. Those against the change argued that immediate registration, while no doubt desirable in theory, could cause inconvenience to banks, who wish to be able to put a company into receivership instantly.

5.3 At the time of the Discussion Paper these arguments seemed fairly evenly balanced. But developments since 2001 mean that the background to this debate has altered. The advance of digital communications means that registration of a receivership ought to be possible almost instantaneously. Companies House is already accepting the e-lodgement of an increasing number of types of document. The Registers of Scotland have in 2007 introduced e-lodgement for conveyancing deeds in the Land Register. Moreover, since 2001 the "no attachment without registration" principle has already been adopted for one type of liquidation,⁷ and also for administrations.⁸ Finally, though receivership will never wholly disappear, the reforms effected by the Enterprise Act 2002 mean that it is destined to lose its hitherto vital role in corporate insolvency. The balance thus seems to us now to be in favour of systematic adoption of the principle. Any inconvenience to banks, or other chargeholders, would be slight, and would be outweighed by the benefits of ensuring that the fact of attachment was fully public. The register in which the attachment should be registered should be the Register of Floating Charges: it makes sense that that register be a one-stop

¹ Insolvency Act 1986, s 53(7) and s 54(6); Companies Act 1985, s 463(2), prospectively replaced by Bankruptcy and Diligence etc. (Scotland) Act 2007, s 45(5).

² Insolvency Act 1986, s 53(1).

³ Insolvency Act 1986, s 54(3).

⁴ *Report on the Companies (Floating Charges) (Scotland) Act 1961* (1970, Cmnd 4336), para 51.

⁵ Paras 4.41–4.44.

⁶ Para 4.32.

⁷ Bankruptcy and Diligence etc. (Scotland) Act 2007, s 45(2).

⁸ Insolvency Act 1986, Sch B1, para 115, as inserted by the Enterprise Act 2002.

shop, ie that charges created there also attach there. Third parties seeking information about floating charges should be able to find it there.⁹ (Here there is a small departure from the Discussion Paper, for in 2001 the Register of Floating Charges did not exist.) That a charge has been created is something that third parties can know from the registers,¹⁰ and so if the registers disclose no such charge they can rely on that fact. If the registers disclose no attachment, third parties should likewise be able to rely on that fact, ie the fact that the charge is still an unattached charge and not a real right.

5.4 We do not suggest that the requirement of registration would apply to existing floating charges. As will appear below, the recommendation would apply only to floating charges registered in the Register of Floating Charges under the Bankruptcy and Diligence etc. (Scotland) Act 2007.

Receivership

5.5 The impact of the recommendation on receivership would be limited because the floating charges that would be affected are precisely those in which it would not normally be competent to have a receivership anyway. That is because the recommendation would apply only to floating charges registered in the Register of Floating Charges under the Bankruptcy and Diligence etc. (Scotland) Act 2007. Thus floating charges created before 15 September 2003,¹¹ in respect of which receivership is always competent as a means of enforcement, would be unaffected, as would floating charges created after that date but before the commencement of Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

5.6 In theory the law could provide that the receivership could still begin on the appointment of the receiver, with the charge itself remaining unattached until registration. But that would introduce an unnecessary complication. For simplicity, the law should continue to be that the appointment of the receiver and the attachment of the charge should be simultaneous. That means that when a receiver is nominated, the appointment should take effect only on registration.

5.7 Under current law, there is a requirement that receivership be registered with the Registrar of Companies and the Accountant in Bankruptcy within seven days.¹² We do not suggest that that rule be altered. It is appropriate that such information should, as now, enter the Companies Register. The requirement is imposed on the chargeholder. There would be a case for saying that, in the interests of uniformity, the registration in the Register of Floating Charges should also be by the chargeholder. However, in the case of an appointment by the chargeholder (as opposed to appointment by the court), the appointment has to be accepted by the person nominated.¹³ In theory there could be a risk that the

⁹ There would, of course, still be a declining number of charges created under the old rules, in respect of which neither the creation nor the attachment would be discoverable from the Register of Floating Charges.

¹⁰ Once Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 has come into force. A defect of the current law, which the 2007 Act will rectify, is that a floating charge comes into existence before it is registered.

¹¹ When the relevant provisions of the Enterprise Act 2002 came into force.

¹² Insolvency Act 1986, s 53(1) and s 54(3), read with Scotland Act 1998, Sch 8, para 23(2), (3).

¹³ Insolvency Act 1986, s 53(6). (This provision applies only to appointment by the chargeholder. There is no parallel requirement for acceptance in s 54 where the appointment is by the court.) One curious aspect of the current rules is that the receivership commences not only without publicity, but does so retrospectively, for it does not commence until acceptance, but on acceptance it commences at the earlier time when the instrument was received.

chargeholder could register a notice even though the person nominated did not accept. That risk perhaps already exists in current law. A simple solution would be to provide that the registration is to be by the person nominated as receiver. That ensures that the issue of acceptance disappears: a receiver who declines appointment will not register that appointment. Because a joint appointment is competent,¹⁴ in such a case the registration should be by both (or all) the joint receivers.¹⁵ What would be registered is a notice of attachment, a concept already introduced by section 45(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007. We so recommend. We would stress once again that this recommendation applies only to floating charges that have been registered in the Register of Floating Charges.

5.8 It remains to add that we do not make any recommendations about other procedural matters in receiverships. There may be such matters that merit consideration, but such consideration is not possible as part of the present project.

5.9 We therefore recommend that:

4. **Sections 53(6) and 54(5) of the Insolvency Act 1986 should be amended so as to provide that, in the case of a floating charge that has been registered in the Register of Floating Charges, the appointment of the receiver (or joint receivers) takes effect at the time that a notice of attachment is registered by the person (or persons) nominated as receiver (or joint receivers) in the Register of Floating Charges, and that such registration constitutes acceptance of office.**

(Draft Bill s 1(1)-(3))

Liquidation

5.10 In Part 3 we made certain recommendations in connection with liquidations. Since liquidation causes a floating charge to attach,¹⁶ those recommendations would in themselves make it easier for third parties to know whether a floating charge has attached. But what they can achieve is necessarily limited. There would still be a gap, even if only for a few days, between the attachment of the charge (by liquidation) and that fact appearing in a public register.¹⁷ Hence there would still be the problem that a real right in land would be created without publicity. That would, at least, be the case in most liquidations. A development since the Discussion Paper was published in 2001 is that section 45(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 adopts the "no attachment without registration" principle for liquidations covered by Insolvency Regulation (Council Regulation (EC) No 1346/2000). Our recommendation is that the rule in section 45(2) should be made general. The "no attachment without registration" principle should be uniform, and so one on which third parties can rely. As with receivership, the recommendation applies only to

¹⁴ Insolvency Act 1986, s 56(3).

¹⁵ This follows the policy of the Receivers (Scotland) Regulations 1986, (SI 1986/1917) reg 5(a).

¹⁶ Companies Act 1985, s 463, prospectively replaced by Bankruptcy and Diligence etc. (Scotland) Act 2007, s 45 in relation to floating charges registered under the 2007 Act in the Register of Floating Charges.

¹⁷ This assumes that the notification is mailed, and then manually handled at the register. There may come a day when digital lodgement is universal. But even if that day arrives, no doubt there will in practice still be failures to comply with the requirement to lodge "forthwith".

charges registered in the Register of Floating Charges under the Bankruptcy and Diligence etc. (Scotland) Act 2007.

5.11 Our Discussion Paper did not canvass the "no attachment without registration" principle in relation to liquidation. One reason was that section 45(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 still lay in the future. Another was that we then thought that attachment by liquidation was uncommon;¹⁸ if a company that had granted a floating charge got into financial difficulties, we surmised that the chargeholder would in practice appoint a receiver before liquidation happens. However, consultees noted that attachment by liquidation cannot be disregarded in practice. One example given to us was where a company's value consists mainly in readily realisable assets, and not so much in its going-concern value. In such a case, we were informed, a floating chargeholder may well be happy to proceed by way of liquidation. Moreover, liquidation may happen at the instance of other creditors, or at the instance of the company itself.

5.12 Section 45(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 provides that the registration is to be by the chargeholder. Our recommendation would extend that to all cases. A possible objection, both to section 45(2) and to our recommendation, is that the chargeholder might not know of the liquidation. We do not consider this objection to be material. In practice a floating chargeholder will normally have a close business connection with the debtor. Indeed, the typical floating charge is often held by the debtor's bank. In such cases the chargeholder would be likely to learn about liquidation almost immediately, and, indeed, would often have advance information. In theory there could be cases of delay before the chargeholder learnt of the liquidation, but any such delay would be likely to be brief. All that is needed for the chargeholder's position to be secure is for registration to happen before the liquidator realises the assets. We therefore consider the risk to the chargeholder to be minimal. We would add that a floating charge is a type of security that presupposes that the chargeholder will be monitoring the affairs of the debtor because of the debtor's freedom to dispose of assets that are subject to the charge without the chargeholder's consent.

5.13 We therefore recommend that:

5. **Section 45 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 should be amended to extend section 45(2) to all cases of winding up.**

(Draft Bill s 3)

Administration

5.14 As has already been mentioned, the new system of administration introduced by the Enterprise Act 2002 provides that a floating charge attaches not when the administrator is appointed but when a notice is registered by the administrator.¹⁹ For reasons already given, to that extent this provision appears to be sound.²⁰ However, a small modification will be necessary to make the provision cohere with the other changes that we are recommending. Under the current law, the administrator registers the notice in the Companies Register.

¹⁸ Discussion Paper para 4.32.

¹⁹ Insolvency Act 1986, Sch B1, para 115, as inserted by the 2002 Act.

²⁰ We do not wish to enter into broader questions as to how floating charges operate in administrations. For some discussion see David Cabrelli, "The Curious Case of the 'Unreal' Floating Charge", 2005 SLT (News) 127.

That should continue to be the case for floating charges created prior to the commencement of Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. But for floating charges created under that Act, ie charges created by registration in the Register of Floating Charges, the notice should be registered in the latter register. This is to ensure consistency of approach. The obligation to register with the Registrar of Companies should remain, but as a matter of information only. The charge would attach on the registration in the Register of Floating Charges of a notice of attachment. Registration would, as now, be by the administrator.

5.15 Accordingly we recommend that:

- 6. In respect of floating charges registered in the Register of Floating Charges, paragraph 115 of Schedule B1 to the Insolvency Act 1986 should be amended so that the time of attachment is the time when the administrator registers a notice of attachment in the Register of Floating Charges. Paragraph 115 should continue to contain a requirement of a notice to the Registrar of Companies.**

(Draft Bill s 2(1))

Floating charges granted by LLPs etc

5.16 A floating charge can be granted by any "company" whether it is a company under the Companies Act or not.²¹ A floating charge can also be granted by a limited liability partnership,²² by a European economic interest grouping²³ and by an industrial and provident society.²⁴ Clearly the same rules about attachment should apply in all cases. Since the relevant provisions regarding floating charges by LLPs and EEIGs are contained in statutory instruments, the adaptations to give effect to our proposals for these entities would be effected by subordinate legislation. As for IPSs, the current position is that they cannot go into receivership or administration. The sole means whereby a floating charge can attach is therefore liquidation, and that is sufficiently covered by the amendments prospectively made to section 3 of the Industrial and Provident Societies Act 1967 by section 49 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. Accordingly no express provision in the draft Bill is necessary.

5.17 Accordingly we recommend that:

- 7. The provisions about floating charges granted by companies should also apply to floating charges granted by limited liability partnerships, by European economic interest groupings and by industrial and provident societies.**

²¹ Companies Act 1985, s 462, prospectively replaced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, s 38(1) read with s 47.

²² Limited Liability Partnerships Act 2000, s 15; Limited Liability Partnerships (Scotland) Regulations 2001 (SSI 2001/128), Reg 3 and Sch 1.

²³ The European Economic Interest Grouping Regulations 1989 (SI 1989/638), Reg 18 and Sch 4.

²⁴ Industrial and Provident Societies Act 1967, s 3, as amended. The section is further amended, prospectively, by the Bankruptcy and Diligence etc. (Scotland) Act 2007, s 49.

International private law

5.18 The recommendations that we have made thus far cover English as well as Scottish liquidations.²⁵ But there will be some types of case, where the granter of the charge is not Scottish, that will not be covered by those recommendations. For example, sections 53 and 54 of the Insolvency Act 1986 regulate the receivership of some types of companies, but English companies are not included.²⁶ It is true that, for reasons given earlier, receivership will in future seldom be competent to enforce a floating charge.²⁷ But there will continue to be certain types of case where it will remain competent. Moreover, the legislation authorising the granting of floating charges is not limited to companies under the Companies Acts, but extends to any company.²⁸ Thus non-UK companies can, as far as UK law is concerned, grant floating charges. There can be difficult questions about how a charge granted by a Ruritanian company can attach, but it would not be within the scope of this project to enter into such questions. What is needed is a simple provision to the effect that in any type of case not covered by the preceding recommendations, a floating charge cannot attach, for the purposes of internal Scots law, without registration. Such a provision would say nothing about the grounds of attachment, ie about whether attachment is justified in any particular case. It would simply be a technical measure to the effect that if attachment is justified, then it is to be effected by registration. The question of the grounds on which attachment is justified is a question for the general law of floating charges, and so outwith the scope of the present project.²⁹ Registration of a notice of attachment would be a necessary condition for attachment but would not be a sufficient condition: the absence of a registered notice of attachment would imply non-attachment, but the presence of such a notice would not, of itself, imply a valid attachment.³⁰ This approach suffices to achieve the policy objectives of this project, namely the enhancement of transactional security, because third parties can deal with a company in the confident knowledge that if the company has granted a floating charge, registered in the Register of Floating Charges, then the absence of a notice of attachment in that register proves the charge to be unattached.

5.19 In these other types of case, the person responsible for registering the notice of attachment should be the chargeholder.

²⁵ Because s 45 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 defines liquidation in a way that includes English liquidations.

²⁶ Section 51 (read with s 70(1)) provides that appointment of a receiver under s 53 or s 54 is possible only for companies that the Court of Session would have jurisdiction to wind up. That excludes all English companies and many foreign companies. It includes almost all Scottish companies, but not quite all, for the Court of Session has (subject to certain qualifications) no jurisdiction to wind up a Scottish company that has its "centre of main interests" in a member state other than the UK. See further para 3.17, above.

²⁷ See para 1.14, above.

²⁸ Bankruptcy and Diligence etc. (Scotland) Act 2007, s 38(1) read with the definition of "company" in s 47. These provisions have been in substance the same since s 1 of the Companies (Floating Charges and Receivers) (Scotland) Act 1961.

²⁹ For example, it has been held that the appointment of a receiver to an English company will cause a floating charge to attach for the purposes of Scots law: *Gordon Anderson (Plant) Ltd v Campsie Construction Ltd*, 1977 SLT 7. That rule would be unaffected by our recommendation, except to the extent of adding a technical requirement of registration. Conversely, if it is the law that the appointment of a receiver to a Ruritanian company would not cause a floating charge to attach for the purposes of Scots law, that rule too would be unaltered, and if in such a case a notice of attachment were in fact presented to the Keeper and accepted for registration, the notice would be without effect.

³⁰ For example, an English automatic crystallisation clause is not effective in Scotland: *Norfolk House plc v Repsol Petroleum Ltd*, 1992 SLT 235. The Keeper would no doubt decline to accept a notice of attachment in such a case, but if he were to accept it the charge would remain unattached in Scotland.

5.20 Accordingly we recommend that:

8. **In any case not covered by the preceding recommendations, a floating charge, being a charge registered in the Register of Floating Charges, should not attach until a notice of attachment is registered in that register on the application of the holder of the charge.**

(Draft Bill s 4)

Consequential amendments

5.21 Section 37 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 deals with the Keeper's handling of documents and notices in connection with the Register of Floating Charges and with the forms of documents and notices. Consequential amendments of section 37 are necessary to deal with the proposed new scheme of notices of attachment. These amendments are contained in section 5 of the draft Bill. That section also amends section 6 of the Requirements of Writing (Scotland) Act 1995. The latter says that to be registered in the Register of Sasines or the Books of Council and Session a document must be in probative form.³¹ Section 48(1) of the 2007 Act amends section 6 by adding a reference to the Register of Floating Charges. But the reference mentions only "documents", and the 2007 Act itself has a distinction between "documents" and "notices". There might therefore have been some uncertainty as to whether notices of attachment do or do not need to be in probative form as a condition of registrability. That uncertainty is removed by a further small amendment to section 6 of the 1995 Act.

Financial Collateral Directive

5.22 The Financial Collateral Directive,³² transposed by the Financial Collateral Arrangements (No 2) Regulations 2003³³ does not allow certain types of formalities to be required for financial collateral arrangements. In our view these provisions do not apply to Scottish floating charges.³⁴

Legislative competence

5.23 The law of floating charges is an area of devolved legislative competence,³⁵ and accordingly we consider the recommendations in this part of our Report to be within the legislative competence of the Scottish Parliament.

³¹ Using the term "probative" as a shorthand reference to the 1995 Act's system whereby documents in a certain form are presumed authentic.

³² 2002/47/EC.

³³ SI 2003/3226.

³⁴ Article 1(5) provides that "this Directive applies to financial collateral once it has been provided". "Provision" means "delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker" (Article 2(2)). When a floating charge is granted, control of the collateral does not pass to the creditor. Nor does it pass on attachment, because the liquidator, receiver or administrator is not the chargeholder's agent. The concept of "provision" thus excludes such arrangements as floating charges from the scope of the Directive. See generally G L Gretton, "Financial Collateral and the Fundamentals of Secured Transactions", (2006) 10 EdinLR 209.

³⁵ Scotland Act 1998, Sch 5, Part II, Head C2. The law relating to business associations is a reserved area, but an exception is: "Floating charges and receivers, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts."

Part 6 Some other issues

Introduction

6.1 The reforms recommended in Parts 3, 4 and 5 would make a useful contribution to the security of transactions, and especially to the security of heritable transactions. In theory, however, more could be done. Nevertheless, we have concluded that no further recommendations for legislation should be made within the context of the present limited exercise, though it may be that they would merit further consideration in future law reform projects. In this Part of the Report we look at some such possible reforms.

Scope of the race-handicap rule

6.2 Section 17(1) of the Bankruptcy and Diligence etc. (Scotland) Act 2007, based on Proposal 4 of our Discussion Paper, contains a race-handicap rule whereby the trustee in sequestration (or anyone in right of the trustee) has a handicap in the race to the register.¹ As a result, someone who receives a deed from the debtor before the sequestration, and who transacts in good faith and with reasonable diligence, can hardly fail to win the race.

6.3 This provision is valuable, but its scope is limited. In the first place, it applies only to personal insolvency (sequestration), and not to corporate insolvency;² even with respect to personal insolvency it applies only to Scottish bankruptcies, and does not therefore apply to cases where the bankruptcy is non-Scottish, even though the debtor has Scottish assets. In the second place, it applies only to immovable property in Scotland. It does not apply to immovable property elsewhere, nor does it apply to other registered property (patents, ships, company shares etc) whether in Scotland or elsewhere, even though such assets may be involved in Scottish insolvency proceedings.

6.4 There are in fact three separate types of issue that should be distinguished. The first is the situs of the property. This may be Scotland, or England (or elsewhere in the UK), or a UK situs in itself (eg UK Government stock) or a foreign situs. Sometimes there are difficult questions as to situs. For instance, the question of whether a patent created under UK legislation has a UK situs, or whether it has a situs of a given part of the UK, is not free from difficulty. The second is the situs of the insolvency process. Thus there may be a winding up in the Scottish courts, or in the English courts, or in the courts of another country.³ The third is legislative competence. The Scottish Parliament has legislative competence in relation to sequestration and also in relation to rights in immovable property in Scotland. It

¹ For s 17, see para 1.16 above. Proposal 4 of the Discussion Paper would in fact have covered all property to which a title is completed by registration, though only in relation to sequestrations. Section 17 of the 2007 Act is thus in that respect more limited than Proposal 4.

² If our recommendation that s 25 of the Titles to Land Consolidation (Scotland) Act 1868 should be repealed is implemented, then liquidators will be heavily handicapped in the race to the register, for they will have to use the complex route of s 145 of the Insolvency Act 1986. In theory, however, a liquidator could make an instant sale, and there would then be a race between that buyer and the previous grantee. Likewise there could be an instant sale by an administrator. By contrast, s 17 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 imposes the handicap not only on the trustee in sequestration but also on a buyer from the trustee.

³ This does not tally precisely with the place of incorporation of the company in question. Whilst in the typical case a company will be wound up in the courts of the country of incorporation, in some cases the courts of another country have winding up jurisdiction. For a brief discussion, see Part 3 above.

does not have legislative competence in relation to corporate insolvency,⁴ whether or not the insolvency is of a Scottish company and whether or not it is being conducted in the Scottish courts. Nor does it have legislative competence in relation to the law relating to a wide variety of asset-types, such as intellectual property (eg patents), ships, aircraft, company shares, company bonds or UK Government stock.⁵

6.5 As well as these three issues, there is a fourth point. For those types of asset (ships, patents etc) where legislative competence is reserved, there is perhaps some obscurity as to the precise time when a grantee acquires the real right of ownership (or other type of right, as may be applicable to the case). Scots law has not given to such assets as ships and patents the sort of close scrutiny that it has given to land. The interpretation, at least from a Scottish perspective, of the property law rules that apply to such assets is not free from difficulty. The question of the transactional security of a grantee in the context of the possible insolvency of the grantor may in such cases thus have a double aspect. The first is to what extent there exists transactional risk under current legislation. In the second place, there is the question of whether an enhancement of transactional security is needed. That second question cannot be considered until the first has been at least addressed, if not fully answered. These issues would require a large-scale area-by-area study.

6.6 We have come to the conclusion that section 17 is sufficient for the time being. In practice the main area of concern has been the effect of sequestration on immoveable property in Scotland, and section 17 deals with that. To go beyond section 17 would in principle be desirable, but for the reasons sketched above we do not consider it feasible within the context of the present limited project.

Receivership

6.7 Proposal 6 of our Discussion Paper was aimed at protecting grantees from the risk of the grantor's receivership. We have come to the conclusion that this proposal does not need to be taken forward, for two reasons. The first is that as a result of the Enterprise Act 2002, receivership is a process that is in steady decline. The second is that the introduction of the "no attachment without registration" principle will of itself bring about an improvement in the transactional security of grantees.

Liquidators: notice of appointment

6.8 Proposal 5(c) of our Discussion Paper was that "the period of 14 days allowed by section 109(1) of the Insolvency Act 1986 for a liquidator in a voluntary winding up to give notice of his appointment to the Accountant in Bankruptcy should be reduced to a period of 7 days."⁶ We continue to think that this would be a useful reform. However, we have come to the conclusion that it should not be taken forward as part of the present limited exercise. Our project is about enhancing transactional security. If our recommendation that winding up resolutions be registered forthwith is implemented, third parties will be sufficiently alerted. Earlier registration of the liquidator's appointment would be valuable but would not of itself promote transactional security.

⁴ Subject to certain qualifications, such as the "process" of winding up. (Scotland Act 1998, Sch 5, Part II, Head C2.)

⁵ Scotland Act 1998, Sch 5, Part II, Heads A4, C4, E3, E4.

⁶ See para 4.26 of the Discussion Paper.

Further reform of the law of floating charges?

6.9 The recommendations made in Part 5 of this report are all based on the concept of attachment. One distinguished consultee forcefully argued that the concept of attachment has always been to some extent problematic, and that in any event it is probably unnecessary, as is shown by the system of administration introduced by the Enterprise Act 2002, in which a floating charge's effect is protected even without attachment. We agree with much of this. However, the present exercise is limited. Its aim is to enhance the transactional security of those who act in good faith and with reasonable diligence. Within the scope of this project it is not possible to embark on a more wide-reaching review of the law of floating charges, an area of law where there may be considerable scope for reform, and not only in relation to the concept of attachment. We are grateful to the consultee for raising this issue and are happy to note it as a matter that may merit consideration in the future.

Priority notices

6.10 The possibility of introducing a priority notice system for the Land Register, though not canvassed in our Discussion Paper on *Sharp*, is canvassed in our third discussion paper on land registration.⁷ Many countries have such a system. The idea is that a grantee can, with the grantor's consent, register a priority notice before the date of settlement. A priority notice would not be open-ended: it would expire after, say, 28 days. Such a system could be implemented in more than one way in terms of technical details. Priority notices would solve many of the problems of transactional security, though not all of them. Since it was not discussed in our 2001 Discussion Paper, and in any event is a subject which more naturally belongs to the law of land registration, which is one of our current projects, it need not be further considered here. We will review the subject in our Report on Land Registration.

⁷ Discussion Paper on Land Registration: Miscellaneous Issues (Scot Law Com DP No 130, 2005), Part 7.

Part 7 List of recommendations

1. The period of 15 days allowed for the forwarding of a copy of a resolution for the voluntary winding up of a Scottish company to the Registrar of Companies for Scotland and the Accountant in Bankruptcy should be replaced by an obligation on the company to forward it forthwith.

(Para 3.8; Draft Bill s 6)

2. A petition for the winding up of a company by a court in Scotland should, on presentation, be notified forthwith by the clerk of court to the Accountant in Bankruptcy and to the Registrar of Companies for Scotland.

(Para 3.20)

3. Section 25 of the Titles to Land Consolidation (Scotland) Act 1868 should be repealed.

(Para 4.6; Draft Bill s 7)

4. Sections 53(6) and 54(5) of the Insolvency Act 1986 should be amended so as to provide that, in the case of a floating charge that has been registered in the Register of Floating Charges, the appointment of the receiver (or joint receivers) takes effect at the time that a notice of attachment is registered by the person (or persons) nominated as receiver (or joint receivers) in the Register of Floating Charges, and that such registration constitutes acceptance of office.

(Para 5.9; Draft Bill s 1(1)-(3))

5. Section 45 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 should be amended to extend section 45(2) to all cases of winding up.

(Para 5.13; Draft Bill s 3)

6. In respect of floating charges registered in the Register of Floating Charges, paragraph 115 of Schedule B1 to the Insolvency Act 1986 should be amended so that the time of attachment is the time when the administrator registers a notice of attachment in the Register of Floating Charges. Paragraph 115 should continue to contain a requirement of a notice to the Registrar of Companies.

(Para 5.15; Draft Bill s 2(1))

7. The provisions about floating charges granted by companies should also apply to floating charges granted by limited liability partnerships, by European economic interest groupings and by industrial and provident societies.

(Para 5.17)

8. In any case not covered by the preceding recommendations, a floating charge, being a charge registered in the Register of Floating Charges, should not attach until a notice of attachment is registered in that register on the application of the holder of the charge.

(Para 5.20; Draft Bill s 4)

Appendix A

Attachment of Floating Charges etc.(Scotland) Bill

[DRAFT]

CONTENTS

Section

- 1 Attachment of floating charge on appointment of receiver
- 2 Attachment of floating charge in administration
- 3 Attachment of floating charge on winding up
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- 5 Further amendment of Bankruptcy and Diligence etc. (Scotland) Act 2007 and amendment of Requirements of Writing (Scotland) Act 1995
- 6 Voluntary winding up: early publicity
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Attachment of Floating Charges etc.(Scotland) Bill [DRAFT]

An Act of the Scottish Parliament to make further provision for the attachment of floating charges; to amend the law relating to resolutions for the voluntary winding up of companies registered in Scotland; to repeal section 25 of the Titles to Land Consolidation (Scotland) Act 1868; and for connected purposes.

GENERAL NOTE

The purpose of the recommendations which are set out in the report is to improve transactional security by reducing the risks of insolvency to a grantee (such as a buyer). Some of the recommendations require to be implemented by subordinate legislation. They are not dealt with in the Bill. The majority of the recommendations however require to be implemented by primary legislation. For the most part the Bill implements these recommendations by amending the relevant provisions of the insolvency legislation. The amendments assume that Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 has come into effect.

1 Attachment of floating charge on appointment of receiver

- (1) The Insolvency Act 1986 (c.45) is amended as follows.
- (2) In section 53 (which provides for the appointment of a receiver by the holder of a floating charge)—
 - (a) in subsection (6)—
 - (i) at the beginning, insert "In a case other than is mentioned in subsection (6A)",
 - (ii) in paragraph (b), for the words "is deemed to be" substitute "is to be regarded as having been", and
 - (iii) the words "; and this subsection applies to the appointment of joint receivers subject to such modifications as may be prescribed" are repealed,
 - (b) after that subsection insert—

"(6A) In a case where the document granting a floating charge by virtue of which the receiver is appointed is registered in the Register of Floating Charges, he is to be regarded as having been appointed on the day on which there is registered in that Register, on his application, a notice of attachment as respects the property subject to the charge.",
 - (c) in subsection (7), for the words "On the appointment of a receiver under this section" substitute "On—

- (a) the day on which and at the time at which the receiver is to be regarded under subsection (6), or
- (b) as the case may be, the day on which he is to be regarded, under subsection (6A),
as having been appointed", and
- (d) at the end there is added—
"(8) This section applies to the appointment of joint receivers subject to such modifications as may be prescribed."
- (3) In section 54 (which provides for the appointment of a receiver by the court)—
 - (a) in subsection (5), at the beginning insert "In a case other than is mentioned in subsection (5A),",
 - (b) after that subsection insert—
"(5A) In a case where the document granting a floating charge by virtue of which the receiver is appointed is registered in the Register of Floating Charges, he is to be regarded as having been appointed on the date on which there is registered in that Register, on his application, a notice of attachment as respects the property subject to the charge.", and
 - (c) In subsection (6), for the words "appointment of a receiver under this section" substitute "date on which the receiver is to be regarded, under subsection (5) or (5A), as having been appointed".
- (4) In section 387(4)(b) (which explains various references to "the relevant date")—
 - (a) the words "(as the case may be)" are omitted, and
 - (b) at the end there is added "or, as the case may be, the date on which the receiver is, under section 53(6A) or 54(5A), to be regarded as having been appointed".
- (5) In Schedule 6 (which makes provision as regards categories of preferential debt), in paragraph 14(1)(b), after the words "54(5)" insert ", or by virtue of section 53(6A) or 54(5A),".

NOTE

Sections 1 to 3 of the Bill, read with section 4, implement the policy that a floating charge should not attach (crystallise) without publicity. The principle of "no attachment without registration" is to apply to all three routes whereby a charge can attach: receivership, administration, and liquidation. However it is only to apply in the case of floating charges registered in the Register of Floating Charges under the Bankruptcy and Diligence etc. (Scotland) Act 2007. For a discussion of the principle of "no attachment without registration" see paragraphs 5.1 to 5.3 of the report. See also paragraph 1.25 of the report.

Section 1 concerns receivership. Principally it amends sections 53 and 54 of the 1986 Act. Section 53 regulates the appointment of a receiver by the holder of a floating charge and the effect of that appointment on the charge. Section 54 does likewise in relation to the appointment of a receiver by the court. In both cases the charge attaches on appointment of the receiver but the fact of appointment is not made public until after the event.

Subsection (2) makes changes to section 53. The receivership will still require to be registered with the Registrar of Companies and the Accountant in Bankruptcy within 7 days (section 53(1) to (5)). However, for floating charges registered in the Register of Floating Charges, the appointment of a receiver will no longer take effect in accordance with section 53(6), but will take effect on registration of a notice of attachment in the Register of Floating Charges by the person nominated as receiver. Such registration will

constitute acceptance of the office and will trigger attachment of the floating charge under subsection (7). Appointment of a receiver and attachment of the charge will still be simultaneous but the fact of appointment and attachment will be publicised at the point of appointment and attachment. Two further points should be mentioned. The power to make modifications where joint receivers are appointed is extended from the original section 53(6) to the whole of section 53. Finally the opportunity is taken to tidy up the wording in section 53(6)(b).

Subsection (3) makes similar changes to section 54. The court's interlocutor appointing the receiver will still require to be registered with the Registrar of Companies and the Accountant in Bankruptcy (section 54(1) to (4)). However for floating charges registered in the Register of Floating Charges the appointment of a receiver will no longer take effect on the date of appointment by the court (section 54(5)) but will take effect on registration of a notice of attachment by the person nominated by the court as receiver. Such registration will trigger attachment of the charge under subsection (6). Appointment and attachment will continue to be simultaneous but they will be made public at the point of appointment and attachment.

Subsections (1) to (3) implement recommendation 4. See paragraphs 5.5 to 5.9 of the report.

Subsection (4) amends section 387(4)(b) of the 1986 Act to take account of the fact that for a floating charge registered in the Register of Floating Charges the date of appointment of a receiver is regulated by new section 53(6A) or section 54(5A). Schedule 6 to the 1986 Act provides a list of debts which are preferential (section 386(1)). Section 387 explains references in Schedule 6 to "the relevant date" which is the date which determines the existence and amount of a preferential debt. Section 387(4)(b) at present provides that, in relation to a company in receivership, the relevant date is in Scotland the date of appointment of the receiver under sections 53(6) or 54(5).

Subsection (5) makes a similar change to paragraph 14(1)(b) of Schedule 6 to the 1986 Act. As mentioned, that schedule provides a list of debts which are to be regarded as preferential. Paragraph 14 of that schedule deals with the accrual of holiday pay where a person's employment has been terminated by or in consequence (among other things) of the appointment of a receiver under sections 53(6) or 54(5) of the Act.

2 Attachment of floating charge in administration

- (1) In Schedule B1 to the Insolvency Act 1986 (c.45) (which makes provision about the administration of companies), in paragraph 115—
 - (a) in sub-paragraph (2)—
 - (i) the words "he may file a notice to that effect with the registrar of companies" become paragraph (a), and
 - (ii) after that paragraph add ", and
 - (b) in a case where—
 - (i) the document granting a floating charge is registered in the Register of Floating Charges, and
 - (ii) the floating charge has not already attached to the property subject to the charge,he may register in that Register a notice of attachment as respects the property.",
 - (b) in sub-paragraph (3), for the words "On delivery of the notice" substitute "Except in a case mentioned in paragraph (2)(b), on delivery of a notice filed under paragraph (2)(a)", and
 - (c) at the end add—

"(4) On a notice of attachment being registered under sub-paragraph (2)(b), the floating charge mentioned in that sub-paragraph attaches to the property which is subject to the charge and that attachment shall have effect as if the floating charge is a fixed security over that property."

- (2) In section 45(6) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (which provides a saving as regards the effect of floating charges on winding up), for paragraph (c) substitute—

"(c) paragraph 115(3) or (4) of Schedule B1 (attachment of floating charge on delivery of a notice to the registrar of companies, or as the case may be on registration of a notice of attachment, by an administrator) to that Act."

NOTE

This section concerns administration and the attachment of a floating charge registered in the Register of Floating Charges.

In administration the principle of "no attachment without registration" already exists. But the registration that triggers attachment is the filing of a notice by the administrator with the Registrar of Companies (paragraph 115(2) and (3) of Schedule B1 to the 1986 Act). Subsection (1) amends paragraph 115 of Schedule B1 to the 1986 Act by requiring a notice of attachment to be registered by the administrator in the Register of Floating Charges and by providing that registration of the notice triggers attachment. The obligation to register with the Registrar of Companies still remains but has no effect so far as attachment of the floating charge is concerned and thus is for information only.

For floating charges created prior to the commencement of Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 the registration that triggers attachment will continue to be filing of the notice with the Registrar of Companies.

Subsection (2) makes a consequential change to section 45(6) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 adding a reference to the new paragraph 115(4) of Schedule B1 to the 1986 Act.

This section implements recommendation 6. See paragraphs 5.14 to 5.15 of the report.

3 Attachment of floating charge on winding up

In section 45 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (which makes provision as regards the attachment of a floating charge created over property of a company which goes into liquidation)—

- (a) in subsection (1), after the word "attaches" insert ", at the time mentioned in subsection (2) below," and
- (b) in subsection (2), for the words "But, in a case mentioned in subsection (7)(a) below, there is no attachment under subsection (1) above until such time as" substitute "The time is that at which".

NOTE

This section concerns the effect of liquidation on a floating charge registered in the Register of Floating Charges. It amends section 45 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 by extending the principle of "no attachment without registration" contained in section 45(2) to other floating charges. (Section 45(2) applies to liquidations covered by Council Regulation (EC) No 1346/2000, commonly known as the Insolvency Regulation.) Thus where a company goes into liquidation, a floating charge registered in the Register of Floating Charges will not attach until a notice of attachment is registered in

that Register on the application of the holder of the charge. The section implements recommendation 5. See paragraphs 5.10 to 5.13 of the report.

For floating charges created prior to the commencement of Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 the old rule contained in section 463 of the Companies Act 1985 that a floating charge attaches on liquidation will continue to apply.

4 Further provision as to attachment of floating charge

- (1) A floating charge—
 - (a) registered in the Register of Floating Charges, and
 - (b) as regards which no provision is made under an enactment mentioned in subsection (2) for attachment to the property subject to the charge,does not attach to that property before a notice of attachment is registered in that Register on the application of the holder of the charge.
- (2) The enactments are—
 - (a) section 53(7) or 54(6) of, or paragraph 115(4) of Schedule B1 to, the Insolvency Act 1986 (c.45),
 - (b) section 45(1) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3),
 - (c) any subordinate legislation which relates expressly to the attachment of a floating charge granted by—
 - (i) a limited liability partnership, or
 - (ii) a European Economic Interest Grouping (or a member of such a grouping).
- (3) In subsection (2)(c)(ii), the reference to a "European Economic Interest Grouping" is to a grouping formed in pursuance of article 1 of Council Regulation (EEC) No. 2137/85 of 25th July 1985 on the European Economic Interest Grouping.

NOTE

This section is a residual provision designed to ensure that if a floating charge has been registered in the Register of Floating Charges it cannot attach (at least as far as Scottish assets are concerned) until a notice of attachment is also registered in that Register.

Sections 1 to 3 of the Bill provide that, in the case of a floating charge registered in the Register of Floating Charges, the charge will not crystallise on receivership, administration or liquidation until a notice of attachment has been registered in that Register. The same rules are to apply to a floating charge granted by a limited liability partnership, a European economic interest grouping or an industrial and provident society. See recommendation 7 and paragraphs 5.16 and 5.17 of the report.

Where the granter of the charge is not Scottish, in some cases the rules set out in sections 1 to 3 (including those rules as applied to limited liability partnerships etc) will not apply. The provisions on receivership, for example, will not apply to English companies. This section fills the gap that would otherwise be there. The intention is to add a strictly technical requirement of registration of a notice of attachment before the charge in question can attach. The grounds on which a charge can attach remain as they were.

This section implements recommendation 8. See paragraphs 5.18 to 5.20 of the report.

5 Further amendment of Bankruptcy and Diligence etc. (Scotland) Act 2007 and amendment of Requirements of Writing (Scotland) Act 1995

- (1) In section 37 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (which provides for the establishment and maintenance of the Register of Floating Charges)—
- (a) in subsection (2)—
 - (i) the word "and" (which occurs immediately after paragraph (a)) is repealed,
 - (ii) in paragraph (b), the words "or 45(2)" are repealed, and
 - (iii) after paragraph (b) insert "and
 - (c) any notice of attachment delivered to the Keeper as respects property subject to a floating charge,"
 - (b) in subsection (5)—
 - (i) in paragraph (b), after the word "documents" insert "(including notices of attachment)", and
 - (ii) in paragraph (c), after the word "document" insert "(including a notice of attachment)",
 - (c) in subsection (8)(b), for the words "sections 39(1) and 45(2) of this Act" substitute "section 39(1) of this Act and notices of attachment",
 - (d) in subsection (9), at the end add—
 - "(c) of notices of attachment in electronic form (and of certified electronic signatures in notices of attachment)".
- (2) In section 6(1)(aa) of the Requirements of Writing (Scotland) Act 1995 (c.7) (which relates to the competence of registering a document in the Register of Floating Charges), after the word "document" insert "(including a notice of attachment)".

NOTE

Where a floating charge is registered in the Register of Floating Charges sections 1 to 4 of the Bill introduce the requirement for a notice of attachment to be registered in that Register before the charge crystallises.

This section makes consequential amendments to the 2007 Act and the 1995 Act to take account of the new arrangements. See paragraph 5.21 of the report.

Subsection (1) makes changes to section 37 of the 2007 Act. Subsection (1)(a) amends section 37(2) to enable the notices of attachment in question to be registered in the Register of Floating Charges.

Subsection (1)(b) extends section 37(5)(b) and (c) (which concerns the provision of copies and extracts of documents) to notices of attachment.

Subsections (1)(c) and (1)(d) extend the rule making power in section 37(8) and (9) to all notices of attachment.

Subsection (2) extends section 6(1)(aa) of the 1995 Act to notices of attachment. The 1995 Act provides for a form of subscription of documents whereby the document has an evidential presumption of having been validly subscribed by the signatory. The effect of section 6(1)(aa), which was inserted by section 48(1) of the 2007 Act, is that only a document having such "presumed authenticity" may be registered in the Register of Floating Charges. The same rule will now apply to notices of attachment.

6 Voluntary winding up: early publicity

In section 30 of the Companies Act 2006 (c.46) (which provides for copies of resolutions or agreements affecting a company's constitution to be forwarded to the registrar of companies), at the end add—

"(5) In its application to a resolution for the voluntary winding up of a company registered in Scotland, subsection (1) is to be read as if, for the words "within 15 days after it is" there were substituted "forthwith on its being".

NOTE

This section amends section 30 of the Companies Act 2006. The purpose of the amendment is to improve transparency by requiring earlier publicity for the fact that a company that is registered in Scotland has gone into voluntary liquidation. Currently the company has to forward a copy of the resolution to the Registrar of Companies for Scotland and the Accountant in Bankruptcy within 15 days (Insolvency Act 1986, section 84(3), as read with Companies Act 2006, section 30, and Scotland Act 1998, section 125, schedule 8, paragraph 23(2) and 23(3)). In future the copy will require to be lodged as soon as the resolution has been passed. The section implements recommendation 1. See paragraphs 3.1 and 3.3 to 3.8 of the report.

7 Mode of completing title: repeal

Section 25 of the Titles to Land Consolidation (Scotland) Act 1868 (c.101) (which provides a mode of completing title) is repealed.

NOTE

This section repeals section 25 of the Titles to Land Consolidation (Scotland) Act 1868. The section implements recommendation 3. See part 4 of the report.

On liquidation (unlike sequestration) the assets of a company do not automatically vest in the liquidator. In general a liquidator's functions can be carried out without vesting. Under section 145 of the Insolvency Act 1986 the court can order vesting on application by the liquidator but such applications are rare. However section 25 of the 1868 Act enables a liquidator to complete title to heritable property almost immediately after their appointment and without the need for judicial authority. This allows a liquidator to bypass section 145 of the 1986 Act and creates the possibility of a race to the register. For the reasons set out in paragraph 4.4 of the report this is not considered to be desirable.

8 Consequential amendment of Pension Schemes Act 1993

In Schedule 4 to the Pension Schemes Act 1993 (c.48) (which makes provision as regards priority in bankruptcy etc.), in paragraph 3(1)(b), after the words "54(5)" insert ", or by virtue of section 53(6A) or 54(5A)".

NOTE

Paragraph 3 of Schedule 4 to the Pension Schemes Act 1993 identifies certain debts ("any sum owed on account of a contributions equivalent premium") which are to be regarded as preferential debts on the appointment of a receiver under section 53(6) or section 54(5) of the Insolvency Act 1986. This section amends paragraph 3(1)(b) to take account of the fact that for a floating charge registered in the Register of Floating Charges the appointment of a receiver is regulated by new section 53(6A) or section 54(5A) of the 1986 Act.

9 Short title and commencement

- (1) This Act may be cited as the Attachment of Floating Charges etc. (Scotland) Act 2007.
- (2) This section comes into force on Royal Assent.
- (3) The remaining provisions of this Act come into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.

NOTE

This section deals with the short title and the dates of commencement. Different elements of the Bill may be brought into force at different times.

Appendix B

Literature on *Sharp* and on *Burnett's Trustee*

The literature on the subject of this report is extensive, and much of it very valuable. The following list includes material published both before and since the publication of the Discussion Paper in 2001. The list is not exhaustive.

1. D P Sellar, "Commercial law update: company law and sale of businesses" (1994) 39 JLSS 328.
2. R Leggett, "When property passes – competition between delivered but recorded feu disposition and crystallised floating charge" (1994) 62 SLG 99.
3. R Rennie, "Dead on delivery" 1994 SLT (News) 183.
4. G L Gretton, "Sharp cases make good law" 1994 SLT (News) 313.
5. G L Gretton, "Floating charges in Scots law: the saga continues" 1995 JBL 212.
6. A J McDonald, "Sharp v Thomson: feudal purism – but is it justice?" (1995) 40 JLSS 7.
7. A J McDonald, "Sharp v Thomson: what now?" (1995) 40 JLSS 256.
8. D P Sellar, "Commercial law update: securities and insolvency" (1995) 40 JLSS 311.
9. K G C Reid, "Sharp v Thomson: property law preserved" (1995) 1 SLPQ 53.
10. K G C Reid, "Sharp v Thomson: a civilian perspective" 1995 SLT (News) 75.
11. N R Whitty, "Sharp v Thomson: identifying the mischief" 1995 SLT (News) 79.
12. R Rennie, "Keeping the price and the property" 1996 JR 68.
13. A J M Steven and S Wortley, "The Perils of a Trusting Disposition" 1996 SLT (News) 365.
14. R Adams and J S MacLeod, "Ownership in Scotland: The Tax Implications of Thomson v Sharp" 1997 British Tax Review 296.
15. K G C Reid, "Equity triumphant: Sharp v Thomson" (1997) 1 EdinLR 464.
16. B Pillans, "Sharp v Thomson – House of Lords Allow Appeal" (1997) 26 Green's Business Law Bulletin 2.

17. D J Cusine, "Sharp v Thomson: the House of Lords strikes back" (1997) 26 Green's Property Law Bulletin 5.
18. D McGrigor "What beneficial interest?" (1997) 50 (May) IHL 94.
19. R Rennie, "Sharp v Thomson: the final act" (1997) 42 JLSS 130.
20. D P Sellar, "Commercial law update: company law" (1997) 42 JLSS 144.
21. D P Sellar, "Commercial law update: rights in security and insolvencies" (1997) 42 JLSS 181.
22. D Guild, "Sharp v Thomson: a practitioner's view" (1997) 42 JLSS 274.
23. C C Milne, "Sharp Shock for Receivers: Sharp v Thomson in the House of Lords" (1997) 65 SLG 65.
24. S Wortley, "Sharp practice for trusting conveyancers" (1997) 65 SLG 113.
25. K G C Reid, "Jam today: Sharp in the House of Lords" 1997 SLT (News) 79.
26. J G Birrell, "Sharp v Thomson: the impact on banking and insolvency law" 1997 SLT (News) 151.
27. G L Gretton, "Scots law in shock: real rights and equitable interests" (1998) 6 ERPL 403.
28. R Michaels, "Sharp Distinctions and Floating Transitions – a German view of Sharp v Thomson" (1998) 6 ERPL 407.
29. E G Dacornia, "Sharp v Thomson and the principle of publicity according to Greek Law" (1998) 6 ERPL 413.
30. R Rennie, "The Tragedy of Floating Charges in Scots Law" (1998) 3 SLPQ 169.
31. S C Styles, "The Two Types of Floating Charge: The English and the Scots" (1999) 4 SLPQ 235.
32. A Fenge, "Englisches Kreditsicherungsrecht versus schottisches Sachenrecht" (1999) 98 Zeitschrift für vergleichende Rechtswissenschaft 410.
33. D McKenzie Skene, "Meaning of 'whole estate of the debtor' in sequestration" (2000) 48 Green's Business Law Bulletin 6.
34. S Brymer, "Sharp v Thomson – An Update" (2000) 45 Green's Property Law Bulletin 1.
35. R Girdwood, "Heritable Property – Sharp v Thomson Revisited" (2000) 48 Green's Property Law Bulletin 7.
36. D McKenzie Skene "At the Sharp end: what is (and is not) a debtor's property" 2000 (Nov) Recovery 10.

37. R Rennie, "To Sharp v Thomson – an Heir" 2000 SLT (News) 247.
38. S C Styles, "Sharp pains for Scots Property Law: The Case of Burnett's Tr v Grainger" 2000 SLT (News) 305.
39. A Fenge, "Floating Charge im schottischen Sachenrecht" 2000 Zeitschrift für europäisches Privatrecht 342.
40. D L Carey Miller, "Transfer of Ownership", in K G C Reid & R Zimmermann (eds), *A History of Private Law in Scotland* (2000).
41. G L Gretton, "Equitable Ownership in Scots Law?" (2001) 5 EdinLR 73.
42. K Swinton, "Is there a need to reverse Sharp v Thomson?" (2001) 69 SLG 156.
43. G L Gretton, "The Integrity of Property Law and of the Property Registers" 2001 SLT (News) 135.
44. J Thomson, "Legal Change & Scots Private Law" in J W Cairns & O F Robinson (eds), *Critical Studies in Ancient Law, Comparative Law and Legal History* (2001).
45. H L MacQueen, "Distinguishing Sharp v Thomson" (2002) 6 EdinLR 269.
46. D Brand and A Belcher, "Sharp v Thomson: The SLC Discussion Paper" 2002 Insolvency Lawyer 83.
47. A J M Steven, "Scottish Land Law in a State of Reform" 2002 JBL 177.
48. A J M Steven, "Sharp v Thomson: A Reply" (2002) 70 SLG 2.
49. S Wortley and D Reid, "Mind the Gap: Problems in the Transfer of Ownership" (2002) 7 SLPQ 211.
50. J Chalmers, "In Defence of the Trusting Conveyancer" 2002 SLT (News) 231.
51. G Maher, "Beneficial Interest in Immovable Property as a Ground of Jurisdiction" 2003 SLT (News) 57.
52. G L Gretton, "Ownership and Insolvency: Burnett's Trustee v Grainger" (2004) 8 EdinLR 389.
53. N R Whitty, "Unjustified Enrichment and Burnett's Trustee v Grainger" (2004) 8 EdinLR 395.
54. S van Erp, "Comparative Case Notes: Burnett's Trustee v Grainger as an Example" (2004) 8.1 Electronic Journal of Comparative Law, <<http://www.ejcl.org/81/editor81.html>>.
55. D McKenzie Skene, "Burnett's Tr v Grainger: appeal decision" (2004) 69 Green's Business Law Bulletin 5.
56. A Burrows, "The race is on (again)" (2004) 49(10) JLSS 46.

57. W Stewart, "Burnett's Trustee v Grainger" (2004) 12 RLR 240.
58. K Swinton, "Burnett's Trustee v Grainger – A race, not a match" (2004) 72 SLG 41.
59. D McKenzie Skene, "The Shock of the Old: Burnett's Trustee v Grainger" 2004 SLT (News) 65.
60. J G Goldsworth, "Scotland: Scots trusts considered in House of Lords' decision" (2004) 11(2) T & T 7.
61. R Rennie, "The Race to the Registers Revisited" (2005) 50(7) JLSS 53.
62. G L Gretton, "Insolvency Risk in Sale" 2005 JR 335.
63. Carsten Jungmann, "Rechtsposition des Grundstücksverkäufers bei Insolvenz des Verkäufers: Schutz durch Trust Clauses bzw Vereinbarungstreuhand? Zugleich eine Besprechung des Entscheidungen Sharp v Thomson und Burnett's Trustee v Grainger des House of Lords", (2005) 69 Rabels Zeitschrift 487.
64. J Howell, "Land Law in an E-Conveyancing World" (2006) Conveyancer and Property Lawyer 553.
65. R G Anderson, "Fraud on Transfer and on Insolvency: ta...ta...tantum et tale?" (2007) 11 EdinLR 187.
66. S Brymer, "Protecting the Purchaser in Insolvency Situations" (2007) 86 Green's Property Law Bulletin 6.

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Appendix C

List of those who submitted written comments on Discussion Paper No 114

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¹ The response came from a Working Party consisting of Professor D L Carey Miller, Professor R Paisley, D W McKenzie Skene and S C Styles.

² The response was put together by J McNeil, A Hamilton and D A Bennett.

³ The response represents the views of the member who prepared it (D R G Flint) rather than the views of the Society.